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.2135, 2136, 2137/Del./2005
A.Y. 1999-2000, 2000-01, 2001-02
ITA NO. 1004, 1005/Del/2010
A. Y. : 2002-03, 2003-04

Nokia Corporation (Formerly Nokia Networks OY) C/o. S.R.Batliboi & Co., 2nd Floor, The Capital Court PAN : AABCN3748E **Appellant**	Vs.	ACIT Circle-2(1) International Taxation, Drum Shaped Building New Delhi **Respondent**

ITA NO. 2286, 2287, 2288/Del./ 2005
A.Y. 1999-2000, 2000-01, 2001-02
ITA NO. 1234, 1235/Del./2010
A.Y. 2002-03, 2003-04

ADIT Circle-2(1), Intl. Taxation Taxation New Delhi	Vs.	M/s. Nokia Corporation (Formerly Nokia Networks OY) C/o. S.R.Batliboi & Co., 2nd Floor, The Capital Court

ASSESSEE BY : Sh. Deepak Chopra, Adv.
Sh. Amit Srivastava, Adv.,
Sh. Ankul Goyal, Adv.
REVENUE BY : Sh. G.K.Dhatt, CIT(DR)
Date of Hearing : 07 .03.2019
Date of Order : 29.03.2019

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common question of law and facts have been raised in the aforesaid appeals and cross appeals, the same are being disposed of by way of composite orders to avoid the repetition of discussion.

2. Appellant, M/s. Nokia Corporation (Formerly Nokia Network OY) (hereinafter referred to as the assessee) by filing the aforesaid appeal sought to set aside the composite impugned order dated 25.02.2005 for A.Y. 1999-2000, 2001-02 and composite order dated 29.12.2009 for A.Y. 2002-03, 2003-04 passed by Ld. CIT(A) on identical grounds, except difference in figures, inter alia that :

"1. Based on facts and circumstances of the case and in law. the learned Commissioner of Income Tax (Appeals) -XXIX ("CIT-A") has erred:

(a) *in upholding the Assessing officer's contention that income earned by the appellant from supply of telecommunications hardware to Indian telecom operators is taxable in India on the basis that the appellant has a Permanent Establishment ("PE") in India under the provisions of Article 5 of the Double Taxation Avoidance Agreement between India and Finland ("India-Finland tax treaty");*

(b) *in upholding the Assessing officer's contention that income earned by the appellant from supply of software to Indian telecom operators is taxable in India on the basis that such income is in the nature of 'royalty', both under the*

provisions of the Income-tax Act, 1961 ('Act') and Article 13 of the India-Finland tax treaty;

(c) *In without prejudice-estimating income from supply of hardware at 18.68 percent of the estimated revenues from supply of hardware (being 70 percent of the total supply revenues);*

(d) *in without prejudice, attributing 50 percent of estimated income from supply of hardware, to activities in India;*

(e) *in without prejudice, not considering the India specific profit and loss account furnished by the appellant, which reflected losses incurred by the appellant from supplies to customers in India;*

(f) *in without prejudice, taxing the alleged 'royalty' income from supply of software on a gross basis;*

(g) *in without prejudice attributing 30 percent of the payments made by the appellant to Nokia India Private Limited ("Nokia India") in pursuance of their "Agreement for Services", to the alleged 'royalty' income from supply of software and applying the provisions of section 44D of the Act to such payments; and*

(h) *in upholding the assessment order of the Assessing officer to the extent grounds taken before him are not accepted or not expressly commented upon in the appellate order.*

- *Acceptance test is carried out by the appellant and subsequent to it, the ownership in the equipment is passed on to the customer.*

- *After sales and support services are carried out by the appellant through its employees.*

- *The purchase order with Bharti Airtel was concluded by Nokia India on behalf of the appellant.*

- *The purchase orders of Hutchison Max Telecom Limited were concluded by Nokia India on behalf of the appellant.*

- *The appellant did not furnish copies of the contracts with Skycell Communications, BPL Telecom Ltd. ONGC, Supreme, Comtel Dedicated Network, Bharti Air Tel and Hutchison Max Direct Export, even though the appellant had submitted before the Assessing officer that supplies to these customers were made on the basis of purchase orders only. The appellant on its own volition had furnished sample purchase orders from some of these customers and no request was made by the Assessing offer for furnishing purchase orders from the remaining customers. Further, the said allegation has been even with respect to Indian parties (Bharti Air Tel, Comtel Dedicated Networks and Hutchison Max Direct Export) to whom no supplies were made during the previous year relevant to the subject assessment year.*

- *The liaison office was fully operational during the*

financial year relevant to the subject assessment year.

- *The appellant has manipulated and forged its contract with Tata Cellular Limited, without giving an opportunity to the appellant to clarify the facts and contest this baseless allegation.*

- *The appellant's equipment supply contract with Sterling Cellular Limited has been signed by Heide Hamalinen as an employee of Nokia India.*

- *The appellant's equipment supply contract with BPL US West Cellular Limited (signed on October 31, 1998) has been signed by Olli Oittinen as an employee of Nokia India.*

- *The appellant is responsible for installation and acceptance in respect of equipment supply contract with BPL US West Cellular Limited dated October 31. 1998.*

- *Reliance has been placed on the equipment supply contracts/ purchase orders of the following customers to whom no supplies have been made by the appellant during the financial year relevant to the subject assessment year:*

  - *Equipment supply contract with Sterling Cellular Limited dated April 20, 1999.*

  - *Letter of intent issued by Bharti Airtel; and*

  - *Purchase orders raised by Hutch Max.*

(c) Based on facts and circumstances of the case and in law, the learned CIT-A has erred in observing as follows:

- *Installation project or supervisory activities of the appellant continued in India for more than six months.*
- *The appellant has assigned the installation project to the Indian subsidiary, but the main responsibility for the project continues to be of the appellant.*
- *Nokia India is only conducting the business of the appellant in India (and not for any other concern) and therefore Nokia India is not acting in the ordinary course of its business.*
- *Some of the equipment supply contracts were signed by employees of Nokia India.*
- *The liaison office and office of Nokia India are fixed place of business of the appellant from which the appellant's business activities are carried out in India.*
- *The appellant's office in India is creating the demand, attending meetings with customers/ suppliers, following and negotiating contract and finalising and concluding contracts on regular and continuous basis. Such activities are not preparatory or auxiliary in nature and therefore not excluded from the purview of constituting PE under Article 5(4)(e) of the India-Finland tax treaty.*
- *In case of offshore supplies undertaken by the appellant*

in India, certain operations are inextricably interlinked in India and therefore income has accrued to the appellant from offshore supply of equipment.

- *The supply of equipment was not merely supply simplicter but it was inextricably linked and interwoven with the total project of the GSM. All equipment were tailored made for Indian conditions and as per requirement of the customer in India.*

- *The learned assessing officer is justified in rejecting the audited India specific accounts filed by the appellant during the course of the assessment proceedings since:*

  - *The appellant has not maintained separate books of accounts for Indian operations;*

  - *No vouchers were produced before the learned assessing officer for verification;*

  - *The justification and basis of claim of various expenses in the audited India specific accounts is not clearly explained; and*

  - *The evidence and nexus that all the expenses are relatable to Indian business is neither established nor proved.*

(d) Accepting the additional evidence produced by the appellant during the course of appellate proceedings but not expressly dealing with the same.

3. *Based on facts and circumstances of the case and in law, the learned CIT-A has erred in upholding the levy of interest under section 234B of the Act.*

4. *Based on facts and circumstances of the case and in law, the order passed by the learned CIT-A is bad in law and void ab-initio.*

5. *Based on facts and circumstances of the case and in law, the order passed by the learned CIT-A violates rules of natural justice.*

The appellant prays for leave to add, alter, amend or vary from the grounds of appeal at or before the time of hearing."

(Grounds of appeal no. 2135 for A.Y. 1999-2000 taken for the sake of brevity.)

3. Appellant, Assistant Director of Income Tax (hereinafter referred to as the revenue by filing the present appeal for A.Y. 2002-03 and A.Y. 2003-04 sought to set aside the impugned composite order dated 29.12.2009 passed by Ld. CIT(A) on the identical grounds, inter alia, that

"1. On the facts and circumstances of the case, Ld. CIT(A) has erred in attributing only 20% of profits to activity of the PE in India for supply of Hardware.

2. On the facts and circumstances of the case, Ld. CIT(A) has erred in attributing only 20% of profits to

activity of the PE in India for supply of Operating Systems Software.

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."

4. Appellant, Assistant Director of Income Tax (hereinafter referred to as the revenue by filing the present appeal for A.Y. 1999-2000, A.Y 2000-01 and A.Y. 2001-02 sought to set aside the impugned composite order dated 25.02.2005 passed by Ld. CIT(A)-XXIX on the identical grounds, inter alia, that

"On the facts & in the circumstances of the case, the learned CIT(A) has erred in :-

1. Directing the AO to compute the profit pertaining to sale of hardware on the basis of 70% of the total receipts and that pertaining to sale of software on the basis of 30% of the total receipts as against 60-40 ratio applied by the AO.

2. Holding that only 50% of the profit from the supply of hardware is attributable to PE in India.

3. The appellant prays for leave to add, alter, amend or vary from the grounds of appeal at or before the time of hearing."

5. Briefly stated common facts necessary for adjudication of the controversy at hand in all the aforesaid appeals are : assessee

company being incorporated under the laws of Finland is into business of designing and supplying hardware & software product for setting up GSM Cellular Radio Telephone System (GSM). Assessee has supplied hardware & software components of products as per the supply contracts to the customers in India (Telecom Operator). During the assessment year1999-2000, assessee claimed to have supplied hardware and software as under :-

Name of the customer	***Total Supply Amount (US$)***
Tata Communication	***32,88,342***
BPL Cellular	***1,43,68,828***
Fascel Limited	***21,64,348***
Skycell Communication Limited	***4,14,358***
BPL Telecom Ltd.	***1,47,660***
Oil and Natural Gas Corporation Limited	***9,500***
Supreme	***8,14,790***
Total Receipts	***2,12,63,491***

6. In subsequent year i.e. A.Y. 1999-2000, A.Y. 2000-01, A.Y. 2001-02, A.Y. 2002-03 & 2003-04, assessee claimed to have supplied hardware and software to the customer / Telecom Operator to the tune of Rs. 200,86,276/-, Rs. 4,09,16,276/-, Rs. 39,923,856/- & Rs.4,51,87,984/- respectively.

7. Assessing Officer by admitting the facts and legal proposition that present appeals are identical to A.Y. 1997-98 & A.Y. 1998-99 followed the assessment order passed for A.Y. 1997-98 & A.Y. 1998-99. So, the AO by relying upon the order passed by Ld. CIT(A) for earlier year proceeded to hold that assessee had a permanent establishment in the form of Nokia India and supply of software is attributable to that PE and further supply of software is to be taxed under the head "royalty". Assessing Officer, however, not followed the decision of CIT(A) on the point of attribution as the decision of CIT(A) to that extent was under challenge.

8. Assessee carried the matter before Ld. CIT(A) by way of filing the appeals who by following order passed by the Ld. CIT(A) in A.Y. 1997-98 and 1998-99, upheld the assessment order to the extent that assessee had carried its business in India through its subsidiary and liaison office on continuous and on regular basis which clearly shows that the assessee had business connection in India as per Section 9(1)(i) of the Act, thus, had PE as per Article 5 of the treaty.

9. Ld. CIT(A) also upheld the findings of the assessing officer that consideration which has been received by the assessee for the license of software in India is clearly liable to be taxed as royalty

under the DTAA as well as under Income Tax Act. However, directed the AO to apply net rate of 30% where contract was executed before May 31, 1997 and 20% where contracts were executed after 31st May, 1997 in A.Y. 1999-2000, 2000-01 by partly allowing the appeals. Feeling aggrieved assessee as well as revenue have come up before the Tribunal by way of filing the cross appeals.

10. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

11. Applications moved by Ld. DR raising additional grounds is dismissed having not been pressed during the course of arguments.

