INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar, Vice President, and,
Pavan Kumar Gadale, Judicial Member]

ITA No.: 1815/Mum/18
Assessment year: 2014-15

DZ Bank AG – India Representative Office …….. Appellant
c/o SRBC & Associates LLP,14th floor, The Ruby,
29 Senapati Bapat Marg, Dadar West, Mumbai 400 028
[PAN: AABCD6455E]

Vs.

Deputy Commissioner of Income Tax
International Taxation Circle 2(1)(2), Mumbai …….Respondent

Appearances:
P J Pardiwalla and **Nitesh Joshi**, *for the appellant*
S S Iyengar, *for the respondent*

Date of concluding the hearing: November 24, 2020
Date of pronouncing the order : December 04,2020

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has called into question correctness of the order dated 20th December 2017 passed by the learned Commissioner (Appeals) in the matter of assessment under section 143(3) r.w.s. 144 C(13) of the Income Tax Act, 1961, for the assessment year 2014-15.

2. The short issue that we are required to adjudicate in this appeal, as learned representatives agree, is whether, on the facts and in the circumstances of this case, the interest income of Rs 29,41,57,201 and commitment fees etc of Rs 1,98,14,938 earned by DZ Bank from its Indian clients can be taxed in the hands of the assessee before us, under article 7 of the India German Double Taxation Avoidance Agreement [(1996) 223 ITR (Stat) 130; Indo German tax treaty, in short], or is the said income only required to be taxed in the hands of the DZ Bank AG Germany, if at all held to be taxable, under article 11 of the Indo German tax treaty. That is the issue sought to be agitated by before us, though, in the course of this hearing, many other facets of the matter came up for discussions, and, having heard parties on those aspects at length, have been adjudicated upon.

3. Grounds of appeals, as set out in the memorandum of appeal- for the sake of completeness, are as follows:

> ***1. erred in concluding that the Appellant constitutes a permanent establishment ('PE') of DZ BANK, AG Deutsche Zentral Genossenschaftsbank ('DZ BANK AGDZ')/ overseas branches, in India as per the provisions of Article 5 of the India-Germany Double Taxation Avoidance Agreement ('IG treaty');***
>
> ***2. erred in taxing the interest income earned by DZ BANK AGDZ/ overseas branches from foreign currency loans ('credit facilities') provided to Indian companies/borrowers at the rate of 40% (plus applicable surcharge and education cess) instead of taxing it as per Article 11 of the IG treaty at the rate of 10%, particularly when the credit facilities are not effectively connected to the alleged PE;***
>
> ***3. erred in taxing the fees for technical services earned by DZ BANK AGDZ/ overseas branches from credit facilities provided to Indian companies/borrowers at the rate of 25% (plus applicable surcharge and education cess) under section 115A of the Act instead of taxing it as per Article 12 of the IG treaty at the rate of 10%;***
>
> ***4. erred in taxing the commitment fees earned by DZ BANK AGDZ/ overseas branches from loans guaranteed by Hermes Deckung, even though the same would not be taxable in India under the provisions of Article 11 of the IG treaty as interest and in the absence of a PE in India, the same should not be chargeable to tax under Article 7 of the IG treaty.***
>
> ***Even assuming without admitting that commitment fees constitutes 'interest', the said income should not be chargeable to tax in India under the provisions of Article 11 (3)(b) of the IG treaty.***
>
> ***5. Without prejudice to the above grounds, erred in not taxing the interest income from credit facilities as per the provisions of section 115A(1) of the Act at the rate of 20%;***
>
> ***6. Without prejudice to the above grounds, erred in bringing to tax the entire income from credit facilities earned by DZ BANK AGDZ instead of only that which can be said to be attributable to the alleged PE in India;***
>
> ***7. Without prejudice to the above grounds, while bringing to tax whole of the income from credit facilities, the learned AO in the OGE to the CIT(A) order erred in not allowing expenses incurred outside India by DZ BANK AGDZ in relation to the credit facilities on account of non-furnishing of documentary evidence;***
>
> ***8. erred in concluding that the Appellant constitutes a business connection in India as per the provisions of section 9(1)(i) of the Act;***
>
> ***9. erred in not granting credit for tax deducted at source (IDS), including credit for which the Appellant could not furnish certificates but the payments were received net of taxes;***
>
> ***10. erred in raising a demand, in respect of taxes already deducted at source appropriately by the deductor and, making a demand of the said taxes which is not in consonance as per provisions of section 205 of the Act.***

4. To adjudicate on this appeal, only a few material facts, as culled out from material on record, need to be taken note of. DZ Bank AG, a company incorporated under the laws of Germany and having its principal place of business in Germany, is engaged in the banking business, and it has, with the permission of the Reserve Bank, a representative office in India. In terms of the Reserve Bank of India's conditions, subject to which this office was permitted, *inter alia*, "the representative office should function purely as a liaison office without transacting any type of banking business" and "all the expenses of the representative office should be met out of inward remittances from the bank". In effect thus, this office was only a liaison office and was not, on its own, engaged in the core business of the assessee, i.e. banking.

5. On 25th September 2014, the assessee filed an income tax return in the name of "DZ Bank AG- India Representative Office", apparently treating the India Representative Office as a taxable entity, disclosing NIL taxable income. This return was subjected to scrutiny assessment proceedings, and, in the ensuing assessment proceedings, the Assessing Officer noticed that during the relevant previous year "DZ Bank AG provided foreign currency loans to Indian companies' and "these loans were in the nature of external commercial borrowings (ECB) as permitted under the Indian Exchange Control Regulations". He further noted that "On perusal of ITS details generated in the case of the assessee it was seen that huge sums of TDS has been made on the interest paid/payable by Indian customers to the assessees". In this backdrop when the Assessing Officer probed the matter further, it was explained by the assessee that TDS on interest payable by the Indian borrowers is borne by them, and that, as per section 115A(5) of the Income Tax Act, 1961, a foreign company is exempt from furnishing a return of income in India when it only earns interest income from foreign currency loans provided to Indian companies, and the appropriate taxes have been deducted at source from the same. The Assessing Officer was, however, not content with the said explanation. He required the assessee to show cause as to why "DZ Bank India Representative Office not be considered a permanent establishment, of the head office, in India, and the interest income and any other income earned by the head office from the operations in India should not be taxed @ 40% as per the provisions of the Income Tax Act". It was explained by the assessee that under article 7 of Indo German tax treaty, only so much of the business profits of a German enterprise can be brought to tax in India as are attributable to its permanent establishment in India, that the representative assessee did not constitute PE of the DZ Bank AG inasmuch as no business activities were carried out from the same, which is a *sine qua non* for PE coming into existence under the basic rule, that maintenance of a fixed place of business inter alia for "any activity of preparatory or auxiliary character", which is what at best the Indian representative office is engaged in, is anyway excluded from the definition of PE, and that the Indian representative office cannot be said to a dependent agent permanent establishment (DAPE) inasmuch as admittedly it has no authority to conclude contracts on behalf of the German Bank and its branches elsewhere. The Assessing Officer, however, rejected these arguments, and, *inter alia*, observed as follows:

