INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI K.N. CHARY, JUDICIAL MEMBER

ITA No. 5624/Del/2015
Asstt. Year: 2000-01

Nokia India Pvt. Ltd., 1st Floor, Tower A, SP Infocity, Industrial Plot No. 243, Udyog Vihar, Phase-1, Dundahera, Gurgaon, Haryana	Vs.	DCIT, Circle 13 (1) New Delhi
(Appellant)		**(Respondent)**

Assessee by:	Shri Sumit Mangal, Advocate
Department by :	Smt. Naina Sain Kapil, Sr.DR
Date of Hearing	14/11/2018
Date of pronouncement	06/12/2018

<u>O R D E R</u>

<u>PER O.P. KANT, A.M.</u>

This appeal filed by the assessee is directed against order dated 22/07/2015 passed by the Ld. Commissioner of Income-tax (Appeals)-6, Delhi [in short the Ld. CIT(A)] for assessment year 2000-01 raising following grounds:

"l. The order passed by the Learned Commissioner of Income Tax (Appeals) - 6 ("Ld.CIT(A)") under section 250 of the Income Tax Act,

1961 ("the Act") is bad in law and on the facts and circumstances of the case.

2. That, the Ld. CIT(A) has erred in law and in the facts and circumstances of the case by upholding disallowance of Rs 38,89,951 (total expenditure in respect of mobile handsets etc. issued on FOC basis net of tax depreciation @ 25 percent) made by the Learned Dy. Commissioner of Income Tax, Circle 13(1) ("Ld. AO") on account of mobile handsets issued on free of cost basis to after marketing service centres and dealers for marketing, promotional purposes and meeting warranty obligations.

3. That, the Ld. CIT(A) has erred in law and in facts of the case by upholding the disallowance of Rs. 8,93,357(disclosed as 'Commercial Gifts' under marketing expenses) made by the Ld. AO on account of mobile handsets issued to employees (amounting to Rs. 4,24,860) and dealers (amounting to Rs. 4,68,497) for purpose of business of appellant.

4. That, the Ld. CIT(A) has erred in law and in facts and circumstances of the case by ignoring the observations in the tax audit report and insisting on additional evidence from the appellant.

5. That, the Ld. CIT(A) has erred in law and in facts and circumstances of the case in not appreciating the fact that it was impossible for the appellant to adduce additional evidence after the lapse of significant amount of time.

6. That, the Ld. CIT(A) has erred in law and on the facts and circumstances of the case by upholding the interest levied by the Ld. AO under section 234B, section 234D and section 244A(3) of the Act.

7. The above grounds of appeals are independent and without prejudice to one another.

8. The appellant craves leave to add / withdraw or amend any ground of appeal at the time of hearing. ”

2. Briefly stated facts of the case as culled out from the order of the lower authorities are that the assessee, a private limited company was engaged in providing services in the nature of installation, commissioning and erection of telecommunication equipment, selling (trading) of mobile phones, networks and accessories etc. For the year under consideration, the assessee filed return of income on 30/11/2000 declaring Nil income. The return was selected for scrutiny and assessment under section 143(3) of the Income Tax Act, 1961 (in short the Act) was completed on 28/03/2003 wherein the additions/disallowances of Rs. 5,12,72,562/-were made.

3. The disallowances made included following :

(i) amount of Rs. 8,93,357/-for expenses towards mobile phones / accessories given to dealers / employees as gift and

(ii) amount of Rs. 47,07,403/-out of total expenses of Rs. 62,76,537/- under the marketing expenses / mobile handsets/accessories etc. given to dealers, employees and service centres after allowing depreciation at the rate of 25%.

4. On further appeal, the Ld. Commissioner Income Tax (Appeals) vide order dated 26/03/2004 sustained most of the additions / disallowances including above two disallowances. On further appeal, the Income Tax Appellate Tribunal (ITAT) in ITA No. 2781/Del/2004

allowed the appeal partly, however the above two disallowances were confirmed.

5. On further appeal, the Hon'ble High Court in ITA No. 841 of 2009, restored the matter on above two issues back to the Tribunal for taking into consideration the arguments advanced by the assessee. Post remand back by the Hon'ble High Court, the Tribunal in order dated 22/09/2011 restored the issue in dispute involved in above two disallowances back to the Assessing Officer for considering afresh after providing an opportunity of being heard to the assessee. In second round of proceedings, again the Assessing Officer upheld the same additions in view of the non-compliance despite opportunity given to the assessee. On further appeal, the Ld. CIT(A) upheld the disallowances. Hence, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

6. Before us, the Ld. Counsel of the assessee stated that ground Nos. 1, 7 and 8 of the appeal are being general in nature and thus, Tribunal is not required to adjudicate upon specifically. Accordingly, we dismiss the same as infructuous.

