

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-2' BENCH,
NEW DELHI**

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

**ITA No. 1920/DEL/2012
[A.Y 2002-03]
&
CO No. 266/DEL/2012
[A/o ITA No. 2018/DEL/2012 [A.Y 2002-03]**

ERICSSON Telephone Corporation India AB [India Branch] 4 th Floor , Dakha House, 18/17 W.E.A Pusa Lane Karol Bagh, New Delhi	Vs.	The Dy. D.I.T [International Taxation] Circle - 1(1) New Delhi
--	------------	--

PAN : AAACE 2393 M

**ITA No. 2018/DEL/2012
[A.Y 2002-03]**

The A.D.I.T [International Taxation] Circle - 1(1) New Delhi	Vs.	ERICSSON Telephone Corporation India AB [India Branch] 4 th Floor , Dakha House, 18/17 W.E.A Pusa Lane Karol Bagh, New Delhi
--	------------	--

PAN : AAACE 2393 M

[Appellant]

[Respondent]

Date of Hearing	:	12.09.2018
Date of Pronouncement	:	28.09.2018

Assessee by : Shri Vishal Kalra, Adv

Revenue by : Shri H.K. Choudhary, CIT-DR
Ms. Anchal Khandelwal, Sr.DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

These two cross appeals are preferred by the assessee and the Revenue against the order of the ld. CIT(A)-20, New Delhi dated 27.02.2012 pertaining to A.Y 2002-03. The assessee has also preferred cross objection No. 266/DEL/2012. All these appeals were heard together and are being disposed off by this common order for the sake of convenience and brevity.

2. First we will take up assessee's appeal.

ITA No. 1920/DEL/2012 [Assessee's appeal]

3. The sum and substance of the grievance of the assessee is that the ld. CIT(A) erred in concluding that the activities carried out by the assessee are in the nature of technical services.

4. Briefly stated, the facts of the case are that the appellant company, viz., Ericson Telephone Corporation India AB(India Branch) is an entity incorporated in Sweden with limited liability, which is a fully

owned subsidiary of M/s Telefonaktiedolaget LM Ericsson AB, Sweden. It set up a branch office in India to carry out its business activity. The Branch Office commenced its operations in March, 1995. The assessee is engaged in the field of telecommunication and mobile telephony. In 1995-96, the assessee was awarded contracts by Indian telecom companies for installing GSM mobile telephone network. Such companies included RPG Cellular Services Ltd., Bharti Cellular Ltd., JT Mobiles Ltd. and Birla AT&T Communications Ltd. In 1996, the installation contracts with Indian companies referred to hereinabove, were assigned to Ericsson Communications Pvt. Ltd., which is an Indian company, but a wholly ITA No.893/Del/2006 owned subsidiary of the parent company (LM Ericsson AB). Thereafter, all the installation contracts concerning setting up of mobile telephone systems were carried out by Ericsson Communications Pvt. Ltd. (ECI), now known as Ericsson India Ltd. (EIL)

5. During the course of scrutiny assessment proceedings, the A.O observed that in the preceding assessment year i.e. 2001-02, the nature of the business of the assessee was the same and the contracts entered into by the assessee during the preceding years continued during this year as well. Following the findings of his predecessor for

assessment year 2001-02 and for the same arguments and facts and also following the order of the AAR, New Delhi in the case of the assessee itself, remuneration received by the assessee was taken as 'fees for technical services' within the meaning of DTAA with Sweden.

6. We find that in assessment year 2000-01, the dispute travelled upto the Tribunal and the Tribunal in ITA No. 893/DEL/2006 held as under:

"10. We are not convinced with the contention put forth on behalf of the Revenue. A Protocol to the DTAA is, for all practical purposes, to be considered as its part and parcel. There is no question of resorting to it only if some clarity is wanting in the DTAA. In fact, a Protocol completes the DTAA. If a particular benefit is being conferred, expanded or reduced by the Protocol, which is absent in the DTAA, then the provisions of the Protocol shall apply pro tanto. A Protocol cannot be viewed as a document independent of the DTAA and has to be considered as its addendum. We, therefore, do not approve the preliminary contention advanced on behalf of the Revenue.

11. Reverting to the facts of the extant case, it is seen that the authorities below have decided the issue of taxability of the amount of fees received by the assessee from technical services earned from Indian concerns simply on the basis of

the Ruling given by the AAR. The fact of the matter is that the DTAA, under which such Ruling was rendered, has been substituted as ITA No.893/Del/2006 discussed supra. In such circumstances, the prescription of [section 245S\(2\)](#) gets attracted, which requires consideration of the arguments of the assessee in the light of the substituted DTAA along with its Protocol to the facts of the instant case. Such new DTAA and the Protocol have not been considered by the Assessing Officer, who has simply gone by the Ruling rendered by the AAR. As such, we are of the considered opinion that the ends of justice would meet adequately if the impugned order on this score is set aside and the matter is remitted to the file of Assessing Officer. We order accordingly and direct him to decide the issue afresh by considering the effect of alterations, introduced in the new DTAA of 1998 along with the Protocol, if any, on the Ruling given by the AAR in the assessee's own case. In other words, if the new DTAA and the Protocol really impact the ruling given by the AAR against the assessee on the issue, then, the Ruling should be applied in the light of such amendments. The decision on issues decided by the Authority, which remain unaltered by the DTAA of 1998 or the Protocol, will have to be applied as such. It is made clear that discussion of the new DTAA or the Protocol above should not be construed as reflection of our opinion on its applicability or otherwise to the facts of the ITA No.893/Del/2006 instant case. The AO should decide its implications independently on merits. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in such fresh proceedings.”

7. On finding parity in the facts and respectfully following the co-ordinate bench [supra], we direct accordingly.

8. A similar view was taken by the co-ordinate bench in assessment year 2001-02 in ITA No. 894/DEL/2006. The relevant finding reads as under:

“We have passed a separate order in respect of the assessment year 2000-01. As the facts and circumstances of the instant appeal are admittedly mutatis mutandis similar to those of the immediately preceding year, we set aside the impugned order and remit the matter to the file of the Assessing Officer for deciding the issue of income earned from Indian concerns towards fee for technical services-and allocation of expenses in the light of our order given today for such preceding year. Needless to say, the assessee will” be allowed a reasonable opportunity of being heard in such proceedings.”

9. In the result, the appeal of the assessee is treated as allowed for statistical purpose.

ITA No. 2018/DEL/2012 [Revenue's appeal]

10. Coming to the Revenue's appeal, the solitary grievance is that the Id. CIT(A) erred in deleting the additions of Rs. 1,27,93,154/- made by the Assessing Officer.

11. Briefly stated, the facts of the case are that the assessee restructured its business and closed down the installation/assembly business and transferred it to M/s EIL. As a part of this exercise, the assets of this business were transferred to M/s EIL. On sale of such assets, the assessee has shown a profit of Rs. 1,52,10,658/-. The total receipts from the services are at Rs. 13,20,22,602/- and the total operating cost is Rs. 13,40,88,663/-.

12. The gross revenues of the assessee have four distinct heads and they are being taxed under the principles described in the table below:

S.No.	Income component	Amount (Rs.)	Taxing Principal
1	Fee from technical services from Indian concerns	9,32,48,802/-	Sec. 44D, Sec. 115A read with Article 7 of
2	Fee from technical services from foreign services	4,81,08,814/-	Article 7 of DTAA
3	Interest income	18,69,986/-	Article 11(5) read with Article 7 of the DTAA
4	Marketing Support Services provided to	34,58,1407-	Article 7 of the DTAA

13. The appellant company had used Transactional Net Margin Method [TNMM] as the most appropriate method and OP/TC as the Profit Level Indicator [PLI]. 51 comparables were used, which were mainly in the business of construction/installation and erection services. The Mean OP/TC of the comparables was determined at 8%. The appellant calculated its margin at 10% and termed its international transaction as at arm's length.

14. The TPO accepted the comparables, the most appropriate and PLI. The only bone of contention is the margin calculation of the appellant company. The appellant company, during the middle of FY, had sold off its business pertaining installation and erection services to its primary customer and, subsequently, this activity was discontinued. There is no dispute that this business activity was the major business activity of the appellant company which constituted 98% of its turnover. The appellant company has taken the profit from the sale of its fixed assets by including the same in receipt side. The first objection taken by the TPO was in respect of this inclusion. The TPO was of the firm belief that the profit on sale of fixed asset should not be included while calculating operating profit of the assessee. The assessee strongly objected to this proposition of the TPO by claiming

that the profit on sale of assets was akin to income from operation of the business. The objection of the assessee did not find favour with the TPO who proceeded by computing the margin of the assessee by excluding the profit on sale of fixed assets. The margin of the assessee was recalculated at minus 1.57% and, accordingly, Rs. 1,27,93,154/- was added to the international transaction of the assessee.

