IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI

BEFORE SH. G. S. PANNU, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 5791/DEL/2015
(Assessment Year – 2010-11)

Nokia India Pvt. Ltd., C/o. TEC, Level 18, DLF Cyber City, Phase-III, Building No.5, Tower A, Gurgaon. (PAN : AAACN 2170 R) **(APPELLANT)**	Vs	DCIT Circle - 10(2), New Delhi. **(RESPONDENT)**

AND
ITA No. 5845/DEL/2015
(Assessment Year – 2010-11)

DCIT Circle - 10(2), New Delhi. **(APPELLANT)**	Vs	Nokia India Pvt. Ltd., 1st & 2nd Floor, Tower-A, SP Infocity, Indl. Area, Plot No.243, Udyog Vihar, Phase-I, Dundahera, Gurgaon. **(RESPONDENT)**

Appellant by	**Sh. Deepak Chopra, Adv, Sh. Ankul Goyal, Advs**
Respondent by	**Smt. Pramita M. Biswas, CIT DR**

Date of Hearing	**16.12.2019**
Date of Pronouncement	**20.02.2020**

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the Assessee and Revenue against the order dated 28.08.2015 passed by DCIT, Circle-18(2), New Delhi under section 143(3) r.w.s. 144C(13) for assessment year 2010-11.

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2. At the time of hearing the Ld. AR pointed out application/letter dated 23.02.2018 for partial withdrawal of original grounds of appeal. From the perusal of that vide application/letter dated 23.02.2018 filed by the assessee before us, wherein it is stated that in addition to filing the instant appeal, the assessee also filed an application under Article 24 of the India – Finland Double Taxation Avoidance Agreement (DTAA) for initiation of Mutual Agreement Procedure (MAP) before the Indian and the Finnish Competent Authorities (CA) on the following issues:

(a) Disallowance under Section 40(a)(i) of the Act due to alleged failure to withhold tax on payments made to Nokia Corp towards:

(i) Purchase of end user operating software

(ii) Purchase of finished mobile phones

(b) Transfer pricing adjustments on account of:

(i) Contract R & D activities

(ii) AMP expenditure

(iii) Excessive software purchase price

A resolution has been arrived between the Indian and Finnish CAs on abovementioned taxation issues raised before the Tribunal in the instant appeal. The said resolution under Article 24 of the India-Finland DTAA has also been accepted by the assessee vide letter dated 20.02.2018. As per Rule 44H of the Income Tax Rules, 1962 orders giving effect to the MAP resolution shall be passed by the Assessing Officer once all appeals are withdrawn by the appellant on the issues so resolved under MAP. Accordingly, the appellant herein i.e. assessee has withdrawn Ground Nos. 2 to 10 and Ground Nos. 15 and 18 in instant appeal for A.Y. 2010-11. The Original Grounds of appeal are as under:

> *"Nokia India Private Limited (hereinafter referred to as 'Appellant') objects to the order passed under section 143(3) r.w.s. I44C (13) of the*

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Income Tax Act, 1961 (hereinafter referred as 'the Act') dated .8 August 2015 (received on 29 August 2015) by the learned Deputy Commissioner of Income Tax (hereinafter referred as 'Ld. AO') pursuant to the directions of the Dispute Resolution Panel (hereinafter referred as 'Ld. DRP') for the assessment year 2010-11 on the following grounds;