7. In ground No. 2 issue of disallowance of amount related to mobile phones provided free of cost (FOC) to dealers, employees and service centres is involved. The ground No. 3 relates to disallowance of Rs. 8,93,357/- for mobile handset given to employees/dealers as commercial gifts under marketing expenses. The ground Nos. 4 and 5 of the appeal are also related to ground No. 2 and 3. Thus in ground Nos. 2 to 5 , the two issues of disallowance of expenses in respect of mobile handset /accessories given on FOC basis to dealers/employees/service centres and mobile handsets given to dealers/employees as gift are involved.

8. On the first issue of mobile handset/accessories given on FOC basis to dealers/employees/service centres is concerned, the Ld. Counsel of the assessee submitted before us that the issue in dispute is covered by the order of the Tribunal in the case of the assessee for assessment year 2003-04, wherein the entire marketing expenditure on account of FOC handset has been allowed.

9. On the contrary, the Ld. DR distinguished the facts that in the instant case the assessee has failed to substantiate providing of the handset to the recipient with evidences and therefore the expenses cannot be allowed under section 37(1) of the Act and the Ld. CIT(A) is justified in sustaining the disallowance made by the Assessing Officer holding the expenditure as capital expenditure.

10. We have heard the rival submissions and perused the relevant material on record. The assessee in its grounds of appeal has mentioned the amount of disallowance at Rs. 38,89,951/-whereas in the original assessment order dated 28/03/2003 the disallowance is mentioned at Rs. 47,07,403/- out of the total expenses claimed of Rs. 62, 76,537/- after allowing 25% depreciation on the same. At this point of time, without commenting on the amount of disallowance, we may like to mention that before the lower authorities the assessee claimed amount written off towards mobile handset/accessories given to dealers (Rs. 50,75,733/-) ; employees (Rs. 10,89,935/-) and to service centres (Rs. 1,10,869) for business purposes like display, promotional purposes , swap handsets etc, which were marketing expenses and therefore it was a revenue expenditure. Whereas the revenue authorities held the expenditure is capital expenditure as they were the assets used for the purpose of the business of the assessee. The relevant finding of the Ld. CIT(A) in order dated 26/03/2004 in first round of the proceeding are reproduced as under :

"6.9. As regards, the handsets given by the appellant to the dealers, employees and AMCSs amounting to Rs. 51,86,602/- the AO has allowed depreciation, stating that they were its assets which were being used for the appellant's business purpose. I am in agreement with the AO. These handsets cannot be allowed to be written off in the present AY merely because the appellant has given this treatment to them in its books of accounts. Two other arguments given by the appellant are that the handsets were given to AMSCs as 'swap handsets' to be given by them to customers whose defective handsets could not be repaired, and further that sample cellular handsets are provided to dealers for display and promotional purposes either on a 'concessional' basis or on a 'free of charge' basis as this exercise enables the appellant to increase its market share in India and also build the Nokia brand in India. Both these arguments cannot be accepted. Firstly for replacement of defective handsets the appellant co. has a separate and huge provision and the amounts spent over and above that provision are claimed as current repairs. Secondly, if it is argued that the giving away of sample handsets for display and promotional purposes increases its market share and establishes its brand name, then they are certainly on capital account, since increase in market presence and establishment of brand name have long term benefits to the appellant company. Hence, it has to be held that these are items of capital nature and the appellant derives enduring benefit from the same. The AO was therefore justified in disallowing the claim of Rs. 51,86,602 as revenue expenditure, treating the same as capital in nature and allowing depreciation on the same as applicable. His action in so doing is upheld. Ground No. 6 therefore fails and is dismissed."