7.19 Admittedly, the assesses DZ Bank India, is a Representative Office of DZ Bank, AG, in India and is actually involved in the following activities in India on behalf of its head office:

a. DZ Bank India approaches Indian banks, financial institutions and corporates and apprises them about the products and services that DZ Bank AGDZ could offer.

b. It initiates a discussion with the potential customer.

c. DZ Bank India approaches its head office/ overseas branches with the funding opportunity,

d. DZ Bank India collects from the customers and provides the necessary information to facilitate the due diligence at the head office/ overseas

e. DZ Bank India collects and provides information in respect of the financial statements of the client, revenue projections, history and background of the company, etc for the head office/ overseas branches.

f. DZ Bank India collects and provides all additional clarification/ documentation required in a transaction by the head office / overseas branches.

g. The head office/ overseas branches examine the documents (including the financial statements) and if specific further information is required, they request the CRO of DZ Bank India to obtain such information.

h. The CRO also provides the local market opinion on the client such as rating by the local rating agencies, historical reputation of the client, declared future plans, etc. and also if there are any regulatory issues involved with such credit.

i. Where the customer has a query on the terms of the credit facility, they contact DZ Bank India.

j. DZ Bank India is also involved in discussing the terms of the credit facility on the instructions of head office/ overseas branch.

k. The CRO under a limited power or attorney may also be instructed by the head office/ overseas branches to be a signatory for the credit facility documents, as already approved by them for execution of the credit facilities.

l. Post disbursal of the credit facility, the head office/ overseas branches ascertain the reasons for the delay in repayments and interest payments as per the agreed repayment schedule through DZ Bank India, and DZ Bank India even assists in recovery where there are such delays.

7.20 Thus, the business transaction by the assessee's head office and overseas branches with its Indian clients would not be complete without the involvement and actions by its Representative Office in India, DZ Bank India. There is, therefore, a real relation between the business carried on by the assessee for which it receives interest and processing charges abroad and the activities of its Representative Office in India, which contributes directly or indirectly to the earning of the income by the assessee. Therefore, it follows that

income shall be deemed to accrue/arise to the assessee in Germany from 'business connection' in India.

7.21 As far as the contention of the assessee based on DTAA is concerned, reference to the relevant provisions of Article 7 of DTAA which deal with the business profits would be necessary.

> ***Article 7: Business profits***
>
> ***1. The profits of an enterprise of a Contracting States shall be taxable only in that State unless the enterprises carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.***

7.22 A perusal of para (1) of Article 7 shows that the profits of an enterprise of Germany are taxable in that country provided that enterprise does not carry on business through a permanent establishment (PE) in India. If the enterprise carries on business, through a 'PE' in India its profits may be taxed in India but only so much of them as are attributable to that PE. This provision is in line with sub-clause (a) of Explanation (I) to clause (i) of Section (1) of Section 9 of the Act.

7.23 The expression 'permanent establishment1 is defined in Article 5. We shall advert to Paras 1 to 3 thereof, which are relevant for our purpose and are reproduced below:

ARTICLE 5

PERMANENT ESTABLISHMENT

1. ***For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.***

2. ***The term "permanent establishment" includes especially,-***
   (a) a place of management;
   (b) a branch;
   (c) an office;
   (d) a factory;
   (e) a workshop;
   (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources, including an installation or structure used for the exploration or exploitation ;
   (g) a warehouse or sales outlet;
   (h) a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on; and
   (i) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities continue for a period exceeding six months.

3. ***An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it provides services or facilities in connection with, or supplies plant and machinery on hire used***

for or to be used in the prospecting for or extraction or exploitation of mineral oils in that State.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include,—

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to- the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

7.24 To summarize the expression 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on and includes within its ambit places enumerated in clauses (a) to (i) of para 2 but excludes places specified in clauses (a) to (e) of para 4, referred to

7.25 It is contended by the assessee that it is merely Representative Office solely for the purpose of acting as communication office of its head office and is covered by the exclusionary clause (e). It is emphasized that no income is received in the representative office, no business is entertained and no activity in violation of conditions prescribed by RBI is carried on there.

7.26 The moot question, however, is whether the exclusionary clause (e) of para 4 is attracted; if so, whether the assessee as a representative office would stand excluded from the meaning of the expression 'permanent establishment'. It is often difficult to distinguish between activities which have a preparatory or auxiliary character and those which have not. The decisive criterion is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole. In any case, a fixed place of business whose general purpose is one which is identical to the general purpose of the whole enterprise, does not exercise a preparatory or auxiliary activity. A fixed place of business which has the function of managing even only a part of an enterprise cannot be regarded as doing a preparatory or auxiliary activity. The function of a representative office, even if it only covers a certain area of the operations of the concern which constitutes an essential part of the business operations of the enterprise, it can in no way be regarded as an activity which has a preparatory or auxiliary character within the meaning of subparagraph (e) of paragraph 4 of Article 5 of the India Germany DTAA,

7.27 Clause (e] of para 4 says that the expression 'permanent establishment' shall be deemed not to include the maintaining of a fixed place of business solely for the purpose of carrying on for an enterprise any other activity of a preparatory or auxiliary character . The assessee has relied on the dictionary meaning of the words 'auxiliary', 'Ancillary', 'Aid' and 'Prepare' in support of its contention that its representative office in India is covered by the exclusionary clause (e). It is unnecessary to refer to all of them here. Suffice it to say that the word 'auxiliary' in common English usage means helping, assisting or supporting the main activity. Therefore, the only task at hand is to ascertain whether the activities carried on in the representative office in India are only supportive of the main business or form one of the main functions of the business. In the instant case of the assessee, however, it is seen that even if some of the function of the representative office may be auxiliary character, the involvement of representative office in scouting for customers in India, giving specific inputs to the head office and its overseas branches about the prospective client and then negotiating with them, signing loan agreements and following up on delayed repayments of principal and delayed payments of interest, are all functions which play an important role in its main business. These roles of the representative office are nothing short of performing a major role in the lending business of the assessee in India and cannot be said to be work of auxiliary character. It is indeed a significant part of the main work of the head office and its overseas branches.

7.28 It follows that the representative office of the assessee in India would be a 'permanent establishment' within the meaning of the expression in DTAA. From the above discussion it can safely be concluded that so much of the profits as shall be deemed to accrue or arise to the applicant in India which are attributable to the 'permanent establishment', namely, the representative office in India, would be taxable in India even under the DTAA [UAE Exchange Centre LLC in A.A.R. NO. 608 OF 2003 dated 26-05-2004].

7.29 Further, it will also be worthwhile to consider the provisions of para (5) of Article 5 of the DTAA. The same is reproduced as under:

> ***5. Notwithstanding the provisions of paragraphs 1 and 2, where a person -'other than an agent of an independent status to whom paragraph 6 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if this person,—***
>
> ***(a) has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise;***
>
> ***(b) has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise; or***
>
> ***(c) habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise.***

7.30 One would appreciate that the provisions of the aforesaid para are the same as Explanation 2 to clause (i) of sub-section (1) of Section 9. It has already concluded while discussing Explanation 2 that the assessee, DZ Bank India, habitually exercises in India,

an authority to conclude contracts for or on behalf of the enterprise at the instructions of the head office or overseas branches. DZ Bank India also habitually secures orders in India, wholly for the DZ Bank AGDZ and its overseas branches.

7.31 Thus, even if the provisions of the DTAA between India and Germany are applied to the case of the assessee, the assessee is a permanent establishment of DZ Bank AGDZ in India, and all the income earned by its head office from clients in India is taxable as its business income in India @40% + surcharge + education cess.

7.32 The Assessee vide its letter dated 21/12/2016 has submitted that during the year DZ Bank India earned interest income on overseas credit facilities provided to India clients amounting to Rs. 43,18,31,765/- which includes an amount of Rs 10,78,74,218 as interest received on loans given to Indian Companies/borrowers and Rs 32,39,57,547 as interest on loans guaranteed by Hermes Deckung and hence they are exempt from taxation in India as per Article 11 (3)(b) of India_Germany Double Taxation Avoidance Agreement. An amount of, Rs. 18,62,82,983 has been submitted by the assessee vide letter dated 9/12/2016. Accordingly, in view of the above facts and discussion, this interest income of Rs. 29,41,57,201 shall be subject to tax @40% along with surcharge and education cess.

6. The Assessing Officer further noted that the assessee has further earned a commitment fee of Rs 1,91,08,038 and agency fees of Rs 7,06,900, in connection with the loans guaranteed by Hermes Deckung, Germany. He noted the plea of the assessee that these amounts cannot be taxed in India under article 7 for want of PE, and under article 11 as these amounts are not covered by the definition of 'interest'. He was, however, of the view that as the assessee has a PE in India, and all these amounts pertain to the said PE, these amounts are taxable in the hands of the assessee as business receipts under article 7. The Assessing Officer thus proceeded to tax entire interest income, commitment fees and agency fees as income of the assessee, and, while computing taxable income, allowed a deduction of Rs 2,77,77,831 being expenses of the representative office. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is aggrieved and is in appeal before us.

7. The hearing in this case was concluded on 20th November 2020, and the matter was refixed thereafter on 24th November 2020 in the light of, *inter alia*, the following show cause notice issued by us to DZ Bank AG, with a copy thereof to the parties before us:

You are hereby required to show cause as to why the income arising on account of DZ Bank AG's India Representative Office, even if any, not be excluded from income, if any and to the extent taxable, in the hands of "DZ Bank AG- India Representative Office", and brought to tax in your hands, as you are the taxable unit, in respect of any of your offices or any other form of presence in India, in terms of the provisions of the Income Tax Act, 1961, as is highlighted below by Hon'ble Supreme Court's judgment in the case of CIT Vs Hyundai Heavy Industries Co Ltd [(2007) 291 ITR 482 (SC)]:

> **Therefore, <u>it is clear that under the Act, a taxable unit is a foreign company and not its branch or PE in India</u>. A non-resident assessee may have several incomes accruing or arising to it in India or outside India but so far as taxability under section 5(2) is concerned, it is restricted to incomes which accrue or arise or is**

deemed to accrue or arise in India. The scope of this deeming fiction is mentioned in section 9 of the Act. Therefore, as far as the income accruing or arising in India, an income which accrues or arises to a foreign enterprise in India can be only such portion of income accruing or arising to such a foreign enterprise as is attributable to its business carried out in India. This business could be carried out through its branch(es) or through some other form of its presence in India such as office, project site, factory, sales outlet etc. (hereinafter called as "PE of foreign enterprise"). It is, therefore, important to note that under the Act, while the taxable subject is the foreign general enterprise (for short, "GE"), it is taxable only in respect of the income including business profits, which accrues or arises to that foreign GE in India.

[Emphasis, by underlining, supplied by us]

It may be clarified that the use of expression "permanent establishment" in the above context was with reference to the provisions of the Indian Income Tax Act, 1961, under which 'permanent establishment' has been assigned an inclusive definition which includes, under section 92F(iiia), "a fixed place of business through which the business of the enterprise is wholly or partly carried on". This reference to "permanent establishment" does not, therefore, prejudice your argument that you did not have a 'permanent establishment' in terms of the requirements of Indo German Double Taxation Avoidance Agreement.