15. Before the first appellate authority, the assessee strongly contended that six months operation of the assessee in installation and erection activity should be compared and bench marked. The assessee submitted the calculation of the results upto the sale of the business segment. It was further contended that since the assessee has sold the business in the middle of the F.Y., the assessee was incurring unutilized capacity in the form of fixed cost no longer recoverable through normal business activity. Therefore, it was pleaded that the excess costs towards unutilized capacity should be excluded from the total operating cost in order to bring the level of capacity utilization of the comparables in line with that of the assessee.

16. After considering the facts and submissions and the remand report, the Id. CIT(A) though was convinced that the profit on sale of fixed asset cannot be considered as operational income but further observed as under:

"4.8 The alternative available in this case for benchmarking is using the financial results upto the sale of business. As per the calculation submitted by the appellant in the installation and erection segment, the appellant has earned an OP/ TC of 14%. This calculation excludes the profit on sale of fixed assets. The TPO has not commented on the calculation made by the appellant in his remand report. The margin so calculated is consistent with the policy of the group company which is based on cost plus 15% on the man hourly rates for the FY 2001-02 (page 48 of the TP report). Mean OP/ TC of the comparables are at 8% which is accepted by the Department. There are totally 51 comparables. As six monthly financial results are not available for these comparables, the annual results are taken for calculation of the PLI. The only extra assumption is that the 51 comparables do not have extraordinary results in the first half of the financial year. This assumption seems to be a very reasonable assumption in the absence of anything contrary in the annual reports of the

comparables. Since, the international transaction carried out for six months has resulted in a markup of 14% as against 8% of the comparables the same should be held as at arm's length".

17. Before us, the ld. DR strongly supported the findings of the Assessing Officer/TPO. It is the say of the ld. DR that the ld. CIT(A) has not given sound reasoning while deciding the issue in favour of the assessee.

18. Per contra, the ld. counsel for the assessee strongly supported the findings of the first appellate authority.

19. We have carefully considered the orders of the authorities below. There is no dispute that the assessee sold its major business activity in the middle of FY. It is equally true that the assessee was incurring unutilised capacity in the form of fixed costs which were no longer recoverable through normal business activity. Meaning thereby, that there was no level playing field with the 51 comparables, in as much as, the comparables were not on the same platform with that of the assessee. In our considered opinion, the first appellate authority has given a very reasonable and justifiable finding in coming to the

conclusion that the appellant has earned OP/TC of 14%. The allegation of the Id. DR that the findings of the Id. CIT(A) is not based on any sound reasonin, is ill founded as the same is justified by the following:

Particulars	Amount	Remarks
Revenue	132,022,602	
Profit on sale of fixed a Assets		
Reimbursements received	14,060,821	
Total Operating Revenue	146,083,423	
Operating Expenses		
Cost of Installation se r vices	965,086	
salaries and other benefits	52,749,188	
Admin expenses	52,960,605	Refer note 1
Depreciation	11,461,146	
WTP	9 668 750	
Total Expenses	127,804,775	
Operating Profit	18,278,648	
OP/TC	14.30%	

Computation of abnormal cost	
Total Cost recharged towards facility usage	38,551,806
No. of days of operations during the year (from 1 April 2001 to September 20, 2001)	172
Cost to be considered for the period of operations	18,216,787

20. Considering the peculiar facts of the case in totality, we do not find any error or infirmity in the finding of the ld. CIT(A).

21. The appeal filed by the Revenue stands dismissed.

22. The ld. counsel for the assessee did not press the cross objection. The same is, therefore, dismissed as not pressed.

23. To sum up, in the result, the appeal filed by the assessee is allowed, whereas the appeal filed by the Revenue as well as the cross objection filed by the assessee are dismissed.

The order is pronounced in the open court on 28.09.2018.

Sd/-

**[SUDHANSHU SRIVASTAVA,]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 28th September, 2018

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	