11. Further , In second round of proceedings before the Ld. CIT(A), the assessee filed a letter dated 21/07/2015 and submitted that in spite of the assessee's best efforts, the recipient of the mobile handset were not traceable. The Ld. CIT(A) has reproduced the contents of the letter in his order. For ready reference same are reproduced as under:

> *"This is with reference to the captioned appeal.*
>
> *In this regard, we under the instructions of and behalf of our client MIs Nokia India Private Limited ("the appellant') would like to submit that the additional evidence i.e.the relevant documents to prove that the mobile handsets distributed on a free of cost basis, could not be obtained by the appellant due to substantial efflux of time. As your office would appreciate, these details relate to a period from 15 years ago. The employees who received-these handsets have left the employment of the Appellant and are untraceable. Similarly, the distributors, dealers and repair centres who received these handsets are no longer under any contractual arrangement with the Appellant and due to their internal reorganization the relevant employees who dealt with the Appellant are no longer traceable. In spite of the Appellant's best efforts, the Appellant could only obtain-the necessary documents to prove that the appellant issues such handsets free of cost from AY 2005-06 onwards.*
>
> *However, the Appellant would still like to contend that based on the facts not in dispute and the legal arguments forwarded by the Appellant, the expenses incurred on free of cost handsets should be allowed as revenue expenditure.*

Without prejudice to the above; it is humbly requested, that the depreciation allowance (25% of expenses) granted by the Assessing Officer should be retained in case your office decides to not treat this expenditure as revenue expenditure due to lack of factual evidence.

The Appellant would like to reiterate that the aforementioned factual evidence is available from AY 2005 - 06 onwards and hence, orders passed in the captioned appeal should not act as a precedent for the years where the Appellant is able to provide factual evidence and supporting documents necessary to prove that these handsets were actually provided free of cost to the respective employees, distributors / dealers and repair centres.

In case you need any clarifications we would be happy to provide the same.

Thanking you and assuring you of our full cooperation at all times."

12. On this issue, the Ld. Counsel of the assessee has relied on the order of the Tribunal in the case of the assessee itself for assessment year 2003-04 in ITA No. 2445/Del/2010 wherein the Tribunal has observed as under:

"9.8 We have perused the submissions advanced by both the sides and the light of the records placed before us and the orders of this Tribunal in assessee's own case relied upon by both the sides. Ld. AR while contesting the issue had categorically submitted that assessee do not have bills of having been issued to its employees/dealers etc. free of cost. He thus submitted that setting aside the issue back to Ld. AO for verification would not serve any purpose.

9.9. Under such circumstances in our considered opinion we find it fit and proper to decide the issue in the light of the records placed before us, orders passed by authorities below as well as the submissions advanced by both the sides.

9.10 It is observed that assesee has shown marketing expenses to the tune of Rs. 53,31,919/- on account of mobile phone handsets issued to AM SC, dealers and employees etc. Ld. AR has sub mitted in his written submission dated 4.12.2017 that the handset given on free of cost basis to AM SC, dealers and employees are no longer owned by assessee. He it has been submitted that the title in the mobile phones is also transferred.

Undisputedly assessee is a company which is engaged in import and sale of mobile handsets. It has a wide team of dealers and sales personnel. Assessee has given free of cost Mobile to all these persons for communication amongst themselves for the business of assessee. Assessee has therefore debited the cost of these phones as marketing expenses and reduced it from its inventory. Apparently assessee do not own these phones and it has been reduced from the stock as no bill is required to b e prepared. Apparently the mobile phones will not be returned to assessee as they would be used by the recipients effective useful life. Therefore naturally the expenditure of giving phones to sales team is an expenditure incurred by assessee wholly and exclusively for the purpose of business of assessee. Assessee has also not capitalised these phones for the obvious reasons that phones are not owned by depreciation thereon. In our view as expenditure is revenue in nature, assessee is eligible for deduction under section 37(1) only. Hence the ground raised by assessee stands allowed."

13. In the above decision of the Tribunal , though the Tribunal has mentioned that the assessee did not have bills of having been issued handset to its employees/dealers etc free of cost , however there is no reference as to failure of the assessee to produce evidence in support of claim of providing the handset to dealers/employees/service centres. In the aforementioned order , The Tribunal has noted factual finding that assessee has given those handset free of cost to all these persons for communication amongst themselves for the business of the assessee. But in the instant case before us the assessee has failed even to establish that those handsets were given to those persons. The assessee has not provided any list of those persons along with name and address either before us or the lower authorities, even for verification on test check basis. The assessee has also not provided any details according to the claim that the handset were swaped under the warranty. The facts of the present case are different from the case relied upon by the Ld. Counsel of the assessee. In the case relied upon by the assessee the Tribunal has decided the matter on the premise of the fact that those mobile handset were provided to the persons, whereas in the instant case there is no evidence on record that those handset were provided to those persons. In the instant case, the assessee has simply written off the amount of handset and claimed the expenses as marketing expenses without any documentary evidence in support of its claim. For claim of any expenditure as revenue expenditure, it is primary requirement to adduce the evidence that it has been incurred for the purpose of running of the business. It was responsibility of the assessee to keep the voucher or other documents in support of its claim as matter was under litigation and the assessee cannot take plea that it is impossible to produce those documents / evidence after lapse of significant amount of time. Thus, in the instant case assessee has failed to

substantiate its claim of revenue expenditure. In view of the above facts and circumstances, the Ld. CIT(A) allowed the alternative claim of the assessee to retain the depreciation allowance granted by the Assessing Officer.

