

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I-1', NEW DELHI  
BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT  
AND  
SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

I.T.A. No. 3891/Del/2010

(Assessment Year : 2006-07)

Ericsson India Pvt. Ltd., Vs DCIT, Circle 11(1),  
4<sup>th</sup> Floor, Dhaka House, New Delhi  
18/17, WEA Pusa Lane,  
Karol Bagh, New Delhi  
GIR / PAN : **AAACE0138N**

(Appellant)

(Respondent)

Appellant by :Shri Ravi Sharma, Adv.  
Shri Anubhav Rastogi, Adv.

Respondent by :Shri Sanjay I Bara, CIT, DR

Date of hearing: 09.07.2018

Date of Pronouncement: 12.07.2018

**ORDER**

**PER BEENA A. PILLAI, JM:**

Present appeal has been filed by assessee against the final assessment order dated 30/06/10 passed by Ld. DCIT, Circle 11 (1), New Delhi under section 143 (3) read with section 144C (13) of the Income Tax Act, 1961 (the Act) for assessment year 2006-07 on the following grounds of appeal:

*1. That on the facts and in the circumstances of the case and in law, the Ld. AO as well as the Hon'ble DRP erred in proposing an addition of Rs.35,10,07,197 being the provision for liquidated damages on the ground that same was in the nature of a contingent liability and therefore, not allowable under section 37(1) of the Act.*

1.1. The Ld AO erred in law in not following the decision of the Hon'ble Delhi ITAT for Assessment year 2001-02 to 2004-05 wherein on the basis of similar facts, the claim of Provision for liquidated damages has been allowed in appellant's own case.

1.2. Without prejudice to Ground 1 to 1.1 above, and in the event that the claim of liquidated damages is not allowed on provisional basis in the year under consideration, in that case, the Ld. AO ought to be directed to allow such claim on payment basis in subsequent years and also not to tax reversal of the same if any, in future years.

2. The Ld. AO erred in law in charging interest under section 234A even though the return of Income is filed before the due date and taxes were paid before filing of return of income.

3. The Ld. AO erred in law in not giving full credit of TDS claim amounting to Rs.24.46,60,874/-

4. That on the facts and in the circumstances of the case and in law, the Ld AO erred in adding Provision for liquidated damages of Rs. 35,10,07,197, Provision for leave encashment of Rs. 53,89,080 and Provision for gratuity of Rs. 1,23,31,201 in computing the book profits under section 115JB of the Act, treating the same as unascertained liabilities.

5. That the Assessment Order passed pursuant to the directions issued by the Learned Dispute Resolution Panel (DRP) is a vitiated order as the Ld. DRP has erred both on facts and in law in confirming the addition made by the Ld. Assessing Officer ('AO')/ Ld. Transfer Pricing Officer ('TPO') to the appellant's income, by issuing a non-speaking order, without appropriate application of mind and in undue haste;

6. The Ld. DRP erred both on facts and in law in confirming Ld. AO/ TPO's action of making an adjustment of Rs. 119,141,295 to the income of the appellant by holding that its international transaction of receipt of cost reimbursements does not satisfy the arm's length principle envisaged under the Income-tax Act 1961 ('Act'). In doing so the Ld. DRP has grossly erred in agreeing with the TPO's action of;

6.1. disregarding the detailed submissions put forth by the appellant and undertaking a flawed Functions-Asset-Risk ('FAR') analysis of the appellant's international transaction of receipt of cost reimbursements, thereby, erroneously concluding that the appellant was undertaking substantial functions, utilizing various assets and assuming several risks leading to application of mark-up in respect of its receipt of cost reimbursements;

6.2. disregarding the business/ commercial reality that the appellant's international transaction of receipt of cost reimbursements is in effect a pass-through 'non-core' transaction and hence no margin is required to be earned by the appellant on the same;

6.3 erroneously comparing the FAR profile of the appellant's international

*transaction of the cost reimbursements with the FAR profile of the appellant's 'Systems Segment', without appreciating that the activities undertaken under the Systems Segment have a wider profile and are completely different from the activities undertaken with respect to the cost reimbursements received by the appellant;*

*6.3.1. without prejudice, if the FAR profile of the appellant's international transaction of receipt of cost reimbursement is compared with the FAR profile of its 'Systems Segment', then the same should be aggregated with the other transactions in the Systems Segment, as in any case, the other relevant operating costs, if any, in respect of the appellant's cost reimbursement transaction are already included in the cost base for the Systems Segment;*

