

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'D', NEW DELHI**

**Before Sh. Kul Bharat, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**(Through Video Conferencing)**

**ITA No. 1000/Del/2015 : Asstt. Year : 2010-11**

M/s Nokia Solutions & Networks Oy, FI-02610, Karaporti-3, Espoo, Finland-2058530-6 And C/o SRBC & Associates, LLP, Golf View, Corporate Tower-B Sector-42, Gurgaon	Vs	Addl. CIT, International Taxation Range-2(2), New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AADCN2300E</b>		

**ITA No. 1116/Del/2017 : Asstt. Year : 2008-09**

**ITA No. 1117/Del/2017 : Asstt. Year : 2009-10**

**ITA No. 6704/Del/2017 : Asstt. Year : 2013-14**

**ITA No. 7419/Del/2018 : Asstt. Year : 2014-15**

M/s Nokia Solutions & Networks Oy, FI-02610, Karaporti-3, Espoo, Finland-2058530-6 And C/o SRBC & Associates, LLP, Golf View, Corporate Tower-B Sector-42, Gurgaon-122011	Vs	DCIT, International Taxation Range-2(2)(2), New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AADCN2300E</b>		

**ITA No. 5121/Del/2019 : Asstt. Year : 2015-16**

M/s Nokia Solutions & Networks OY, ERNST & Young LLP, Golf View, Corporate Tower-B Sector-42, Gurgaon-122011	Vs	DCIT, International Taxation Range-2(2)(2), New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AADCN2300E</b>		

**Assessee by : Sh. Deepak Chopra, Adv.**  
**Revenue by : Sh. Sunil Kumar, CIT DR**

<b>Date of Hearing: 21.09.2021</b>	<b>Date of Pronouncement: 07.12.2021</b>
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## **ORDER**

### **Per Bench:**

The present appeals have been filed by the assessee against the orders dated 30.01.2015, 30.01.2017, 30.10.2017 and 24.05.2019 passed by the AO u/s 143(3)/144C(13) of the Income Tax Act, 1961.

2. The assessee Company is incorporated in Finland and is engaged in the manufacture and supply of telecom equipment on principal-to-principal basis to various Indian Companies and also to its group company Nokia Solutions and Networks India Private Limited ('NSN India').

3. Nokia Corporation is a public listed company, incorporated in Finland, and is the ultimate parent entity of the Nokia group. Presently Nokia corporation is in business of manufacturing and sale of mobile phones through its subsidiaries worldwide. Upto AY 2007-08, Nokia Corporation was also in the telecom network business and was filing returns with DCIT, Circle-2(1), International taxation, New Delhi. However, w.e.f. 1.4.2007, the said telecommunication network business was transferred by Nokia Corporation to Nokia Siemens Networks B.V. [later changed to Nokia Solutions Networks BV] [NSN BV for short], Nokia Siemens Networks Oy [Later changed to Nokia Solutions and Networks Oy] [NSN Oy for short] is the wholly owned

subsidiary of NSN BV and is incorporated in Finland. NSN Oy is the business principal and operational headquarters company of NSN group. However, NSN Oy did not voluntarily filed its return of income for AY 2008-09 or later assessment years.

4. When this fact came to light, a notice under section 142(1) of the IT Act, 1961 dated 02.06.2011 was issued to NSN Oy to file its return of income for AY 2010-11. In pursuance of the same, return declaring total income Nil was filed by the assessee on 17.10.2011. Even though the income was declared at Nil, assessee has shown net tax payable of Rs. 25,780,929 and taxed paid of Rs. 78,661,048 and thus refund of Rs. 52,880,119 has been claimed in the return. The return was selected for scrutiny and notice u/s 143(2) was issued on 31.07.2012 served on the assessee. The case was transferred from DCIT, Circle 2(1), International Taxation to Addl. DIT, Range-2, International Taxation vide DIT(Intl. Taxn.)-II order F.No. No. DIT[Intl. Taxation]-II/2012-13/863 dated 31.10.2012. In response to various notices issued, the A.Rs. of the assessee, Sh. Amit Arora, CA, Ms. Garima pandey, CA, Sh. Jatin Budhiraja, CA and Ms. Prachi Bhatia, CA c/o SRBC & Associates, Sector-42, Gurgaon, the authorized -representatives of the assessee appeared from time to time, filed written submission and discussed the case.