Assessee's appeal no. 2135, 2136, 2137/Del/2005 & 1004, 1005/Del/2010 For A.Y. 1999-2000, 2000-01, 2001-02, 2002-03 & 2003-04 respectively

12. Undisputedly, initially no return of income was filed by the assessee, but pursuant to the notice issued u/s 148 of the Act, assessee filed its return declaring nil income and thereafter notice u/s 143(2) was issued and AO assessed the total income of the assessee from the supply of hardware at USD 3879226 and income

from the supply of USD 8505397 on which AO computed the total tax at Rs. 18,66,08,995/- (aforesaid figures are taken from assessment year 1999-2000 for disposal of all the appeals as facts and ground raised are identical). It is also not in dispute that order passed by Ld. CIT(A) for A.Y. 1997-98 and 1998-99 have been decided by the special bench of the Tribunal vide order dated 22.06.2005 and order dated 05.06.2018 reported as (2005) 95 ITD 269 (Delhi) (Special Bench) and (2018) 65 ITR (T 23) (Delhi Trib.) (SB) (hereinafter referred to as SB-I & SB-II) respectively. It is also not in dispute that order dated 22.06.2005 passed by the special bench has been confirmed by Hon'ble Delhi High Court to the limited extent.

13. In the backdrop of the aforesaid facts and circumstances of the case, the Ld. AR for the assessee contended that identical issue common in all the aforesaid appeals that "as to whether the assessee is having a Permanent Establishment (PE) in India", has already been decided in favour of the assessee by the special bench and present appeals are covered to that extent.

14. At the very outset the Ld. DR for the revenue contended that without prejudice to the other grounds raised by the assessee, the

revenue department hereby accepts that ground no. 2 is not being pressed in view of the findings returned by special bench of the Tribunal vide order dated 05.06.2018 for A.Y. 1997-98, 1998-99. However, he has vehemently contested ground no. 1 raised by assessee.

15. However, on the other hand the Ld. DR for the revenue in order to repel the argument addressed by Ld. AR for the assessee that facts of appeal for AY 1999-2000, 2000-01 and 2001-02 are distinguishable from A.Y. 1997-98 and A.Y. 1998-99 and as such orders dated 22.06.2005 and 05.06.2008 passed by the Tribunal are not applicable to the present appeals and also filed written submissions which are made part of the appeal files and contended, inter alia, that in the present appeals AO as well as Ld. CIT(A) have categorically held that there exists a fixed placed PE in the form of the premises of the Indian subsidiary which was at the disposal of the assessee, from which the assessee was carrying on its business; that Ld. CIT(A) has held that assessee is having PE under Article 5(2) of the DTAA in the form of "Place of Management", "Office" and "Sales Outlet' as well as under Article 5(3) in the form of "Installation & Supervisory PE" and all

these forms of PE do not require a "Geographically Fixed Place" but the activities associated also constitute the "core business" of the assessee. Relevant extract of the written submissions made by Ld. DR for the revenue is as under :-

> *"Mr. Simon Piers Beresford Wylie, MD, NIPL who, in his statement under oath has confirmed as under –*
> *"Q.10. What all facilities were provided by Nokia Ltd. to the expats coming for marketing and signing the cont. on behalf of Nokia Ltd. Finland?*
> *Ans. Administrative support like office support, cars, telephone etc. is provided by Nokia Limited.*
> **********
> *Q15. Are there separate offices of Nokia Finland OY and Nokia Ltd. Since 1995?*
> *Ans. Always the offices have been the same."*

16. When we examine assessment orders as well as order passed by Ld. CIT(A) for A.Y. 1999-2000 to A.Y. 2003-04, there are categoric findings that both AO as well as the Ld. CIT(A) have passed the orders under challenge by following orer of A.Y. 1997-98 and 1998-99, subsequently, set aside by "Special Bench" of the Tribunal. For ready perusal findings of the AO following the order passed in A.Y. 1997-98, 1998-99, returned in A.Y. 1999-2000 to 2001-02 are extracted as under –

" 2.2 Before getting into the details, it is pertinent to not that all the facts and legal proposition has been discussed at length in the assessment orders of A. Y. 1997-98, and A.Y. 1998-99. Complete reliance is placed on the orders of the those years passed by my predecessor. The same orders were subject matter of appeal and the Hon'ble CIT(A) XXIX has upheld the view that the hardware is taxable in India and supply of software is to be taxed under the head royalty. To this extent, reliance is also placed on the orders of CIT(A), that there is a permanent establishment in India and supply of software is attributable to that permanent establishment and further supply of software is to be taxed under the head "royalty". The Department has not agreed to the decision of the CIT(A) on the point of view of attribution. In order to appreciate the correct transaction of the case and genesis of the income to the assessee, it is pertinent to understand how the whole business is carried out.

5.1 So for as the taxability of the consideration for licensing of various software is concerned, I rely on the orders passed by my predecessor that the same is in the nature of royalty."

17. Similarly Ld. CIT(A) while passing the impugned order for A.Y. 1999-2000, 2000-01, 2001-02 also categorically relied upon

order passed by his predecessor in A.Y. 1997-98 and 1998-99, relevant extract thereof is extracted as under –

> *"4. I have considered the submissions of the appellant and facts of the case carefully. In the appellant's case on almost similar facts my ld. Predecessor for A.Ys. 97-98 and 98-99 has held that the appellant had PE in India. After considering all the submissions of the appellant and facts of the case my predecessor has held as under :*
>
> *"All the facts and circumstances suggest that the assessee carried out business in India, which was not merely preparatory or incidental in nature. The designing of GSM is not the incidental activity, without which the business of the assessee could have been carried on. In fact it was the heart of the activity but for which even the requirements of Indian operators could not have been listed out. The requirements were worked out on the basis of design and thereafter the equipment was supplied and the software was licensed. The assessee always had the presence of its office or the office of Indian company to aid it in its activities. Thus, it is not a bald case of mere sales. Many more activities were required and done for setting up GSM for Indian operators. Accordingly, it is held that income accrued directly to the appellant u/s 5(2), and it also can be deemed that*

income accrued to it through its office in India or the office of IC in India."

It was also held by the CIT(A) that in the above assessment years that under the treaty the appellant had a PE in India through office of the Indian company. He has observed that in the context of these facts it will be difficult to hold that the appellant and the Indian company acted independently in so far as their business are concerned and it will more appropriate to hold that IC merely acted at the instructions of the assessee in respect of installation and marketing contracts. It was also observed by the CIT(A) that we have also seen that appellant himself has taken up the responsibility on behalf of the subsidiary company and has gone to the extent of holding out that its equity will not be diluted below 51% till installation contract is completed, except with written permission of the Indian operator.

4.7 Considering the above facts, circumstances and legal position in all the three assessment years it is established that the appellant had carried its business in India through its subsidiary and LO on continuous and on regular basis which clearly shows that th appellant had business connection in India as per section 9(1) of the IT act and also had PE as per Article 5 of the treaty. Therefore, following the judgment of my predecessor for A.Ys. 97-98 & 98-99 and considering the arguments of the A.O., judgment

of IHH (supra) and Sutron Corporation (supra) as mentioned above, I also hold that the appellant's activities were not auxiliary and preparatory in nature but it constituted a PE in India. Therefore, its income was liable to be taxed as per Article 7 of the treaty. Accordingly this ground of the appellant is dismissed.

5.4 I have considered the submissions of the appellant, remand report of AO and facts of the case carefully. The appellant's submission that the AO should have accepted the computation of Indian PE which has been given by Pricewaterhose Coopers Qy, is not justified because the appellant has not maintained any books of accounts separately for Indian operations. Similarly, none of the vouchers were produced before the AO for any verification. The justification and basis of claim of various expenses in the certified accounts is not clearly explained. The evidence and nexus that all the expenses are relatable to Indian business is neither established nor proved. <u>These accounts were not reliable. Similar view was also taken by my predecessor for A.Y. 1997-98 and 1998-99. Therefore, considering these facts, I also hold that the A.O. was justified in rejecting certified accounts. In earlier years the bifurcation of total receipts in the software and hardware was taken as 70% and 30%</u>. During the years under appeals some of the contracts

are also continuing contracts and some are fresh purchase orders. The AO has not examined all the bills of supplies to examine the exact appropriation towards the hardware and software. The AO has simply mentioned that the appellant during these years have been making supplies to establish the telecom operators in continuation with their earlier contracts when main and basic equipments were already supplied and the assessee has mainly supplying in the years under consideration is for software for up gradation of system for enhancing the capacity and hardware for expansion of the existing GSM networks. Therefore, he presumed that in these years components of the software will be more than the hardware. However, the AO has not given any detail as to how he has arrived n this bifurcation from the departure of earlier years. On the other hand, the appellant has argued that in case of other telecom vendors software has been considered as 10 to 25% of the total supply. The AO has not made any attempt either in the assessment order or in the remand report to explain the basis of arriving at the percentage split in the case of other telecom vendors nor has he attempt to distringuished the appellant's case from that of other telecom vendors wherein lower percentage has been considered towards software supply. As the AO has not given the analysis and details of various purchase orders which could have

substantiated the estimates made by the AO, the estimate made by the AO is totally arbitrary and based on presumptions only unsubstantiated by any facts on records. Therefore, following the orders of earlier years i.e. 97-98 and 98-99, I estimate that in the total supplies, the component of hardware is 70% and software is 30%. Therefore, AO is directed to recomputed the income on the basis of earlier years ratio of 70% to 30%.

6. In earlier years my predecessor has attributed about 50% of the total net profit to the Indian operations. Considering the facts of the case and submission of the appellant and relying on the judgment of my predecessor for the asstt. Year 1997-98 & 1998-99 I also direct the AO to attribute 50% of the net income as computed in para 5.5 from the sale of hardware as the net income of the appellant attributable to Indian PE. Therefore, this ground is partly allowed."

18. The Ld. CIT(A) following the order passed by his predecessors for A.Y. 1997-98 upheld the order passed by AO with certain modification, inter alia, that hardware and software split ratio was modified from 60:40 to 70:30 and also directed the AO to apply tax rate of 20% on supply of software wherever the main supply order was signed after 31.04.1997 ; directed the AO to allow

70% of the actual expenditure incurred by the assessee in respect of services rendered by Nokia India in place of estimated figure of 4%; and that directed the AO to attribute only 50% of the net income to the assessee's PE in India.

19. Now, we would examine the argument addressed by Ld. DR for the revenue that facts of A.Y. 1999-2000 to 2001-02 are different from A.Y. 1997-98 in the backdrop of the aforesaid facts and circumstances of the case.

20. Undisputedly the basic issue to be decided in all the appeals is "as to whether there is fix place Permanent Establishment (PE) qua Nokia India Pvt. Ltd.".

21. Ld. DR for the revenue drew our attention to para 4.10 at page 12 of the assessment order and para 4.1 at page 6 of the impugned order passed by Ld. CIT(A). AO after discussing the relevant provisions of Indo-Finland treaty reached the conclusion that :

> *"From the above said facts, which have been discussed in the earlier paras of this order and the findings from the contracts and documents submitted by the assessee, it had a fixed placed of business in the form of Nokia's India office and the so called liaison office, both of which were operating from the*

same premises. The CIT(A) has already upheld that the assessee had a permanent establishment in the form of Nokia India."

