

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. 1700/DEL/2018
[Assessment Year: 1999-2000]

ITA No. 1701/DEL/2018
[Assessment Year: 2000-01]

ITA No. 1702/DEL/2018
[Assessment Year: 2001-02]

ITA No. 1703/DEL/2018
[Assessment Year: 2002-03]

ITA No. 1704/DEL/2018
[Assessment Year: 2003-04]

ITA No. 1705/DEL/2018
[Assessment Year: 2004-05]

The A.C.I.T.
Circle 1(2)(2)
International Taxation
New Delhi
PAN : AAACE 9466 B

Vs.

Ericsson, AB Sweden
S 16480, Stockholm,
Sweden

ITA No. 1732/DEL/2018
[Assessment Year: 1999-2000]

ITA No. 1733/DEL/2018
[Assessment Year: 2000-01]

ITA No. 1734/DEL/2018
[Assessment Year: 2001-02]

ITA No. 1735/DEL/2018
[Assessment Year: 2002-03]

ITA No. 1736/DEL/2018
[Assessment Year: 2003-04]

ITA No. 1737/DEL/2018
[Assessment Year: 2004-05]

Ericsson, AB Sweden Vs. The ACIT/DDIT
C/o Price Water House Coopers Pvt Ltd Circle 1(2)(2),
Tower - C, 18th Floor, New Delhi
DLF Cyber City, Gurgaon

PAN : AAACE 9466 B

[Appellant]

[Respondent]

Date of Hearing : 14.10.2021
Date of Pronouncement : 27.10.2021

Assessee by : Shri Percy Pardiwalla, Sr. Adv
Shri Vishal Kalra, Adv

Revenue by : Shri Gangadhar Panda, CIT- DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:

The above captioned appeals by the assessee and revenue are preferred against the very same order of the Id. CIT(A) - 42, New Delhi dated 29.12.2017. Since common issues are involved in all the above

appeals pertaining to same assessee and were heard together, these are being disposed off by this common order for the sake of convenience and brevity.

2. The assessee is in appeal against that part of the order of the Id. CIT(A) which has been decided against it and the Revenue is in appeal in respect of the other part of the order of the Id. CIT(A) which has been decided against it.

3. The brief history of the captioned appeals are that in the first round of litigation, vide order dated 12.03.2004, the Assessing Officer in Assessment Year 1999-2000, has made the additions as under:

S. No.	Income Head	Gross income amount (Rs)	Net taxable amount (Rs)	Tax rate	Tax amount (Rs)
1.	Sale of	1,003,309,774	7,22,88,469*	48%	3,46,98,465
2.	Supply of software	253,263,779	253,263,779	10%	25,326,378
	Total	1,256,573,553	282,181,224		6,00,24,843

4. While making the additions, the relevant observations of the Assessing Officer read as under:

"As in preceding years (he claim of the assessee is that they had supplied the equipment at the port in Sweden and their income is not liable to tax in India as per provision of the Indian Income Tax Act, 1961 (the Act) and the Indo Swedish Double Taxation Avoidance Agreement (DTAA) vide Notification No. GSR 705(E). This issue has been examined at length in the orders passed during earlier years for Assessment Year 1997-98, 1998-99 and 2000-01. In these orders my predecessors had held that the assessee company was liable to tax in India both under the Income Tax Act, 1961 and the DTAA. It was held that the assessee had fixed place of business in India as well as it had dependent agents in India by virtue of which permanent establishment of the assessee was constituted in India within the meaning of Article 5 of the DTAA. The facts and circumstances of the case remain the same for this year as in preceding years. The nature of activities carried out and the contracts under which such activities have been earned out remain the same. Hence, the supply of telecom hardware is therefore held to be business profits liable to tax in India under this head. The payments received by the assessee for the supply of software is held to be 'royalty' within the meaning of the DTAA and

is to be taxed as such. The position regarding royalty payments has also been upheld by the Hon'ble CIT(Appeals)."

5. The additions were challenged before the Id. CIT(A) and the Id. CIT(A) confirmed the additions partly against which the assessee preferred appeal before this Tribunal and for the additions deleted by the Id. CIT(A), the Revenue preferred appeal before this Tribunal.

6. Before the Tribunal, the assessee strongly contended that the issues have been squarely decided in favour of the assessee and against the Revenue by the Special Bench of this Tribunal in A.Ys 1997-98 and 1998-99 which order has been upheld by the Hon'ble High Court of Delhi in ITA No. 504, 507, 508, 511 of 2007 by judgement dated 23.12.20011. The Tribunal was convinced with the contentions of the assessee and decided the appeal in favour of the assessee and against the Revenue following the orders of the Special Bench in A.Ys 1997-98 and 1998-99.