5. After discussion, draft assessment order dated 31.03.2014 was passed and communicated to the assessee, after making the following observations and findings:

“As mentioned, NSN Oy is a company incorporated in Finland and is a leading manufacturer and supplier of telecommunication network equipment and provider of related services. NSN Oy is a wholly owned subsidiary of Nokia Solutions and Networks BV ('NSN BV'). During the FY relevant to the subject AY, NSN Oy supplied telecom network equipment (comprising of hardware and software integral to the telecom hardware) to Indian telecom operators. NSN Oy has an Indian group company - Nokia Siemens Network Private Limited (now known as Nokia Solutions and Networks India Private Limited) ('NSNIPL'), which is a wholly owned subsidiary of Nokia Solutions and Networks BV. During the previous year relevant to the subject assessment year, NSNIPL was engaged in manufacturing and trading of telecom network equipment and provision of related installation and commissioning services. It is submitted that NSNIPL rendered installation and commissioning services in relation to the telecom network equipment supplied by NSN Oy to Indian telecom operators.”

6. As per notes to computation of income submitted along with the return, NSN Oy has earned income from the following during the subject AY:

“Supply of equipment (comprising of hardware and software) and spare parts etc. to India telecom operators. It is submitted that this NSN Oy does not have a PE in India and thus supply of equipment from outside India is not liable for tax in India. Total supplies made during the year to Indian customers is shown at Euro 544,435,298 (equivalent to INR 32,464,676,820 taking

Euro 1 = INR 59.63). Out of the total supplies of 544,435,298 Euros made by NSN Oy to India telecom operators-

- 152,340,455 Euros is in respect of software (INR 9,739,403,046); and
- 392,094,843 Euros is in respect of hardware (INR 23,380,615,488) [approx. 72%].

7. In addition to the above, NSN Oy has also sold network equipment worth INR 9,861,132,884 to NSN India Pvt. Ltd. Taking the same proportion as above, hardware sales to NSNIPL would come to INR 7,100,015,676 and software portion will come to INR 2,761,117,208.

8. Provision of services to NSNIPL (Network support services). Total payments received by NSN Oy on this account is INR 244,195,397. This international transaction was referred to the Transfer Pricing Officer who has not suggested any adjustment in this respect vide his order dt. 24.01.2014. Revenue of INR 244,195,397, being revenue from provision of network support services to NSN India have been offered to tax as Fee for Technical Services @ 10.5575% on gross basis under the provisions of section 9(1)(vii) read with section 115A of the Act for the subject A.Y.

9. During the FY relevant to the subject AY, NSN Oy also procured following services from NSNIPL, in respect of which it is submitted that NSNIPL was compensated at arm's length price:

“(i) Marketing and warranty support services under the terms of 'Agreement for Services';

(ii) Contract Research and Development ('R&D') support services under the-terms of 'R&D Subcontracting Agreement' (Payment made to NSNIPL of INR 5,602,553,834); and

(iii) Network Management Services under the terms of 'Agreement for Support Services'.”

10. Breakup of supplies of equipment (comprising of hardware and software) made by NSN Oy to Indian telecom operators during FY 2009-10 (relevant to the subject AY) is as under:

<i>Name off the telecom operator</i>	<i>Amount (in Euros)</i>
Bharti	96,970,837
Datacom	11,079,908
IBM	152,500
Idea	90,643,663
Indus	158,420
Maxis	3,802,226
Tata	122,207,859
Vodafone	219,419,882
Total	544,435,298

11. In addition to the above, NSN Oy has also supplied some telecom products (hardware and hardware specific software) to NSNIPL. It is submitted that revenues from supply of telecom network equipment to Indian customers from outside India on a principal to principal basis have been considered as 'business income' since NSN Oy does not constitute a Permanent Establishment in India. Accordingly, taxes amounting to INR 52,878,899 deducted by Indian customers in respect of the

same have been claimed as refund in the return of income for the subject AY.