1. *The order passed by the Ld. AO under section 143(3) read with section 144C of the Act is bad in law and on the facts and circumstances of the case and is liable to be set aside.*
2. *The Ld. AO and the Ld. DRP have erred in relying upon evidence collected in illegal survey and summons proceedings and erred in not relying upon the VTT report and software supply agreement.*
3. *The Ld. AO and the Ld. DRP have erred in disallowing the expenses amounting to INR 29,436,191,870 incurred by the Appellant on purchase of software from Nokia Corporation ("Nokia Corp") under Section 40(a)(i) of the Act.*
4. *The Ld. AO and the Ld. DRP have erred in disallowing the expenses amounting to INR 4360,45,22,887 incurred by the Appellant on purchase of mobile phones and accessories from Nokia Corp under Section 40(a)(i) of the Act.*
5. *The Ld. TPO, Ld. AO and the Ld. DRP have erred in making transfer pricing additions amounting to INR 470,84,65,081 to the income of the Appellant on account of Advertising and Market Promotion expenses incurred by the Appellant.*
6. *Without prejudice to the above, despite the specific directions of the Ld. DRP to exclude selling and distribution expenses while computing the quantum of adjustment, the Ld. AO / TPO have failed to appreciate that the AMP expenditure incurred by the Appellant is essentially in the nature of sales promotion expenditure, and have erred in re-calculating the adjustment without excluding such expenditure. The Ld. AO / TPO have further erred in erroneously enhancing the adjustment (from Rs. 252.43 crores to Rs. 470.84 crores).*
7. *The Ld. TPO, Ld. AO and the Ld. DRP have erred in making transfer pricing additions amounting to Rs. 97,65,63,440 on account of Contract Software Development carried out by the Appellant for its Associated Enterprises.*
8. *Without prejudice to the above, the Ld. TPO, Ld. AO and the Hon'ble DRP have erred in further enhancing the adjustment by Rs. 17,53,680 (i.e. from Rs. Rs. 97,65,63,440 to Rs. 97,83,17,120), by using State Bank of India's Prime Lending Rate as on 30th June of the relevant financial year (i.e. June 30, 2009) as interest rate, for making working capital adjustment.*
9. *The Ld. TPO, Ld. AO and the Ld. DRP have erred in disallowing a portion of the expense incurred by the Appellant amounting to INR 358,49,23,473 on purchase of software from Nokia Corp by treating it to be excessive under transfer pricing regulations.*
10. *Without prejudice to the above, the Ld. AO erred in further enhancing the adjustment proposed by the Ld. TPO by Rs. 21,07,29,467/-.*

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11. The Ld. AO and the Ld. DRP have erred making a disallowance of the trade offers amounting to INR 834,92,63,976 provided by the Appellant to its distributors (HCL Infosystems Ltd as well as other distributors) under Section 40(a)(ia) of the Act.

12. The Ld. AO and the Ld. DRP have erred in making a disallowance of Rs. 166,02,61,748 incurred by the Appellant on account of trade price protection paid to distributors as compensation for reduction in prices of handsets, and in ignoring all the evidence (including confirmations from dealers) submitted by the Appellant in this regard.

13. The Ld. AO and the Ld. DRP have erred in disallowing 25% of the total provision made by the Appellant amounting to INR 1,14,87,176 for obsolescence of inventory.

14. The Ld. AO and the Ld. DRP have erred in disallowing marketing expenditure incurred by the Appellant amounting to INR 58,56,03,845 by way of issuance of handsets on a free of cost (FOC) basis to employees, dealers and After Marketing Service Centres (AMSCs) on the ground that the same would give enduring benefit and cannot be claimed as revenue expenditure.

15. Further, the Ld. AO and the Ld. DRP have erred in disallowing expenditure incurred by the Appellant by way of issuance of FOC handsets when the Ld. TPO has already made an adjustment on account of "alleged excessive" Advertising and Market Promotion (AMP) expenses which includes the handsets issued on FOC basis and this has resulted in double disallowance of the same amount.

16. Without prejudice to the above, the Ld. AO and the Ld. DRP have erred in not allowing current year depreciation in respect of the FOC phones given to AMSCs for warranty purposes and to dealers for promotional purposes. The Ld. AO has also erred in not allowing earlier years' depreciation in respect of the FOC phones despite the DRP's direction in this regard.

17. The Ld. AO and the Ld. DRP have erred in making an addition of INR 19,52,02,050 to the income of the Appellant on account of difference in the value of sales appearing in the sales tax return and the audited financials of the Appellant.

18. The Ld. AO and the Ld. DRP have erred in disallowing the entire expense incurred by the Appellant on purchase of software under Section 40(a)(i) of the Act when a part of such expense had already been disallowed by the Ld. TPO as being excessive under transfer pricing and this has resulted in double disallowance of the same amount.

19. The Ld. AO and the Ld. DRP have erred in denying the benefit of deduction under Section 10AA of the Act to the Appellant on the non transfer pricing additions / disallowances made by them.

20. The Ld. AO has erred in not allowing the Appellant the full credit of pre-paid taxes.

21. The Ld. AO has erred in incorrectly computing the interest under Section 234B of the Act.

22. The Ld. AO has erred in levying interest under Section 234C of the Act.

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23. The Ld. AO / TPO / DRP have erred in ignoring the judicial pronouncements relied upon by the Appellant.
24. The above grounds of appeals are independent and without prejudice to one another.
25. The Appellant craves leave to add / withdraw or amend any ground of appeal at the time of hearing.