7. The Revenue appealed before the Hon'ble High Court of Delhi and the Hon'ble High Court was pleased to set aside the order of the Tribunal and the Id. CIT(A) and remitted the matter back to the file of

the Id. CIT(A). The findings of the Hon'ble High Court of Delhi read as under:

"7. This Court has considered the submissions of the parties. Para 3.2 and 3.3 of the order of CIT (Appeals) points to the inferences drawn by the authority. Given that the CIT (Appeals) is vested with adjudicatory powers including power to appreciate the facts subject to the condition that reasonable opportunity is to be afforded to the assessee, the ITAT was correct in holding that such fact determination to the detriment of the assessee was unwarranted in the circumstances of the case. However, the problem is that the ITAT did not stop and remit the matter to proceed on a fresh determination of the same material. Its discussion - to be found in paras 24 and 27 of the impugned order, was rendered based on the findings with respect to the previous years (1997-98) and the failure to make out a new case. We are of the opinion that having primarily recorded that the CIT (Appeals)'s order was bad for the reason that he did not follow the procedure prescribed by the law, the ITAT ought not to have followed in the same manner, in appreciating the facts in the first instance as it did. We are conscious that this Court in its ruling in Ericsson (supra) had rendered findings on the question of taxability of the transaction of supply and concluded that the supply contracts did not lead to any inferences that income had arisen or accrued in India. The facts found by this Court also pointed that there was PE. However, that decision has to be seen in the light of the facts available to Court at that time. The question as to what was the

material collected during the survey and what are the inferences drawn and whether the question of PE or any other issue would arise, is something this Court ought not to surmise.

8. In these circumstances, this Court deems it most appropriate to set aside the order of the ITAT and CIT (Appeals) and remit the matter to the CIT (Appeals) who shall give reasonable opportunity to the assessee, in the light of the materials collected during the survey conducted on 22.11.2007 for the assessment years in question i.e. 1999-2000 to 2004-05. It is open to the assessee to take all contentions including the submissions to be made in the light of the previous judgment of this Court. Rights and contentions of the parties are reserved.

9. The impugned order is set aside. Appeals are allowed in above terms."

8. Following the directions of the Hon'ble High Court [supra], the Id. CIT(A) initiated fresh appellate proceedings and once again confirmed the assessment order. The impugned order of the Id. CIT(A) is under appeal before us.

9. Representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. 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.

10. The appellant company [EAB] is a company incorporated in Sweden and is a tax resident of Sweden. It is a wholly owned subsidiary of Telefonaktiebolaget LM Ericsson, Sweden. The main business of the assessee is supply of GSM Mobile Telecommunication System comprising of hardware and software to various cellular companies operating in India.

11. Ericsson India Pvt Ltd [EIL] is also a wholly owned subsidiary of LME Sweden.

12. The common grievance in the captioned appeals relates to whether the appellant company has business connection and exposure to Permanent Establishment [PE].

13. The appellant's claim is that it had supplied the equipment at Port in Sweden and their income is not liable to tax in India as per provisions of the Act and also the Indo-Swedish DTAA. Further contention of the assessee is that the receipts are not in the nature of Royalty as per the India Sweden DTAA.

14. In so far as the supply of hardware is concerned, the Assessing Officer/ld. CIT(A) held that the assessee had fixed place of business in India as well as it is dependent agents in India by virtue of which PE of the assessee was constituted in India within the meaning of Article 5 of the DTAA.

15. The views taken by the Assessing Officer/ ld. CIT(A) were duly considered by the Special Bench of the Tribunal in assessee's own case for A.Ys 1997-98 and 1998-99 which order of the Tribunal was upheld by the Hon'ble High Court of Delhi [supra].

16. The ld. CIT(A) is of the firm belief that in light of the facts and documents and evidences unearthed during the course of survey operation conducted on 22.11.2007, the facts of the A.Y under

consideration are clearly distinguishable from the facts of A.Ys 1997-98 and 1998-99 considered by the Special Bench of the Tribunal.

17. Referring to the judgement of the Hon'ble High Court of Delhi by which the Hon'ble High Court has upheld the order of the Special Bench of the Tribunal for A.Ys 1997-98 and 1998-99, the Id. CIT(A) was of the opinion that the Hon'ble High Court has categorically stated that "The position might have been different if the buyer had the right to reject the equipment on the failure of acceptance test carried out in India."

18. Taking a leaf out of the aforesaid observations of the Hon'ble High Court of Delhi, the Id. CIT(A) took the first step to distinguish the facts of the year under consideration with the facts of A.Ys 1997-98 and 1998-99. The Id. CIT(A) thus observed as under:

"5.23 Before taking up the facts emerging out of the survey material, it is important to mention that while deciding the appeal in the case of the assessee for AY 1997-98 and 1998-99, the contract signed with RPG was taken as the sample agreement to decide the issue by authorities. The right to reject the equipment on the failure of substance test was not there in the RPG agreement. However, perusal of Bharti Cellular Contract Dated 22.12.2003 shows that there are clauses related to rejection of the goods. The relevant clauses in this regard are discussed below.