12. During the previous year relevant to the subject AY, Indian customers have withheld taxes of Rs. 78,661,049 on payments made to NSN Oy. Party wise details of taxes withheld as submitted are as follows:

Name of the party	Taxes withheld in (Rs.)
Bharti Airtel Limited - for software	5,951,054
Tata Teleservices Limited - for software	12,704,387
NSNIPL	60,005,608
- for software 34,223,458	
- For N/w support services <u>25,782,150</u>	
60,005,608	
Total	78,661,049

13. Total tax deducted on account of software comes to Rs. 52,878,899 and for network support services comes to Rs. 25,782,150. The network support services have been offered for taxation in Income Tax Return. It may be mentioned here that the group company NSNIPL is deducting tax on payment of software, however, the assessee claims it to be its business income.

14. Heard the arguments of both the parties and perused the material available on record.

15. We have gone through the draft order of the AO, order of the Id. DRP in the case of the assessee and also order u/s 92CA(3) in the case of NSNPL. We have gone through the issue with regard to the tax receivable to the exchequer of India from

the assessee keeping in view the global profits earned by the assessee, provisions of DTAA and also various judgments of the Courts on the issue of PE and attribution of profits thereof.

16. Arguments at length have been taken up before the Tribunal by both the parties. Coming to the relevant core issue, we find that Appeal before us involve to the following two straight issues,

(a) Does the assessee has Permanent Establishment (P.E) in India and

(b) If so, what is the amount of income which can be attributed to the P.E and which is taxable in the hands of the assessee.

17. In this case the revenue determined the assessee as being a Dependent Agent PE (DAPE). The main observations of the AO are as under:

"The Indian AE was involved in Market survey, market research, consumer survey, marketing promotion, after sale services and warranty services etc. and this created a mutual goodwill for each other and dependency on each other.

b) If the performance of NSN India is not upto the requisite benchmark, the sale of NSN OY will suffer. Thus, the sale orders are secured by NSN OY by the efforts and performance of Indian AE.

c) It is a case of secondment of employees to manage the functions in India. Further, there are instances of visit of

foreign expats. The appellant failed to furnish the details of visit of foreign expats.

d) The engagement of two companies is end to end which includes pre-bid discussions, bid discussions, conclusion of contract, capturing requirements of the client, design as per requirements of the client, supply of equipment and installation & commissioning of equipment.

C2. The appellant argued that the instant appeal is for AY 2010-11 and in terms of the existing provision of treaty, securing order was not a condition for creation of DAPE within para 5 of Article 5 of the India-Finland DTAA. This condition was introduced subsequently and for AY 2010-11 and previous years the only condition which could give rise to a DAPE was whether the agent has an authority to conclude contract.

C3. As per the contract, Indian AE is responsible for market survey and this is for sourcing and conclusion of order with end customers. Indian AE is in the capacity of dependent agent permanent establishment as it is the only touch point of the appellant in India and performing functions to secure orders from customers. The fact of joint bidding is not disputed. The appellant has not demonstrated the fact of visit of foreign expats for bid negotiations and also for recording the specific requirements of customer in order to deliver the equipment suited to the requirements of the customer. Thus, it is evident that Indian AE was playing the role of bid negotiations and capturing of technical requirements.

C4. In this regard, it may be relevant to refer to the judgment of the Hon'ble Supreme Court of Italy in Phillip Morris (supra) wherein it has been held that:

"the participation of representatives or employees of a resident company in a phase of the conclusion of a contract between a foreign company and another resident entity may fall within the concept of authority to conclude contracts in the name of the foreign company, even in the absence of a formal power of representation".

C5. The expression 'an authority to conclude contracts' has not been defined in the DTAA. Para 5 of Article 5 of OECD Model Convention also uses the similar expression, namely: 'an authority to conclude contracts.' Para 31-35 of the OECD commentary deal with para 5 of the OECD Model Convention whose language, is similar to para 4 of Article 5 of the DTAA.

C6. It is pertinent to mention here that India has clarified its position in 2008 on para 33 of the OECD commentary by making it clear that it does not agree with both these sentences from para 33 of the OECD commentary as in its view the mere fact that a person has attended or participated in negotiations in a State between an enterprise and a client, can, in certain circumstances, be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise; and that a person who is authorized to negotiate the essential elements of contract, and not necessarily all the elements, can be said to exercise the

authority to conclude contracts. 'Skaar' a well known author, proposes to apply a business activity test in such situations: where the intermediary also performs activities like locating customers, explaining the conditions of the contract and finally concluding the contract on behalf of the foreign enterprise, it appears obvious that the main parts of the business were conducted by the intermediary and the constitution of an Agency PE seems to be justified.