14. In our opinion, the finding of the Ld. CIT(A) on the issue in dispute is well reasoned and we do not find any error, accordingly we uphold the same.

15. On the issue of disallowance of Rs. 8,93,357/-of mobile handsets given to dealers (Rs. 4,68,497/-) and employees (Rs. 4,24,860/-), the Ld. Counsel submitted that same may also be allowed in view of the decision of the Tribunal (supra).

16. The Ld. DR on the other hand submitted that items given as gift is different from the items given for the purpose of business and same cannot be treated at par and this issue is not specifically dealt by the Tribunal and thus may not be considered as covered by the order of the Tribunal (supra).

17. We have heard submission of both the parties on the issue in dispute. In the original assessment under section 143(3) dated 28/03/2003 the assessee failed to file evidence in support of claim of commercial gifts given to employees and dealers and therefore this sum was disallowed by the Assessing Officer. The Ld. CIT(A) in first round of proceedings also upheld the action of the Assessing Officer in view of the absence of documentary evidence in support of the claim of commercial gifts. The finding of the Ld. CIT(A) is reproduced as under:

> *"6.8 I have gone through the rival submissions. As regards the handsets given as gifts, as agitated in grounds of appeal no. 4 and 5, I am in agreement with the AO that the same cannot be allowed in the absence of full and proper evidence regarding the*

same. As the Appellant has not submitted sufficient evidence regarding the same. As the appellant has not submitted sufficient evidences before the AO as repeatedly mentioned by him in the order as well as in the remand report, I am unable to now accept the same. Even otherwise once the appellant states that it has given 'gifts' to employees and dealers, it cannot say that these were for official use. A gift is given without any expectation of return from the receiver. Thus a gift given for official use is itself contradictory. Besides there is no way of ensuring that the 'gifts' are used for official use of the company so as to say that the expenditure on the same was for business expediency and hence allowable u/s 37(1). The disallowance of Rs 8,93,357 is therefore confirmed. As regards the appellant's alternate plea, taken in ground No. 5 that depreciation on the same be allowed also. I am unable to agree since the gifts given by the appellant no longer remain its assets and would have in any case been used for their own personal use rather than that of the company. Thus both the pleas cannot be accepted. Grounds of appeal no. 4 and 5 are therefore decided against the appellant and are dismissed."

18. In second round of the proceeding before the Ld. CIT(A) also the assessee expressed its inability to furnish evidence with regard to this claim and thus Ld. CIT(A) dismissed the claim of the assessee.

19. Before us the Ld. Counsel of the assessee submitted that the issue in dispute is also covered by the finding of the Tribunal (supra) for assessment year 2003-04 on the issue of handset provided on FOC basis to dealers/employees. On the perusal of the order of the Tribunal, relevant part of which we have also reproduced in earlier paragraphs no. 12 , we do not agree with the contention of the Ld. Counsel. This issue of providing gifts to dealers/employees was not

before the Tribunal (supra) and thus cannot be treated as covered by the above decision of the Tribunal. The contention of the Ld. Counsel that it was impossible for the assessee to adduce evidence after the lapse of significant amount of time, is also not correct because the assessee failed to produce those evidences before the Ld. Assessing Officer or the Ld. CIT(A) in even first round of the proceedings. In our opinion, the assessee has failed to discharge its onus to produce the evidence in support of its claim of gifts given to dealers/employees and therefore, the Ld. CIT(A) is justified in rejecting the claim of the expenses. Accordingly, we do not find any error in the order of the Ld. CIT(A) and uphold the same.

20. The ground Nos. 2 to 5 of the appeal are accordingly dismissed.

21. The ground No. 6 is consequential and thus accordingly we're not required to adjudicate upon.

22. In the result, the appeal of the assessee is dismissed.

This decision was pronounced in the Open Court on 6th December, 2018.

sd/-	sd/-
(K.N. CHARY)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 06 /12/2018

Veena /Dragon

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi