IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'G' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 2810/DEL/2003 [A.Y 1998-1999]
ITA No. 3147/DEL/2003 [A.Y 1999-2000]
ITA No. 3148/DEL/2009 [A.Y 2000-2001]
ITA No. 3149/DEL/2009 [A.Y 2001-2002]
ITA No. 3150/DEL/2009 [A.Y 2002-2003]

M/s Siemens Mobile Communications SPA [Formerly Siemens Information and Communication Networks SPA] [Formerly ITALTEL SPA]	Vs.	The Dy.C.I.T [Now D.D.I.T] Intll. Taxation New Delhi
PAN :		

ITA No. 3012/DEL/2003 [A.Y 1998-1999]

The Dy.C.I.T [Now D.D.I.T] Intll. Taxation New Delhi	Vs.	M/s Siemens Mobile Communications SPA [Formerly Siemens Information and Communication Networks SPA] [Formerly ITALTEL SPA] PAN :
(Applicant)		(Respondent)

Assessee By : Shri Deepak Chopra, Adv
Ms. Priya Tandon, Adv

Department By : Shri G.K. Dhall, CIT- DR [Intll.]

Date of Hearing : 30.08.2019
Date of Pronouncement : 30.09.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This is a bunch of appeals filed by the assessee for Assessment Years 1998-99 to 2002-03. The Revenue has filed cross appeal for Assessment Year 1998-99. Since common issues are involved in all the above appeals pertaining to same assessee, these are being disposed off by this common order for the sake of convenience and brevity.

2. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

3. The appellant, M/s Siemens Mobile Communications [SMCS for short], is a company incorporated under the laws of Italy. The appellant was engaged in the business of manufacture and supply of microwave transmission equipment. During the years under consideration, SMCS

supplied microwave transmission equipment (including both hardware and software components) to its customers in India, being independent telecom operators viz., BPL Mobile Communications Ltd., Usha Martin Telecom Ltd., Tata Communications Ltd., Modicom Network Pvt. Ltd. and Aircel Digilink Pvt. Ltd.

4. The quarrel is in respect of taxability of offshore supplies made by SMCS to the aforementioned telecom operators in India. The Revenue has taken the consistent position that some portion of the profit relating to these offshore supplies should be brought to tax in India. The basis for this position taken by the Revenue is the activities relating to installation, commissioning and maintenance, which would require the presence of SMCS in India and hence some portion of the profit would trigger taxability in India.

5. The Assessing Officer and the ld. DR have emphasized that unless these activities are completed, sale cannot be said to have been concluded.

6. On the other hand, the ld. counsel for the assessee has consistently taken a stand that no portion of the profits arising from offshore supplies are liable to be taxed in India. For this proposition, the ld. counsel for the assessee placed strong reliance on the decision of the Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd. 288 ITR 408, though it was in context of the provisions of section 9(1)(i) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act']. Similar view was taken by the Hon'ble High Court of Delhi, in the case of Nortel Networks India International Inc. 386 ITR 353.

7. The entire quarrel can be summarized in the form of the following questions:

(a) Whether SMCS had a "business connection" in terms of section 9(1)(i) of the Act?

(b) Even if the answer to the above is yes, whether in absence of any permanent establishment ("**PE**") of SMCS in India, could there be any tax liability on SMCS in India?

(c) Even if there did exist a PE of SMCS in India, can it be stated that some activities relating to offshore supplies were carried out in India, to trigger taxability in India?

(d) The admitted fact being that the activities pertaining to installation, testing and commissioning were carried out by the telecom operators in India themselves or Siemens Public Communication Network Limited (**SPCNL**), an Indian company, under direct and independent contracts with such telecom operators, would make any exposure on SMCS for existence of an installation PE under Article 5(2)(j) of the Double Taxation Avoidance Agreement between India and Italy (DTAA)?

(e) Whether the Liaison Office (**LO**) opened by the appellant could be any exposure of a PE on SMCS in terms of having this LO in India?

(f) Whether in absence of any employees of SMCS being involved in activities pertaining to installation, testing and commissioning in India, there could be any exposure on SMCS of having a fixed place PE in terms of Article 5(1) of the DTAA?

(g) Whether the SPCNL could be said to be a dependent agent PE (**DAPE**) of SMCS in India, under Article 5(4) of the DTAA?

8. The Hon'ble Supreme Court in the case of Formula One World Championship Ltd. 394 ITR 80 and ADIT v. E-Funds IT Solution Inc. 399 ITR 34 has held that there triggers no taxability in respect of offshore supplies in the absence of a PE of the non-resident assessee in India. In so far as the attribution of profit is concerned, as enshrined in Article 7 of the DTAA, the same would be inapplicable in absence of any activity relating to the offshore supplies being carried out in India.

9. Interestingly, in 1998-99, the ld. CIT(A) has decided the issue involving the existence of a PE in favour of the appellant. However, in subsequent years, the successor ld. CIT(A) did not follow the order passed by his predecessor.