This notice is being issued to you in terms of the requirements of Explanation 2 (b) to Section 153 as it exists now and in terms of requirements of Explanation 3 to Section 153 as it stood at the relevant point of time. It is further clarified that considering the requirements of the present context, in our considered view, the inclusive definition of 'person' under section 2(31) for this purpose also includes any entity on which an assessment under the Income Tax Act, 1961 is framed.

The matter is fixed for hearing, through videoconferencing on webex portal, on 24th November 2020 at 2.30 pm. The meeting ID and the password will be placed in the public domain on our official website www.itat.gov.in.

7. We have heard the rival contentions at length, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

8. The first question that arises is whether the assessee before us is a taxable unit, and whether, given the fact that none of the parties has raised this issue before us and having regard to very peculiar facts of this case, we have to essentially take a judicial call on that aspect of the matter and direct that the additions impugned in this appeal may be considered, if at all taxable, in the right hands.

9. Learned counsel fairly accepts that the taxable unit can only be the foreign enterprise, DZ Bank AG, in this case, and not the 'DZ Bank AG- India Representative office' *per se*. He, however, seeks to rationalize the present situation by submitting that the permanent account number, under which the return in question is filed is allotted to DZ Bank AG, and, therefore in substance the present assessment is framed on DZ Bank AG. He relies upon section 292B to plead that the mistake of the income tax return having been filed in the name of 'DZ Bank

AG- India representative office', if that be so, ignored. However, when asked whether the interest income earned by the DZ Bank AG was included in this return of income, his reply was in negative. In response to our question that if we are to treat this as an income tax return of DZ Bank AG, will it not result in a situation that assessment of the DZ Bank AG will reach finality with taking into account the said interest income, and the taxes withheld from those interest payments will technically become refundable to the DZ Bank AG, if so claimed, learned senior counsel did not have much to say beyond submitting that it is a hypothetical situation as no such refund is, and will be, claimed. He submits that such an approach is too technical an approach to the subject matter, and the lapse of the assessee, if at all a lapse, is an inadvertent and trivial procedural mistake which must not obstruct the path of substantial justice. Learned counsel submits that, if the foreign enterprise and its representative entity are to be treated as the same unit- as is the correct position, in substance what is being sought to be taxed is interest income under article 7 which has already been offered to tax under article 11, and this claim is patently incorrect. Therefore, in case we agree with that proposition on merits, there is no point in prolonging the agony of the foreign enterprise by further delaying the matter being decided on merits in a different set of proceedings. Learned counsel submits that section 153 cannot come into play in this case because that would be applicable only when an income is excluded from the hands of one person and sought to be taxed in the hands of some other person, but here is a situation in which DZ Bank AG- India Representative Office and DZ Bank AG are one and the same thing, have a common permanent account number and represent the same artificial juridical person. He does not share our perception that given the present context, the expression "person" can indeed be given the extended meaning as proposed by us, and argues at length on that aspect. Learned counsel then explains to us the practical problems that the assessee will have to face in the event of our adopting the proposed course of action inasmuch as fresh income tax returns will have to be filed when, in effect, there is no income other than the interest income in respect of which, by the virtue of Section 115A(5), filing of income tax return under section 139(1) is not required anyway. It is submitted that the income which has been taxed in the impugned assessment has been wrongly taxed, and it deserves to be vacated on merits in any event. We are urged to take a holistic and practical view of the matter. Learned Departmental Representative, on the other hand, does not make any specific submissions and leaves the matter to us. In any case, he is unable to bring on record anything to challenge the legal proposition that the taxable unit in India is only the foreign company, and not its PE or other constituents in India.

10. We have noted that the entire proceedings in this case proceed on the basis that the DZ Bank AG and its Indian representative office are two distinct taxable entities. So far as the interest income taxable in India under article 11 of the Indo German tax treaty is concerned, it has been contended that in view of the provisions of Section 115A (5), as it stood at the relevant point of time, DZ Bank AG was not required to file the income tax return under section 139(1) because the tax deductible under chapter XVII B was duly deducted from such income. The assessee has filed the income tax return in the name of DZ Bank- India representative office, and has not disclosed therein the amounts admittedly taxable in the hands of DZ Bank AG, Germany under article 11 of the Indo German tax treaty. By implication, therefore, DZ Bank AG and its Indian representative office are treated as two distinct taxable units or taxable entities, even though there is only one permanent account number allotted to the DZ Bank AG, which is used for filing the income tax return of DZ Bank AG- India Representative Office. That position, on the first principles, is unsustainable in law. It is only elementary that the tax subject is only the foreign enterprise

and not its PE in India, though, so far as profit attributable to the PE are concerned, the same are taxable in the hands of the foreign enterprise. That is what a coordinate bench of this Tribunal, speaking through one of us *(i.e. the Vice President)* in the case of **Dresdner Bank AG Vs ACIT [(2006) 11 SOT 158 (Mum)]** has held by observing, *inter alia*, that **"Under section 4 of the Act, it is total income of every 'person' which is taxable. Section 2(31), in turn, defines 'person' as including a 'company', which in terms of the provisions of section 2(23A), includes a 'foreign company' as well. Section 6(4) of the Act lays down that a company, unless it is an Indian company or unless it is controlled or managed entirely from India, cannot be said to be resident in India. A foreign company, which is not wholly controlled or managed in India, is therefore a non-resident so far as residential status under the Act is concerned. Section 5(2) further lays down that as far as a non-resident assessee is concerned scope of total income of such an assessee is confined to (i) an income which 'accrues or arises in India' or is 'deemed to accrue or arise in India' and (ii) an income which is received or is deemed to be received by or on behalf of such foreign company. <u>This elementary analysis makes it clear that under the Income-tax Act, so far as foreign companies are concerned, taxable unit is a foreign company and not its branch or permanent establishment in India,</u> even though the taxability of such foreign companies is confined to (i) an income which 'accrues or arises in India' or is 'deemed to accrue or arise in India', and (ii) an income which is received or is deemed to be received by or on behalf of such foreign company**…… **To determine income accruing or arising in India to a foreign enterprise (hereinafter referred to as 'general enterprise' or as 'GE'), therefore, <u>we have to compute income attributable to such branch(es) in India, or other form(s) of presence in India</u> such as office, project site, factory, sales outlet etc., (hereinafter collectively referred to as 'permanent establishment' or 'PE') <u>of foreign enterprise</u>"** *[Emphasis, by underlining supplied by us]*. Subsequently in the case of **CIT Vs Hyundai Heavy Industries Co Ltd [(2007) 291 ITR 482 (SC)]** similar were the views of Hon'ble Supreme Court. Their Lordships also observed that "**it is clear that under the Act, <u>a taxable unit is a foreign company and not its branch or PE in India</u>……., as far as the income accruing or arising in India, an income which accrues or arises to a foreign enterprise in India can be only such portion of income accruing or arising to such a foreign enterprise as is attributable to its business carried out in India**" *[Emphasis, by underlining supplied by us]*. The expression "PE", as used here, is not in the strict treaty sense but it also covers any form of presence leading to taxation in source jurisdiction. A foreign enterprise may have several types of income taxable in India, including, of course, income attributable to its PE(s) in India. These different streams of income, even if that be so, apart, what is taxable unit is only the foreign enterprise. Therefore, irrespective of whether the assessee was liable to file income tax return under section 139(1) or not, once the assessee chose to file the income tax return, it would seem to us that the assessee could have filed the income tax return only for DZ Bank AG, and not for India office of DZ Bank AG, and all the income, under whichever article of the applicable tax treaty- article 11, article 7 or any other article, were liable to be disclosed therein, and the income was required to be computed in accordance with the applicable legal provision, including the transfer pricing provisions, if applicable. In the present case, though the assessee has used the PAN number as was allotted to the DZ Bank AG, it has apparently filed the income tax return in the name of DZ Bank AG- India Representative Office, the income tax return is verified by the India Representative Officials and created an artificial demarcation of income of the HO and Branch by excluding the interest income received by DZ Bank AG directly and taxed under article 11, and declaring that the assessee, styled as DZ Bank AG- India Representative office, did not have any

taxable income. The Assessing Officer has categorically noted that the assessee has filed an income tax return disclosing NIL income- something which is *ex facie* incorrect, if DZ Bank AG and DZ Bank AG- India Representative Officer were indeed to be treated by the assessee as one taxable entity, as the DZ Bank AG admittedly has paid taxes on interest income under article 11.

11. It is, however, equally true, as learned senior counsel rightly points out, that in the event of the issue regarding taxability of the impugned income under article 7 being decided in favour of the assessee, the filing of income tax return in the name of DZ Bank AG- India Representative Office will end up being nothing but a seemingly inadvertent error without any consequences in terms of loss of revenue, and we must, therefore, adopt a pragmatic approach on the issue, and ensure that our actions do not subject assessee to any avoidable inconvenience- particularly when the income tax department has not really objected to the stand of the assessee at any stage, and when there is no loss to the revenue in terms of the basic tax liabilities. Clearly, the mistake is not of the assessee alone. We will infringe neutrality if we are to do anything which helps revenue make out a new case at this stage or which puts the assessee worse off as a result of his coming in appeal before us. We are alive to these concerns, and we were also alive to these concerns while raising the issue in question, but it is equally important to us that if we are to uphold any part of taxability impugned in appeal before us, we must not do so in the name of an assessee which is not, and cannot be, a taxable unit at all. Of course, in the event of our holding that no part of the income brought to tax in the impugned assessment is sustainable in law, the aspect as to in whose hands it could have been taxed will be rendered academic anyway. We, therefore, accept learned senior counsel's suggestion to take a call on taxability, as impugned in appeal before us, on merits first. Today, when ease of doing business, demystification of tax system, and an emphasis on catching tax evaders rather than getting bogged down to the technicalities, are the key *mantras* and top priorities of all the organs of the State, we cannot also be hyper pedantic in our approach. It is, therefore, essential to first examine the taxability of amounts brought to tax in the assessment before us, because unless there is any real of loss of revenue on that count, all these issues with respect of filing of tax returns disclosing this income in the hands of correct entities are purely academic delights. It is also important to understand that once we appreciate the fundamental position that the foreign enterprise and its representative office in India are one and the same thing, so far taxation of income in India is concerned, what essentially follows is that the income being sought to be taxed under article 7, on net basis, in the impugned assessment, has already been taxed in the hands of the same assessee under article 11, on gross basis, and that aspect of the matter has reached finality. It is also not in dispute that in terms of the provisions of Section 115A(5), as they then stood, the assessee did not have obligation to file any income tax return in respect of the said taxability. Viewed thus, the assessee may not be at fault, on that score, on technicalities either. Coming to the substance of the matter, we find that what has already been taxed, as such, under article 11 is entire interest revenue relatable to India operations of DZ Bank AG, and what is now being sought to be taxed, under article 7, is the profit element in respect of these interest revenues received by DZ Bank AG relatable to its India operations. When we take note of the fact that the DZ Bank AG- India Representative Office is not a taxable unit, and the taxable entity is only DZ Bank AG, it is so glaring that same income is now being sought to be taxed, under article 7, in the hands of the assessee which has already been taxed in the hands of the assessee, under article 11, in the same assessment year under the same tax treaty. That is clearly, to put it mildly, incongruous on the first principles, and, as we will see a little later in our analysis, simply contrary to the scheme of

taxation in article 7 and article 11. Be that as it may, let us examine the broader question about taxability of the amounts in question, in terms of the treaty provisions, in the hands of the assessee. We may add, at the cost of stating the obvious though, that the provisions of the domestic law come into play, by the virtue of provisions of Section 90(2) of the Income Tax Act, 1961, and, therefore, if case of the Assessing Officer fails on the treaty provisions, there is no need to examine the same in the light of the provisions of the domestic tax law.

12. As the fundamental issue in appeal before us is taxation of interest income under article 7 of the Indo German tax treaty, let us begin by looking at the provisions of Article 7 first. The article is being reproduced below for ready reference:

ARTICLE 7- BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make, if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions, expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, and according to the domestic law of the Contracting State in which the permanent establishment is situated.

4. Insofar as in a Contracting State and in exceptional cases the determination of the profits to be attributed to a permanent establishment in accordance with paragraph 2 is impossible or gives rise to unreasonable difficulties, nothing in paragraph 2 shall preclude the determination of the profits to be attributed to a permanent establishment by means of either apportioning the total profits of the enterprise to that permanent establishment or estimating on any other reasonable basis; the method of apportionment or estimation adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

[Emphasis, by underlining, supplied by us]

13. As is glaring from a plain reading of the above provision, under article 7(7), where profits sought to be taxed under article 7 include any item of income which is dealt with separately in other articles of the Indo German tax treaty, article 7 will yield to those specific provisions in respect of that income. That treaty approach is in consonance with the well settled principle of law contained in the Latin maxim ***generalia specialibus non derogant***, i.e. general provisions do not override the specific provisions. Quite clearly, therefore, when a particular type of income is specifically covered by a treaty provision, the taxability of that type of income is governed by the specific provisions so contained in the treaty. Of course, even in the scheme of taxability of such specific incomes under the treaty provisions, as we will see a little later, the situations are specified in which the taxability under those specific provisions cease to come into play, and the taxability can shift to the general provisions of article 7.

14. The question then we must ask ourselves before embarking upon examining taxability of an income under article 7 is whether such an income can be taxed under any other specific provisions of the treaty, and, if so, whether there any situations in those specific provisions of the treaty which provide for taxation of the said income under article 7. There is no dispute that what has been earned by the assessee bank from Indian clients is in the nature of 'interest' income, and that article 11 has specific provisions for taxation of interest income, in the hands of a resident of one contracting state, from the other contracting state. We must, therefore, deal with the provisions of article 11, and examine the scheme of taxability of interest income in the hands of the assessee before us.

15. Let us, therefore, move on to deal with, and examine, the taxability of interest income under article 11. The related treaty provision is set out below for ready reference:

ARTICLE 11- INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest.

3. Notwithstanding the provisions of paragraphs 1 and 2—

(a) interest arising in the Federal Republic of Germany and paid to the Government of the Republic of India, the Reserve Bank of India, the Industrial Finance Corporation of India, the Industrial Development Bank of India, the Export-Import Bank of India, National Housing Bank and Small Industries Development Bank of India shall be exempt from German tax;

(b) interest arising in the Republic of India and paid to the Government of the Federal Republic of Germany, the Deutsche Bundesbank, the Kreditanstat fur Wiederaufbau or the Deutsche Investitions-und Entwicklungsgesellschaft (DEG) and interest paid in consideration of a loan guaranteed by HERMES-Deckung shall be exempt from Indian tax.

4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

5. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

6. Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a land or political sub-division, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

[Emphasis, by underlining, supplied by us]

16. There cannot be, and there is no, dispute that interest income is specifically covered by article 11 which, *inter alia*, provides that "**interest income arising in a contracting state and paid to a resident of the other contracting state may be taxed in the other contracting state**" and restricts the taxability of such interest income, in the cases in which recipient of the interest income is beneficial owner thereof, to 10% of the gross amount of interest. There is also no dispute that the interest revenues relating to the India operations of

the DZ Bank AG have been offered to tax under article 11, and the matter has reached finality as such. In the assessment order itself, that aspect of the matter has been categorically noted by the Assessing Officer.

17. Clearly, therefore, the interest income is taxable on gross basis, in the source jurisdiction- subject to, of course, certain exemptions which are not relevant in the present context as on now. We will deal with one of these exemptions a little later, as the same is relevant in the context of examining Assessing Officer's case on taxation of commitment fees.

18. Coming back to the taxation of interest under article 11, the exception to this scheme of taxability of interest is set out in article 11(5) above. As is so set out in this provision, unless beneficial owner of interest, resident in a contracting state, i.e. the foreign enterprise, "**carries on business in the other contracting state in which the interest arises, through a permanent establishment situated therein**" and unless "**debt claim in respect of which the interest paid is effectively connected with such permanent establishment**", the exclusion clause under article 11(5) will not come into play.

19. Let us in the light of the provisions of article 11(5), revert to the facts of this case.

20. As a plain reading of the assessment order would show, it is not even case of the revenue that the business of DZ Bank AG is carried on through its India representative office, but that there is "**a real relation between the business carried on by the assessee for which it receives interest and processing charges abroad and activities of its representative office in India which contribute directly or indirectly to the earning of income of the assessee** *(i.e. DZ Bank AG, Germany)*". One has to understand the subtle distinction, as the Assessing Officer has himself so well identified in the assessment order, between carrying on business of banking vis-a-vis carrying on activities which contribute directly or indirectly earning of income by the banking business. The case of the revenue authorities is best confined to the latter category, but then, even if that be a correct claim, that can not be reason enough to invoke exclusionary clause in article 11(5).

21. Under article 5(4)(e), on a somewhat parallel note, even when an assessee maintains a fixed place of business but that place is so maintained solely for the purpose of an activity or preparatory character, the maintenance of such a place of business does not amount to a permanent establishment, and, therefore, to taxation of business profits under article 7. In other words, therefore, even if there is "a real relation between the business carried on by the assessee for which it receives interest and processing charges abroad and activities of its representative office in India which contribute directly or indirectly to the earning of income of the assessee", as is stated in the assessment order, that relationship *per se* will not make it taxable in India.

22. It is also important to bear in mind the fact that the exclusion clause under article 11(5) will be triggered only when the twin conditions that the foreign enterprise carried on business in the source jurisdiction and that the debt claim being effectively connected with the permanent establishment are satisfied. So far as the debt claim being effectively connected with the PE is concerned, that cannot come into play only merely because the PE had a supporting role in creation of the debt claim. Unless a debt claim is part of the assets of the PE or income arising therefrom can be said to be income of the PE, it cannot normally be treated as effectively connected with the PE. In any case, the Assessing Officer has not brought on record any material to establish, or even indicate, that the debt claim is effectively connected with the PE, save and except for the supporting services rendered by the Indian Representative office in connection with dealing with that debt claim but then rendition of service by the PE, in connection with a debt claim, by itself would not make the debt claim effectively connected with the PE. What essentially follows is that unless the foreign enterprise, i.e. DZ Bank AG Germany, carries on business through the permanent establishment in India, even if there be any, interest income earned by the foreign enterprise, even if earning of the said income is on account of a significant contribution from the activities of such a permanent establishment, cannot be taken out of taxability under article 11(5). Clearly, therefore, the conditions laid down under article 11(5) are not satisfied on the facts of this case, and, the entire interest income, therefore, is required to be taxed under article 11. For this reason alone, the interest income cannot be brought to tax under article 7 because the condition precedent for an interest income being brought to tax under article 7, i.e. fulfilling the twin conditions set out in article 7, are not satisfied.

23. On a conceptual note, there can perhaps be situations in which an interest income from India, in the hands of a foreign enterprise, could be a combined fruit of business carried on by the foreign enterprise outside India, as also in India by the virtue of supporting services provided by its representative office in India. Unless the conditions set out in article 11(5) are not satisfied, as in this case, there cannot be, in the light of preceding discussions, any occasion to take such interest out of the ambit of article 11, and, when entire interest revenues are taxable under article 11, nothing survives for taxation, or is permitted to be taxed, under article 7.

24. In certain situations, the fruits of services rendered by the Indian liaison office to the foreign enterprise, could at best be taxed by making an ALP adjustment to free services rendered by the Indian liaison office. The line of reasoning, in support of this proposition, could be as follows. The domestic law definition of the expression "enterprise" under section 92F(iii) includes "a permanent establishment" which, for that purpose and as further defined in section 92F(iiia), includes "a fixed place of business through which the business of the enterprise is wholly or partly carried on". Therefore, even when business of a foreign enterprise is partly, no matter even if that part be relatively insignificant given the overall scheme of business, carried on through its fixed place of business in India, such an establishment could qualify to be a "permanent establishment" for the purposes of the transfer pricing regulations. There is also a school of thought that whatever be the treaty protection under section 90, such a treaty protection does not extend to transfer pricing regulations. As noted by a coordinate bench of this Tribunal, in the case **of Shell Global Solutions BV Vs DDIT [(2016) 75 taxmann.234 (Ahd)]**, "the profit adjustment mechanism, envisaged in tax treaties, do not deal with supra national income determination, and, therefore, the provisions of tax treaties cannot be seen as restricting, or overriding, domestic

law mechanism on this aspect". It is not even in dispute that India representative offices of foreign enterprise do perform certain services which are part of the business activities, even though such services are at best preparatory and auxiliary activities. As a corollary to this legal and factual position, a suitable arm's length price adjustment for the free services rendered by the Indian office to the foreign enterprise could probably be in order. Such an ALP adjustment could factor for the functions performed, assets employed and the risks assumed by the Indian office. Undoubtedly, in terms of the Reserve Bank of India restrictions, the representative office functions purely as a liaison office "without transacting any type of banking business" but then the source of income in such a situation will be from the services rendered by 'an enterprise" to its 'associated enterprise', and, in terms of the mandate of section 92, "any income arising from an international transaction shall be computed having regard to the arm's length price". The RBI restrictions are on carrying on of banking business by the India representative offices, but these offices can, and admittedly do, carry on economic activities nevertheless, and it is as a result of these economic activities, ALP adjustments could possibly be made.

25. However, when we put the above propositions to the learned senior counsel, he vehemently opposed the same. His first objection was that such a direction, if made, will broaden the scope of the appeal because the issue regarding ALP adjustment is not even made out by any of the authorities below, and by directing the same, or even obliquely suggesting the same, we will end up enlarging the scope of this appeal. His second objection was that it is incorrect to proceed on the basis that the treaty provisions donot restrict the application of transfer pricing provisions, and he relied upon his analysis about the scope of article 9 with respect to 'associate enterprise'. His third point was that when profits of the liaison office are not taxable in India, there cannot be any question of ALP adjustment with respect to so called free rendition of services by the Indian representative or liaison office to the foreign enterprise. His last point was that when what is to be eventually taxed in the hands of the foreign enterprise in India can never exceed the receipts of the foreign enterprise from India, and when entire receipts on account of interest are taxed in the hands of the foreign enterprise, under article 11, there cannot be further attribution of income on account of ALP adjustment in respect of related services. The fact that this income is taxed on the gross basis, according to learned counsel, does not really matter, because so far as this aspect is concerned, we are concerned about the fact of taxation *per se* and not the modalities of taxation. Learned Departmental Representative, on the other hand, relies upon his stand that at least some income must be attributed to the operations of the India representative office.

26. We see merits in the stand of the learned senior counsel for a very short reason. It is an undisputed fact that the entire related interest income has been brought to tax in the hands of the foreign enterprise, even though on gross basis under article 11. In case any income is brought to tax on account of ALP adjustment, and bearing in mind the fact that such an income will also be relatable to earning the same interest income, it will indeed result in a situation that for revenue of 'x' amount earned from India, what will become taxable in India will be an amount more than 'x' amount- something which is clearly incongruous. The taxable amount in a tax jurisdiction cannot, under any circumstances, be more than the entire revenue itself in that jurisdiction. In this view of the matter, even an income on account of ALP adjustment for free rendition of services by the Indian representative office to the foreign enterprise itself- even if that be treated as an associated enterprise and a hypothetically independent entity, in the cases of banks where entire interest revenues are

taxed on gross basis, is ruled out. In this view of the matter, we see no need to deal with the other issues raised in learned senior counsel's defence, and leave those issues open for adjudication in the appropriate cases.

27. In view of the above legal analysis, once entire interest revenues earned in India in the hands of the foreign enterprise is taxed in its hands under article 11- as is the undisputed position in this case, nothing survives for taxation under article 7, and, given the fact that entire related revenues are taxed in the hands of the assessee on gross basis under article 11, directly or indirectly, nothing more than entire business receipts can be brought to tax in India. In any case, under the scheme of taxability in article 7 and by the virtue of specific provisions of article 7(7), as long as an income is taxable under any other specific provisions of the treaty, *[such as article 8 (shipping and air transport business income), article 10 (dividends), article 11(interest), article 12 (royalties and fees for technical services), article 13 (capital gains)]*, and unless it is excluded from the operation of such specific provisions *[such as under article 10(4), article 11(5) , article 12(5)]*, it cannot be taxed under article 7.