22. The Ld. CIT(A) confirmed the finding returned by the AO by returning following findings :-

"4.1 In all the years under appeal, the appellant has carried on its business in systematic and continuous manner in India. Simply assigning some of the work of installation to Nokia India (wos) does not mean that the appellant was not carrying on core activities in India. It is the appellant who has assigned some installation project to the Indian subsidiary but the main responsibility is of the appellant only. The installation work is only a part of total project undertaken by the appellant. Nokia India is only conducting the business of the appellant and not of any other concern. Therefore, it is not undertaking the work in ordinary cause of its business. The installation work is inextricably linked with the total project of designing, supplying, installation, operations, after sales service and warranty. As per the annexure to the assessment order of A.Y. 1999-00 and 2000-2001 it is clear that in the contract with BPL US West, the responsibility of the appellant are well defined in all the activities of the project. In fact the overall responsibility was of the appellant. Besides this the A.O. has discussed various projects in detail and has mentioned that some contracts were signed by the employees of Nokia India also. The existence of PE is governed by the Article 5 of

the DTAA. The appellant is undertaking various projects in India and making supplies continuously for several years. The activities are being done continuously in India on regular basis. The word 'Permanent Establishment' postulates the existence of substantial element of an enduring or permanent nature of foreign enterprise in another country which can be attributed to a fixed place of business in that country. It should be of such a nature that it would amount to virtual projection of the foreign enterprise of one country into the soil of another country. Article 5(1) of DTAA defines the term PE as a fixed place of business through which the business of an enterprise is wholly or partly carried on…… The office of the appellant, the office of Nokia India are fixed place of business from which the appellant's business activities are being carried out in India. These offices are fixed place and hence a productive character i.e. contribute to the profits of the enterprise. The mere fact that an enterprise has fixed place which is used for business activities is sufficient to constitute a place of business. So even if business is being carried on partly through the fixed place it will be a PE within the meaning of Article 5 of DTAA. From various facts on records it also emerges that In India the appellant has place of management, an office as well as premises were used as sales outlet or for receiving orders. Therefore, as per provisions of Article 5(2) also the appellant had PE in India. Similarly the installation project or Supervising Activity has continued for more

than six months. It is immaterial whether employees stayed here or not but the supervisory activity in connection with Installation Project has continued for more than six months. It is the continuance of activity which is the required condition and not the stay of employees. As the installation and supervisory activity has been continued for more than the prescribed period as per treaty, the appellant also had PE as per provisions of article 5(3) of the treaty.

23. Referring to the aforesaid findings of AO as well as Ld. CIT(A) the Ld. DR contended that AO as well as the Ld. CIT(A) have returned categoric findings that their existing a fixed place PE in the form of premises of Indian Subsidiary which was at the disposal of assessee and from which the assessee was carrying on its business. So the office of Nokia India Pvt. Ltd. (NIPL) are fixed place business from which the assessee's business activities were being carried out in India under article 5(1), 5(2) and 5(3) of the DTAA. The Ld. DR for the revenue also contended that the office premises of NIPL were at the disposal of assessee and relied upon statement of Mr. Simon Piers Beresford Wylie, MD, NIPL.

24. Now, we would examine the contention raised by Ld. DR in view of findings returned by Special Bench in assessee's own case for AY 1997-98 in SB-II, whereby as per directions of the Hon'ble

High Court following issues have been examined available at page 18 paper book

> *"(a) Whether the subsidiary of the assessee (Nokia India Pvt. Ltd.) would provide business connection? Or whether the same constitutes a permanent establishment of assessee in India?*
> *(b) And if the answer to above question is found to be affirmative, then whether any attributes of profits on account of signing, network planning and negotiation of offshore supply contracts in India could be attributed to such business connection/permanent establishment.*
> *(c) Whether notional interest on delayed consideration of supply of equipment and licensing of software taxable in the hands of assessee as interest from vendor financing."*

25. Answers to the aforesaid questions given by the SB-II are extracted as under :-

> *"10. We shall now first take up the key issue, whether the Indian Subsidiary, Nokia India Pvt. Ltd. (NIPL) constitutes PE of Nokia Networks OY in India and/or whether the said subsidiary would provide business connection in India. First of all, we have to analyse the case of the Assessing Officer. The primary case of the AO qua the Indian subsidiary was that, it constitutes a Department Agency Permanent*

Establishment (DAPE) of the assessee in India. However, the findings of the Assessing Officer is scattered at various places where he has taken into account several facts and has mixed up the entire concept of PE in as much as while holding LO as a PE, at the same length and based on same material facts has treated NIPL as a PE of assessee in India. In so far as the LO is concerned he has treated it to be a fixed place PE, however so far as Indian subsidiary is concerned he has treated it to be a DAPE. We shall discuss in brief the relevant observations made by the learned Assessing Officer and analyse his finding with factual clarification and analysis based on material placed on record, which has been extensively referred to during the arguments raised by the parties before us."

""40. Though the issue of business connection under the provisions of Income-tax Act should ordinarily be taken first as to whether any income of the assessee directly or indirectly accrues or arises through or from any business connection in India. But, since the main mandate of the direction of the Hon'ble High Court as well as the key arguments of the parties before us including the case of the department mostly revolves around the question whether assessee had any permanent establishment in the form of NIPL in terms of Article 5 or not,

therefore, we will take up the issue of PE first

41. We shall now deal with the concept of fixed place of PE' which has been harped upon by the Id. CIT-DR at great length and has been objected to by the learned counsel that it was never the case of the department either by the Assessing Officer or by the Id. CIT(A) that the assessee had a fixed place of business in terms of Article 5(1), albeit the entire case of the Revenue was that NIPL is a DAPE in terms of Article 5(5). Despite Ld. Counsel's objection we would like to proceed with the applicability of the fixed place PE' in the case of the assessee, because;

Firstly, there is a reference by the Assessing Officer in paragraph 36 of its order though it was more in the context of LO. The relevant portion of paragraph 36 for the sake of ready reference is reproduced hereunder:—

> *"Before the contract was signed a number of expatriates came to India, stayed in India and carried out the network planning. They were also involved in negotiating the same with various customers and were interacting with them on regular basis. This was not possible without the assessee having a fixed place of business from which it carried out these operations. This fixed place of business was*

the liaison office together with office of the Indian company. This fact has been confirmed by the Managing Director ofthe Indian company that the expats who were coming to India were provided administrative support like office, telephone, fax and at times conveyance."

Secondly, even the Special Bench had proceeded to determine the issue of N1PL constituting a fixed place PE in India; and

Lastly, even the Id. CIT (A) in the impugned order though in the context of LO had also mixed up the concept of fixed place PE in the case of NIP L.

Accordingly, we are proceeding with adjudication of the fixed place PE qua NIPL. In para (1) of Article 5, one of the crucial terms used is 'fixed place of business through which the business of an enterprise is wholly or partly carried on'. The word 'through' assumes a great significance, because it enlarges the scope of a fixed place in as much as where no fixed premises may belong to an enterprise but even if a particular space is made available at its disposal then such place is reckoned to be place of business under this paragraph. Now it is well accepted principle that if an enterprise has a certain specified place at its disposal which is used for its business activities, then it is sufficient to

constitute a place of business even though such availability of space to an enterprise may not give it any legal right to use that place. The entire concept of fixed pace PE under Article 5(1) under the OCED model convention had come up for consideration before the Hon'ble Apex Court in the case of Formula One World Championship Ltd. (supra). Their Lordships have threadbare discussed the concept after referring to various commentaries and views of eminent international jurists, judgments rendered by foreign courts and also the judgment of Hon'ble High Courts in India. The Hon'ble Apex Court first of all have referred to the judgment of the Hon'ble Andhra Pradesh High Court in the case of CIT v. Vishakhapatnam Port Trust [1983] 1441TR 146/15 Taxman 72, wherein the Hon'ble High Court had laid down a very important proposition which is reproduced hereunder: "

26. Special bench also extracted the key findings of case cited as formula One World Championship Ltd. [2017] 394 ITR 80 (SC) which are as under :-

"43. The key sequitur and proposition which is culled out from the judgement of the Hon'ble Supreme Court is that;

Firstly, the fix place should be where the commercial and economic activity of the enterprise is carried out;

Secondly, such a fix place acts as a virtual projection

of the foreign enterprise;

Thirdly, PE must have three characteristics, stability productivity and dependence; and

lastly, fixed place of the business must be at the disposal of the foreign enterprise through which it conducts business.

Thus, according to the Supreme Court the 'disposal test' is paramount which needs to be seen while analyzing fixed place PE under Article 5(1). Though in our humble understanding, the test of permanency qua fixed place has been slightly diluted by the Hon'ble Court but not the "disposal test". Again this judgment of Hon'ble Supreme Court has been reiterated and referred extensively in a subsequent judgment by the Hon'ble Supreme Court in the case ofAsstt. DIT v. *E-Fund IT Solution (supra) , wherein the Hon'ble Apex Court had quoted extensively the same views and commentaries and also the judgment of Formula One World Championship Ltd. and held that there must exist a fixed place in India which is at disposal of foreign enterprise through which they carry on their own business. In that case, the Indian subsidiary company of the foreign enterprise was rendering support services which enabled the foreign enterprise in turn to render services to its client and the outsourcing of work to the Indian subsidiary was held to be not giving rise to fixed place of PE. This*

judgment of the Hon'ble Supreme Court nearly clinches the issue before hand in so far as role of Indian subsidiary while deciding the fix place PE. "

27. Applying the principle lay down by Hon'ble Supreme Court in **formula One World Championship (supra)** SB-II proceeded to conclude that assessee did not have any PE in India as per provisions contained under Article 5 of India-Finland DTAA, the operative part of which is extracted as under :-

"44. Now in the light of the aforesaid principle we shall examine the various kinds of contracts/activities undertaken by the assessee and the facts and material on record, specifically with reference to the following activities which have been identified by the Hon'ble High Court remanding the matter back to the Tribunal

(a) Signing of contracts;

(b) Network planning;

As discussed earlier, the Assessing Officer has noted that LO was engaged in the activities of network planning, negotiation of contract and signing of contracts, however in the earlier round it has been categorically held that LO is not a PE qua these activities and nowhere there is a categorical and

specific finding by the Assessing Officer or by the Id. CIT(A) in the entire order that there exist any fixed place PE qua the Indian subsidiary, i.e., NIPL, except for stating that office of the LO and NIPL were co-located, employees of the assessee were working with NIPL and therefore, it constituted a fixed place PE. If that reasoning alone is to be taken into consideration, then such an interpretation of PE did not found judicial favour either by the earlier Special Bench or by the Hon 'ble High Court qua the LO, hence on same reasoning and principle, NIPL would also cannot be reckoned as fixed place PE. Be that as may be, one of the key arguments by the Revenue before us is that foreign expatriates were present in NIPL office who were working as an employee of NIPL and were engaged in the business of NIPL, i.e., installation and marketing activities. The key thrust of the Id. CIT-DR before us was that; firstly, Country Manager of LO continued to be the MD of the NIPL; secondly, the identity between LO and NIPL were blurred and NIPL was nothing but 'virtual projection' of the assessee in India; thirdly, NIPL was doing most of the activities in India like Market Development, liaisioning with customers, technical assistance, marketing of products, etc.; fourthly, employees of the assessee company were seconded to NIPL for installation contract of NIPL, and their salaries were paid by the assessee, therefore, through these employees PE gets constituted and in

support he strongly relied upon the judgment of Morgan Stanley and Centrica India off-shore Private Ltd. (supra); lastly, whenever the asses see's employee used to come to India then NIPL was providing infrastructure facilities like, telephone, fax, vehicles, etc. which goes to show that there was a place in the form of NIPL which was at the disposal of the assessee.