10. As mentioned elsewhere, the appellant has supplied items to independent telecom operators and such supplies have been made offshore. A perusal of the contracts with the telecom operators shows

that supply was concluded with the title and risk in the components passing on to the concerned telecom operators offshore.

11. However, the ld. DR has analyzed the contracts in a Tabular Form as under:

date of ontract	Nature of Contract	Name of the Party	Auth Signatory	Remarks
5-11-96	Design, manufacture and delivery of Product [PB-1; cl.2.1, p. 134] Product' means in relation to Siemens the NSS [PB-1; Cl.1.1, p. 132] or 'Network Switching Sub-system' [PB-1; Cl.1.1, p. 131, Annex-2.1, p.155 & Appx-1, p. 179] Contract price includes charges for Installation of individual components over a period of 3 years. [PB-1; p. 193 to 197, 211 to 213 (Installation & Testina Base , Inst. & Testinp. 7% of HW/SW excluding spares). 232 to 235, 254, 256] Provision of Services in the nature of generation of SSS Database, Testing of the data base using the test exchange at Gurgaon, India & delivery of the	Modicom	U. Binotti [PB-1, p. 154]	- For a period of 3 years. [PE 1, p. 181-187] - Supplier to deliver th products to the customer the port of destination [PB- p. 135] Title to products supplie shall pass at the same tim that risk passes under Cl terms [PB-1, p. 138, CI-5] - Supplier will have representative present for a inventorying [PB-1, p.308] Siemens (SPCNL) t provide support servic on a 24 hour basis, 7 days week [PB-1, p.338] includin 24 hour call
7-02-97 7-9-97	Design, manufacture and delivery of Digital Microwave System [PB-1; Art-1, p.4 & 63] Scope of the 'System' is the Supply, Installation and Commissioning of microwave systems. [PB-1; Annex-2,p.37 & 110] Assessee to support the equipments for a period of 10 years. [PB-1; Annex-2,p.37 & 110] After completion of all the work assessee will offer this 'System' for acceptance by BPL. who after performing tests	BPL	U. Binotti [PB-1, p.29 & 88]	Final quantities of th equipment will be confirme on the basis of joint surve reports of the assesse and BPL. [PB-1; Art-4.0; p.7 & 66] - After the arrival of th equipments at the port destination, the assesse shall furnish to BPL th details of the quantities the equipment delivered an the equipments shall b checked jointly by representative of th assessee and one of BPl

	Assessee shall make available all the test instruments required for acceptance.[PB-1; Annx-8, p.56 & 121] - Specific documentation, as agreed will be detailed in the Service Contract. [PB-1; Annx-5, p.117]			to the system....in accordance with CIF Mumbai. [PB-1; Art-17, p.12 & 72] - Assessee shall at its own cost and expenses, take **precautions for the safety of the equipment** system. [PB-1, Art-19.01, p.13 & 72] - Assessee shall **insure at its cost & expenses the equipments up to BPL's warehouse**. [PB-1; Art-29.01, p.20 & 80] - Link Engineering **Survey has to be carried out by the assessee at the site**. [PB-1; Annx-5, p.48] - BPL has to provide **access to the sites to the assessee for installation**. [PB-1; Annx-8, p.55 & 121] - **After completion of all the work, SPCNL and assessee will offer this system for acceptance by BPL.** [PB-2; Annex-8, p.121 r.w. Agency Agreement cl.2(f), p.616]
01-08-97	- UMTL called for proposals from intending suppliers for the **manufacture, delivery** (CIF Calcutta Airport), **Installation, Testing & Commissioning**. [PB-2, p.346] - Assessee has an **obligation towards successful testing** of the supplied equipments and even though UMTL conducts the tests, "if the works or any section fails to pass the tests", the **assessee [vendor] has a right to "require such test to be repeated**" and the costs towards these tests to be borne by the assesse. [PB-2; cl.7.1, p.376] - In the event of **failure to pass the Acceptance Test, the contract price [for the supply] shall be adversely affected and reduced**. [PB-2; cl.7.2, p.377] - Only after the passing of the acceptance test that the [supplied] **"System" shall be taken over by UMTL** and a "**Certificate of Acceptance**" will be issued. [PB-2; cl.8.1, p.377] - Scope of the **"System" include 'integration of the same with the existing network';** [PB-2; Annex-3, p.353 r.w.cl.5.2, p.375] - **10% of the purchase order**	Usha Martin	P. Stangalino [PB-2, p.348]	- **"System"** means the hardware & software that is required to be supplied under the contract; [PB-2; cl.9, p.350] - "**Installation & testing**" means all tests that are to be successfully completed before 'Handover'; [PB-2; cl.10, p.350] - **"Handover"** means the state at which the 'System' is ready for 'Acceptance Testing', upon completion of the contract's work including 'Installation and Commissioning' [PB-2; cl.11, p.350] ; - **"Commissioning"** means putting installed and tested system at site into service. [PB-2; cl.14, p.350] - Advance payment by UMTL against the presentation of "**Advance Payment Bond**" of equivalent amount by the assessee. [PB-2; cl.4.2.1, p.380] - UTML to provide **access to the site to the assessee**. [PB-2, p.372] - Contract includes provision for "Local Supplies" [PB-2,

