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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: May 18, 2015

+ ITA 261/2014, C.M. No.10059/2014
+ ITA 262/2014, C.M. No.10060/2014
+ ITA 263/2014, C.M. No.10062/2014
+ ITA 264/2014, C.M. No.10064/2014
+ ITA 265/2014, C.M. No.10066/2014
+ ITA 266/2014, C.M. No.10068/2014

DIRECTOR OF INCOME TAX -I ..... Appellant

Through: Mr. Rohit Madan, Sr. Standing Counsel with Mr. Akash Vajpayee, Advocate.

versus

ERICSSON AB ..... Respondent

Through: Mr. Percy Pardiwala, Sr. Advocate, Mr. Vikas Jain and Mr. Shubham Rastogi, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The Revenue is aggrieved by the order of the Income Tax Appellate Tribunal (hereinafter referred to as "the ITAT") dated 20.07.2012 in several appeals preferred by the assessee for Assessment Years (AYs) 1999-2000 to 2004-05. Its grievance is that the ITAT erroneously examined the merits of

the contentions and drew inferences in the assessee's favour which were entirely unwarranted.

2. This Court does not propose to discuss the facts in detail in view of the final order made. The assessee (Swedish company) is a subsidiary of LME. It entered into a contract with Indian telecom service providers during 1995-97 for supply of telecommunication equipments which comprise hardware and software components. It claimed that it was not liable to tax under the provisions of Income Tax Act, 1961 (hereinafter referred to as "the Act") and also relied upon a Double Taxation Avoidance Agreement (DTAA) between India and Sweden. For previous year i.e. 1997-98, the Revenue unsuccessfully brought to tax the consideration received by the assessee, towards the supply of equipments. The matter ultimately culminated in a reported decision of this Court in *Director of Income Tax v. Ericsson* (2012) 343 ITR 470 (Del).

3. For the succeeding years, 1999-2000 to 2004-05, assessments were pending. Apparently for some years, re-assessment notices had been issued and matters proceeded. In these circumstances, a survey was conducted on 22.11.2007 in the premises of Ericsson India Limited (EIL), a subsidiary of LME. For the concerned year, the assessment was completed on 31.12.2007. For some years which this Court is concerned, the assessment had been completed earlier in the light of the previous assessments made for 1997-98. Appeals were pending before the CIT (Appeals). The said authority took note of the materials collected during the course of survey under Section 133A and sought to use them in the assessee's pending appeals. The discussion, on the basis of which the CIT (Appeals) arrived at

its findings, is to be found in para 3.1 to 3.3 of the order dated 23.02.2011. The assessee appealed to the ITAT for all these assessment years. In its common order – impugned order for these proceedings, the ITAT held that:-

> "*The First Appellate Authority came to a conclusion that new facts/evidences were gathered during the survey U/S 133A and were also collected from Cellular operators u/s 133(6) of the Act much after the Order of the Special Bench of the Tribunal in assessee's own case for the A.Y. 1997-98. The Ld. CIT(A), without confronting the assessee or the Assessing Officer tried to make out a case that the facts are different in these years . He summarized the new facts/evidences at para 3.3 of his order at pages 6 to 11. The basis on which this summary is arrived is not stated. A perusal of this summary demonstrates that the Ld.CIT(A) has not indicated as to what is the documentary evidences are relied upon by him for coming to a conclusion, that the facts of the current years are different from that of the earlier years. General observations are made and vague conclusions are drawn. The documents were not put to the assessee, nor explanations were called for from the assessee. The views of the assessee and the Assessing Officer on these new evidences are I necessary to form an opinion or draw conclusions on these documents. Surmises and conjectures are drawn. The nature of evidence found, the nexus the particular document/evidence has with the impugned Assessment Years, the inference that the CIT(A) seeks to draw from these documents and the reply of the assessee to such proposed, inferences are not brought out or discussed in the order. Under these circumstances we are unable to concur with the view of the CIT(A) that the facts and circumstances of the case in these Assessment Years before us, differ from the facts and circumstances of the case in the earlier. Assessment Years based on which the Jurisdictional High Court has delivered a judgment.*"

4. Thereafter the ITAT considered the materials which the CIT (Appeals) had taken into account while recording adverse findings and concluded that there was no distinction between the facts which were considered by this Court in its decision in *Ericsson* (supra) and the facts for the subsequent assessment years.

5. Learned counsel for the Revenue contends that given the findings of the ITAT that the CIT (Appeals) did not offer any opportunity to the assessee to make submissions with respect to the materials obtained from the survey and unilaterally rendered findings, the ITAT itself ought not to have proceeded with first instance appreciation of such material. Learned counsel pointed to the explanation of CIT (Appeals)'s powers under Section 251 of the Act that empowered it to not only set aside the AO's order but also pass such orders as may be appropriate after giving reasonable opportunity to the assessee in the circumstances as warranted. The ITAT ought to have remitted the matter to CIT (Appeals).

6. Learned senior counsel for the assessee, Mr. Percy Pardiwala, resisted the submissions of the Revenue and contended that the impugned order should not be disturbed. He argued that the findings with respect to the title of the goods passing in the high seas and, therefore, being outside the jurisdiction of India cannot be faulted with. He also submitted that the question in this appeal was taken into account in the previous ruling of this Court for AY 1997-98.

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.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

MAY 18, 2015
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