C7. The Indian AE does not bear any risk of loss in this case and its business cannot stand on its own without the support of the appellant. The risk and return of the business done by the Indian AE fully accrue to the appellant for Marketing support services. The appellant has control on the business activities of Indian AE in the context of scope of activities as well as the strategy to perform the marketing functions. The legal dependence is reflected by the facts of arrangement or agreement between the two.

C8. It may be relevant to point out that Indian AE while discharging the functions as assigned by the appellant has the right to use the intangible asset in the form of "brand, trademark and logo" but there is no cost paid for the same to the appellant. The appellant company may economically own an asset but the risk associated with use/exploitation of that risk does lie in India.

C9. Further, there is a persistent risk of violation of copyright of software product in Indian market. It is critical to note that

the appellant would come to know about the instances of infringement of copyright only through the local presence of Indian resources. It is noteworthy that the function of Indian AE of identification of potential customers and continuous engagement with such customers goes into development of market intangible in the form of a) customer lists b) order backlog c) customer contracts and related customer relationships d) non-contractual customer relationships. No compensation has been made to Indian AE for all such functions to develop market intangible asset. Section 92B of I.T. Act provides that market intangible includes client list. Indian AE has performed this function of maintaining and up keeping the client list in the capacity of PE entity.

C10. This shows that Indian AE is responsible for protecting, development & maintenance of the intangible assets (copyright, brand, patent & confidential data of customers) in India. The risk of receivables from customers also exists in India. However, there is no compensation made for such functions.

18. Now, taking the second issue first, we find that the AO has attributed the profits in the following way:

"9.1 As discussed above, the assessee has PE in India, wherein R&D is being carried out on behalf of the assessee and the assessee earns income from utilizing the inventions so developed worldwide. There are no details available on record for such type of income which is attributable to its permanent establishment in India for the above mentioned activities. Under

the above circumstances Rule 10 of the Income Tax Act is invoked for computing the profit of the assessee attributable to its activities in India relating to Research and development. For arriving at the profit attributable to the Research and Development undertaken by the P.E. of the assessee in India the global accounts of the assessee may be referred to.

9.2 Extracts of Financial statements from its global accounts for calendar year 2009 show a **gross margin** of 2,088,770,399 Euro against R&D expenses of 2,045,424,819 Euro. Similarly, for calendar year 2010 gross margins are 2,252,634,393 Euro against R&D expenses of 1,863,993,151 Euro. Taking weighted average of 2009 and 2010 the **gross margins** for the period April, 2009 to March, 2010 comes to 2129.7 million Euro against R&D expenses of 2000 million Euro. Thus, the gross profits of NSN Oy for the year under consideration as a proportion of R&D expenses comes to 106.48%. Thus, against R&D expenses of Rs. 100 the company is making gross profits of Rs. 106.48 and net profit of Rs. 6.48 i.e. net margins on R&D expenses are to tune of 6.48%. During the year, the assessee has made payments of Rs. 5,602,553,834/- to NSNIPL on account of provision for software services. On this expenditure the assessee is held to have made profits @ 6.48% i.e. Rs. 363,045,488/-. 5% of this amount (Rs. 18,152,274/-) can be allowed as Head Office expenditure u/s 44C of the Act. Therefore, the taxable income of PE of NSN Oy on account of income from R&D comes to Rs.344,893,214/-."

### **Adjudication:**

19. The assessee emphatically denies that the Appellant has a P.E. in India. However, without any prejudice to that basic contention, the assessee submitted that even assuming without conceding that the assessee has a P.E in India, no profit or income can at all be attributed to the P.E as the net profit of the assessee is loss and there are no taxable attributable profits available. The AO has incorrectly determined the profits taking into GP into consideration and if the net profit is taken into consideration rightly, then the issue as to whether the assessee has a P.E in India is would end up as an academic issue.

20. The attribution of profits (Net Profit) stands covered in favour of the Appellant by the Judgment of the Special Bench in the case of Nokia Corporation for A.Ys 1997-98 and 1998-99 (involving Same business as carried out by the Appellant) as mentioned in the PB Volume C-page 936, at 949-950 (para 287). The Special Bench held that the Appellant Company's world wide **Net Profit margins** as per its audited accounts are to be applied for determining the quantum of the income to be attributed to the P.E. The effect being if the Appellant Company is in net loss as per its audited accounts or the calendar years 2009 and 2010, which relate to the present A.Y. 2010-11, there would be no profit or income attributable to the P.E. There are losses in both years as per the audited accounts. PB- Volume A of Compilation page 164, at 169 and page 180, at 185.