45. First of all, in so far as the allegation that the Country Manager of the LO continued to be the Managing Director of the Indian Company, the same has with reference to one employee, namely, Mr. Hannu Karavitra who was the Country Manager in LO and in that capacity has signed two contracts in the month of February and March, 1995. These contracts were signed when NIPL was not even in existence. After the incorporation of NIPL on 23.05.1995, not an iota of evidence has been brought on record that Mr. Karcnitra had signed am contract on behalf of the assessee. He was a Managing Director of NIPL from 01.01.1996 to 31.07.1999 and after he was employed with NIPL. he has not signed any supply contracts with the Indian customers. All the installation contracts which have been signed by the NIPL have been executed by the NIPL independently with the Indian customers on principal to principal basis and any income received or accrued thereof was subject to tax in India. During the course of the hearing, it was brought to our notice that on one assignment letter

dated was signed by Mr. Hannu Karavitra whereby on shore services were assigned to NIPL and while working in India he was receiving salary from assessee only. First of all, Mr. Hannu Karavitra was employed with the LO earlier, prior to the incorporation of NIPL and he was not employed with the Indian company. In any case assignment was from assessee to NIPL and no authority was being exercised on behalf of the assessee company vis-a-vis the customers. Whether Mr. Hannu Karavitra was representative of the assessee and was working for NIPL or was receiving salary from assessee, same would have some relevance in the context of 'Service PE', but certainly not while examining the 'fixed place PE'. Even if the arguments sake it is accepted that he was a seconded employee to NIPL, then also if he had worked under the control of NIPL despite lien was maintained with assessee company, then also it does not lead to an inference that assessee company was having any kind of a PE, leave alone under paragraph 1 of Article 5. Similarly the allegation has been made by the Assessing Officer as well as strongly contended by the learned CIT-DR that employees of the NIPL were mostly belonging to the assessee company as some of the expatriates/ technical persons were working on installation contract of NIPL for which activities, salaries were paid and managed by assessee. This concept perhaps may assume some significance while deciding the concept 'Service PE'for

which reliance was also placed by the learned CIT- DR on Morgan Stanley and Centrica off-shore Pvt. Ltd, however as per the then existing provision of Article 5 between India and Finland treaty, there was no such concept of 'Service PE' per se except for certain activities mentioned in clause (a) and (b) of Paragraph 3 of Article 5, which ostensibly are not applicable at all. Since none of the on-shore activities are carried out by the assessee in India albeit was done by its Indian subsidiary, provisions of paragraph 3 of Article 5 will also not attract. Once there is no concept of 'Service PE' (though there is no allegation by the Assessing Officer or CIT (A) that there is any kind of service PE), then such plea of the learned CIT-DR has no legs to stand. His core argument was on the point that installation activities done through employees of the assessee constitutes a 'Service PE' and assessee was unable to furnish the details of employees working in NIPL alongwith the details of their duration and therefore, in absence of such details adverse view should be drawn for treating these employees constituting PE in India. The entire thrust of his argument simply whittles down for the reason thatfirstly, there is absolutely no concept of 'Service PE' in the then existing provision of Article 5; and secondly, other than off-shore supply of equipment, no other activities has been carried out by the assessee after the incorporation of the Indian subsidiary NIPL

and this fact has been accepted by the Hon'ble High Court also. Thus, any activities relating to NIPL under the independent contract cannot be reckoned to constitute a PE in the context of Article 5(1); and even if for argument sake it is accepted that the activities of NIPL were managed by assessee, then also, it does not constitute PE qua activities of supply contract or any activity from where it can be held that any income has been received or accrued to the assessee in India or through or from any asset in India. NIPL is an independent entity and all its income from India operation is liable for tax in India.

46.Another set of allegations which can said to have some significance is that; whenever the employees of the assessee were visiting India in the context of networking, assigning or negotiation ofoff-shore supply contract, the employees of NIPL were either assisting by providing certain administrative support services made available in the form of telephone, fax and conveyance; or the NIPL was providing technical and marketing support services to assessee and hence it is assisting in sale of equipments of the assessee in India and therefore, NIPL per-se by 'force of attraction rule will constitute a PE, because even if one sale of the assessee is through Indian company then by virtue of this rule as enshrined in Article 7 of lndia- Finland DTAA, PE will get constituted and there would be a deemed PE in the form of Indian company whose

income has to be attributed accordingly. This second part of allegation does not hold ground at all, because; firstly, as stated in the earlier part of the order, assessee and NIPL have entered into separate marketing and technical support agreements in respect of the projects installed and has no correlation with the supply contract. This has been specifically held so by the Hon'ble High Court also in paragraph 34 reproduced in the earlier part of the order; secondly, not only that, for rendering these services NIPL was compensated with cost plus mark up of 5% which though has been adversely commented by the Assessing Officer and Id. CIT (A) but there has been no determination of ALP under transfer pricing mechanism. This inter alia means that the remuneration paid by the assessee to NIPL for these services has to be reckoned at arm's length; and lastly, not one off-shore sale has happened in India through NIPL and this fact has again been accepted by the Hon'ble High Court in its order that no part of off-shore supply was concluded in India with any business connection in India as it was independent contract between Assessee and Telecom operators in India. In so far as allegation of administrative support services provided to employees of assessee in India for supply contract by NIPL and hence it leads to fixed place PE, strong reliance has been placed by Ld. CIT-DR on the statement of the then Managing Director, Mr. Simon

Bresford. From the relevant statement he had pointed out that how the marketing support services have been provided by the Indian company to the assessee and also the administrative support services were provided by NIPL to assessee. Regarding marketing support services by NIPL to assessee we have already discussed above that it was done under separate contract and NIPL was remunerated at arm's length. In so far as administrative facilities being provided by the NIPL to the expatriates coming for signing of contract on behalf of the Nokia Finland, he had stated that, administrative support like office support, cars, telephones, etc. was being provided by NIPL ; and earlier office of liaison office of NIPL are at the same premise in the year 1995. Relying on such statement, Id. CIT-DR has vehemently contended that this material facts itself goes to prove that there is a fixed place PE which was at the disposal of the assessee. In light of such contention, we have to see whether any place of business was provided by NIPL to the assessee which can be said to be at a disposal of the assessee for carrying out its business wholly or partly in India. The sequitur of the judgment of Hon'ble Apex Court as incorporated above is that, in order to ascertain as to whether an establishment being a fixed place for PE or not is that physically located premises have to be 'at the disposal of the enterprises'. Nowhere the disposal test has been diluted by the Hon'ble Apex Court rather it

has been reiterated at various places not only in the Formula One World Championship judgment but also in the subsequent judgment of E-Fund. As culled out from the certain observations of the Assessing Officer as well as the statement of the MD that the employees of the assessee whenever came to India for the purpose of supply contract for negotiation on network planning, then they were provided administrative services like telephone, fax and conveyance. Now, whether such kind offacilities can at all be treated to be a fixed place of business of the assessee company. Telephone or fax or a car cannot be reckonedas physically located premise. The word used in Article 5(1) is 'fixed place of business through which business of enterprise is wholly or partly carried out'. A fixed place alludes to some kind of a particular location, physically located premise or some place in physical form. Nowhere is it borne out that any kind of physically located premise or a particular location was made available to the assessee which was at the disposal of the assessee for carrying out wholly or partly its business through that place. Not only there should be an existence of a fixed place of business but also through that fixed place business of the enterprise should be wholly or partly carried out. No such material has been brought on record that any kind of such fixed place was made available. Providing telephone or fax or conveyance services can ever be equated with fixed place. Even the co-location of

earlier LO office and the Indian subsidiary company was only in the initial year of 1995 and later on LO office has moved out which is also evident from the statement of the Managing Director. Thus, providing such kind of administrative support services to the assessee's employees visiting India will not form fixed place PE, and therefore, the great emphasis by the learned DR on this point is not much of credence as it lacks any further material support or evidence that any physical place was made available which can be said to be at the disposal of the assessee for carrying out its off-shore supply contract in India. In fact the entire allegation of fixed place was qua the LO and never in the context of NIPL by the Assessing Officer. The entire case of the Assessing Officer was that NIPL is a DAPE of the assessee, because all employees of the assessee were either working for the NIPL or NIPL was undertaking certain marketing and technical support services for the assessee. The concept of DAPE would be discussed in succeeding paragraphs. However, so far as the issue of fixed place PE is concerned the same does not get established at all by making to reference ofproviding of telephone, fax and car facility to the employees of assessee visiting India. As regards allegation that expatriates employees of assessee in India were assisting the NIPL and hence used the office of NIPL, is of no relevance qua assessee's business, because, the technical expatriates were in India to

assist/help NIPL with performance of installation activities of NIPL and not to carry out the business of the assessee which was manufacturing and sale of network equipments. This activity per se cannot be reckoned that the Indian office was being used for the purpose of assessee's business or assessee was undertaking business in India through fixed place of business. The test laid down by the Hon'ble Supreme Court does not get satisfied in this case as nothing has been brought on record by the AO or Id. CIT-DR that any physical space was made available which can be said to be at the disposal of assessee for assessee's own business of supply and sale of equipments.

47. Now coming to the paragraphs 2, 3 and 4 of Article 5, it is not the case of any one that the NIPL constitutes any kind of PE under these provisions. Albeit if one goes by clause (e) of Paragraph 4 of Article 5, where it has been categorically provided that the PE shall not be deemed to include a maintenance of a fixed place of business solely either; a) for the purpose of advertising; b) for the supply of information or for scientific research; c) being activities solely of a preparatory or an auxiliary character in the business of the enterprise. This clause clearly excludes any activities solely for preparatory or auxiliary in nature and if one goes by scope of remand by the Hon'ble High Court, i.e., to see, whether signing, networking planning and negotiation constitutes a PE and also

whether profits can be attributed to such activities, then such kind of an activity ostensibly falls within the scope and realm of preparatory or auxiliary in nature, because mere signing, planning and negotiation or networking before supply of goods, are preliminary activities and therefore, under this all pervasive exclusion clause there cannot be any PE which can be deemed either in terms of Paragraphs 1, 2 and 3 of Article 5. Under the present DTAA if activities are in the nature of preparatory and auxiliary character, then same have been specifically excluded from being treated as PE. Hence, even if for the argument's sake it is accepted that there can be some kind of fixed place under Article 5(1), then such a place cannot be reckoned as PE, because the activities carried out from such a place are in the nature of preparatory and auxiliary. Accordingly, in terms of Article 5(4), there could not be any fixed place PE under Article 5(1) because the activities of the assessee in India were purely pertaining to network planning, negotiation and signing of contracts before off-shore supply of (GSM) equipments and sale of goods have been made off-shore outside India.

48. Coming to the Dependent Agent PE as provided in paragraph 5 of Article 5, the key consideration for holding an agent to be a deemed PE is that, a person/enterprise who is not an agent of independent status is acting in a contracting state (here in this case

India) on behalf of an enterprise of other contracting state (here Finland) in respect of any activities where he habitually exercises an authority to conclude contracts on behalf of the enterprise; or if he has no such authority, but habitually maintains stock of goods or merchandise which he regularly delivers goods or merchandise on behalf of the enterprise, then he is deemed to be DAPE. From the material facts discussed in detail herein above are that the entire contract supply of off-shore equipments has been done by the assessee outside India and no activity relating to off-shore supply has been performed in India. There is no material fact on record that NIPL has negotiated or concluded any contract of supply of equipment on behalf of the assessee which binds the assessee. The title of the goods supplied is directly passed on to the customers in India and NIPL neither undertakes any negotiation process nor assist in delivery of goods. Under a DAPE the character of the agent can be said to be determined; firstly, his commercial activities for the enterprise is subject to instruction or comprehensive control; and secondly, he does not bear the entrepreneurial risk. The agent must have sufficient authority to bind enterprise's participation in the business activities and the agent involves the enterprise to a particular extent in the business activities. Thus, the qualified character of the agency is the authorization to act on behalf of somebody else so

much as to conclude the contracts. Here the NIPL neither has any authority to conclude contracts for supply nor any of the orders has been booked by NIPL which can be said to be binding upon the assessee. NIPL is an independent entity carrying out activities of installation, technical support services for the equipments installed are being carried out on principal to principal basis independently with Indian customers; and marketing support agreement is an independent agreement with the assessee for which it is remunerated at arm's length and none of its activities even remotely relate to supply of equipments, leave alone habitually exercising any authority to conclude contract. Lastly, it bears its own entrepreneurial risks.

