

ITAT had to remand back case instead of appreciating the facts itself if CIT(A) didn't confront assessee with new facts

Summary – The High Court of Delhi in a recent case of Ericsson AB., (the Assessee) held that where in earlier years, consideration received by assessee Swede company for supply of telecom equipments as not taxable, while in current year Tribunal had recorded that Commissioner (Appeals)'s order was bad as he did not confront assessee with new material gathered during survey, Tribunal ought to have remanded matter back to Commissioner (Appeals) for readjudication of facts; it should not have itself appreciated facts

Facts

- The assessee (Sweden based company) entered into a contract with Indian telecom service providers for supply of telecommunication equipments. The consideration received by assessee for said services were held non-taxable by High Court.
- However during succeeding years, the Commissioner (Appeals) took note of fact that new facts/evidences were gathered during the survey under section 133A and without confronting the assessee or the Assessing Officer, he made out a case that the facts were different in these years and concluded assessment.
- The Tribunal had noticed that the Commissioner (Appeals) had not indicated as to what was documentary evidences which were relied upon by him.
- Thereafter, the Tribunal considered the materials which the Commissioner (Appeals) had taken into account while recording adverse findings and concluded that there was no distinction between the facts which were considered by the Court in earlier years and the facts for the relevant assessment years.
- On appeal, the revenue submitted given the findings of the Tribunal that the Commissioner (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 Tribunal itself ought not to have proceeded with first instance appreciation of such material and the Tribunal ought to have remitted the matter to Commissioner (Appeals).

Held

- The Commissioner (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 Tribunal 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 Tribunal did not stop and remit the matter to proceed on a fresh determination of the same material. Its discussion was rendered based on the findings with respect to the previous years (1997-98) and the failure to

make out a new case. Having primarily recorded that the Commissioner (Appeals)'s order was bad for the reason that he did not follow the procedure prescribed by the law, the Tribunal ought not to have followed in the same manner, in appreciating the facts in the first instance as it did. This Court in its ruling in earlier year 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.

- In these circumstances, Court deems it most appropriate to set aside the order of the Tribunal and Commissioner (Appeals) and remit the matter to the Commissioner (Appeals) who shall give reasonable opportunity to the assessee, in the light of the materials collected during the survey.