21. The relevant portion of the said Special Bench Judgment is quoted herein below (page 287 of Volume C, at page 949-950):

*"287....Taking all these into consideration, we consider it fair and reasonable to attribute 20% of the net profit in respect of the Indian sales as the income attributable to the PE.*

*The following steps are involved in computing the income attributable to the PE:*

*First the global sales and the global net profit have to be ascertained. From the accounts presented before us as well as before the Income-tax authorities, the global net profit rate has been ascertained at 10.8% and 16.1% by the CIT (Appeals), to which no objection has been taken by either side. This percentage has to be applied to the Indian sales and by Indian sales, we mean the total contract price for the equipment as a whole and not the bifurcated price which the Assessing Officer has referred to in the assessment order. This will also be consistent with our view that the software and the hardware constitute one integrated equipment. The resultant figure would be the net profit arising in respect of the Indian sales. Out of this figure of net profit 20% shall be attributed to the PE to cover the three activities mentioned above. The Assessing Officer is directed to compute the income of the PE as directed above."*

22. The revenue appealed before the Hon'ble Delhi High Court against the said Special Bench Judgment and the only ground raised by the Department was with regard to the rate of **Net Profit** (20%) applied by the Special Bench and not with regard to the method of taking the net profit rate of the foreign enterprise. The revenue department has thus accepted the

finding of the Special Bench with regard to the **Net Profit** margin method and has allowed that finding to become final.

The same method of attribution of profits to the P.E, on the basis of the **Net Profit** rate of the foreign enterprise has been applied by the revenue in the cases of three other assesseees who were in the same field of business as the Appellant viz. ZTE, Huawei and Nortel. Each of these assesseees was engaged in the supply of telecom equipment to Indian telecom operators. The ITAT order passed in the case of Nortel specifically records that in the cases of each of these two assesseees, the revenue had adopted the **Net Profit** rate of the foreign enterprise for determining the amount of profit income which was attributable to each enterprise's respective P.E.

23. Hence, applying the said Special Bench Judgment to the facts of the present case, as the Appellant has global net loss as per its audited accounts, no profit or income can be attributed to the assessee in India.

24. To mention Special Bench ruling is in line with the provisions of Article 7(1) of the India Finland Double Taxation Avoidance Agreement (DTAA), which is set out at page 719, at 723 of Volume B of the Compilation. For the sake of convenience, Article 7(1) is reproduced hereunder:

"1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on

business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

25. Article 7(1) thus provides as under:

“(a) The profits of an enterprise can ordinarily be taxed only by the country in which it is located.

(b) If however, the enterprise has a P.E. located in another country (which is also a signatory to the DTAA), through which it carries on its business, then a portion of its profits, to the extent it is attributable to the P.E. can be taxed in the other country.”

26. On a plain reading of Article 7(1) of the DTAA, the question of attributing profits to the P.E. arises only if the foreign enterprise is making a profit. This is the condition precedent. If it is making a loss then no question arises at all of attributing any profit to the P.E., which would be taxable in India.

27. The Assessing Officer has taken gross profit margins of the Appellant Company for 2009 and 2010 as per its audited accounts instead of the net profit margins. The gross profits margins of the Appellant Company for 2009 and 2010 were positive, and that was how the A.O. could attribute profits to the P.E. In so adopting the gross profit margins of the Appellant Company, the A.O. has acted in a manner which is directly contrary to Article 7(1) of the DTAA and also contrary to the

said Special Bench Judgment. It is the **Net Profits** margins which are to be considered as for attribution as per the DTAA.