5.24 Para no. 19.2 of the contract provides for rejection of goods and obligate supplier to replace the rejected goods. The para 19.2 reads as under:

"If any inspected or tested goods fail to conform to Specifications as specifies in Annexure 3 and Annexure 4, during the Acceptance Test, Buyer or Buyer Affiliate may **reject** such goods and the Supplier shall either replace the rejected goods or make all alterations necessary to meet specification requirements at no charge to Buyer or Buyer notification from Buyer or Buyer Affiliate."

5.25 Further, para no. 19.11 of the Bharti Contract deals with replacement of faulty equipment and reads as under:

"If System Part of System, before Acceptance as per Article 19, fails to meet the Specifications per Annex 3, it shall be replaced by Supplier on priority at no cost to Buyer or **Buyer** Affiliate. Replacement of faulty equipment will be made within 2-4 weeks, however standby will be made available using spares immediately using spates *immediately* for emergency scenario."

5.26 Furthermore, para no. 23.I(iv) of Bharti Contract provides that if such remedies are not reasonably or economically feasible, Supplier may request Buyer and Buyer Affiliate to return the System and refund to Buyer or Buyer Affiliate, the purchase price

less a reasonable amount for depreciation as reflected on the books of Buyer or Buyer Affiliate, provided always.

5.27 Therefore, in view of the above discussion, there is a difference in the contract with Bharti with reference to the 'rejection clause'. Therefore, it is an important finding that the facts of the case for the years in question are distinguishable from the AY 1997-98 and 1998-99 in the case of the assessee."

19. The above observations of the Id. CIT(A) are factually incorrect and he has misdirected himself by considering erroneous facts. Firstly, the contract which was considered was not of RPG but was of JT Mobile and this contracts is placed in Volume III of the paper book at pages 854 to 875. At clause (18), contents of acceptance read as under:

"18. Acceptance test shall be carried out in respect of the System or parts thereof by the Installation Contractor which shall be binding on the Contractor herein.

Acceptance shall be performed in accordance with the terms and conditions stipulated in the Installation Contract."

20. Clause (21) reads as under:

21.1 THE SYSTEM

If the System upon installation by the installation Contractor, would not conform to and function and operate in accordance with the criteria and specifications set forth in the Specification (Annexes 1, 2 and 3), 'contractor warrants to repair or replace the System or parts thereof, in accordance with what is stated below, so that it will conform to and function and operate in accordance with the criteria and specifications set forth in the Specification.

HARDWARE, SPARE PARTS AND TEST EQUIPMENT

Contractor shall, for a period of twelve (12) months from the respective Date of Acceptance or the deemed acceptance under Article 18, Acceptance, whichever is earlier at his option without undue delay repair or replace without charge to JT MOBILES any part of the Hardware or Spare Parts or Test Equipment found to be faulty by reason of defective material, design or workmanship.

Any repaired or replaced Hardware, Spare Parts or Test Equipment will be warranted for the remainder of the original warranty period, however not less than three (3) months.

Consumable parts, such as lamps, batteries, fuses etc., are excluded from said warranty.

21. Clause 23 reads as under:

"INFRINGEMENTS

23.1 Contractor shall indemnify and keep indemnified JT

MOBILES against all actions or claims for infringement of patents, copyrights, registered designs or any other intellectual property right by reason of the proper use of the System in India where the System is installed, and Contractor shall promptly, at his option and own expense, either

- I. procure for JT MOBILES and its customer the rights for continued use of the System in its present form, or
- II. replace or modify the System so that it no longer infringes any such rights, or
- III. settle or defend any further claim, suit or proceeding against JT MOBILES arising out of such continued use,

provided always

- a) that JT MOBILES without delay informs Contractor in writing of any claim made by reason *of* alleged infringement as aforesaid and refrains from taking action on account of such claims without previous approval of Contractor;
- b) that JT MOBILES without delay informs Contractor in writing if legal action is taken on account of such claim and that Contractor shall have full authority to defend or settle the same through its counsel;
- c) that Contractor is informed of all circumstances which may be of relevance in the legal action taken and JT MOBILES refrains from all steps in any legal action which may

prejudice Contractor;

- d) that in case Contractor fails to act against such claims or actions JT MOBILES shall have the right to take appropriate legal action and shall be repaid any expenses in so doing; and
- e) that the infringement or alleged infringement is not arising out of the use of the System in combination or conjunction with any other item or the use thereof not supplied or manufactured by Contractor.

23.2 This Article 23, infringements, provides Contractor's sole liability and JT MOBILES' sole remedy for claims of infringements of intellectual property rights brought by a third party by reason of the proper use of the system."

22. The above clauses with the contract with JT Mobile will now be compared with the relevant clauses of contract with Bharti Cellular Contract.