	price **shall be paid against the "Certificate of Acceptance"**. [PB-2; cl.4.2.1, p.381]			p.381]
15-01-98	- Supply of Equipment and other obligations as per Annexure-V. [PB-2; cl.3 r.w. cl.13 & Annex-V, p.394,400 & 493] - **Title to the Equipment shall pass to TCL after arrival of the equipment at the port of entry in India.** [PB-2; cl.17, p.401] - **Various tests** [PB-2, cl.1.2 to 1.4; p.391-393] **and payment schedule of the invoiced amount** [PB-2; cl.7 r.w.cl.8; p.396-398] **are interlinked and dependent upon each other.** Various **guarantees given by the assessee shall only be released after the issuance of Final Acceptance Certificate for Phase-II and the Network Acceptance Certificate.** [PB-2; cl.8.4; p.398] Equipments/system supplied must pass the following tests– ▪ Installation Test ▪ NMS Acceptance Test ▪ System Acceptance Test ▪ Final Acceptance Test ▪ System Stability Test - **Assessee shall notify TCL when the equipments supplied are ready for acceptance tests**. Tests shall be carried out by TCL with the guidance of the assessee. [PB-2; cl.25; p.404] - Annexure-III of the contract is the Implementation Plan which include **"Installation and Commissioning"**. [PB-2, p.485-488]	Tata Telecom	E. Negri [PB-2; p.409]	- All post-delivery responsibilities i.e. delivery from customs to warehouse to site and all cost of warehousing and transportation up to the designated site; Storage; transportation of debris and surplus to warehouse and/or garbage dump etc. are the responsibility of assessee. [PB-2; cl.16 r.w. Annex-V; p.401 & 493] - **Assessee shall** submit draft documents of Acceptance Test Procedure and Report prior to the start of Acceptance Test [PB-2; cl.1.2; p.391] and it shall also **submit the Acceptance Test Report** within 1 week after the completion of the Acceptance Test as well as a corrective solution plan in case of failure. [PB-2; cl.1.2; p.392 r.w. cl.1.2; p.499] - After correction of all deficiencies and on provision of the formal Test Report, TCL shall issue the **Final Acceptance Certificate (FAC) and the release of 'Down Payment Bank Guarantee** of 10% of the contract value.[PB-2; cl.1.3; p.392 r.w. cl.8.4; p.398] - After completion of the System Stability Acceptance Test, TCL will issue **Network Acceptance Certificate (NAC) and the release of 'Performance Guarantee** of 15% of the purchase order.[PB-2; cl.1.4; p.393 r.w. cl.8.4; p.398]
30-01-98	- Service Contract between TCL & Seimens India (SPCNL) and BPL and SPCNL [PB-2, p.498 & p.566] - Almost all the clauses of the service agreement are a mirror image of the supply contract. Especially cl.-2 [PB-2; p.503&394] on Interpretation, Scope of Work, Cl.7 on Payment Terms [PB-2, p.503&396], cl.8.4 on release of bank guarantees [PB-2 cl.8.4 p.505&398]. Annex-I	TCL & Seimens India (SPCNL)		- **SPCNL shall submit Acceptance Test Report** to TCL within 1 week after the completion of the Acceptance Test as well as a **corrective solution plan** in case of failure. [PB-2, cl.1.2; p.499 r.w. cl.1.2; p.392]

	[PB-2; p.522 & 411] & Annex-III [PB-2; p.557&485] are identically worded with that of the Supply agreement Especially, all the antecedents to the award of contract to the assessee starting from the issuance of RFQ by TCL till the issuance of LOI by TCL and the acceptance of such LOI by the assessee and SPCNL are the same.			
11-10-97	Assessee appointed SPCNL as its sole agent for the sales promotion of specified equipments (Apdx-A) to the specified customers (Apdx-B) [PB-2; Art-1 ;p.615] Agreement provides for assistance and collaboration of commercial, technical administrative and legal nature concerning assessee's contracts with BPL, MODICOM, Motorola for BPL US West, Tata, UTML, VSNL, TCL, Motorola & Shyam Telelink. [PB-2; cl.2(f), p.616 & 625] Duty and obligations of SPCNL to the assessee to continue till the completion of all the obligations arising out from the contracts of the assessee with the above contracts [PB-2; cl.2(f), p.616] Duty and obligations of SPCNL to the assessee to continue even after termination of agency agreement if the assessee's obligations for performance of contracts with the above customers continue. [PB-2; cl.2(f); p.616] Commission payable to SPCNL is linked to the CIF price of contracts and can be varied depending upon any subsequent variations/recoveries by the customers from the CIF price. [PB-2 cl.5, p.617-618]	Agency Agreement with SPCNL		Comparison of the equipments specified in Apdx-A [PB-2; p.622] with the supplies made to various customers specified in Apdx- B [PB-2; p.623] reveals that this is an agency agreement for services in respect of specific supplies to specific customers.

12. It seems the ld. DR has misconstrued the relevant clauses of the contracts. Clause 15.1 of the agreement dated 26.02.1997 with BPL

Mobile Communications Limited, exhibited at page no. 12 of paper book no. 1; clause 15.1 of the agreement dated 17.09.1997 with BPL Mobile Communications Limited, exhibited at page no. 71 of paper book no. 1; clause 5 of the agreement dated 26.11.1996, with Modicom Network Private Limited, Exhibited at page no. 138 of paper book no. 1; Annexure 2 of the agreement dated 01.08.1997 with Usha Martin Telecom Limited, Exhibited at page no. 352 of paper book no. 1; and clause 16 of the agreement dated 15.01.1998, with Tata Communication Limited, Exhibited at page no. 401 of paper book no. 1 show that supply was concluded with title and risk in the components passing on to the concerned telecom operators offshore.

13. The Revenue has placed reliance on the decision of the Hon'ble High Court of Andhra Pradesh in the case of M/s Larson and Toubro Ltd. v. State of Andhra Pradesh [2015] – TIOL – 3055 which appears to be misplaced in as much as in that case, the contract in place did not specify that title passed outside India, whereas, in the case in hand, and as mentioned elsewhere, the title passed offshore. Further, the consideration for supply of components was also received by the

appellant offshore. Even the warranty services towards replacement as well as maintenance were performed from the facilities in Italy.

14. The ld. DR pointed out that the employees of the appellant were constantly visiting India for the purpose of negotiation and signing of contracts. The assessee failed to furnish the details of visit by such employees.

15. In this context, it would be relevant to understand the dates of signing of each such contracts, which can be understood from the following chart:

Sl No	**Particulars of the Supply Contract**	**Contract Date**
1.	Agreement with BPL Mobile Communications Limited	26.02.1997
2.	Agreement with BPL Mobile Communications Limited	17.09.1997
3.	Agreement with Modicom Network Private Limited	26.11.1996
4.	Agreement with Usha Martin Telecom Limited	01.08.1997
5.	Agreement with Tata Communication Limited	15.01.1998

16. It can be seen from the above that all the contracts were signed in F.Y. 1997-98. Therefore, the allegation of the department on the existence of a PE should fall, because, if the expatriate employees were coming for negotiation and signing of contracts, these activities are not revenue generating activities and since no expatriate employees visited in the subsequent years, issue of fixed PE in any case would not arise. For this proposition, we draw support from the decision of the Hon'ble High Court of Delhi in the case of DIT v. Ericsson A.B., New Delhi [2012] 343 ITR 470.

17. It would be pertinent to understand the role of SPCNL. The appellant had entered into an agreement dated 01.10.1997 with its sister concern, SPCNL, where under SPCNL was required to carry out marketing and promotional activities; inform SMCS about the programs and plans of various public bodies, corporations or private entities; call for tenders; enable commercial, technical, administrative and legal support; etc. For these services rendered, SPCNL was remunerated on arm's length basis.

18. On 01.10.1997, SPCNL also entered into independent contracts with the telecom operators in India for undertaking installation, testing and commissioning of the components supplied to them by the appellant. In addition to these activities, the scope of activities performed by SPCNL also encompassed manufacturing, sale and trading of a wide range of telecommunication equipment, such as switching equipment, optical transmission equipment, internet broadband equipment, etc. SPCNL entered into an agreement with BPL Mobile Communications on 2.6.1997 and with Tata Communication Ltd on 13.01.1998.

19. The Revenue has constantly repeated that installation, testing and commissioning, were performed either by the telecom operators themselves or by SPCNL. These certificates are placed at pages 1027-1032 of paper book no. 4, stating that pre-network and pre-installation services as well as installation, testing and commission of the hardware components was done by SPCNL under independent contracts. In fact, the certificate issued by Usha Martin Telecom Limited, which is at page no. 1026 of paper book no. 4 states that pre-network and pre-installation services as well as installation, testing and commission of the hardware components was done by Usha Martin Telecom Limited itself.

20. It would not be out of place to mention here that SPCNL was separately being remunerated by the above telecom operators in India for the services rendered by it. In fact, in the contract between SPCNL and BPL Mobile Communications Limited, separate consideration for providing the installation and other services has specifically been provided for, which can be seem from clause 9 of the Service Contract, Exhibited at page no. 579 of paper book no. 2.

21. The ld. DR has vehemently stated that any portion of remuneration relating to the service of installation, maintenance and commissioning was embedded in the Supply Contract.

22. Another fact which has been highlighted by the ld. DR is that the appellant had established a Liaison Office [LO] in India on 03.11.1997. The fact is that the same was shut down on 31.01.2000. As the LO came into existence only on 03.11.1997 and only two contracts were signed after that date which can be seen from the chart of the date of execution of contracts exhibited elsewhere.