28. The computation made by the A.O. in his assessment order is incorrect as the AO has not allowed the payments made by the Appellant to NSN India for the services rendered by NSN India as a deduction from the profit attributable to the alleged PE. If the said payments are allowed as a deduction from the gross profit figures taken by the A.O., then again the resultant figure would be losses. Consequently, even if the method of attribution adopted by the A.O. is considered to be correct, in any event, there would be no profit/income attributable to the PE. The computation is as under:

Particulars	Amount (INR)
Gross Margin of the alleged PE (as determined by the AO)	6,62,39,89,219
Less: Deduction for actual payments to NSN India during the relevant A.Y.:	
(a) Compensation for network management support	1,28,53,61,568
(b) Compensation for marketing support	2,49,01,07,317
(c) Compensation for R&D support	5,60,25,53,834
Net operating profit/loss of the alleged PE	(2,75,40,33,500)

29. Consequently, even if the Appellant has a P.E. in India, no profit or income can in law at all be attributed to the P.E. which

would be taxable in India. Hence, we hold that the adjudication on issue of PE would be academic in nature.

**R&D centre FPPE:**

30. The Id. DR and the AO also made reference to the R&D subcontracting agreement and highlighted that the assessee has fully authority to decide on the R&D projects, their start and termination. The contract shows that NSN Oy is the owner of all results of the R&D subcontracting work. Further NSN Oy has all rights to enter any premises under the control of the Subcontractor (NSNIPL) for the purpose of taking possession of the materials. Clause 2.2 of the agreement reads as under:

*"NSN shall at any time be entitled to enter any premises under the control of the Subcontractor for the purpose of taking possession of the materials referred to in clause 2.1. It is expressly understood that the Subcontractor shall use such documents, drawings, models or nay other materials only for the purpose of fulfilling the subcontracting work for NSN and for no other purpose whatever and that such materials are subject to confidentiality as set out in Clause 15."*

31. Thus, the AO concluded that the office premises of NSNIPL is nothing but a branch of assessee which is virtually under the control of assessee because no independent party would give such unfettered rights to any other independent party.

32. The appellant has relied on the decision of Hon'ble Delhi High Court in the case of Adobe Systems Incorporated vs. Assistant Director of Income-tax 69 taxmann.com 228 whereas

the revenue held that the contract clause 2.2 providing unfettered rights to enter any premises and this case distinguishes it from the cited case.

33. It may be important to note that the decision of Hon'ble bench in the case of the assessee on this issue for AYs 2004-05 to 2006-07 is based on R&D activities for the assessee in terms of the different "Research and Development Subcontracting Agreement". The case in hand is based on separate R&D agreement valid from January 2008 to December, 2010.

34. As regards Chennai Global Network Solutions Center(GNSC), the AO highlighted based on perusal of website in public domain that NSN Oy has claimed these facilities to be of its own. The appellant has not denied this fact. The only dispute is regarding the disposal test. In this regard, the AO relied on the claim of the appellant in public domain which reads as under:

*"our Global services hub, GSM-Edge product management, Service Management Capability Center and a Centralized Solution Support Center (CSSC) are also based in India strengthening our local presence further".*

35. The issue of Global Development Centres not being a fixed place PE would also be an academic discussion owing to non-availability of the attributable profits.

36. Further, the Hon'ble Jurisdictional High Court in the case of Adobe Systems Incorporated vs. ADIT W.P.(C) 2384/2013 &

CM 4515/2013 vide order dated 16.05.2016 and the Hon'ble Supreme Court in the case of ADIT vs. E-Funds IT Solution Inc. in Civil Appeal No. 6082 of 2015 vide order dated 24.10.2017 held that R&D centres cannot give rise to any PE.

### **Issue of Software supply –Royalty:**

37. The Appellant supplies, along with the hardware, software which can only be used along with the hardware. Though the supply made to the customer is one in severable supply for Customs duty purposes, the value of the software is shown separately in the invoice. The Assessing Officer has held the amount charged for the software to be "Royalty" which is chargeable to tax in India.

38. This issue is covered in favour of the Appellant by the Judgment of the Delhi High Court in the case of Ericsson AB (343 ITR 470). The Supreme Court of India in the case of Engineering Analysis Centre of Excellence Private Limited( LL 2021 SC 124) settled the long-running contentious issue over how payments made by Indian customers to non-resident suppliers for the use or resale of computer software should be characterised, providing much-needed tax certainty on the issue.

39. The Hon'ble Apex Court held,

*"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, 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.”*

40. Hence, we hold that the software sales cannot give raise to Royalty income taxable in India in the case of the assessee before us.

41. In the result, all the appeals of the assessee are allowed.  
Order Pronounced in the Open Court on 07/12/2021.

Sd/-

**(Kul Bharat)**  
**Judicial Member**

**Dated: 07/12/2021**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**