32. Clause 19.2 reads as under:

"19. Acceptance Test is the responsibility of Buyer or Buyer Affiliate and shall be performed by preferred Subcontractor nominated by Buyer or Buyer Affiliate and as approved by Supplier. Acceptance Test shall be carried out by the Subcontractor for each Purchase Order in respect of the System or each Part of the

System supplied under the Purchase Order, as per Acceptance Test Procedure as mutually agreed between Parties as per Annexure 5.

If any inspected or tested goods fail to conform to Specifications as specified in Annexure 3 and Annexure 4, during the Acceptance Test, Buyer or Buyer Affiliate may reject such goods and the Supplier shall either replace the rejected goods or make all alterations necessary to meet Specification requirements at no charge to Buyer or Buyer Affiliate, within a period of six (6) weeks from the date of written notification from Buyer or Buyer Affiliate.

19.3.1 The Acceptance Test shall be completed within thirty (30) days from the Date of Completion, the result of which shall be accounted for in a protocol, as per Acceptance Test Procedure document.

19.3.2 If Buyer or Buyer Affiliate does not carry out and complete the Acceptance Test within thirty (30) days from the Date of Completion for reasons not attributable to Supplier, it shall be deemed that the Buyer or Buyer Affiliate has carried out and completed the Acceptance Test as aforesaid.

19.4 Within fifteen (15) days from completion of the Acceptance Test in accordance with Article 19.3 above, Buyer or Buyer Affiliate shall give Supplier a written notice stating whether or not the System or Part of System (as the case may be), is accepted.

Acceptance of the System or Part of System shall not be refused

because of minor deviations, which do not prevent the System or Part of System to be put into operation. However, this will not relieve the Supplier from his obligation to remedy said deviations without undue delay.

19.6 If Supplier has not received the said written notice from Buyer or Buyer Affiliate in terms of Article 19.5 above, stating whether or not the System or Part of System is accepted, within fifteen (15) days from completion of the Acceptance Test, the System or Part of System shall be deemed accepted as of the sixteenth (16th) day.

19.7 If Buyer or Buyer Affiliate should commercially use the System or Part of System prior to or without the above-mentioned Acceptance Test, such use shall be deemed as Acceptance of the System or Part of System.

19.8 When according to the above, the System or Part of System is accepted or deemed accepted, such acceptance shall be confirmed by the issuance by Buyer or Buyer Affiliate of an Acceptance Certificate. Buyer or Buyer Affiliate shall notify Supplier, the names of persons authorised to issues an Acceptance Certificate. The Acceptance Certificate shall be issued promptly and at the latest three (3) days after Supplier's written request. Such Acceptance Certificate shall be conclusive evidence of the acceptance of the System and the date on such certificate shall be deemed to be the Date of Acceptance.

19.9 If Buyer or Buyer Affiliate does not issue the Acceptance Certificate within the period specified in Article 19.4 above, it shall be deemed to have been issued by Buyer or Buyer Affiliate to Supplier and all the provisions of Article 19.4 shall apply accordingly.

19.10. If the System or Part of System supplied by the Supplier is not installed due to reasons which can be attributable to the Buyer or Buyer Affiliate beyond 150 days, then such System or Part of System will be deemed to be Accepted.

33. Clause 23 reads as under:

"23.1 Supplier shall indemnify and keep indemnified Buyer and Buyer Affiliate against all actions or claims brought by a third party for alleged infringement of patents, registered designs or any other intellectual property right by reason of the proper use of the System in the Territory where the System is installed, and Supplier shall promptly, at his option and own expense, either

- i) procure for Buyer and Buyer Affiliate the rights for continued use of the System in its present form, or
 - ii) replace or modify the System so that it no longer infringes any such rights, or
- iii) settle or defend any further claim, suit or proceeding against Buyer or Buyer Affiliate arising out of such continued use, or

- iv) if such remedies are not reasonably or economically feasible, Supplier may request Buyer and Buyer Affiliate to return the System and refund to Buyer or Buyer Affiliate the purchase price less a reasonable amount for depreciation as reflected on the books of Buyer or Buyer Affiliate, provided always
 - a) that Buyer and Buyer Affiliate without delay informs Supplier in writing of any claim made by reason of alleged infringement as aforesaid and refrains from taking act on account of such claims without previous approval of Supplier;
 - b) that Buyer as a Buyer Affiliate without delay informs Supplier in writing if legal action is taken on account of such claim and that Supplier shall have full authority to defend or settle the same through its counsel;
 - c) that Supplier is informed of all circumstances, which may be of relevance in the legal action taken and Buyer and Buyer Affiliate refrains from all steps in any legal action, which may prejudice Supplier;
 - d) that in case Supplier fails to act against such claims or actions Buyer and Buyer Affiliate shall have the right to take appropriate legal action and shall be repaid any expenses in so doing; and
 - e) that the alleged infringement is not arising out of the use of the System in combination or conjunction with any other item or the use thereof not supplied or manufactured by

Supplier.