3. Thus, the Revised Grounds of appeal on account of MAP settlement are as under:-

ITA No. 5791/Del/2015 (Assessee's appeal)

"Nokia India Private Limited (hereinafter referred to as 'Appellant') objects to the order passed under section 143(3) r.w.s. I44C (13) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') dated .8 August 2015 (received on 29 August 2015) by the learned Deputy Commissioner of Income Tax (hereinafter referred as 'Ld. AO') pursuant to the directions of the Dispute Resolution Panel (hereinafter referred as 'Ld. DRP') for the assessment year 2010-11 on the following grounds;

1. The order passed by the Ld. AO under section 143(3) read with section 144C of the Act is bad in law and on the facts and circumstances of the case and is liable to be set aside.
2. The Ld. AO and the Ld. DRP have erred making a disallowance of the trade offers amounting to INR 834,92,63,976 provided by the Appellant to its distributors (HCL Info systems Ltd as well as other distributors) under Section 40(a)(ia) of the Act.
3. The Ld. AO and the Ld. DRP have erred in making a disallowance of Rs. 166,02,61,748 incurred by the Appellant on account of trade price protection paid to distributors as compensation for reduction in prices of handsets, and in ignoring all the evidence (including confirmations from dealers) submitted by the Appellant in this regard.
4. The Ld. AO and the Ld. DRP have erred in disallowing 25% of the total provision made by the Appellant amounting to INR 1,14,87,176 for obsolescence of inventory.
5. The Ld. AO and the Ld. DRP have erred in disallowing marketing expenditure incurred by the) Appellant amounting to INR 58,56,03,845 by way of issuance of handsets on a free of cost ("FOG") basis to employees, dealers and After Marketing Service Centres ("AMSCs") on the ground that the same would give enduring benefit and cannot be claimed as revenue expenditure.
6. Without prejudice to the above, the Ld. AO and the Ld. DRP have erred in not allowing current year depreciation in respect of the FOC phones given to AMSCs for warranty purposes and to dealers for promotional purposes. The Ld. AO has also erred in not allowing earlier years' depreciation in respect of the FOC phones despite the DRP's direction in this regard.

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7. The Ld. AO and the Ld. DRP have erred in making an addition of INR 19,52,02,050 to the income of the Appellant on account of difference in the value of sales appearing in the sales tax return and the audited financials of the Appellant.
8. The Ld. AO and the Ld. DRP have erred in denying the benefit of deduction under Section 1OAA of the Act to the Appellant on the non transfer pricing additions / disallowances made by them.
9. The Ld. AO has erred in not allowing the Appellant the full credit of pre-paid taxes.
10. The Ld AO has erred in incorrectly computing the interest under section 234B of the Act.
11. The Ld. AO has erred in levying interest under Section 234C of the Act.
12. The Ld AO / TPO/ DRP have erred in ignoring the judicial pronouncement relied upon by the Appellant.
13. The above grounds of appeals are independent and without prejudice to one another."

ITA No. 5845/Del/2015 (Revenue's appeal)

1. "Whether on the facts and circumstances of the ease, the Dispute Resolution Pane, (DRP) is legally justified in issuing directions to grant depreciation on the mobile ban sets valued a, Rs. 6,3,34,029/- ignoring provisions of section 32(1) of Income Tax Act, 1961 (the Act) and without considering a fact that ownership of these mobile handsets was transferred from the assessee to the dealers?
2. Whether on facts and circumstances of the case, the Dispute Resolution Panel (DRP) is legally justified in issuing directions to grant depreciation on the mobile handsets value at Rs.51,33,96,664/- issued free of cost during warranty period to After Marketing Service Centre (AMSCs) without considering the fact that value of Rs. 51,33,96,664/- was debited in P&L account as revenue expenditure and the Assessing Officer (AO) had accepted the claim of the assessee that expenditure of Rs. 51,33,96,664/- was revenue in nature?
3. Whether on facts and circumstances of the case, the Dispute Resolution Panel (DRP) is legally justified in issuing directions to grant depreciation on the mobile handsets without considering ownership of handsets and nature of expenditure?
4. *That the appellant craves to add, amend, alter or modify any of the above grounds of appeal."*

4. The assessee company was incorporated in 1995 and it is a wholly owned subsidiary of Nokia Corporation, Finland. The company is primarily engaged in the business of trading and manufacturing of mobile handsets, spare parts and accessories. In addition to this activity, the company also