23. Moreover, the only allegation of the Assessing Officer is that the LO has assisted in the negotiation and signing of the contracts. We find that the Special Bench of the Tribunal in the case of **Motorola Inc.**96 TTJ 1 itself had held that an LO does not tantamount to existence of a PE in terms of Article 5 of the DTAA.

24. The ld. DR has placed strong reliance on the decision of the Tribunal in the case of Hitachi Hitech Technologies ITA Nos. 2683 to 2688/DEL/2015 and pointed out that the Tribunal has held that the existence of the LO constituted a PE of Hitachi Hitech Technologies.

25. In our considered opinion, the decision in the case of Hitachi Hitech Technologies [supra] was delivered on different set of facts wherein pursuant to survey operation, certain facts were unearthed and on the basis of these facts, the Tribunal came to the conclusion that the LO constituted a PE of Hitachi Hitech Technologies. The case in hand is devoid of all those facts and hence the said decision of the Tribunal would do no good to the Revenue.

26. As mentioned elsewhere, the Revenue has strongly alleged that title in components passed to telecom operators in India onshore. SMCS had a significant role to play in the process of carrying out acceptance tests and the same was done by SPCNL on behalf of the appellant.

27. Another point raised by the ld. DR in support of the assessment order is that It is difficult to envisage that the appellant would have chosen to remain unrepresented either by itself or through a representative during a crucial test on which the functioning or non functioning of a component supplied by it was to be determined. According to the ld. DR, the appellant entrusted the responsibility of testing for defects on SPCNL indicates that SPCNL was the agent of the appellant and the role of SMCS was not limited to supply of components from abroad. In fact, it extended to ensuring that the system was fully functional after installations.

28. Another allegation of the Revenue is that contracts between SPCNL and the telecom operators are in the same line between the appellant and the telecom operators. It is the say of the ld. DR that the appellant

has parted with some of its responsibilities by getting separate contract signed between the telecom operators and SPCNL.

29. According to the ld. DR, it is not possible that any telecom operator entering into an arrangement with the appellant for supply of components would enter into an arrangement for installation with any other company. Therefore, engagement of SPCNL was dependent and conditional on supply of components by the appellant. These evidences clearly show that the appellant had local presence in the form of SPNCL in India.

30. Supporting the orders of the authorities below, the ld. DR stated that contracts involving high amounts, like in the present case, can be negotiated and concluded without any face to face interaction.

31. Referring to the execution of Power of Attorney (**PoA**) the ld. DR stated that the appellant has failed to substantiate why contracts could not be signed in Italy. It is the say of the ld. DR that the contracts were negotiated and signed in India itself.

32. As mentioned elsewhere, the ld. CIT(A) had set aside the assessment order for Assessment Year 1989-99 stating that supply of hardware could not be taxed in India in the absence of PE of the appellant in India. Despite this, the Assessing Officer at the time of passing of assessment orders for Assessment Years 1998-99 to 2002-03, simply disregarded the order passed by the appellate authority which was on identical set of facts. The ld. DR, in support of subsequent order stated that in Assessment Year 1998-99 there was no analysis done by the ld. CIT(A) in respect of contractual terms. This assertion by the ld. DR is ill-founded. A perusal of the order of the ld. CIT(A) for Assessment Year 1998-99 clearly shows that he had considered the contracts and had carefully scrutinized the same while holding in favour of the assessee.

33. Coming to the issue relating to Power of Attorney, facts on record show that the PoA dated 13.09.1997 was not executed for signing of contract dated 26.02.1997 entered into between SPNCL and BPL Mobile Communications. The contract dated 26.02.1997 was signed by Shri Binotti under a separate PoA dated 16.02.1997. This is evident from the contract dated 26.02.1997, exhibited at page no. 2 of paper book no. 1, for which the PoA was executed on 16.02.1997. The said PoA has also

been exhibited at page no. 1014 of paper book no. 4. Contract dated 17.09.1997, at page no. 61 of paper book no. 1, PoA was executed on 15.11.1997. This PoA has also been exhibited at page no. 1018 of paper book no. 4. In our considered view, signing of the contract is merely putting signature on a paper and does not, in any manner, lead to an inference of PE or business connection.

34. As mentioned elsewhere, the Revenue has alleged that the appellant has failed to provide information with respect to employees who visited India during the subject AYs which precluded the Revenue to analyse whether the appellant has a PE in India. We have already pointed out the dates of execution of contracts from which it can be seen that almost all the contracts were signed in F.Y. 1997-98. Since all the contracts were entered into between 26.02.1997 and 15.01.1998, there was no occasion for any employee of the appellant to visit India thereafter.

35. A thorough understanding of the facts indicate that the role of the appellant was limited to mere supply of hardware components directly from Italy in such a manner that sales stood concluded, title transferred

and consideration received outside India. Even the appellant was required to repair or replace faulty equipment during the warranty period. But for this, the telecom operator concerned was required to send the faulty equipment to the facility of the appellant in Italy.

36. It is pertinent to understand clearly that onshore income from onshore services, i.e., undertaking installation, testing and maintenance by SPCNL and income earned by SPCNL through performance of marketing and promotional activities for the appellant were voluntarily offered to tax in India.

37. Supporting the business connection of the appellant in India, the ld. DR pointed out that customs clearance, transportation, warehousing and storage facilities were provided by the appellant in respect of components, title in which already vested with the telecom operators in India. Facts on record show that these services were provided through independent Clearing & Forwarding Agents (**C&F Agents**), who were remunerated for the services rendered by them under separate contracts. The certificate obtained by C&F Agents are exhibited at page no. 856 of paper book no. 3.

38. Considering the facts in totality, we have no hesitation to hold that no business connection can be said to have been established, and therefore, no further income can be attributed to India. Our view is supported by the Circular no. 23 dated 23.07.1969 issued by the Central Board of Direct Taxes, wherein it has been stated that no liability will arise to a non-resident where transaction of sale is on principal to principal basis since the transaction of supply of components by the appellant are on its own account, unaffected by the services to be rendered by SPCNL. This itself would take the transaction of supply of components outside the purview of section 9(1)(i) of the Act.

39. In so far as the issue relating to fixed place PE is concerned, the allegation is that supply of components is linked to a fixed place and also the activity of installation, commissioning and maintenance. In our understanding of the facts, since the offshore contract for supply of components cannot be read together with the onshore contract of rendering installation, commissioning and maintenance, and has to be seen in the light of the provisions of India- Italy DTAA and tests set out in the decision of the Hon'ble Supreme Court in the case of Formula [supra]

and which are (a) Place of business (b) Disposal test and (c) Virtual projection.

40. Considering the facts on record, SPCNL should not be considered a fixed place from which business of the appellant was wholly or partly carried out. The business of SPCNL is not dependent on the appellant as the facts show the variance in the scope of activities nor it can be said that SPCNL is at the disposal of the appellant.

41. We will now address to the issue of installation PE. The allegation of the Assessing Officer is that since the appellant is engaged in the activity of manufacture and supply of components as well as had other obligations including delivery, acceptance test and installation, assembly or supervision on sites, which activities continued for over 6 months, the said activities constituted PE under the terms of Article 5(2)(j) of the India – Italy, DTAA.

42. As mentioned elsewhere, a perusal of the Supply Contracts between the appellant and the telecom operators in India will indicate that the role of the appellant was limited to mere supply of hardware components

directly from Italy. The appellant was neither responsible for, nor undertakes installation, testing and commissioning, the same being the responsibility of the telecom operators themselves, who either undertook the same themselves or had the option of appointing SPCNL.

43. Considering these facts in the light of the Hon'ble High Court of Delhi in the case of Nortel Networks India International Inc., [supra], it can be said that there was no installation PE of the appellant.

WHETHER THERE IS A DEPENDENT AGENT PE

44. This is in reference to Article 5(4) of the India – Italy, DTAA and the same would apply only when a non-resident is acting in India, through an agent, other than an agent of independent status on fulfilling the following conditions:

(a) the agent as afore-stated habitually exercises in India, the authority to conclude contracts;

(b) the agent maintains a stock of goods or merchandises from which it regularly delivers goods or merchandises on behalf of the said non-resident;

(c) the agent secures orders, wholly or almost wholly, on behalf of the said non-resident or for an enterprise or other enterprises controlling, controlled by or subject to the common control of the said non-resident.

45. The Revenue has kept on alleging that SPCNL was controlled by the appellant but at the same time, nothing has been brought on record to evidence as to how the aforementioned conditions get satisfied so as to result in formation of DAPE of the appellant in India. In fact, and as mentioned elsewhere, one of the allegations of the Revenue was that the employees of the appellant frequently visited India for negotiations and signing of contracts which itself shows that SPCNL had no authority to conclude contracts.

46. As has been elaborately discussed elsewhere, obligation to carry out installation, commissioning and maintenance under the Services Contract was by way of separate contracts between SPCNL and the telecom operators. SPCNL cannot be regarded as DAPE of the appellant in India.

47. Contracts between the appellant and telecom operators show that the appellant was not even responsible for performing pre-network surveys or software updates. The appellant does not hold any equity capital in SPCNL and the sphere of activities performed by SPCNL was much broader than those envisaged under the agreement entered into between SMCS and SPCNL.

48. Assuming, yet not accepting that the installation activities were undertaken by SPCNL at the behest of the appellant, the same would still not render the income of the appellant to be taxable in India, since the supply of hardware components, i.e., the taxable activity, was completed before the installation activities.

49. The ld. DR had placed reliance on the decision of the co-ordinate bench in the case Daikin Industries Ltd., Gurgaon [2018 – TII- 165, which is distinguishable on facts, because in that case the Indian entity involved was identifying customers, approaching customers, negotiating prices, and finalizing products sold by it in the capacity of a distributor, as well by the non-resident entity therein. Moreover, in that case, the said Indian entity had failed to establish how it was economically and otherwise independent.

50. The ld. DR has relied on the decision of the Tribunal in the case of Shanghai Electronic Group Co. Ltd. [2010] 2010 – TIOL – 79 which is also distinguishable on facts as in that case, the non-resident entity also indulged in enabling supervisory services in respect of erection, testing and commissioning in addition to manufacturing boilers, turbine and generator equipments.

51. It was in this context that the offshore contract pertaining to supply of equipments and the onshore contract pertaining to provision of services were inextricably linked. In addition to this, there was a clear

finding that contracts were negotiated and concluded by a team of persons in India, which fact finding is missing in the case in hand.

52. The issue of chargeability of interest u/s 234B of the Act on the facts of the case in hand has been decided by the Hon'ble High Court of Delhi in favour of the assessee in the case of GE Packaged Power Inc. 373 1TR 65, wherein it has been held that no interest under section 234B of the Act can be levied on the assessee-payee on the ground of non-payment of advance tax because the obligation was upon the payer to deduct the tax at source before making remittances to them. The relevant extracts of the decision are reproduced hereunder:

> *"22. This Court, therefore, holds that Jacobs (supra) applies in such situations; Alcatel Lucent (supra) can be explained as a decision turning upon its facts; its seemingly wide observations, limited to the circumstances of the case. This Court, therefore, holds that the view taken by ITAT was correct; the primary liability of deducting tax* (for *the period concerned, since the law has undergone a change after the Finance Act, 2012) is that of the payer. The payer will be an assessee in default, on failure to discharge the obligation to deduct tax under Section 201 of the Act.*

27. For the above reasons, this Court finds that no interest is leviable on the respondent assessees under Section 234B, even though they fled returns declaring NIL income at the stage of reassessment. The payers were obliged to determine whether the assessees were liable to tax under Section 195(1), and to what extent, by taking recourse to the mechanism provided in Section 195(2) of the Act. The failure of the payers to do so does not leave the Revenue without remedy; the payer may be regarded an assessee-in-default under Section 201 and the consequences delineated in that provision will visit the payer. The appeal of the Revenue is accordingly dismissed without any order as to costs. "

It may be pointed out that the Finance Act, 2012, w.e.f. 1.4.2012 added proviso below section 209(1)(d) of the Act. But the said proviso is applicable from assessment year 2013-14 and, therefore, prospective in operation.

28. In our understanding, the insertion of the proviso cannot be considered to have retrospective effect so as to expose a non-resident company to levy of interest u/s 234B of the Act for the assessment years prior to assessment year 2013-14. In the light of the above, we direct the Assessing Officer to not charge interest u/s 234B of the Act."

Respectfully following the findings of the co-ordinate bench, we hold that no interest is leviable u/s 234B of the Act. Accordingly, we direct the Assessing Officer not to charge interest u/s 234B of the Act.

53. Considering the facts of the case in totality, the issues mentioned at para 7 hereinabove, are decided in favour of the assessee and against the revenue. Meaning thereby, that all the appeals by the assessee are allowed and that of the revenue is dismissed.

ITA No. 2810/DEL/2003 [Assessee's appeal]

54. The solitary grievance of the assessee is that the ld. CIT(A) erred in taxing income from supply of software to Indian parties as income of the appellant.

55. The quarrel is in respect of consideration received by the assessee from offshore supply of hardware components which imbibed the supply of software. The assessee was asked to show cause as to why its income

or consideration received by it for licencing to use software should not be taxed as royalty.

56. The assessee made a detailed submission claiming that it has actually sold only copyrighted article. This contention of the assessee did not find any favour with the Assessing Officer who was of the firm belief that what has been charged as consideration is licensing fees for right to use software. According to the Assessing Officer, what has been transferred is not software itself but the right to use the software.

57. The Assessing Officer further observed that the assessee is receiving consideration for licensing use of such software and thus the consideration received is taxable as 'royalty' within the definition of 'Royalty' under Article 13 of the DTAA. The Assessing Officer further observed that the computer software supplied by the assessee contains information concerning commercial use of the software. The software contains facilities such as, call waiting, call divert, voice mail, billing, short messages, fax, conference and numerous other features which are being used by the cellular operators for commercially exploiting the service provided.

58. Drawing support from the definition given to Explanation 2 to section 9(1)(vi) of 'Royalty', the Assessing Officer formed a belief that the scope of definition is much wider in its ambit than the definition given in DTAA.

59. The Assessing Officer finally concluded by holding that this royalty has not been accrued to the assessee through PE as per para 5 of Article 13 of DTAA but the Royalties have been received directly from Indian customers to whom the assessee has granted the licence to use the software. Therefore, such royalty is not taxable as business income of the assessee as per Article 7 of the DTAA. Rather, it is taxable under Article 13 of the DTAA. The Assessing Officer, accordingly, computed the liability of the assessee as under:

Income from supply of hardware	9,90,36,601/-
Tax on above @ 48%	4,75,37,568/-
Tax on supply of software	7,58,33,736/-

60. The assessee carried the matter before the ld. CIT(A) but without any success.

61. Before us, the ld. counsel for the assessee, at the very outset, stated that the impugned issue is directly covered in favour of the assessee and against the revenue by the decision of the Hon'ble High Court of Delhi in the case of ZTE Corporation 392 ITR 80.