This Article 23, Infringements, provides Supplier's sole liability and Buyer's and Buyer Affiliate's sole remedy for claims of alleged infringements of intellectual property rights brought by a third party by reason of the proper use of the System."

34. A perusal of the above relevant clauses of the two contracts shows that there is no basis for the findings of the ld. CIT(A) about the rejection of the goods. The allegations of the ld. CIT(A) have been duly considered by the Hon'ble High Court of Delhi in assessee's own case in A.Ys 1997-98 and 1998-99 [supra]. The relevant findings of the Hon'ble High Court of Delhi read as under:

" [Article 15](#) of the Installation Agreement deals with acceptance test made by the Installation contractor which "includes the integrity of whole system and certificate binds the assessee". [Article 17](#) provides warranties to rectify the defects in both hardware and software provided by the assessee. On this basis it was argued that the Assessing Officer rightly concluded that overall responsibility was on the assessee for supply, erection and after sale services and the assessee had complete control over the management, functions and the associates. The question that falls for consideration is as to whether this acceptance test, which was performed in India, would be relevant for determining as to

whether income accrued in India in terms of [Section 5 \(2\)\(b\)](#) of the Act.”

41. We, find that the terms of contract make it clear that acceptance test is not a material event for passing of the title and risk in the equipment supplied. It is because of the reason that even if such test found out that the system did not conform to the contractive parameters, as per [article 21.1](#) of the Supply Contract, the only consequence would be that the Cellular Operator would be entitled to call upon the assessee to cure the defect by repairing or replacing the defective part. If there was delay caused due to the acceptance test not being complied with, [Article 19](#) of the Supply Contract provided for damages. Thus, the taxable event took place outside India with the passing of the property from seller to buyer and acceptance test was not determinative of this factor. The position might have been different if the buyer had the right to reject the equipment on the failure of the acceptance test carried out in India.”

35. The observation of the Hon'ble High Court of Delhi that the position might have been different if the buyer had the right to reject the equipment on the failure of acceptance test carried out in India has been explained by Shri Pardiwala by referring to the judgment of the Hon'ble High Court of Delhi in the case of Mahavir Commercial Company 86 ITR 147 wherein the following principle, inter alia, was laid down:

"..... This supposed incongruity was sought to be explained per curiam in *Kwei Tek Chao v. British Traders and Shippers Ltd.* (1954) 2 K.B. 459. that if property passed when the documents are transferred that property is subject to the condition that the goods should re-vest in the seller if on an examination by the buyer he finds them not to be in accordance with the contract. It is not necessary to consider this aspect because in any case the ascertainment of the obligations under the contract will determine to what extent the transfer of property is subject to a condition or if the property passes conditionally whether the ownership left in the seller is the reversionary interest in the property in the event of the conditions subsequent operating to restore it to him. In any case where the performance of some condition is imposed upon the buyer but is not made a condition of the transfer of the property, the property once passed is not re-vested in the seller by the buyer's subsequent default."

36. It is the say of Shri Pardiwala that in the case of Mahavir Commercial Company [supra], the court has explained the observations made by the Hon'ble High Court of Delhi lucidly.

37. The second step taken by the Id. CIT(A) was confronting the evidences collected during survey and called for specific comments of the assessee. This has been extracted by the Id. CIT(A) at pages 27 to 37 of his order which have been summarised as under:

- Most of the documents collected during survey do not relate to the captioned AYs.
- The documents collected during survey relate to a period when business model of the Appellant had changed because the changed business model was effective from April 1, 2006 and documents impounded during survey conducted on November 22, 2007 relates to such changed business model.
- The appellant clarified that with new business model effective from 01/04/2006, the appellant only interacted with EIL and then EIL started doing business with Indian cellular operators,

38. As can be seen from the above summary and documents confronted to the assessee, the so called evidences/documents did not pertain to Assessment Years 1999-2000 to 2004-05. At para 5.30, the ld. CIT(A) has observed that the telecom projects generally run over for three or more years. Therefore, the role of the appellant entity to supply the telecom solution is also spread across the years and the business model for such contracts remained same across the years.

39. In our considered opinion, such observations of the Id. CIT(A) should go against him because if nothing is changed, then why did he differ from the findings of the Special Bench of the Tribunal which order was upheld by the Hon'ble High Court of Delhi [supra].

40. It is worth mentioning here that the business model of the appellant company changed from 01.04.2006 and therefore, any adverse inference drawn may be relevant for the Assessment Year commencing after 01.04.2006 and certainly not for Assessment Years under appeal before us.

41. To substantiate his findings, the Id. CIT(A) further considered the documents reflecting joint participation in bid management, documents reflecting control/influence of appeal on EIL, documents reflecting control/influence of appeal on EIL, documents reflecting activity performed by EIL on behalf of appellant in India and documents reflecting function of software compatibility to the customer requirements.