28. It is also important to bear in mind the fact that, as we have indicated earlier as well, that the case of the revenue proceeds on the fallacy that Indian representative office of DZ Bank AG and DZ Bank AG are two distinct entities, and that is apparently conceptual justification for accepting taxability of the entire related interest income in the hands of the DZ Bank AG on gross basis under article 11 and then seeking to tax profits relating to earning of such income in the hands of DZ Bank AG- India Representative Office, under article 7. It is only a corollary of the unambiguous position that the DZ Bank AG and DZ Bank India Representative Office are only one taxable unit, that the same income cannot be taxed in the hands of the same assessee twice- once under one article of the treaty i.e. Article 11, and then under another article of the treaty, i.e. Article 7. The scheme of taxability under article 7 and article 11, does not visualize, or permit, such incongruous situations.

29. That leaves us with the taxability of commitment fee of Rs 1,91,08,038 and agency fees of Rs 7,06,900. So far as these receipts are concerned, the Assessing Officer, in paragraph 9.1 of the assessment order, has noted the claim of the assessee that these were in connection with a loan guaranteed by HERMES-Deckung, Germany, and for that reason not taxable under article 11(3)(b) of the Indo German tax treaty. While he did not dispute the claim of the assessee that these amounts these amounts are in the nature of interest, and as such eligible for exemption under article 11(3)(b), he rejected the claim for the short reason that "it has been held that the assessee is a permanent establishment of DZ Bank AG in India, and all the income earned by the head office from clients in India is taxable as its business income in India". That reason is clearly incorrect. As we repeatedly emphasized, the DZ Bank AG and DZ Bank AG- India representative office are one and the same thing so far as taxation in India is concerned. These payments to DZ Bank AG were subject matter of remittances by Indian clients to the DZ Bank AG. If these were not taxable at that stage, there is nothing further by way of DZ Bank India Representative Office where the same can be taxed. The very approach of the Assessing Officer proceeds on gross misconception of facts. In any event, when principal transaction (i.e. interest income in question) itself does not lead to taxable income in India, a transaction subsidiary thereto (i.e. commitment fees and agency fees relatable thereto) cannot result in an income taxable in India either. We have taken note

of the fact that what are termed as commitment charges and agency fees are in fact integral part of the loan arrangements, relatable to the same loan, and part of consideration for the same loan having been extended by DZ Bank AG to India. Unless there is something in a tax treaty to indicate to the contrary, as noted in the case of **Hindalco Industries Ltd Vs ACIT [(2005) 94 ITD 242 (Mum)]**, by a coordinate bench of this Tribunal, subsidiary transaction takes colour from the principal transaction. The coordinate bench had noted that "**…….. when principal transaction is such that it does not generally give rise to taxability in the source country, the transaction subsidiary and integral to such a transaction also does not give rise to taxability in the source country. In other words, the subsidiary and integral transactions have to take colours from the principal transaction itself and are not to be viewed in isolation**". In any event, article 11(4) defines "interest" "**as used in this Article means income from debt-claims of every kind**" *[emphasis, by underlining, supplied by us]*, in most exhaustive manner and covering all income from a debt claim. The commitment fee and agency fee clearly fit in this description, and nothing to the contrary has been even brought to our notice by the learned DR or in the material on record.

30. In the light of the above discussions, as also bearing in mind entirety of the case, it is clear that, on the facts and in the circumstances of this case and in law, there is no income, other than the interest income of DZ Bank AG from its clients in India, on which tax liability under article 11 has already been discharged, taxable in the hands of the assessee bank. So far as this taxability is concerned, the assessee did not have any obligations to file the income tax return under section 115A(5) as it existed at the relevant point of time. It is difficult not to miss the fact that we are looking at a situation in which an income, which has already been brought to tax in the hands of the assessee under a treaty provision, is being sought to be taxed again in the hands of the same assessee, in the same assessment year but only under a different provision in the same tax treaty. We cannot, and donot, approve such an approach. The impugned demands are, thus, also devoid of legally sustainable merits from this point of view as well. We, therefore, uphold the plea of the assessee against taxability of interest income of Rs 29,41,57,201 and commitment fees etc of Rs 1,98,14,938, in the hands of the assessee bank, additionally under article 7 of the Indo German tax treaty also. That finding is, however, without prejudice to the taxability of the interest income under article 11 of the Indo German tax treaty. We make it clear that the income in question could only be taxed under article 11, and not additionally under article 7 also, but the income is taxable nevertheless, subject to the exemptions set out in and under the scheme of article 11, on gross basis.

31. Given our line of reasoning, as above, it is wholly academic issue as to whether or not the assessee had a permanent establishment in India, because PE or no PE, the debt claim in question could not be said to be effectively connected to the alleged PE, and, therefore, neither the exclusion article 11(5) could have been triggered, nor the taxability under article 7 could not have come into play. It is not even Assessing Officer's case that the debt claims in question are effectively connected with the PE, but at best that there is "**a real relation between the business carried on by the assessee for which it receives interest and processing charges abroad and activities of its representative office in India which contribute directly or indirectly to the earning of income of the assessee** *(i.e. DZ Bank AG, Germany*)- something is much less than the threshold nexus level to trigger article 11(5) exclusion clause. The existence of permanent establishment, in the light of our analysis of

legal position, is not really relevant for determining the issue of taxability under article 7 on the facts of the present case.

32. In view of our detailed findings above, the question that we had raised on our own, with respect to the right hands in which impugned demands could be brought to tax, is rendered infructuous, and it does not call for our adjudication as on now and in this case. Suffice to say that the tax demands raised in the impugned assessments, for the detailed reasons set out above, are wholly unsustainable in law, and it is, therefore, wholly academic question as to, if at all these were demands could be lawfully raised, whether these demands could have been lawfully raised in the impugned assessment or whether separate proceedings were required to be initiated in the hands of the DZ Bank AG. For this reason, we also do not see need to deal with the scope of Section 153 on the facts of this case, as also the question whether, given the present context, appellant before us could be treated as a 'person' in the inclusive definition of Section 2(31) under the Income Tax Act, 1961. All these issues are rendered academic in the present situation.

33. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 04 day of December, 2020.

Sd/-	Sd/-
Pavan Kumar Gadale	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 04 day of December, 2020

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai