IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCE 'E', NEW DELHI

BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER

AND

SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.827, 828, 829, 830 & 831/Del./2008
(ASSESSMENT YEAR : 1997-98, 1998-1999, 1999-2000, 2000-2001, 2001-02)

Dy.Commissioner of Income Tax Central Circle -20, New Delhi	Vs.	M/s. Nokia Corporation, C/o. S.R.Botliboi & Co 2nd Floor, The Capital Court LSC Phase III, Old Palme Marg, Munirka, New Delhi
Appellant		**Respondent**

ASSESSEE BY : None
REVENUE BY : Shri Amit Katoch, Sr.DR

Date of Hearing : 16 .01.2019
Date of Order : 25 .03.2019

O R D E R

PER BENCH :

Since common question of law and facts have been raised by the Revenue by appellant Dy. Commissioner of Income Tax (hereinafter referred to as the 'Revenue') in the aforesaid appeals the same are being disposed of by way of composite order to avoid repetition of discussion.

2. Appellant, Dy. Commissioner of Income Tax (ITA no. 827-831/Del/2008) (hereinafter referred to as the Revenue) by filing the present appeal sought to set aside the impugned order dated 26.11.2007 passed by the Commissioner of Income-tax (Appeals)-XXIX, New Delhi , affirming the penalty order dated 18.01.2006 passed u/s 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act'), qua the A.Ys. 1997-98, 1998-99, 1999-2000, 2000-01 & 2001-02 respectively on the identical grounds inter alia that :-

> *"1. On the facts and circumstances of the case, Ld. CIT(A) has erred in cancelling the penalty levied by the Assessing Officer u/s 271(1)(c) of the I.T.Act, 1961 amount to Rs. 4,20,46,690/- , Rs. 3,39,09,035/- , 4,06,60,146/-, 4,71,90,528/-, & 14,60,96,736/- for A.Y. 1997-98, 1998-99, 1999-2000, 2000-01 & 2001-02 respectively.*
>
> *2. The order of the CIT(A) be set aside and that of A.O. be restored.*
>
> *3. The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal."*

3. Briefly stated that facts necessary for adjudication of the controversy at hand are : the assessee is tax resident of Finland has opted to be taxed in India under the provision of the India-Finland Double Taxation Avoidance Agreement (DTAA) for the year under assessment. Under the Provisions of tax treaty,

income derived by the appellant from supply of telecommunication equipment to Indian telecom operators qualifies as 'Business Profits', which are taxable in India only where and to the extent the same were attributable to 'Permanent Establishment' (PE) of the assessee in India, if any. On the basis of assessment framed u/s 143(3) of the Income Tax Act by holding that the assessee had a PE in India having income from supply of hardware which was held to be business income and as such taxable to the extent, the same was attributable to the PE in India. AO also held in AY 1997-98, 1998-99 that income from supply of software is in the nature of business income and taxable on the same business as income from hardware. However for AY 1999-2000 to 2001-2002 supply to software was held to be in the nature of royalty and taxable on gross basis. However, coordinate bench of Tribunal in AY 1997-98 and 1998-1999 deleted the addition made by the AO / CIT(A) for supply of software by treating it not in the nature of 'Royalty'. Consequently penalty proceedings have been initiated and penalty of Rs. 4,20,46,690/-, Rs. 3,39,09,035/-, Rs. 4,06,60,146/-, Rs. 4,71,90,528/- & 14,60,96,736/- u/s. 271(1)(c) of the Act for the A.Ys. 1997-98, 1998-99, 1999-2000, 2000-01 & 2001-02 @ 100% has been levied.

4. Assessee carried the matter before Ld. CIT(A) who has deleted the penalty levied by AO by accepting the appeals of the assessee. Feeling aggrieved the revenue has come up before the Tribunal by way of filing the present appeals.

5. We have heard the ld. DR for the revenue and gone through the order passed by the lower revenue authorities.

6. Undisputedly special bench consecuted by the Tribunal vide its order dated 22.06.2005 in ITA no. 1963 & 1964/Del/2001 in assessee's own case reported as [2005] 95 ITD 269 (Delhi) (SB) decided the issue of characterization of revenue's earned from supply of embedded software as 'royalty' and the splitting up of the revenue from supply of equipment between hardware and software in favour of the assessee and the decision rendered by special bench has been confirmed by Hon'ble Delhi High Court in DIT vs. Nokia Networks OY [2013] 358 ITR 259 (Delhi). It is also not in dispute that qua certain issues (relating to existence of PE / business connection, resulting attribution of income and vendor financing) were remanded back to be decided by the Special Bench and said issue was accordingly decided by the Special Bench vide order dated 05.06.2018 reported as [2018] 65 ITR (T) 23 (Delhi-Trib.) (SB). It is also not in dispute that the lower

revenue authorities have relied upon the order passed in A.Y. 1997-98 and 1998-99. However, now the issue has been decided in favour of the assessee by the Special Bench vide order dated 05.06.2018 reported as (2018) 65 ITR (T) 23 (Delhi-Trib.) (SB), Order dated 22.06.2005 cited as [2005] 95 ITD 269 (Delhi) (SB)

ITA NO. 827 & 828 / DEL. / 2008 FOR A.Y. 1997-98 & 1998-99

7. When undisputedly quantum appeal of the assessees qua A.Y. 1997-98, 1998-99 have been decided in favour of the assessee as the assessee is not found as assessee's Indian subsidiary does not found to constitute a PE in India ; and that income from supply of software is not taxable as royalty and these findings have been confirmed by Hon'ble High Court, a penalty levied on the assessee is not sustainable in the eyes of law.

8. Hon'ble Jurisdictional High Court in case cited **as Commissioner of Income Tax Vs. Nokia India Pvt. Ltd. [2012] 343 ITR 434 (Delhi)** held that when the quantum proceedings had been decided in favour of the assessee penalty levied u/s 271(1)(c) is not sustainable. So, we are of the considered view that when very basis of levying the penalty i.e. addition made in the quantum proceedings, have been deleted / decided in favour of the assessee by the Tribunal as well as

Hon'ble High Court the penalty levied u/s 271(1)(c) is not sustainable having been become infructuous. So, revenue appeal no. 827 & 828/Del/2008 for A.Y. 1997-98 are hereby dismissed.

829, 830 & 831/Del/2008 for A.Y. 1999-2000, 2000-01, 2001-02

9. The Ld. CIT(A) deleted the penalty levied u/s 271(1)(c) on merit by holding that AO has failed to point out any facts or material on the basis of which he had arrived at the conclusion that assessee had either concealed any particulars of income or had furnished inaccurate particulars of income, thus, failed to discharge the primary onus as required u/s 271(1)(c). We are of the considered view that factual findings of the ld. CIT(A) in this regard are well reasoned and do not call for any interference.

10. At the same time, we are of the considered view that when two views were possible, in case assessee adopted a favourable view at the time of filing of return, the penalty cannot be levied u/s 271(1)(c). Moreover, when undisputedly it being a debatable issue.

11. Undisputedly in A.Y. 1999-2000, 2000-2001 and 2001-02 lower revenue authorities have relied upon decision rendered by the revenue authorities in A.Y. 1997-98 and 1998-99 wherein issues on the basis of which penalty has been levied have been decided in favour of the assessee, inter alia, that Liaison Office

do not constitute assessee's PE in India ; that assessee's Indian subsidiary does not constitute a PE in India; and that the income from supply of software is not taxable as royalty. It is also not in dispute that assessee's case in A.Y. 1999-2000, 2000-01 & 2001-02 is mirror image of A.Y. 1997-98 & 1998-99 relied upon by the revenue authorities and same have also been decided in favour of the assessee in the light of decision rendered by Special Bench in assessee's own case for A.Y. 1997-98 & 1998-98 dated 05.06.2018 reported as (2018) 65 ITR (T) 23 (Delhi-Trib.) (SB), Order dated 22.06.2005 cited as [2005] 95 ITD 269 (Delhi) (SB)

12. Hon'ble Jurisdictional High Court in case cited as (**2012) 349 ITR 477 (Delhi) Commissioner of Income Tax Vs. Pradeep Agencies Joint Venture** that confirmed the findings recorded by Tribunal that where two views were possible and matter was referred to special bench penalty has been rightly deleted by returning following findings :

> *"8. We have also heard the learned counsel for the assessee who submitted that the only point that has to be examined is whether the Tribunal was right in deleting the penalty on the ground that two views were possible when the assessee filed the nil return. He submitted that the best proof of this*

submission is that the Tribunal itself, when it was considering the quantum appeal in respect of the assessment year 2003-04, was in doubt as to which of the two views were possible. It is for this reason that the matter had been referred to the Special Bench. The learned counsel for the revenue sought to counter the submission by stating that the referral order was passed on 04.04.2007 which is much after the date on which the return was filed and on that date there was no doubt at all with regard to the position in law.

9. Having considered the arguments advanced by the counsel for the parties, we are of the view that the submissions made by the learned counsel for the assessee cannot be brushed aside that there were two views possible inasmuch as the Tribunal itself was in doubt as to which of the two views were to be preferred. And it is for this very reason that the Tribunal had passed the referral order dated 04.04.2007 requiring the matter to be considered by a Special Bench. The fact that the referral order came into being much after the returns were filed would be of no help to the revenue inasmuch as all that the referral order indicates is that a doubt existed with regard to which of the views were possible. It cannot be said that prior to that date, the assessee could not have had such a doubt in its mind when it had indeed filed its return.

10. Therefore, we see no reason to disagree with the Income Tax Appellate Tribunal in its conclusion with regard to the penalty proceedings and in particular in its order deleting the penalty imposed on the assessee. We feel that no

substantial question of law arises for our consideration inasmuch as it is a settled principal of law that where two views are possible a penalty cannot be imposed on the assessee."

13. In view of what has been discussed above, finding no illegality or perversity, aforesaid appeals filed by the revenue are dismissed.

Order pronounced in open court on this 25th March, 2019.

Sd/-	**Sd/-**
(R.K.PANDA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 25/03/ 2019
BR

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A)-XXVI, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI

Date of dictation	12.03.2019
Date on which the typed draft is placed before the dictating Member	13.03.2019
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	
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	