42. For this, the ld. CIT(A) heavily drew support from the show cause notice issued under the Customs Act, 1962 to Bharti Televentures Ltd and Ericsson India Ltd. The show cause notice provides that :

“investigations carried out by the DRI resulted into finding that the software is being downloaded by the employees of EIL from the server located outside India and the OD/CDs are being provided to the customers”

43. We have the benefit of the judgment in the case of Bharti Airtel Vs Commissioner of Customs, Bangalore wherein at clause 1.3, the CESTAT has considered Appeal No. C/575/2008 is by M/s Ericsson India Pvt Ltd hereafter referred to as EIL or the third appellant against the order of the Commissioner No. 6/2008 dated 30.04.2008 challenging the imposition of penalty of Rs. 10 crores u/s 112(a) of the Customs Act.

44. At clause 4.2, it is mentioned as under:

"4.2 Proceedings were initiated by issuance of show-cause notices dated 29-3-2005, 9-3-2006, 29.05.2006 and 29.05.2006 to the appellant-1 wherein it was proposed to

- adding the value of software separately imported under Rule 4 of the Customs Valuation Rules, 1998 read with Section 14 of the Customs Valuation Rules, 1962;
- Demand duty of Rs. 28,67,32,517/-, Rs. 53,35,28,802/-, Rs. 120,73,95,283/-, Rs. 3,67,47,428/- under the proviso to Section 28(1) of the Customs Act, 1962 along with applicable interest under Section 28AB *ibid*;
- Confiscate the equipment under Section 111(m) of the Customs Act, 1962; and Impose penalty under Section 112(a)/114A of the Customs Act, 1962.

4.3 Proceedings were initiated by issuance of show-cause notices dated 29-5-2006 and 31-5-2006 to the appellant-2 wherein it was proposed to ;

- Reject the values declared in respect of telecom equipments imported and re-determine the assessable value by adding the value of software separately imported under Rule 14 of the customs Valuation Rules, 1998 read with Section 14 of the Customs Valuation Rules, 1962;
- Demand duty of Rs. 5,80,10,601/- + Rs. 3,30,83,584/- under the proviso to Section 28(1) of the Customs Act, 1962 along with applicable interest under Section 28AB *ibid*;

- Confiscate the equipment under Section 111(m) of the Customs Act, 1962; and impose penalty under Section 112(a)/114A of the Customs Act, 1962.

4.4 The show cause notices also proposed penalties on EIL, the third appellant."

45. At clause 21.4, the following observations have been made:

- (a) The ADG, DRI has only issued the show-cause notices and did not adjudicate the cases. ADG, DRI had been duly appointed as Collector by Notification No. 19/90-Cus. (N.T.), dated 26-4-1990. Further, he had been specifically empowered by the Board vide Circular No. 4/99-Cus., dated 15-2-1999 to issue show-cause notices and the said Circular has not been withdrawn. ADG, DRI had been duly appointed as Commissioner under Notification No 17/2002-Cus. (N.T.), dated 25-10-2002. Subsequently, Notification No. 44/2011 confers the functions of proper officers for the purposes of Section 17 and Section 28 of the Customs Act. Further, amendment (dated 16-9-2011) to Section 28 makes it clear that all persons appointed as officers of customs under sub-section 1 of Section 4 before 16-7-2011 shall be deemed *"to have and always had the power of assessment under Section 17 and shall be "deemed to have been and always had been proper officers"* for the purpose of Section 28.

- (b) The issuance of show -cause notice by ADG DRI and its adjudication by the same officer on being transferred and posted as Commissioner of Customs do not involve any violation of principles of natural justice
- (c) The fact that no *cross-examination* was granted of the author of CAIR report is not in violation of principles of natural justice as further questionnaire given by the assessee stands replied on behalf of the group of scientists. Further the reports of two experts produced by the appellants stand admitted and examined by the Commissioner.
- (d) The appellants (1) and (2) imported telecom equipment systems and declared the same as MSG classifiable under Chapter Heading 85.15, BSC and BTS classifiable under Chapter Heading 85.25. They did not disclose preloading of software in the factory in Sweden. There was a single contract for purchase of equipments; there was no option but to buy the so-called hardware and software only as a package; and no separate fixed price was available for the software component. In fact, no price for BTS software was indicated for period prior to September 2001.
- (e) The programs that make the switching equipment function are not independent software and cannot be marketed separately. Similarly, the programs required to make the BTS functional are loaded on to flash drive and are integral part of BTS equipment