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undertakes contract software development for its Associated Enterprises. Nokia India has a manufacturing unit located in Chennai from where it manufactures mobile phones for the Indian market and as well as for export purpose. Nokia Corporation and its several worldwide affiliates form a group that occupies a leadership position in the global telecom industry. It is the world's leading manufacturer and distributor of mobile telecom industry. The assessee, M/s. Nokia India Pvt. Ltd. filed its return of income on 14.10.2010 declaring a total income of Rs.694.97 crore. Subsequently, the return was revised on 30.03.2012, as the assessee increased its TDS credit to Rs.4,30,44,396/-. The return was processed u/s 143(1) of the Income Tax Act, 1961. The case was taken up for scrutiny and a notice u/s 143(2) of the Act dated 29.08.2011 was issued and served on the assessee. Further notice u/s 142(1)/143(2) along with detailed questionnaires were issued and served on the assessee. On behalf of the assessee, the Authorized Representative of the assessee appeared from time to time. Written submissions were filed by the assessee. During the course of assessment proceedings, the assessee was directed vide order dated 28.03.2014 to get its accounts audited u/s 142(2A) of the Act ("special audit") and further directed to furnish the report within a period of 120 days from the date on which the order was received by the assessee. On 25.08.2014, the assessee received the audit report and same was submitted before the Assessing Officer. The assessee's case for Assessment Year under consideration was referred to the Transfer Pricing Officer to determine the "Arm's Length Price" u/s 92CA(3) of the Income Tax Act in respect of "international transactions" entered into by the assessee during the previous year 2009-10. The TPO passed an order dated 30.01.2014. The draft assessment order was passed u/s 143(3) r.w.s. 144C(1) on 22.10.2014, wherein the assessee's income was proposed to be assessed at Rs.9787,82,85,371/- as against the returned income declared by the assessee at Rs.694,99,29,995/-. Against the draft assessment order, the assessee filed objections before the Dispute Resolution Panel on 21.11.2015. The DRP issued directions u/s 144C(5) of the Act on 31.07.2015. Accordingly, the final assessment order dated 28.08.2015 was passed in accordance with the directions of the DRP. The

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Assessing Officer made following additions:

Para Ref of the order	Particulars	Amount (in Rs.)	Amount (in Rs.)
	Returned Income		694,99,29,995/-
	Add :		
	Disallowance due to failure to deduct tax at source (TDS) on amounts credited or paid to Nokia Corporation u/s 40a(i) of the Act:		
5	A) Payment for purchase of software	2943,61,91,870/-	
6	B) Purchase of finished goods from Nokia Corp.	4360,45,22,887/-	
	Sub-total		**7304,07,14,757/-**
	Transfer Pricing order u/s 92CA of the Act:		
7	A) Advertising, Marketing and Promotional Expenditure	470,84,65,081/-	
8	B) Software Development Services	97,83,17,120/-	
9	C) Purchase of Software from Nokia Corp.	358,49,23,473/-	
	Sub Total		**927,17,05,674/-**
10	Disallowance under section 40a(ia) of the Act for failure to deduct tax at Source (TDS) :		
	A) For Trade Offers to HCL Inforsystem	562,15,92,920/-	
	B) For Trade offers to Others than HCL Infosystem	272,76,71,056/-	
	Sub total		**834,92,63,976/-**
11	Disallowance of claim of Trade Price Protection		**166,02,61,748/-**

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	expenditure		
12	Disallowance of claim of Provision for obsolescence of inventory		**114,87,176/-**
13	Disallowance of claim of Marketing expenses		**58,56,03,845/-**
14	Unexplained Sales Reversal		**19,52,02,050/-**
	Grand Total		**10006,41,69,221/-**

Thus, the assessee's total income was assessed at Rs.10006,41,69,221/-.