49.We shall in brief examine various allegations of the AO, which has been harped upon by the Ld. CIT-DR also to contend that there is some kind of PE in the form of DAPE. First of all, Assessing Officer as discussed in the earlier part of this order has time and again referred to the employment details of Mr. Hannu Karavitra which we have already clarified that he was the employee of the assessee as Country Manager in LO till the time NIPL was not incorporated and after the incorporation of NIPL, he became the Managing Director and his period and designation of employment is contained in page 369 (9 to 11) of the paper book, from where it is seen that he was Managing Director between 01.01.1996 to 31.07.1999. It has already been

clarified that once the said employee came into rolls of NIPL, he has not signed any contract with any Indian customer for off-shore supplies but has signed installation contracts on behalf of the NIPL. All the details of supply contracts are contained at page 203 of the paper book which also gives the details of the persons signing it and none of the supply contract had been signed by any employee of NIPL. Thus, the basic condition contained in Article 5(5) does not stand satisfied at all. The contract which has been signed by NIPL is installation which cannot be reckoned DAPE, because assessee in India has not carried out any installation activities on its own. In so far as the allegation of the Assessing Officer that NIPL was in complete control of the assessee and was subject to its instruction. This again in our opinion is not a relevant consideration at all for a creation of a DAPE as discussed above, because none of the supply activities of the assessee has been carried out by NIPL and the employees if at all were for the NIPL's activities in India for which it is liable to tax in India. Further, for the purpose of this clause also, if activities are of preparatory and auxiliary in nature, then again the same will not satisfy the threshold of DAPE. The Assessing Officer has also referred to the fact that in the accounts of LO for the period ending 31st December,1995 there was an expenditure of Rs.5 crores which suddenly from the year1996, got shifted

in the Indian company and from there he draws an inference that Indian company has not received any compensation for the same from assessee and this shows the close business connection between the NIPL and the assessee. This observation again is of no consequence, because when the Indian company came into existence in May, 1995 operations of the LO were slowly scaled down and there was no was requirement of the LO and the employees of the LO were transferred to the Indian Company w.e.f. June 1995. In so far as the allegation of the Assessing Officer that NIPL is a dependent agent, we find that nowhere he has brought on record that NIPL had any authority to conclude contracts relating to supply of equipments on behalf of the assessee. The Managing Director in his statement in answer to question no. 9 has clearly stated that network planning was a service which could be provided by NIPL; however he categorically emphasized that it is pre-bid exercise which was only exercised to request for quotation. Nowhere it has been said in the statement that NIPL in anyway had authority to conclude contract on behalf of the assessee. In so far as the other allegation of the Assessing Officer which has been discussed in the earlier part that, NIPL has concluded contracts with cellular operators for installation services and it becomes responsibility of assessee to get the contracts executed by the NIPL; and further assessee had issued

guarantee to the Indian customers that it will get the contracts executed by NIPL, again has no significance for determination of DAPE,

because such a contention of the Assessing Officer may have been relevant for composite contract situation which is not the consideration in the present case and does not have any bearing whatsoever in this matter. Even otherwise also assisting in performance of the installation services of NIPL does not make Indian Company DAPE of assessee under Article 5(5); and revenues from installation is any way being taxed in India. Coming to another allegation that all the contracts were signed in India and employees of the Indian company have attended meeting at the time of finalization of such contracts as witnesses, is again of no consequence either for the purpose of fixed place PE or DAPE, because for the fixed place, disposal test needs to be satisfied; and for DAPE, authority to conclude contracts which is binding on the assessee needs to be seen. Next objection of AO is that the warranty and guarantee services provided by NIPL's employee were monitored by assessee and for the installation work done by Indian company, some kind of note regarding installation contracts were sent to the assessee. This objection has no relevance for determination of PE, because, firstly, it would have been of some relevance in the case of composite contract situation; and secondly, managing or

providing guarantee by assessee does not yield any income to the assessee, albeit to NIPL, which is taxed in India. Lastly, in so far as the expatriates of NIPL were responsible for installation work were employees of the assessee, only proves that assessee provided necessary assistance, information, knowledge and expertise to do the work. This observation of AO only goes to prove that that expatriates employees deputed in NIPL are in connection with the installation contracts executed by NIPL and since there is no concept of 'Service PE' in India, therefore, nothing turns around on such observation. Thus, on the facts and material on record, we hold that there is no DAPE within the scope and terms of Article 5(5) of the treaty.

50.Admittedly, paragraph 6 of Article 5 is not applicable. Paragraph 7 of Article 5 deals with 'agent of independent status.' Independence of an agent has to be both legal as well as economic independence. Legal independence has to be seen from the context, whether the agent's commercial activities for his principal are subject to detailed instructions or comprehensive control by the principal or not; or to what extent the agent exercises freedom in the conduct of his business on behalf of principal; or the agent's scope of authority is affected by limitations on the scale of business which may be conducted by the agent. Economic independence has to be seen from the context as to what extent the agent bears the 'entrepreneurial risk"

or "business risk" and agent's activities are not integrated with those of the principal;and whether the agent acts exclusively for the principal. The tests for determining the independent status has to be seen from what kind of activities is being carried out by the agent for his principal. Here in this case, first of all we have to borne in mind that installation activity carried out by NIPL is not generating any revenue or income for the assessee in India albeit any income from such activity is already subject to tax in India. The off-shore supply contract is carried out by assessee on FOB basis from Finland and as discussed in foregoing paragraphs NIPL is carrying out various onshore activities, like installation activity, marketing and technical support services, which fact has been clearly highlighted by the Hon'ble High Court in para 34, that these activities have nothing to do with supply contract. The consideration accruing or arising under the contracts undertaken by NIPL is already assessed in the hands of NIPL in India and there is no adverse inference in this respect. The dispute as highlighted by the Hon'ble High Court only pertains to the consideration under the Supply Agreement entered between the assessee and the various customers. Qua the supply contract nothing is being performed by the NIPL in India as agent of the assessee. None of the onshore activities of NIPL can be said to be devoted wholly and almost wholly on behalf of the assessee, because, the contracts undertaken and

signed by NIPL in India are independent and on principal to principal basis with the Indian customers and assessee has not signed any kind of installation contract with the Indian customers for which it could be said that the installation activity of NIPL was wholly and almost wholly on behalf of the assessee. The two contracts which were signed earlier prior to the incorporation of NIPL were separate and assigned to it and income from such installation has been shown in the hands of NIPL in India. There is no income whatsoever from installation activities has been earned by the assessee in India or can be attributed either directly or indirectly through NIPL. Insofar as other activities like marketing and technical support services are concerned, same has been transacted at arm 's length as discussed in detail in foregoing paras, hence no profit can be attributedfrom these activities as held by the Hon'ble High Court. Even if NIPL is held to be; subject to significant control with respect to the manner in which work is to be carried out; is subject to detail instructions from the assessee as to the conduct of work; is exercising less freedom in the conduct of business on behalf of assessee; seeking approval from the assessee for the manner in which the business is to be conducted; etc., then all such control if at all could be only in relation to the contracts carried out by the NIPL in India to ensure technical quality of the contact work done. When there is absolutely no income

generated to the assessee from installation contract work done in India by the NIPL, then all such comprehensive control does not have much relevance. Article 5(7) will apply only when some of the activities of the foreign enterprise are done by an agent wholly or almost wholly on behalf of that enterprise. Here the crucial test is that activities of the assessee must be carried out through the agent wholly and almost wholly for the assessee. When installation activity is not carried out by the assessee in India and is done by NIPL on principal to principal basis with the customers then there is no question of examining the installation activity for purpose of PE. The activity carried out by the assessee through an agent in India would be key factor for examining PE. Thus, provision of paragraph 7 of Article 5 will also not apply.

51. Lastly, coming to paragraph 8 of Article 5, it clearly states that mere fact that company which is a resident of a contracting status controls or is controlled by a company which is resident of the other contracting states or which carries on the business in other state, whether through a PE or otherwise shall not of itself constitutes either company or a PE of other. This inter alia means that if the NIPL, i.e., an Indian company is controlled by assessee who is resident of Finland, then this by itself will not constitute a PE. Thus, a subsidiary cannot be reckoned to constitute PE merely because it

is controlled by a foreign enterprise. In other words simply because NIPL is a subsidiary and is controlled by assessee it will not be treated as a PE. Even the OECD and UN Model Conventions clarify that mere existence of foreign enterprise's subsidiary in a source state should not give rise to foreign enterprise's PE in the source state. The reason being that the existence of a subsidiary does not by itself, constitute that subsidiary company is a PE of its Parent entity, on the principle that, for the purpose of taxation, a subsidiary company constitutes an independent legal entity in the source state. This has been held so by the Hon'ble Apex Court in the case E-Fund IT Solutions. Thus, the exception given in Article 5(8) to a company controlled by a foreign enterprise or its subsidiary answers most of the allegation made by the Department that NIPL being a subsidiary of the assessee itself will provide status of a PE.

52. In so far as the argument of the learned CIT DR that Indian subsidiary is a virtual projection of the assessee as employees of Assessee Company were practically performing all kinds of work, and therefore, it has to be treated as a permanent establishment of assessee. In support of such a concept of virtual projection, strong reliance has been placed on the judgment of the Hon'ble Andhra Pradesh High Court in the case of CIT v. *Vishakapatnam Port Trust (supra) which the learned CIT DR submitted that have been*

referred and relied upon by the Hon'ble Supreme Court in the case of Formula One (supra) also. First of all, the concept of 'virtual projection' has to be seen in the context of any of the ingredient of PE enshrined in Article 5. Hon'ble Andhra Pradesh High Court while explaining the concept of fixed place PE, observed that the PE postulates existence of a substantial element of enduring or permanent nature of a foreign enterprise in another country which can be attributed to a fixed place of business in that country. Such a fixed place should be of such a nature that it would amount to a virtual projection of the foreign enterprise of one country to the soil of another country. The concept of 'virtual projection' flows from the fixed place itself or with any other parameters of establishment of PE under Article 5. This concept alone is not relevant but has to be seen in relation to fixed place or any other concept of PE. The Hon'ble Supreme Court while coming to the conclusion in paragraph 76, held that not only Buddh International Circuit was a fixed place where the commercial or economic activity of conducting Formula One Championship was carried out, but one could clearly discern that it was a virtual projection of a foreign enterprise, namely, Formula One on the soil of this country. All the characteristic of the fixed place PE including the physical location and disposal test stood satisfied. The concept of virtual projection cannot be in vacuum dehors any other

parameters of PE. In other words, virtual projection is in relation to either fixed place or in relation to any other parameters or conditions envisaged in Article 5. As in the case of Vishakapatnam Port Trust, it was in relation to fixed place. The concept of virtual projection does not mean that even without a fixed place, virtual projection itself will lead to an inference of a PE. If on a facts there is no establishment of a fixed place and disposal test is not satisfied, then virtual projection itself cannot be held to be a factor for creation of a PE. Thus, the concept of virtual projection brought in by the AO will not lead to any kind of establishment of PE. In so far as allegation of the department that employees of assessee were responsible for all the activities, it has been already dealt by us that if at all it may have some bearing or relevance when examining Service PE, which was absent in the then prevalent DTAA. Thus, we hold that there is no PE within the terms of Article 5 of India Finland DTAA. "

28. Special bench of Tribunal vide order dated 22.06.2005 (SB-I) also decided the issue of business connection of the assessee in India with respect to PE observed that the issue of "business connection" becomes academic. But special bench – II vide order dated 05.06.2018 have returned categoric findings qua existence

of business connection of the assessee in India. Special Bench-II has also discussed the issue of business connection raised with respect to the Liaison Office (LO) qua which Hon'ble High Court in respect to LO held that "there is no material or evidence on the basis of which it can be said that LO can offer a business connection to assessee in India and it does not constitute PE of assessee in India". Special Bench vide order dated 05.06.2018 held that aforesaid findings of Hon'ble High Court in context of LO ostensibly applies to NIPL also as the terms and condition on the supply of contract continues having been discussed in para 17 of the High Court judgment.

29. It is also held by Special Bench-II that even if it is assume that the NIPL does not render a business connection to assessee in India, even then no income earned by the assessee from offshore supply of equipment of Indian Customers can be brought to tax in India in view of the Explanation 1 to Section 9(1)(i) of the Act. Special Bench following the decision rendered by Hon'ble Delhi High Court in case of **Nortel Network India International Inc. [2016] 386 ITR 353 (Delhi)** held as under :-

> *57. Whence in the concept of LO already a categorical finding has been given by the Hon'ble High Court that*

supply of off-shore equipment which has been done outside India cannot be held to be taxable in India, then the same principle and proposition would also be applicable in the case of NIPL also, because, so far as the supply contracts are concerned there is absolutely no change in the facts and circumstances as even after the NIPL is incorporated in May, 1995, the off shore supply equipment and the supply contract remained the same. The marketing activities and installation contract undertaken by NIPL has been on principal to principal basis; and in the case of former agreement between assessee and NIPL, the payment has been made to NIPL on cost plus markup basis which has not been disturbed; and in the later agreement there is an independent contracts by NIPL with Indian customers which has nothing to do with the assessee. The income arising from both the contracts are taxable in the hands of the NIPL in India. Thus, the finding and the ratio of the Hon'ble High Court would apply mutatis mutandis though rendered in the context of LO will also apply in the case of NIPL as qua the supply contract there is no material change in any case.