- (f) The separately imported softwares are found to be dupes copied in EIL, Gurgaon. Undisputedly, the impugned software is proprietary software. It has not been explained as to how the same was permitted to be copied by a third party, namely, EIL. It was claimed that it might be a cost-saving measure adopted by Ericsson AB Sweden. Allowing copying of proprietary software by a third party (even if the said party happens to be a subsidiary) was not a "cost-saving measure" but part of a design to evade customs duty. No records were kept for such copying of software. The copied software was sent to Sweden and dispatched back to India. The CDs/ODs were not in proper packing and not properly labelled defeating the claimed status of the software. They were not opened and not used till they were seized by the DRI authorities. The appellants have not chosen to ask for provisional release of the said items even though the total declared value was Rs. 113.50 crores. This is to be contrasted with their efforts to take provisional release of seized equipments worth Rs. 9.94 crores after furnishing bank guarantee worth Rs. 2,35,43,253/-. In fact, there was no proposal to confiscate the said seized software with declared value running to hundreds of crores. In other words, the Department has treated the said goods as unworthy of confiscation and the appellant has treated the same as unworthy of retrieval.
- (g) The equipment imported had the software preloaded, in fact, with a backup. In addition, undisputedly, the appellants could have downloaded the software through internet if the backup

also crashes. Under these circumstances, what was separately imported as software classified under 85.24 can be appropriately considered only as e-waste.

- (h) The claim that the permission to use the software i.e., "licence" for use of the software was associated with the software separately imported in CDs/ODs has not been substantiated. The licence granted for use of software obviously should be associated with the software preloaded in the factory, along with backup, which alone was utilized/used for the intended purpose. To say that the licence was associated with the unused software and not to the software actually used is not logical, to say the least.
- (i) The dispute is not about classification of the separately imported software which we have considered nothing more than e-waste. The dispute is whether what was preloaded in the hard disk/flash drive at factory in Sweden before dispatch should be "pulled out" or disintegrated from the machine and given a separate status and should be classified under 85.24 and its value should be excluded for determining the value of the imported equipments. It is not the case that the appellants brought the software in CDs/ODs and presented the same along with the hardware and sought classification of/both hardware and software separately.
- (j) The final cost of equipment included the cost of the programs in the form of software. Equipment was imported by the assessee

declaring it as hardware and declaring its value less to the extent of the corresponding software price indicated for the software.

- (k) The programs in the software define and characterize the particular hardware and elevate the same to the functional apparatus/equipment. The software is written in a specialized language PLEX which is proprietary in nature. The software is machine-specific and the same is mandatory required for working of the said machine. It has not been shown that there is separate identity for the impugned software marketable as a separate commodity. We have not been shown that there was an option to buy the impugned software separately.
- (l) There is no justification for excluding the price of preloaded software from the value of equipments as claimed by the assessee-appellants.
- (m) There is clear evidence of deliberate under declaration of value of the imported equipments by the assessee-appellants through a grossly deceptive method with intention to e. see cs. duty In view of the above, the invocation of extended period for demand of duty, confiscation of the imported goods, and imposition of penalties on the assesseees are justified."

46. And finally, at Clause 23(h), the following findings have been given:

"23(h)In view of the deliberate misdeclaration with intention to evade duty, the extended period of limitation is invocable. Penalties are also imposable on the appellant-assessees. However, in the absence of evidence no penalty can be imposed on EIL."

47. The entire basis of the findings of the ld. CIT(A) has been demolished by this order of the CESTST.

48. The ld. CIT(A), thereafter, proceeded by considering the place of signing of the contract to emphasize that EIL is PE of EAB in India and further observed that not only the contracts were signed in India, but a number of employees of the assessee company and their associated companies visited India for the purpose of net work survey and to negotiate the terms of the contract.

49. These adverse observations of the ld. CIT(A) have been duly considered by the Hon'ble High Court of Delhi in assessee's own case for Assessment Years 1997-98 and 1998-99 [supra] as under :

"43. Thus, Overall Agreement does not result the income accruing in India. The execution of an overall agreement is prompted by purely commercial considerations as the India Cellular Operator would be desirous of having a single entity that he could liaise with, a fact which even the Board has noted in its Instruction No.1829 dated 21 st September, 1989. Although Instruction number 1829 stands withdrawn by virtue of Circular No.7/2008 dated 22nd October, 2009, such withdrawal can have no retrospective effect and the principle laid down in Instruction No. 1829 must continue to govern the assessment for the relevant year.

44. The aforesaid analysis will bring forth the legal position that the place of negotiation, the place of signing of agreement, or formal acceptance thereof or overall responsibility of the assessee are irrelevant circumstances. Since the transaction relates to the sale of goods, the relevant factor and determinative factor would be as to where the property in the goods passes. In the present case, the finding is that property passed on the high seas. Concededly, in the present case, the goods were manufactured outside India and even the sale has taken place outside India. Once that fact is established, even in those cases where it is one composite contract (though it is not found to be so in the present case) supply has to be segregated from the installation and the only then would question of apportionment arise having regard to the expressed language of [Section 9](#) (1) (i) of the Act, which makes the income taxable in India to the extent it arises in India."

50. Considering the facts emanating from the orders of the first appellate authority, we are of the considered opinion that they are not at all distinguishable on the facts of Assessment Years 1997-98 and 1998-99 and since on those facts the Special Bench of this Tribunal has decided the appeal in favour of the assessee, which order has been upheld by the Hon'ble High Court of Delhi [supra], we are of the considered view that the property in goods have been passed outside India alongwith risks and reward.