*6.3.2. without further prejudice, if the Ld. TPO's contention of separately considering the appellant's cost reimbursement transaction as a 'distribution activity' is accepted, then in that case, the operating margin of trading companies presented by the appellant during the assessment proceedings should be considered;*

*6.4. holding that only current year (i.e., FY 2005-06) data should be used for comparability analysis, despite the fact that such data was not necessarily available to the appellant at the time of preparing its TP documentation;*

*6.5. without prejudice to all the other grounds, erroneously disregarding two comparable companies presented by the appellant in respect of its Systems Segment (selected using current year) during the assessment proceedings;*

*6.6. without prejudice to all the other grounds, rejecting all low-profit/ loss making companies based on erroneous/ unsound reasons, thereby considering only one profit making company for determining the arm's length margin in respect of the cost reimbursement transaction;*

*6.7. erroneously applying a mark-up of 11 % earned in the Systems Segment on the cost reimbursement transaction value without appreciating the fact that margin of the Systems Segment is a result of various activities undertaken by the appellant in the said segment which includes manufacturing, trading of core telecom infrastructure equipment, installation and other activities;*

*6.7.1. In any case and without prejudice, in disregarding the arm's length operating margin of 6.74% determined by the Ld. TPO himself, and arbitrarily considering a higher mark-up of 11 % earned by the appellant in its Systems Segment to determine the arm's length margin for the appellant's receipt of cost reimbursements;*

*6.8. applying a mark-up of 11 % earned by the appellant in its Systems Segment on the cost reimbursement transaction value without appreciating the fact that in the Systems Segment, the appellant had significant related party transactions, thereby making the comparison to be in contravention of the requirements of the Act and relevant guidelines in this regard;*

*6.9. not giving a reasonable opportunity to the appellant of refuting/ rebutting*

*the basis on which adjustment was made by the Ld. TPO in the TP order and in not considering/ appreciating the contentions/ arguments/ evidentiary data put forward by the appellant;*

*6.10. denying the benefit of (+/-) 5 percent [as per proviso to section 92C(2) of the Act] available to the appellant;*

*That the above grounds of appeal are without prejudice to each other.*

**2.** Brief facts of the case are as under:

**2.1.** For the year under consideration, assessee filed its return of income on 31/11/2006, declaring total income of Rs.94,03,37,165/- under normal provisions of Act and Rs.371,376,582/-under section 115 JB of the Act. The case was processed under section 143 (1) of the Act and was taken up for scrutiny. Accordingly notices under section 143 (2) of the Act was issued, in response to which representatives of the assessee attended the assessment proceedings from time to time.

Ld. AO observed that Ericsson India Pvt.Ltd. (hereinafter referred as 'the assessee') is a company incorporated under the Indian Companies Act, 1956. Assessee is wholly owned subsidiary of Telefonaktiebolaget LM Ericsson, Sweden ('LME'). LME is ultimate holding company of all Ericsson Group Companies located in various countries across the globe.

**2.2.** During the relevant Assessment Year under consideration, assessee was engaged in business of manufacturing of electrical apparatus for line telephone or telegraphy including such apparatus for carrier current line system and parts thereof, marketing of telecommunication equipment, implementation and commissioning of telecommunication equipment meant for mobile telephony, internet services and rendering technical services in connection therewith and development of telecommunication related software. It was observed by Ld. AO

that assessee had undertaken international transactions relating to reimbursement of expenditure on which no margin was charged. Accordingly issue was referred to Transfer Pricing Officer (TPO). Ld.TPO observed that assessee classified its international transaction into 3 segments being; (i) systems segment, (ii) software services segment and (iii) others. Ld.TPO after going through various submissions advanced by assessee, proposed adjustment of Rs.119,141,295/-, by considering transaction to be sale and support services rendered by assessee on behalf of its AE.

**2.3.** Aggrieved by the adjustment proposed, assessee raised objections before DRP. DRP upheld the adjustment proposed by ld.TPO. Subsequently Ld. ACIT passed consequential order, giving effect to directions of DRP and completed assessment by making following additions:

S.N.	Particulars	Amount (Rs.)
1	Capital investment subsidy	2,51,924
2	Provision for Liquidate damages	351,007, 197
3	Computation of book profit under section 115 JB	74,01,04,060
4	Transfer Pricing addition in pursuance of order u/s 92CA(3) of the Act	11,91,41,295

**2.4** Aggrieved by order of Ld. ACIT, assessee is in appeal before us now.

**3.** At the outset, the Ld. A.R. submitted that **Ground No.1 to 3** raised in assessee's appeal stand squarely covered by orders passed by Coordinate Benches of this Tribunal in assessee's own case for earlier / previous assessment years as under:

***“3.1 Ground No.1 stands covered by order passed for Assessment Years 2001-02. 2002-03. 2003-04 and 2004-05 in***

*assessee's own case which is placed at page 95-158 of the Paper Book, the relevant paras of these orders are as under:*

**Assessment Year 2001-02:**

*“3.8 The excess provision on account of liquidated; damages was offered to tax under section 41(1) of the Act in the subsequent years 'as the same were waived of by the Customer.*

*Hence, there is no infirmity in' method of accounting as-stated' by, the Ld. CIT(A) in its order in, respect ,of accounting followed by the appellant in respect of Liquidated Damages.*

*In view of the above facts and the legal position, the claim in respect of liquidated damages is allowable as liability accrued in the year under appeal, hence allowable under section 37(1) of the Act.”*

**Assessment Year 2002-03:**

*“20. Thus, it has been concluded by the Tribunal that liquidated damages is allowable as liability accrued in the year under appeal, hence, allowable u/s 37(1) of the Act. No material has been brought on record by the Revenue that the facts of the present year differ from the facts in assessment year 2001-02. One of us (i.e., Accountant Member) is the party to the said decision. Following the said decision of the Tribunal which is in assessee's own case for preceding year, we allow both the grounds. We hold that liability regarding liquidated damages is allowable liability during the year under consideration, hence, could not be added either under normal computation of income or while computing income u/s 115JB of the Act. These grounds raised by the assessee are allowed.”*

**Assessment Year 2003-04 & 2004-05:**

*“25. In the assessment orders, the A.O. made disallowance of Rs.252,679,327/- and Rs.156,071,161/- in Assessment Year 2003-04 and 2004-05 respectively, claimed as provision for liquidated damages by the assessee on the reasoning that*

*it was in the nature of contingent liability and, therefore, was not allowable u/s 37(1) of the Act.”*

**3.2** Ld. DR did not dispute factual position, which is common in both the Assessment Years and that the dispute being the same, is based on same contract. Under such circumstances we do not find any reason to deviate from the view taken by the Coordinate Bench of this Tribunal for assessment year 2005-06 (supra).

**3.3** It is submitted that there is no change in the facts and circumstances of the case for the year under consideration vis-à-vis the previous / earlier years.

Respectfully following the same, we are of the considered opinion that assessee is eligible for the deduction in respect of provision for liquidated damages as revenue expenditure allowable u/s 37(1) of the Act.

**3.4. Accordingly this ground raised by assessee stands allowed.**

**4. Ground No. 2** is in respect of interest under section 234A of the Act charged by Ld. AO.

**4.1.** We direct Ld. AO to verify the date of return of income filed and to consider the claim of assessee as per law.

**4.2. Accordingly this ground raised by assessee stands allowed for statistical purposes.**

**5. Ground No. 3** is in respect of non-granting of TDS credit claimed by assessee. Ld. AO shall verify the same from the 26-AS as well as the TDS certificate and shall consider the claim of assessee as per law.

**5.1. Accordingly this ground raised by assessee stands allowed for statistical purposes.**

**6. Ground No. 4** is in respect of addition made by Ld.AO towards provision for liquidated damages, Provision for Leave Encashment and Provision for Gratuity, in computing book profits under section 115 JB of the Act.

**6.1.** It has been submitted by Ld.Counsel that the issue stands covered by order for Assessment Year 2003-04 and 2004-05 which is placed at pages 100-117 of paper book. The Coordinate Bench of this Tribunal had allowed the claim of assessee by relying upon the decisions of *Hon'ble Delhi High Court* in the cases *CIT Vs HCL Comet System & Services, 292 ITR 299 (Del.)*, for the previous Assessment Year 2003-04 and 2004-05.

**6.2.** Similar was the view taken for immediately preceding Assessment Year in 2005-06.

**6.3.** Respectfully following the same view, **we allow this ground raised by assessee.**

**7. Ground No. 5** has not been argued by Ld.Counsel, and **hence is dismissed.**

**8. Ground No. 6** is in respect of the Transfer Pricing adjustment made by Ld.AO amounting to Rs.119,141,295/-. Ld. Counsel at the outset submitted that identical issue on similar facts and circumstances has been dealt with by Coordinate Bench of this Tribunal vide order dated 12/09/16, in immediately preceding Assessment Year 2005-06 in ITA No. 1927/Del/2011 as under:

*“7. We have perused the records placed before us and the orders passed by the authorities below. On perusal of the agreement*

*entered between the AE and the assessee clearly shows that the later acts only as a facilitator for its AE and does not undertake any transaction on a regular basis. The main purpose of undertaking such a transaction was to achieve administrative convenience for the AE. The assessee merely acts as an intermediary or facilitator for administrative convenience of the AE. Therefore, the transaction of cost recharge for supply of hardware is a mere pass through cost which is timely reimbursed to the assessee by the AE and cannot entail a markup since no service is being rendered.*

*7.1 It is observed that the Ld. CIT(A) has dealt with the issue a length and has examined the scope and nature of services rendered by the assessee to its AEs in each segment. Ld. CIT(A) observed as under:*

*“36. I have carefully examined this issue and considered submissions made by the appellant in the light of the material available on record, the main bone of contention is whether the appellant has undertaken significant functions, employed significant assets and borne significant risks with respect to the cost reimbursement transaction.*

*37. The claim of the appellant is that with respect to the said transaction it has not undertaken any significant functions, employed significant assets and borne significant risks with respect to the cost reimbursement transaction. To explain the same the appellant has undertaken a detailed analysis of Functions performed, Assets employed and Risks assume (FAR) of the said international transaction of reimbursement of costs by the AEs and based on the FAR analysis it has concluded that with respect to the said international transaction the appellant has not undertaken any significant functions, employed significant assets and borne significant risks. The appellant in its submissions has submitted that the only function undertaken by it with respect to the sad international transaction was the supply of*

ancillary telecom equipment on which it had incurred transportation cost and personal cost. However, such cost was not significant and the same has been captured in the overall cost base of the Wireless segment, which the TPO has also accepted to be at arm's length

38. In my considered view a FAR analysis forms the bedrock of any transfer pricing analysis. In the instant case the appellant by way of any FAR analysis has clearly demonstrated that it did not undertake any significant functions, employed significant assets and borne significant risks. Ericsson India Pvt. Ltd. Further, the appellant has also submitted sample copies third party invoices for the said international transactions which also mentions the name of the customer to which it is supplied.

39. Further, I have also examined the agreement between the appellant and its AE from where it is observed that for supply of equipment the contract is between Bharti and the AE, The relevant extract of the agreement is produced below:

Quote:

General:

WHEREAS, EAB is engaged in the business of supply of GSM, CDMA, WCDMA and related products;

WHEREAS, EIL is engaged in the business of manufacture, marketing and sale of telecommunication products, provision of network roll out and support services and marketing and business promotion;

WHEREAS. EAB has entered into a Contract with respect to procurement and sale of certain equipment and materials with Bharti Cellular Ltd. ("Bharti ") dated 22<sup>nd</sup> December 2003 (the "Bharti Supply Contract ");

Further it is observed that the appellant is instructed by its AE for purchase and supply of ancillary equipment such as antennas and filters. The relevant extract of the agreement is produced below:

Quote:

*WHEREAS, pursuant to the Bharti Supply Contract, EAB has desired and EIL has agreed to procure and supply antennas, filters, etc. as instructed by EAB from time to time effective April 2004 to Bharti.*

*40. The above extract clearly indicates that the primary contract has been entered into between the AE and Bharti and the appellant purchases and supplies the equipment at the instruction of AE. The above extracts clearly indicates that the primary contract has been entered into between the AE and the appellant purchases and supplies the equipment at the instruction of the AE.*

*41. Based on the facts present and the material placed on record, I accept the appellant's contention that the cost reimbursement transaction was undertaken by the appellant only for administrative convenience and the appellant had not undertaken any significant activity in this regard.”*

*7.2 We do not find any infirmity in the findings of the Ld. CIT(A). We therefore, confirm the same and dismiss this ground of appeal raised by the Revenue.”*

**8.1.** It has been submitted that there is no change in the FAR analysis and functions performed by assessee for the year under consideration vis-a-vis Assessment Year 2005-06. The agreement under which the services has been rendered by assessee to its AE, is also same for both the years wherein assessee has rendered services to “Bharati” on behalf of its AE. Authorities below have not brought on record any distinguishing feature to differentiate the factual circumstances between the year under consideration and that of Assessment Year 2005-06.

**8.2.** Accordingly we allow the claim of assessee and delete the adjustment made by Ld.TPO on this count.

9. In the result, appeal filed by assessee stands allowed.

Order pronounced in the open court on 12/07/2018.

Sd/-  
**(G.D.AGRAWAL)**  
**PRESIDENT**

Sd/-  
**(BEENA A. PILLAI)**  
**JUDICIAL MEMBER**

Dt. 12<sup>th</sup> July, 2018

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Copy forwarded to: -

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

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By Order,

**ASSISTANT REGISTRAR**  
ITAT Delhi Benches