5. As regards Ground No.1, the Ld. AR submitted that the same is general in nature, hence Ground No.1 is dismissed.

6. As regards to Ground No. 2 relating to disallowance under section 40(a)(ia) on account of trade offers of Rs. 834,92,63,976/- provided to distributors, the Ld. AR submitted that Section 194H is not applicable as amount disallowed u/s 40 (a)(i) is in the nature of post sale discount. The Ld. AR submitted that post-sale discount is an accepted mode of providing a reduction in purchase price which is also acceptable under the indirect tax laws. Further, it has not been brought out in the assessment orders as to how raising of debit notes in the current fact pattern take away the nature of the aforesaid amounts being discounts. Thus, the Ld. AR submitted that the mere fact that discounts are extended through debit notes would not automatically convert the underlying amount involved as a commission. The mere fact that the discounts / trade offers are not forming part of agreement between HCL and NIPL cannot be a reason for applicability of withholding tax under Chapter-XVII-B of the Act on the underlying amount of trade offers, particularly where the Assessing Officer has not disputed the genuineness of the transaction. The Ld. AR relied upon the decision in case of Tupperware India (P.) Ltd. vs. CIT (1960) 39 ITR 594 (Bom.). The Ld. AR submitted that the trade scheme / offers were floated by assessee for Distributors under schemes to maximize sales in each territory and incentivize high-performing Distributors who achieve their monthly sales targets. Therefore, discount is given to the Distributors which have been

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referred by the Assessing Officer as a 'benefit'. The details of Trade offers were submitted at Pg. 199 to 203 of the Paper book Volume I by the Ld. AR. The Ld. AR further submitted that relationship between the assessee and HCL is that of principal to principal and not that of principal to agent. This fact is evident from Clause 2, 7, 8, 9, 14 and 19 of the "Agreement for the Supply of Cellular Mobile Phones" between HCL and the assessee. In the absence of a principal-agent relationship, such 'benefit' extended to the Distributors cannot partake the character of 'commission' liable for withholding tax under Section 194H of the Act. The Ld. AR relied upon the following case laws:

- Ahmedabad Stamp vendors Association vs. UOI (2002) 257 ITR 202 (Guj)
- CIT vs. Ahmedabad Stamp vendors Association (2012) 348 ITR 378 (SC) (SLP Dismissed against the HC order)
- CIT vs. Jai Drinks (P) Ltd. (2011) 336 ITR 238 (Del.)
- CIT vs. Intervet India Pvt. Ltd. (2014) 364 ITR 238 (Bom)
- CIT vs. Mother Dairy India & Anr. (2013) 358 ITR 218 (Del)
- CIT vs. United Breweries Ltd. (2016) 387 ITR 150 (Andhra Pradesh & Telangana)
- Foster's India (P) Ltd. vs ITO (2018) 117 TTJ 346 (Pune)

The Ld. AR further submitted that no payment has been made by the assessee and thus the primary condition for invoking Section 194H remains unsatisfied. In this regard, the Ld. AR relied upon the following case laws:

- Hindustan Coca Cola Beverages (P.) Ltd. Vs. CIT (2018) 402 ITR 539 (Raj.)
- Pr. CIT vs. Gujarat Narmada Valley Fertilizer And Chemicals Ltd (2019) 266 Taxman 19 (Guj.)

The Ld. AR further submitted that Section 194J is also not applicable as activities undertaken by distributors were on its own account and not as a

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service provider to the assessee. The requirement of withholding taxes under Section 194J of the Act also does not arise as tax under that Section has to be withheld on the "sum" paid to a resident inter alia for rendering of professional or technical services, and there was no payment in the instant case, as the assessee has merely offered a discount to its distributors. In this regard, the Ld. AR relied upon following case laws:

- Hindustan Coca Cola Beverages (P.) Ltd. Vs. CIT (supra)
- Pr. CIT vs. Gujarat Narmada Valley Fertilizer And Chemicals Ltd. (supra)

The Ld. AR further submitted that HCL did not provide any professional/ technical service to the assessee. Marketing activities have been undertaken by HCL on its own account to ensure that the phones (instruments) HCL buys from the assessee are sold to its customers, i.e. in order to promote its own sales.

7. The Ld. DR submitted that Trade offers are in the nature of commissions and are liable to be withhold under Section 194H of the Act. The Ld. DR submitted that discounts were given by way of debit notes which were not adjusted or mentioned in the invoice generated upon original sales made by the assessee. There is no provision in the agreement between HCL and the assessee for such discounts which was over and above the pre-agreed invoice price. The Ld. DR further submitted that HCL would be entitled to specific incentives on meeting the "Monthly Target Value" as per the approved Scheme and the pay-out is dependent on the achievement of certain percentage of targets given by the assessee to HCL. Therefore, The Ld. DR submitted that relationship between the assessee and HCL is that of principal to principal or principal to agent is not relevant. Alternatively, The Ld. DR submitted that as payments for technical service liable for withholding under Section 194J of the Act, a combination of various services has been rendered by HCL for which no consideration was payable by the assessee. Services being provided by HCL are consultancy in nature and covered by the nature of technical services defined under Explanation 2 to

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Section 9(1)(vii) of the Act and thereby subject to withholding provisions under Section 194J of the Act.