51. No doubt the contract in question was signed in India and the acceptance test had to be performed in India would not justify the findings of the Id. CIT(A) in light of the judgment of the Hon'ble Andhra Pradesh High Court in the case of Additional CIT Vs. Skoda Export 172 ITR 358. The ratio laid down by the Hon'ble Supreme Court in the case of Ishibkawajima-Harima Heavy Industries Ltd Vs. DIT 288 ITR 408 squarely apply on the facts of the case wherein the Hon'ble Supreme Court has held that the fact that the contract was signed in India is of no material consequence since all the activities in connection with off shore supplies were carried outside India. We are therefore, of the view that the decision in the case of Ishibkawajima-Harima Heavy Industries Ltd [supra] covers the issue as to whether any part of the

profit arising from supply of equipment by the assessee is chargeable to tax.

52. Considering the facts of the case in totality, in light of the discussion hereinabove, we do not find any merits in the findings of the ld. CIT(A) in respect of addition sustained by him. We are of the considered view that the appellant has no business connection in India in respect of supply of GSM System by the appellant to cellular operators in India and further, there is no PE in any form in India in the captioned Assessment Years and therefore, the question of attribution of profit does not arise at all.

53. Before parting, the ld. DR has placed strong reliance on the decision of this Tribunal in the case of Huawei Technologies Co, Ltd ITA No. 1500/DEL/2014 and others for Assessment Years 2009-10 to 2016-17. However, we are of the considered view that the facts of the case in hand are clearly distinguishable from the facts of that case in as much as in that case wherein at Article 6.3 it has been mentioned "Risk of loss of goods shall pass from seller to owner upon acceptance of the goods." Whereas the facts of the case in hand

show that risk and reward pass over at the Port of Sweden at the time of delivery of goods.

54. Ground No. 4 with all its sub-grounds are allowed.

55. Ground No. 7 relates to charging of interest u/s 234B of the Act.

56. This issue is now no more res integra in light of the judgment of the Hon'ble Supreme Court in the case of Mitsubishi Corporation TS 869-SC-2021 dated 17.09.2021 wherein the Hon'ble Apex court has held that prior to Assessment Year 2013-14, interest cannot be charged u/s 234B of the Act.

57. We, accordingly, direct the Assessing Officer to charge interest as per provisions of law keeping in mind the ratio laid down by the Hon'ble Supreme Court in the case of Mitsubhishi Corporation [supra].

58. As a result, all the captioned appeals of the assessee are allowed.

59. The common grievance of the Revenue in the captioned appeals read as under:

"1. On the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in holding an attribution percentage of only twenty percent on account of hardware sales as against fifty percent for A.Y. 1999-2000 to A.Y. 2001-2002; zero percent for A.Y.2002-03 due to worldwide loss and hundred percent for A.Y. 2003-04 & A.Y. 2004-05, whereas the facts of survey action carried out by the Department on 22.11.2007 merited an attribution of higher percentage.

2. On the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in holding that the payment In respect of supply of software was in nature of business income and cannot be characterized as Royalty either under the Income Tax Act or under the Indo-Sweden DTAA?"

60. This issue is now no more res integra by the judgment of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt Ltd in Civil Appeal No. 8733 to 8734 of 2018 alongwith a bunch of 104 appeals. The relevant findings of the Hon'ble Apex Court read as under:

"168. Given the definition of royalties contained in Article 12 of the DTAA's mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (section 9(1)(vi), along with *explanations* 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessee's, have no application in the facts of these cases.

169. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this

judgment.

170. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in *Citrix Systems (AAR)* (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

61. Respectfully following the decision of the Hon'ble Supreme Court, all the captioned appeals by the Revenue are dismissed.

62. To sum up, in the result :

REVENUE'S APPEALS:

ITA No. 1700/DEL/2018	-	Dismissed
ITA No. 1701/DEL/2018	-	Dismissed
ITA No. 1702/DEL/2018	-	Dismissed
ITA No. 1703/DEL/2018	-	Dismissed
ITA No. 1704/DEL/2018	-	Dismissed
ITA No. 1705/DEL/2018	-	Dismissed

ASSESSEE'S APPEALS

ITA No. 1732/DEL/2018	-	Allowed
ITA No. 1733/DEL/2018	-	Allowed
ITA No. 1734/DEL/2018	-	Allowed
ITA No. 1735/DEL/2018	-	Allowed
ITA No. 1736/DEL/2018	-	Allowed
ITA No. 1737/DEL/2018	-	Allowed

The order is pronounced in the open court on 27.10.2021.

Sd/-

Sd/-

[AMIT SHUKLA]
JUDICIAL MEMBER

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated : 27th October, 2021

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

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Date of dispatch of the Order	