62. The ld. DR could not bring any distinguishing decision in favour of the Revenue.

63. We have given thoughtful consideration to the orders of the authorities below and have also considered the decision of the Hon'ble High Court of Delhi [supra]. We find force in the contention of the ld. counsel for the assessee. Similar issue was considered and decided by the Hon'ble High Court of Delhi [supra]. The relevant findings of the Hon'ble High Court read as under:

> "20. The misconception that the revenue harbors stems from its flawed appreciation of a copyright license. True, "copyright" is not defined; yet what works are capable of copyright protection is spelt out in the Copyright Act. Sections 13 and 14 of the Copyright Act flesh out the essential ingredients that make copyright a property right. More particularly, Section 14 states as follows:

"14. Meaning of copyright- For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely :-

(a) In the case of a literary, dramatic or musical work not being a computer programme-

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub clauses (I) to

(vi)

(b) In the case of a computer programme,-

(i) to do any of the acts specified in clause (a)

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) In the case of an artistic work,-

(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub clauses (i) to (iv);

(d) In the case of a cinematograph film-

(i) to make a copy of the film, including a photograph of any image forming part thereof;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public

(e) In the case of a sound recording-

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) To communicate the sound recording to the public Explanation - For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation."

Thus, Section 14 categorically provides that copyright "means the exclusive right to do or authorizing the doing of any of the acts mentioned in Section 14 (a) to (e) or any —substantial part thereof". The content of copyright in respect of computer programmes is spelt out in Section 14 (b). A joint reading of the controlling provisions of the earlier part of Section 14 with clause (b) implies that in the case of computer programs, copyright would mean the doing or authorizing the doing- in respect of work (i.e. the programme) or any substantial part thereof -

(b) In the case of a computer programme,-

(i) to do any of the acts specified in clause (a)

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

21. The reference to clause (a) and (b) means that all the rights which are in literary works i.e."(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;(ii) to issue copies of the work to the public not being copies already in circulation;(iii) to perform the work in public, or communicate it to the public;(iv) to make any cinematograph film or sound recording in respect of the work;(v) to make any translation of the work;(vi) to make any adaptation of the work;(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub clauses (I) to (vi)" inhere in the owner of copyright of a computer programme. Therefore, the copyright owner's rights are spelt out comprehensively by this provision. In the context of the facts of this case, the assessee is the copyright proprietor; it made available, through one time license fee, the software to its customers; this software without the hardware which was sold, is useless. Conversely the hardware sold by the assessee to its

customers is also valueless and cannot be used without such software. This analysis is to show that what was conveyed to its customers by the assessee bears a close resemblance to goods- significantly enough, Section 14 (1) talks of sale or rental of a "copy". The question of conveying or parting with copyright in the software itself would mean that the copyright proprietor has to assign it, divesting itself of the title implying that it has divested itself of all the rights under Section 14. This would mean an outright sale of the copyright or assignment, under Section 18 of the Act. Section 16 of the Copyright Act enacts that there cannot be any other kind of right termed as "copyright".

22. In the present case, the facts are closely similar to Ericson. The supplies made (of the software) enabled the use of the hardware sold. It was not disputed that without the software, hardware use was not possible. The mere fact that separate invoicing was done for purchase and other transactions did not imply that it was royalty payment. In such cases, the nomenclature (of license or some other fee) is indeterminate of the true nature. Nor is the circumstance that updates of the software are routinely given to the assessee's customers. These facts do not detract from the nature of the transaction, which was supply of software, in the nature of articles or goods. This court is also not persuaded with the submission that the payments, if not royalty, amounted to payments for the use of machinery or equipment. Such a submission

was never advanced before any of the lower tax authorities; moreover, even in Ericson (supra), a similar provision existed in the DTAA between India and Sweden."

64. Respectfully following the findings of the Hon'ble High Court [supra] we direct the Assessing Officer to delete the impugned addition.

65. In the result, all the appeals of the assessee, viz.,

ITA No. 2810/DEL/2003	[A.Y 1998-1999]	-	Allowed
ITA No. 3147/DEL/2003	[A.Y 1999-2000]	-	Allowed
ITA No. 3148/DEL/2009	[A.Y 2000-2001]	-	Allowed
ITA No. 3149/DEL/2009	[A.Y 2001-2002]	-	Allowed
ITA No. 3150/DEL/2009	[A.Y 2002-2003]	-	Allowed

And appeal of the Revenue in

ITA No. 3012/DEL/2003	[A.Y 1998-1999]	-	Dismissed

The order is pronounced in the open court on 30.09.2019.

Sd/-	**Sd/-**
[SUDHANSHU SRIVASTAVA]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 30th September, 2019
VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	