8. We have heard both the parties and perused all the relevant material available on record. It can be seen from Clause 2, 7, 8, 9, 14 and 19 of the "Agreement for the Supply of Cellular Mobile Phones" between HCL and the assessee that relationship between the assessee and HCL is that of principal to principal and not that of principal to agent. The discount which was offered to distributors is given for promotion of sales. This element cannot be treated as commission. There is absence of a principal-agent relationship and benefit extended to distributors cannot be treated as commission under Section 194H of the Act. As regards to applicability of Section 194J of the Act, the Assessing Officer has not given any reasoning or finding to the extent that there is payment for technical service liable for withholding under Section 194J. Marketing activities have been undertaken by HCL on its own. Merely making an addition under Section 194J without the actual basis for the same on part of the Assessing Officer is not just and proper. The Ld. DR's contention that discounts were given by way of debit notes and the same were not adjusted or mentioned in the invoice generated upon original sales made by the assessee, does not seem tenable after going through the invoice and the debit notes. In fact, there is clear mentioned about the discount for sales promotion. Thus, on both the account the addition made by the Assessing Officer does not sustain. Ground No. 2 is allowed.

9. As regards to Ground No. 3 relating to disallowance on account of Trade Price Protection (TPP) extended to distributors for reduction in prices of handsets INR 166,02,61,748/-, the Ld. AR submitted that trade price protection offered to distributor is motivated by commercial expediency and hence allowable under Section 37(1). The Ld. AR submitted that Trade price protection is offered to counter the change in prices of handsets by competitors, life of the model, market demand of the model etc. Same is offered to protect distributors against the probable loss that they may suffer

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due to fall in the prices of handsets. Sample copies of detailed calculation, internal approval is submitted at page 565-586 of Paper book Volume II by the Ld. AR. The Ld. AR submitted that it is not relevant whether the expenditure incurred "wholly and exclusively" for the purposes of business has been incurred in discharge of a contractually liability or is backed by a contract. The Ld. AR relied upon the decision of Tupperware India (P.) Ltd. (supra) Copies of party wise details of Trade Price Protection and confirmations received from distributors were submitted before the Assessing Officer vide submission dated 10.03.2014 and the same have been reproduced at Page 301-390 of the Paper book Volume 1 by the Ld. AR. For Example:

- HCL Infosystems Ltd break-up is at Pg. 204 and the confirmation is at Page 308.
- Eastern enterprise break-up is at Pg. 204 and the confirmation is at Page
- G.R.SARDA & SONS break-up is at Pg. 204 and the confirmation is at Page 303.
- Fusion Voice Solutions break-up is at Pg. 204 and the confirmation is at Page 302.
- Fayam Enterprises break-up is at Pg. 204 and the confirmation is at Page 301.

The Ld. AR further submitted that TPP is offered to distributors on handsets which have not been subject to trade offers/discounts. This is evidenced by specific clause in the Trade Schemes filed before the Assessing Officer vide submission dated 10.03.2014 trade scheme copies at Page 208-299 of the Paper book Volume 1. Expenditure is allowable as revenue expenditure under Section 37(1) of the Act since it has been incurred wholly and exclusively for business and same cannot be questioned by the Assessing Officer. The Ld. AR relied upon the decision in case of CIT vs. Dalmia Cements (B.) Ltd. [2002] 254 ITR 377 (Del).

10. The Ld. DR submitted that the disallowance made on the ground that the assessee failed to justify the commercial expediency of the expenditure. The basis of computation, methodology of determining the stock lying

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unsold with the dealers, details of dates/periods and model for which TPP is offered was not provided. The Ld. DR submitted that no policy pertaining to TPP was furnished. Confirmations are stereotyped confirmation which makes the same doubtful. Expense on account of TPP is not justified since it is in addition to trade offers being provided to the distributors and retailers. The Ld. DR submitted that TPP has not been debited as an expense but has been directly adjusted from total sales.

11. We have heard both the parties and perused all the relevant material available on record. It is market practice that if there is any change in prices of handsets by competitors, change in life of mobile model, change in market demand of particular model which affects the sales, the distributor is protected by the Trade Price Protection. This is actually a commercial expediency in modern day technological changes which are very fast and vast. Besides, Trade Price Protection is offered to distributors on handsets which have not been subject to trade offers/discounts. This is evidenced by specific clause in the Trade Schemes filed before the Assessing Officer vide submission dated 10.03.2014 trade scheme. In-fact, it was pointed out during the course of hearing that in Assessment Year 2008-09, even the Assessing Officer has allowed the deduction for the instant like expenditure. In Assessment Year 2008-09, the matter was remanded back to the file of the Assessing Officer, who has allowed the deduction with respect to the expenditure, where confirmations have been obtained from the recipients. In any case, so far as the instant year is concerned, we have already noted in the earlier paragraph that the requisite confirmations were filed before the Assessing Officer. Thus, this expenditure is allowable as revenue expenditure under Section 37(1) of the Act since it has been incurred wholly and exclusively for business and same cannot be questioned by the Assessing Officer. Ground No. 3 is allowed.

12. As regards to Ground No. 4 relating to disallowance of 25% of provision for obsolescence of inventory, the Ld. AR submitted that these provision is in accordance with Global company policy and has been

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consistently followed. The Ld. AR submitted that in fact the provision made on the basis of scientific formula and past experience. "Excess stock = Stock in place – Requirement for next 90 days". The Ld. AR submitted that obsolete inventory is defined as inventory which has not been consumed for last 90 days and will not be required for next 90 days. The Ld. AR submitted that provision represents 100% of non-moving inventory of spare parts/accessories of handsets which has been phased out. The Ld. AR further submitted that as these accessories are plastic or metallic parts net realizable value is zero. The Ld. AR submitted that method followed is the amount of provision created in a year is debited to the P&L and actual obsolescence is charged to such provision. The Ld. AR submitted that excess provision if any is reversed and offered to tax in year of reversal. Further, the Ld. AR submitted that disallowance made by the Assessing Officer on account of provision for obsolescence of inventory has been deleted by the DRP in AY 2011-12.

13. The Ld. DR submitted that no evidence regarding computation of provision of obsolete stock. The Ld. DR submitted that provision being in the nature of unascertained liability cannot be allowed. The Ld. DR relied upon the Assessment Order.

14. We have heard both the parties and perused all the relevant material available on record. It can be seen that in A.Ys. 2000-01, 2001-02, and 2003-04, this issue was remanded back by the Tribunal to the file of the Assessing Officer with direction to determine and decide the same afresh in respect of the cost of obsolete items with reference to net realizable value. For A.Y. 2003-04, the Hon'ble High Court upheld the findings of the Tribunal. Only in A.Y. 2011-12, the DRP has taken a different view by deleting the said additions. In the instant year, the Assessing Officer has not given any independent reasoning for making an ad-hoc disallowance of 25% of the total expenditure. Considering the history of the dispute, the matter is remanded back to the file of the Assessing Officer to decide in the light of the precedents, and keeping in mind that the direction of DRP

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in Assessment Year 2011-12 has been accepted by the Department (as pointed out before us that no appeal was filed by Revenue in Assessment Year 2011-12). Needless to say, the assessee be given opportunity of hearing by following principles of natural justice in the remanded proceedings. Ground No. 4 is partly allowed for statistical purpose.

15. As regards to Ground No. 5 relating to disallowance of marketing expenditure incurred on account of issuance of handsets on Free of Cost ('FOC') basis and Ground No. 6 relating to depreciation to be allowed if the aforesaid expenditure is held to be capital expenditure, the Ld. AR submitted that handsets were issued to AMSC's as replacement for defective handsets submitted by customer within the 12 months warranty period which cannot be repaired. Since the handsets have to be repaired, they cannot be accounted for under provision of warranty. Also, the ownership of the handsets does not lay with the assessee. Handsets were issued to Dealers as sample for display and promotional purpose on concessional or FOC basis. Ownership in such handsets does not remain with assessee. Handsets were issued to employees for official use as marketing employees interact with dealers and other service organizations such as AMSC's, etc.). Handsets were also issued to other employees for business use. Therefore, handsets were issued to AMSC's, Dealers and employees on free of cost basis entirely for the purpose of its business. This issue has been decided in favour of the assessee in AY 2003-04 by the ITAT on the ground that the said expenditure is wholly and exclusively for the purpose of business of the assessee. The decision has also been affirmed by the Hon'ble Delhi High Court.

16. The Ld. DR submitted that handsets of employees are capital assets as assessee will receive business benefits over a period of time. If ownership of the handsets is transferred to the employees, then same should be treated as perquisite eligible to withholding under section 192 of the Act. The Ld. DR submitted that handsets issued to After Marketing Service Centre's ('AMSC') cannot be claimed under marketing expenditure

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as they are warranty expense and can be claimed if documentary evidence of reconciliation is available. No evidence that handsets have been issued to ultimate customers. Handsets issued to dealers with intention to display show the intention to reap benefit over a time. Thus, only depreciation could have been claimed on the same.

17. We have heard both the parties and perused all the relevant material available on record. In the present assessment year, the assessee is engaged in manufacture, import and sale of mobile handsets. The assessee has given mobile handsets to its employees, dealers, sale personnel etc. for free of cost and thus no longer owned the said handsets. Thus, the said cost was rightly taken as business expenditure by the assessee and was rightly reduced from the inventory. This issue is decided in favour of the assessee for A.Ys. 2003-04 by the Tribunal in ITA No. 2445/Del/2010 order dated 30.01.2018 which was also affirmed by the Hon'ble High Court in ITA No. 955/2018 order dated 31.08.2018. Thus, Ground No. 5 is allowed. Since we held that it is business expenditure Ground No. 6 becomes infructuous, hence Ground No. 6 is dismissed.

18. As regards to Ground No. 7 relating to addition on account of difference in value of sales appearing in sales tax return and audited financial statements, the Ld. AR submitted that difference for various reasons like sale reversals, debit note received from customer due to warranty. Assessee reported sales of INR 25000 crores and thus no reason to underreport sales of INR 19.52 crores.

19. The Ld. DR submitted that difference between sales as per sales tax return and audited financial statements of INR 19,52,02,050 was properly disallowed by the Assessing Officer.

20. We have heard both the parties and perused all the relevant material available on record. The explanation given by the assessee was not justified through the evidences as to what extent sale reversals, debit

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notes received from the customer due to warranty prevented the assessee to given the financial statement which is less than the sales tax return. Ground No. 7 is dismissed.

21. As regards to Ground No. 8 relating to denying benefit of deduction u/s 10AA on non transfer pricing additions/disallowances, the Ld. AR submitted that the Assessing Officer is duty bound to re-compute the eligible deduction under section 10A/10AA in respect of addition/disallowance made by him.

22. The Ld. DR submitted that the assessee could not show that the disallowance pertains to the activities undertaken by it in business which is eligible for such deduction.

23. We have heard both the parties and perused all the relevant material available on record. The assessee failed to demonstrate the deduction claimed under Section 10A/10AA on non transfer pricing additions. There was no evidence produced before the Assessing Officer as to how the claim is tenable under Section 10A/10AA. Ground No. 8 is dismissed.

24. As regards to Ground No. 9, the Ld. AR submitted that the Assessing Officer has not given full credit of pre-paid taxes, so the Assessing Officer be directed to give full credit of pre-paid taxes.

25. The Ld. DR relied upon the Assessment Order.

26. We have heard both the parties and perused all the relevant material available on record. From the perusal of records, it can be seen that the proper credit of pre-paid taxes were not given by the Assessing Officer while calculating the total tax. Therefore, we direct the Assessing Officer to give proper credit of pre-paid taxes to the assessee after verifying the same. Needless to say the assessee be given opportunity of hearing by following principles of natural justice. Ground No. 9 is partly allowed for statistical purpose.

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27. As regards to Ground No. 10 and Ground No. 11, the same is consequential, hence need not be adjudicated at this stage.

28. As regards to Revenue's appeal being ITA No. 5845/DEL/2015, the only issue is relating to depreciation which was already decided by us while giving finding to Ground No. 5 and 6 in assessee's appeal hereinabove. We held that the said expenditure is business expenditure; therefore, question of depreciation does not survive. Hence, appeal of the Revenue is dismissed.

29. In result, appeal of the assessee is partly allowed for statistical purpose and appeal of the Revenue is dismissed.

Order pronounced in the Open Court on 20th FEBRUARY, 2020.

Sd/- Sd/-

(G. S. PANNU)
VICE PRESIDENT

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 20/02/2020
Priti Yadav, Sr. PS*/R. N

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

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Date of dictation	16.12.2019
Date on which the typed draft is placed before the dictating Member	17.12.2019
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	20.02.2020
Date on which the final order is uploaded on the website of ITAT	20.02.2020
Date on which the file goes to the Bench Clerk	20.02.2020
Date on which the file goes to the Head Clerk	

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