58. Apart from the judgment of Hon'ble Delhi High Court in the case of assessee as discussed above, we find that, Hon'ble High Court in Nortel Network India International Inc. (supra) somehow on similar set of

facts has reiterated the same principle. Before that the relevant facts in the said case were as under:—

The assessee was incorporated in the USA and was a tax resident of the USA. The assessee was a part of the N group which was stated to be a leading supplier of hardware and software for global system for mobile communication cellular radio telephone systems. The assessee was a step-down subsidiary of N, a company incorporated in Canada. N(C) also had an indirect subsidiary in India N (I). N (I) negotiated and entered into three contracts with R, namely, optical equipment contract, optical services contract and the software contract on June 8, 2002. On the same date, N (I) entered into an agreement assigning all rights and obligations to sell, supply and deliver equipment under the equipment contract to the assessee. R and N(C) were also parties to the assignment contract and in terms thereof N(C) guaranteed the performance of the equipment contract by the assessee (assignee). In terms of the assignment contract, R placed purchase orders directly on the assessee and also made all payments for the equipment supplied directly to the assessee. The equipment supplied to R was manufactured by N(C) and another group entity in Ireland. The same was invoiced by the assessee directly to R and consideration for it was received directly by the assessee. The Assessing Officer held

that income arose to the assessee in India and was assessable. The Commissioner (Appeals): held that keeping in view the facts of the case, 50 per cent, of the asses see's estimated profits could be attributed to the permanent establishment in India. This was upheld by the Tribunal. The Income-tax authorities concluded that the assessee was a shadow company ofN(C) and both the companies were essentially a singular entity. In other words the Income-tax authorities disregarded the corporate structure of the assessee and proceeded on the basis that its identity was the same as N(C).

On the issue, whether the appellant had a PE, both fixed place PE and DAPE in India in the terms of liaison office Nortel Canada and also in terms of subsidiary Nortel Network India Pvt. Ltd. which carried out installation services, Hon'ble High Court observed and held as under:—

It is apparent from the plain reading of Section 9(1) of the Act that all income which accrues or arises through or from any business connection in India would be deemed to accrue or arise in India. In C1T v. R.D. Aggarwal & Co.: (1965) 56 ITR 20 (SC), the Supreme Court observed that business connection would mean "a relation between a business carried on by a non-resident and some activity in the taxable territories which are attributable directly or indirectly

to the earnings, profits or gains of such business". However, by virtue of Explanation 1 to Section 9(1) of the Act, only such part of the income which is reasonably attributable to operations carried out in India would be taxable. Thus, if it is accepted that the Assessee has received only the consideration for the equipment manufactured and delivered overseas, it would be difficult to uphold the view that any part of Assessee's income is chargeable to tax under the Act as no portion of the said income could be attributed to operations in India.

44. There is little material on record to hold that Nortel India habitually exercises any authority on behalf of the Assessee or Nortel Canada to conclude contracts on their behalf. There is also no material on record which would indicate that Nortel India maintained any stocks of goods or merchandise in India from which goods were regularly delivered on behalf of the Assessee or Nortel Canada. Thus, by virtue of Explanation 2 read with Explanation 3 to Section 9(1) (i) of the Act, no part of Assessee's income could be brought to tax under the Act. It is only when a non-resident Assessee's income is taxable under the Act that the question whether any benefit under the Double Taxation Avoidance Treaty is required to be examined.

47. As noticed earlier, there seems to be no dispute that the title to the equipment passed in favour of Reliance overseas. However, the AO, CIT (A) and ITAT did not consider the same to be relevant as according to them, the equipment continued to be in the possession of the "Nortel Group" till its final acceptance by Reliance. In our view, even if it is accepted that the equipment supplied overseas continued to be in possession of Nortel India till the final acceptance by Reliance, the same would not imply that the Assessee's income from supply of equipment could be taxed under the Act. Clause (a) of Explanation 1 to Section 9(l)(i) of the Act postulates the principle of apportionment and only such income that can be reasonably attributed to operations in India would be chargeable to tax under the Act. The position in Ishikawajima-Harima Heavy Industries (supra) was also similar. There too, the equipments were supplied overseas and the contractor continued to retain control of equipment and material till the provisional acceptance of the work or the termination of the contract.'

Thus, the Hon'ble High Court in Nortel's case has clearly concluded that equipments supplied overseas cannot be taxed under the Act and as per clause (a) of Explanation 1 to Section 9(l)(i) which postulates the principle of apportionment, the only such income that

can be reasonably attributed to assessee in India could be chargeable to tax under the Act and therefore, under the fact where there is off shore supply of equipments nothing can be held to be taxed in India in terms of Section 9(1). In fact, in the finding of the Hon'ble High Court in paragraphs 69 to 72, it has been held that the Indian subsidiary of Nortel and LO will not constitute a PE. For the sake of ready reference, paragraphs 69 to 72 are reproduced hereunder:—

69. The AO, CIT (A) and ITAT have held that the office of Nortel India and Nortel LO constituted a fixed place of business of the Assessee. As pointed out earlier, we find no material on record that would even remotely suggest that Nortel LO had acted on behalf of the Assessee or Nortel Canada in negotiating and concluding agreements on their behalf. Thus, it is not possible to accept that the offices of Nortel LO could be considered as a fixed place of business of the Assessee. In so far as Nortel India is concerned, there is also no evidence that the offices of Nortel India were at the disposal of the Assessee or Nortel Canada. Even if it is accepted that Nortel India had acted on behalf of the Assessee or Nortel Canada, it does not necessarily follow that the offices of Nortel India constituted a fixed place business PE of the Assessee or Nortel Canada. Nortel India is an independent

company and a separate taxable entity under the Act. There is no material on record which would indicate that its office was used as an office by the Assessee or Nortel Canada. Even if it is accepted that certain activities were carried on by Nortel India on behalf of the Assessee or Nortel Canada, unless the conditions ofparagraph 5 of Article 7 of the Indo-US DTAA is satisfied, it cannot be held that Nortel India constituted a fixed place of business of the Assessee or Nortel Canada.

70. The AO has further alleged that the offices of Nortel LO and Nortel India were used as a sales outlet. In our view, this finding is also unmerited as there is no material which would support this view. The facts on record only indicate that Nortel India negotiated contracts with Reliance. Even assuming that the contracts form a part of the single turnkey contract, which include supply of equipment - as held by the authorities below - the same cannot lead to the conclusion that Nortel India was acting as a sales outlet.

71. The AO's conclusion that there is an installation PE in India, is also without any merit. A bare perusal of the Services Contract clearly indicates that the tasks of installation, commissioning and testing was contracted to Nortel India and Nortel India performed such tasks on its own behalf and not

on behalf of the Assessee or Nortel Canada. Undisputedly, Nortel India was also received the agreed consideration for performance of the Services Contract directly by Reliance.

72. The finding that Nortel India is a services PE of the Assessee is also erroneous. There is no material to hold that Nortel India performed services on behalf of the Assessee.

73. The AO has also held that Nortel India constituted Dependent Agent PE of the Assessee in India. The aforesaid conclusion was premised on the finding that Nortel India habitually concludes contracts on behalf of the Assessee and other Nortel Group Companies. In the present case, there is no material on record which would indicate that Nortel India habitually exercises authority to conclude contracts for the Assessee or Nortel Canada. In order to conclude that Nortel India constitutes a Dependent Agent PE, it would be necessary for the AO to notice at least a few instances where contracts had been concluded by Nortel India in India on behalf of other group entities. In absence of any such evidence, this view could not be sustained.

74. The CIT (A) as well as the IT AT has proceeded on the basis that the Assessee had employed the services of Nortel India for fulfilling its obligations of

installation, commissioning, after sales service and warranty services. The IT AT also concurred with the view that since employees of group companies had visited India in connection with the project, the business of the Assessee was carried out by those employees from the business premises of Nortel India and Nortel LO. In this regard, it is relevant to observe that a subsidiary company is an independent tax entity and its income is chargeable to tax in the state where it is resident. In the present case, the tax payable on activities carried out by Nortel India would have to be captured in the hands of Nortel India. Chapter X of the Act provides an exhaustive mechanism for determining the Arm s Length Price in case of related party transactions for ensuring that real income of an Indian Assessee is charged to tax under the Act. Thus, the income from installation, commissioning and testing activities as well as any function performed by expatriate employees of the group companies seconded to Nortel India would be subject to tax in the hands of Nortel India and the same cannot be considered as income of the Assessee."

This judgment of Hon 'ble Delhi High Court clearly clinches the issues in hand, both on the point of taxability u/s. 9(l)(i) and also in the context of PE. Thus, respectfully following the ratio laid down in aforesaid judgment of Hon'ble High Court in the case

of assessee as well as in the case ofNortel, we hold that income of the assessee from off-shore supply of equipments in pursuance of supply contract cannot be brought to tax in India. ”

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30. So the special bench-II held on the issue of attribution that once it had returned the finding that nothing from the income of offshores supply could be taxed in India on account of absence of any activities pertaining to such supply being carried out in India the said issue has become academic.

31. Despite the fact that both AO as well as Ld. CIT(A) have categorically relied upon findings returned by their predecessors qua AY 1997-98 and 1998-99 as discussed in the preceding paras, Ld. DR has tried to distinguish the fact of AY 1999-2000 to 2001-2002. First contention raised by Ld. DR that AO has brought on record material vide para 4.10 at page 12 of assessment order that there is a PE in case of NIPL. The Ld. DR also referred to the findings returned by Ld. CIT(A) in the para 4.1 of the impugned order which are as under :-

> *"4.1 In all the years under appeal, the appellant has carried on its business in systematic and continuous manner in India. Simply assigning some of the work of installation to Nokia India (wos) does not mean that the appellant was not carrying on core activities in India. It is the appellant who has assigned some installation project to the Indian subsidiary but the main responsibility is of the appellant only. The installation work is only a part of total project*

undertaken by the appellant. Nokia India is only conducting the business of the appellant and not of any other concern. Therefore, it is not undertaking the work is ordinary cause of its business. The installation work is inextricably linked with the total project of designing, supplying, installation, operations, after sales service and warranty. As pe n:e annexure to the assessment order of A.Y. 1999-00 and 2000-200lit is clear that in the contract with BPL US West, the responsibility of the appellant are well defined in all the activities of the project. In fact the overall responsibility was of the appellant. Besides this the A.O. has discussed various projects in detail and has mentioned that some contracts were signed by the employees of Nokia India also. The existence of PE is governed by the Article 5 of the DTAA. The appellant is undertaking various projects in India and making supplies continuously for several years. The activities are being done continuously in India on regular basis. The word 'Permanent Establishment' postulates the existence of substantial element of an endusing or permanent nature of foreign enterprise in another country which can be attributed to a fixed place of business in that country. It should be of such a nature that it would amount to virtual projection of the foreign enterprise of one country into the soil of another country. Article 5(1) of DTAA defines the term PE as a fixed place of business through which the

business of an enterprise is wholly or partly carried on The office of the appellant, the office of Nokia India are fixed place of business from which the appellant's business activities are being carried out in India. These offices are fixed place and hence a productive character i.e. contribute to the profits of the enterprise. The mere fact that an enterprise has fixed place which is used for business activities is sufficient to constitute a place of business. So even if business is being carried on partly through the fixed place it will be a PE within the meaning of Article 5 of DTAA. From various facts on records it also emerges that In India the appellant has place of management , an office as well as premises were used as sales outlet or for receiving orders. Therefore, as per provisions of Article 5(2) also the appellant had PE in India. Similarly the installation project or Supervising Activity has continued for more than six months. It is immaterial whether employees stayed here or not but the supervisory activity in connection with Installation Project has continued for more than six months. It is the continuance of activity which is the required condition and not the stay of employees. As the installation and supervisory activity has been continued for more than the prescribed period as per treaty, the appellant also had PE as per provisions of article 5(3) of the treaty.

32. Ld. DR for the revenue laid emphasis on the findings given by special bench vide order dated 05.06.2018 that AO as well as CIT(A) in A.Y. 1997-98 & A.Y. 1998-99 have not given categoric finding that are existed a fixed place PE qua NIPL, whereas in the instant case AO / CIT(A) have given categoric finding in para 4.10 of assessment order and para 4.1 of impugned order passed by ld. CIT(A).

33. However, when we read the order passed by special bench 05.06.2018 in totality question raised by Ld. DR has been duly replied by extensively dealing with the arguments raised by Ld. DR with regard to existence of fixed place PE in the form of NIPL and has given categoric finding that there is nothing on record to show that the premises of NIPL were at the disposal of assessee as the same were for ancillary and auxiliary activities and thus could not go to establish fixed place PE of the assessee in India. This issue has been duly discussed in para 43 of the order passed by special bench dated 05.06.2018. Relevant findings of special bench-II with regard to NIPL are extracted for ready perusal as under :-

> *"46. Now in the light of the aforesaid principle we shall examine the various kinds of contracts/activities undertaken by the assessee and the facts and material on record, specifically with reference to the following*

activities which have been identified by the hon'ble High Court while remanding the matter back to the Tribunal.

(a) *Signing of contracts ;*

(b) *Network planning ;*

(c) *Negotiation of offshore contract in India.*

As discussed earlier, the Assessing Officer has noted that liaison office was engaged in the activities of network planning, negotiation of contract and signing of contracts, however in the earlier round it has been categorically held that liaison office is not a permanent establishment qua these activities and nowhere there is a categorical and specific finding by the Assessing Officer or by the learned Commissioner of Income-tax (Appeals) in the entire order that there exist any fixed place permanent establishment qua the Indian subsidiary, i.e.,Nokia India Pvt.Ltd., except for stating that office of the liaison office and Nokia India Pvt. Ltd. were co-located, employees of the assessee were working with Nokia India Pvt. Ltd. and therefore, it constituted a fixed place permanent establishment. If that reasoning alone is to be taken into consideration, then such an inter pretation of permanent establishment did not found judicial favour either by the earlier Special Bench or by the hon'ble High Court qua the liaison office, hence on same reasoning and principle, Nokia India Pvt.. Ltd. would also cannot be reckoned as fixed place permanent establishment."

34. Moreover, AO as well as Ld. CIT(A) though have brought on record stray facts as contended by Ld. DR that there exists a fixed place PE but in the same breath they have recorded the finding that they are relying upon findings of their predecessor returned in AY 1997-98 and 1998-99, which have been over turned by special bench vide order dated 05.06.2018 in favour of the assessee.

35. So far as question of Assisting Nokia India Pvt. Ltd. by expatriates employees of the assessee by using office of Nokia India Pvt. Ltd. as contended by Ld. DR, is concerned this issue has also been duly decided by special bench vide order dated 05.06.2018 by returning following findings :-

> *"As regards allegation that expatriates employees of the assessee in India were assisting the Nokia India Pvt. Ltd. and hence used the office of Nokia India Pvt. Ltd., is of no relevance qua the assessee's business, because, the technical expatriates were in India to assist/help Nokia India Pvt. Ltd. with performance of installation activities of Nokia India Pvt. Ltd. and not to carry out the business of the assessee which was manufacturing and sale of network equipments. This activity per se cannot be reckoned that the Indian office was being used for the purpose of the assessee's business or the assessee was undertaking business in India through*

fixed place of business. The test laid down by the hon'ble Supreme Court does not get satisfied in the case as nothing has been brought on record by the Assessing Officer or the learned Commissioner of Income-tax-Departmental representative that any physical space was made available which can be said to be at the disposal of the assessee for the assessee's own business of supply and sale of equipments."

36. Moreover, the issue that "NIPL does not constitute a fix place PE of the assessee as held by special bench-II" vide order dated 05.06.2018, has already been challenged by the revenue in appeal before the Hon'ble High Court in which following question of law has been framed

"2.1 Whether on facts and circumstances of the case and in law, Ld. ITAT erred in holding that NIPL did not constitute a fixed place PE of the assessee, without appreciating the fact that NIPL is a virtual projection of the assessee for the following reasons…"

37. So, we are of the considered view that the contention raised by Ld. DR that the issue of NIPL being a fixed place PE of assessee in terms of paragraph 5(1) of taxed treaty has not been considered by Special Bench vide order dated 05.06.2018 is not sustainable.

38. The next contention raised by Ld. DR for the revenue in order to distinguish facts of AY 1999-2000 and 2001-02 are none

of the contracts under which supplies have been made to the customers are turnkey contracts; that fresh contract for equipment supplies with parties with whom turnkey contracts was under taken during earlier years and portion of turnkey contracts has already been assigned to the Indian subsidiary. On the other hand, Ld. AR contended that the findings of the Ld. CIT(A) that facts of the case for AY 1999-2000 to 2001-02 are almost similar to that of 1997-98, 1998-99 which were also subject matter of the decision of SB-I and SB-II.

39. Undisputedly aforesaid contention raised by the Ld. DR on the basis of finding of Ld. CIT(A) were agitated by the assessee before Hon'ble High Court as well as before special bench II. It is also not in dispute that during the years under assessment in the ordinary course of business operation the assessee entered into fresh contracts, however, the terms and conditions were similar to the contracts for AY 1997-1998 and 1998-1999 and all these contracts were considered by the Ld. CIT(A).

40. So far as the question of assigning portion of ternkey contracts to Indian subsidiary as contended by Ld. DR is concerned, again Special Bench II has considered this issue and proceeded to hold that at page 78 and 56 of the Special Bench II

order that "the income from installation activities have been shown in the hands of NIPL in India and there is no income whatsoever from the installation activities which has been earned by the assessee in India or can be attributed either directly or indirectly through NIPL. Moreover, before Hon'ble High Court in first round of litigation "dispute in the assessee's case only pertains to the consideration under the supply agreement entered into between the assessee and the various customers.

41. In so far as the question of agitating the findings returned by Ld. CIT(A) that facts of the case under consideration are similar to A.Y. 1997-98, 1998-99 by the assessee is concerned it is contended by Ld. AR for the assessee that this stand was taken by the assessee only to show that the cases under consideration were on stronger footing as during the year under assessment assessee has only entered into "standalone supply contracts" and there was no turnkey contracts. This contention of the Ld. AR for the assessee appears to be sustainable because ground no. 2 on factual matrix has been taken by the assessee on without prejudice basis.

42. It is further contended by Ld. DR for the revenue that none of the contracts under which supplies have been made to the customers are turnkey contracts. To repel this argument, Ld. AR

for the assessee contended that in the case before Special Bench II there were only issue as to turnkey contracts viz Modi Telstra and Skycell Communication Ltd. and the rest of the contracts were merely supply contracts.

43. When we examine the aforesaid contention of Ld. DR for the revenue and Ld. AR for the assessee in the light of the findings returned by Special Bench II. It is held by referring to the order of Hon'ble High Court in assessee's own case that –

> *"(vii) giving the nomenclature of a turnkey project or works contract is not relevant in determining whether any profit arising from the supply of equipment pursuant to such contract was chargeable to tax in India;"*

44. So we are of the considered view that aforesaid findings go to clinch the issue in favour of the assessee that decision of Special Bench II is applicable to the facts and circumstances of the cases under consideration.

45. Ld. DR for the revenue further contended that Special Bench-II has only considerd existence of PE under Article 5(1) and same was rejected on ground of non-satisfaction of disposal test. However, on the other hand, the Ld. AR of the assessee drew our attention towards para 49 page 73 of the decision rendered by Special Bench II and stated that the Special Bench II has duly

considered the argument of existence PE under Article 5(2) and Article 5(3) also. For ready perusal finding returned in para 49 are extracted as under :-

"49. *Now coming to the paragraphs 2. 3 and 4 of article 5, it is not the case of any one that the Nokia India Pvt.Ltd. constitutes in kind of permanent establishment under these provisions. Albeit if one goes by clause (e)of paragraph 4 of article 5, where it has been categorically provided that the permanent establishment shall not be deemed to include a maintenance of a fixed place of business solely either ; (a) for the purpose of advertising; (b) for the supply of information or for scientific research ; (c) being activities solely of a preparatory or an auxiliary character in the business of the enterprise. This clause clearly excludes any activities solely for preparatory or auxiliary in nature and if one goes by scope of remand by the hon'ble High Court, i.e., to see, whether signing, networking planning and negotiation constitutes a permanent establishment and also whether profits can be attributed to such activities, then such kind of an activity ostensibly falls within the scope and realm of preparatory or auxiliary in nature, because mere signing, planning and negotiation or networking before supply of goods, are preliminary activities and therefore, under this all pervasive exclusion clause there cannot be any permanent establishment which can be deemed either in terms of paragraph 1, 2 and 3 of article 5. Under the present*

double taxation avoidance agreement if activities are in the nature of preparatoryand auxiliary character, then same have been specifically excluded from being treated as permanent establishment. Hence, even if for the argument's sake it is accepted that tlliere can be some kind of fixed place under article 5(1), then such a place cannot be reckoned as permanent establishment, because the activities carried out from such a place are in the nature preparatory and auxiliary. Accordingly, in terms of article 5(4), there could not be any fixed place permanent Establishment under article 5(1) because the activities of the assessee in India were purely pertaining to network planning, negotiation and signing of contracts before offshore supply of (GSM) equipments and sale of goods have been made off shore outside India."

46. So in view of the findings returned by Special Bench extracted above the contention raised by Ld. DR is not sustainable because Special Bench has categorically held that under all pervasive exclusion clause there cannot be any permanent establishment which can be deemed either in terms of paragraph 1, 2 and 3 of Article 5 of the DTAA.

47. Furthermore to repel the argument addressed by Ld. DR for revenue, Ld. AR for the assessee by relying upon decision rendered by Jurisdictional High Court in case of **National Petroleum**

Construction Company vs. Director of Income Tax (Delhi) 383 ITR 648 contended that provision of paragraph 2 and 3 of Article 5 are complementary to each other and thus paragraph 2 of Article 5 which an extraordinary provision can not be read in isolation to paragraph 1 of Article 5. Moreover, Special Bench has returned categoric finding that when preliminary conditions of Article 1 are not satisfied, there is no question of being a PE under any of the sub clause of paragraph 2. Operative part of findings returned by Hon'ble High Court is as under :-

> *"16. Paragraph 2 of Article 5 of the DTAA provides for an inclusive definition of the term "Permanent Establishment" and specifically lists out places of business that fall within the meaning of that expression. The use of the word 'especially' underscores the intention of the authors of the treaty to remove any doubts that the places listed in sub-paras (a) to (i) fall within the definition of the term 'Permanent Establishment'. Normally an inclusive definition is used to expand the width of the term sought to be defined, however, that does not appear to be the principal intent in drafting paragraph 2 of Article 5 of the DTAA. Read in the context of the other provisions of Article 5, paragraph 2 clearly indicates that it has been used as an explanatory provision to specifically include the species*

of places of business that would constitute a PE of an enterprise. In this view, paragraph 1 and 2 of Article 5 of the DTAA complement each other. Thus, all classes of PEs as specified in various sub- paras of paragraph 2 of Article 5 of the DTAA would be construed as a PE subject to the essential conditions of paragraph 1 of Article 5 being met. Insofar as sub-paras (h) and (i) of paragraph 2 of Article 5 are concerned, the test of permanence as required under paragraph 1 of Article 5 is substituted by a specified minimum period of nine months. Thus, places of business as specified under sub-paras (h) and (i) of paragraph 2 of Article 5, cannot be construed as a PE of an enterprise unless they exist for a period of atleast nine months.

17. Paragraph 3 of Article 5 is an exclusionary clause and is intended to exclude certain places of business from the scope of the expression 'Permanent Establishment'. Paragraph 3 begins with a non-obstante clause- "Notwithstanding the preceding provisions of this Article". Thus, the exclusions provided under paragraph 3 would override the provisions of paragraph 1 & 2 of Article 5 of the DTAA. In other words, even if a place of business squarely falls within the definition of paragraph 1 of Article 5 and is specifically listed in paragraph 2 of the said Article, the same would, nonetheless, not be construed as a PE of an enterprise, if it falls within any of the exclusionary clauses

contained in sub-paras (a) to (e) of paragraph 3 of Article 5 of the DTAA."

48. In view of the matter we are of the considered view the contention of the Ld. DR that Special Bench has only considered PE under Article 5(1) and the same was rejected on ground of non-satisfaction of "disposal test" is not tenable because it is settled principle of law that Article 1 and 2 are complementary to each other and Special Bench has held that when preliminary conditions laid down under Article 1 are not satisfied there is no question of being a PE under any of the sub clauses of paragraph 2.

49. Ld. DR for the revenue by relying upon para 3.3 at page 4 of assessment order further contended that purchase order of Airtel addressed to assessee in its "local Delhi Office" (which happens to be the office of NIPL) shows that the office premises of NIPL were at the disposal of the assessee which fact was also confirmed by M/s. Simon Piers Beresford Wylie, MD, NIPL and as such the business of assessee was being carried out from the premises of NIPL and moreover office and administrative support like telephones, facts etc. cannot be provided without any connection or availability of physical and geographical place and these facts prove the existence of PE under Article 5(1), Art. 5(2) & Art. 5(3).

50. However, to repel this argument Ld. AR for the assessee contended that the aforesaid letters of customers as referred by AO in para 3.3 were directed to liaison office of the assessee and not NIPL. When this contention of the Ld. DR is examined in the light of the decision rendered by Special Bench I, Special Bench II and Hon'ble High Court whereby it is held that LO does not constitute a business connection nor proves existence of PE of the assessee in India Special Bench II has dealt with this issue as under :-

> *"46. Now in the light of the aforesaid principle we shall examine the various kinds of contracts/activities undertaken by the assessee and the facts and material on record, specifically with reference to the following activities which have been identified by the hon'ble High Court while remanding the matter back to the Tribunal.*
>
> (d) *Signing of contracts ;*
>
> (e) *Network planning ;*
>
> (f) *Negotiation of offshore contract in India.*
>
> *As discussed earlier, the Assessing Officer has noted that liaison office was engaged in the activities of network planning, negotiation of contract and signing of contracts, however in the earlier round it has been categorically held that liaison office is not a permanent establishment qua these activities and nowhere there is a categorical and specific finding by*

the Assessing Officer or by the learned Commissioner of Income-tax (Appeals) in the entire order that there exist any fixed place permanent establishment qua the Indian subsidiary, i.e.,Nokia India Pvt.Ltd., except for stating that office of the liaison office and Nokia India Pvt. Ltd. were co-located, employees of the assessee were working with Nokia India Pvt. Ltd. and therefore, it constituted a fixed place permanent establishment. If that reasoning alone is to be taken into consideration, then such an inter pretation of permanent establishment did not found judicial favour either by the earlier Special Bench or by the hon'ble High Court qua the liaison office, hence on same reasoning and principle, Nokia India Pvt.. Ltd. would also cannot be reckoned as fixed place permanent establishment."

So in view of the matter we are of the considered view that the contention raised by Ld. DR is not sustainable.

51. It is further contended by Ld. DR for the revenue that customers only know one Nokia India who has an office at Manipalpur and entered with this office for supply, installation and commissioning, warranty etc." Ld. DR has raised this question before SB-II and has been duly replied with by holding that aforesaid allegation does not go to establish the existence of assessee's PE in India.

52. Ld. DR for the revenue further contended that the assessee has not furnished the list of its own employees visiting India and their total period of stay including the purpose of visits in India; that nominal salary to the seconded employees is paid by NIPL and major part of their salaries (80%) paid by the assessee; and that salaries paid by the assessee to the expats working with NIPL not recovered from NIPL which has established existence of assessee's PE in India.

53. However, when we examine the findings of Special Bench II on this issue in para 36 to 38 this issue was raised and was duly decided and ultimately Special Bench II reaches the conclusion that existence of assessee's PE in India is not established.

54. Ld. DR for the revenue by relying upon para 3.5 of AO and para 7 of the Ld. CIT(A) further contended by referring to contract between Sterling Cellular Ltd. and assessee signed on 20.04.1999, signed by Heide Hamalinen, employee of NIPL and the Authorized Signatory of the assessee and contract with BPL US West Cellular Ltd. signed by Olli, employee of NIPL but no details of the visit and stay of the employees provided. However, on the other hand, the Ld. AR for the assessee contended that similar argument was raised by the revenue in A.Y. 1997-98, 1998-99 in respect of

another employee Mr. Hannu Karvitra and Special Bench reached the conclusion that none of the contract was signed by such expat when they were seconded to NIPL. The Ld. DR for the revenue has not controverted the fact that agreements were signed by such expatriates on 20.04.1999 and 31.10.1998 when the period of such secondment was over (period of segment of Heide Hamalinen being 01.09.1997 to 31.07.1998 and period of secondment of Olli being 01.09.1995 to 31.12.1996). So we are of the considered view that this issue was also duly decided by Special Bench II of Tribunal in A.Y. 1997-98 and 1998-99.

55. The Ld. DR for the revenue by relying upon para 4.10 and 4.11 of the assessment order contended that the assessee has a fixed place PE in the office and a DAPE in the form of NIPL from which assessee's business activities are being carried out in India and such a fix place PE under Article 5(1) of the DTAA.

56. No doubt, AO as well as the Ld. CIT(A) have retuned the finding that there exists a fix place PE but when we read the order of AO as well as Ld. CIT(A) as a whole ultimately they have relied on order passed by Ld. CIT(A) in assessee's case for A.Y. 1997-98, 1998-99 which has further been decided by SB II in favour of the assessee that "assessee had no PE in the form of NIPL". The

relevant finding of Special Bench II at page no. 72 of the order are extracted for ready perusal as under :-

> *"As regards allegation that expatriates employees of the assessee in India were assisting the Nokia India Pvt. Ltd. and hence used the office of Nokia India Pvt. Ltd., is of no relevance qua the assessee's business, because, the technical expatriates were in India to assist/help Nokia India Pvt. Ltd. with performance of installation activities of Nokia India Pvt. Ltd. and not to carry out the business of the assessee which was manufacturing and sale of network equipments. This activity per se cannot be reckoned that the Indian office was being used for the purpose of the assessee's business or the assessee was undertaking business in India through fixed place of business."*

57. Further more when the revenue has challenged the order passed by Special Bench II in case of assessee for 1997-98 and 1998-99 before the Hon'ble High Court the question of law on this issue has been framed which is extracted as under :-

> *"2.1 Whether on facts and circumstances of the case and in law, Ld. ITAT erred in holding that NIPL did not constitute a fixed place PE of the assessee, without appreciating the fact that NIPL is a virtual projection of the assessee for the following reasons…"*

58. So in view of the matter we are of the considered view that the contention of the Ld. DR is not tenable that the facts of the year under considerations are distinguishable from A.Y. 1997-98, 1998-99 because issue that "the assessee has a fix place PE in the NIPL office and DAPE in the form of NIPL" has already been dealt with by the Special Bench II as is evident from a question of law framed by Hon'ble High Court on the findings returned by the Tribunal in SB II holding that NIPL did not constitute a fix place PE of the assessee.

59. Ld. DR for the revenue by referring to the statement of Mr. Simon Piers Beresford Wylie, MD, NIPL contended that Indian entity provided administrative support like telephones, Fax etc. and that said services could not be provided without any connection or availability of physical and geographical space and further contended that office premises of NIPL was at the disposal of assessee.

60. For the sake of repetition it is again brought on record that this issue was extensively argued and decided by Special Bench II that

> "*however, so far as the issue of fixed place permanent establishment is concerned the same does not get*

established at all by making to reference of providing of telephone, fax and car facility to the employees of the assessee visiting India."

61. It is further contended by Ld. DR for the revenue that assessee has not furnished list of an employee visiting India and their total period of stay alongwith purpose of visit in India; nominal salary is paid to the seconded employees by NIPL and major part of their salaries i.e. 80% was paid by the assessee; and that salary paid by the assessee to expats working with NIPL not recovered from NIPL. To repel this argument, Ld. AR for the assessee contended that this contention has already been dealt with by the Special Bench in para 36 page 49 of the order and no adverse view was taken.

62. In para 36 to 38 at page 49 of order passed by SB-II aforesaid contention raised by Ld. DR was duly dealt with and decided in favour of the assessee by returning following findings :

"36. In sum and substance his arguments on permanent establishment can be summarized in the following manner :

- *The assessee's employees were stationed in India and provided services in India, which is evident that expatriates deputed were on payroll Nokia Ltd.*

- *Various expatriate employees visited India to provide services regarding supply of equipments, for which Nokia India Pvt. Ltd. provided administrative support, like telephone, cars etc.*
- *Setting up of GSM network is very complex and technical project which was carried out by highly skilled employees of the assessee company sent to the India from time to time.*
- *Supply contacts and related agreements were signed in India by the employees of the assessee.*
- *The services claimed to have been provided by the Nokia India Pvt. Ltd. both to the assessee and to cellular operators were in fact provided by expatriates of the assessee and Nokia India Pvt. Ltd. did not reimburse the salary. Details of expatriates and their salary paid in foreign currency were pointed out to before us.*
- *Responsibility and liability for all the services provided to the customers in India was with the assessee.*
- *Heavy reliance on the judgments of Morgan Stanley (Supreme Court) and Centrica (Delhi hon'ble High Court) (supra).*
- *Identity of Nokia India Pvt. Ltd. and the assessee merged into one due to above factors and hence it acted as "virtual projection" of foreign entity.*

Decision

37. We have heard the rival contentions and perused the relevant findings given in the impugned orders, materials referred to before us especially in the light of the direction given by the hon'ble High Court and the scope of remand before this Tribunal. The hon'ble High Court in respect of the following substantial question of law;

"1. Whether on a true and correct interpretation of the relevant Double Taxation Avoidance Agreement the Tribunal's reasoning is right in law in holding that Nokia India Pvt. Ltd. (the subsidiary of the appellant) is a permanent establishment?

2. Whether the Tribunal was right in law in holding that a perception of virtual projection of the foreign enterprise in India results in a permanent establishment?

3. Without prejudice, if the answrs to Q. 1 and Q. 2 are in affirmative, is there any attribution of profits on account of signing, network planning and negotiation of offshore supply contracts in India and if yes, the extent and basis thereof ?

4. Whether in law the notional interest on delayed consideration for supply of equipment and licensing of software is taxable in the hands of the assessee as interest from vendor financing ?

Has remanded the matter to the Tribunal with certain observations. While adjudicating the aforesaid issues, the hon'ble High Court had first of all noted certain

errors which had crept in the earlier order of the Special Bench specifically with regard to the certain facts which have been highlighted in the following manner :

(i) The Indian subsidiary was executing contracts on behalf of the appellant through its employees,

(ii) All the contracts with the operators were signed in India.

(iii) The employees of Indian Office (LO) were compensated by some other entity.

(iv) From 1996 onwards all the expenses of Indian office were shifted to the Indian subsidiary.

(v) The employees of the Indian Office were responsible for execution of the contracts with operators.

(vi) No compensation was paid to IC for marketing and support services prior to 1997.

(vii) PSC was set up in India to supervise the supply contract with TATA.

(viii) Certificate of acceptance was signed by Indian subsidiary on behalf of the appellant.

(ix) The appellant has accepted that the license of customized software is not sale, but royalty, and

(x) The appellant has actually earned interest from Vendor financing and on account of delayed payments by the operators in the relevant previous year.

38. After noting the aforesaid facts, the hon'ble High Court observed that the finding of fact by the Special

Bench specifically with regard to point Nos. (i), (iv), (v) and (vi) are purely based on assumption which are completely divorced from the facts for arriving to the conclusion on Nokia India Pvt. Ltd. being permanent establishment."

So, the contention raised by Ld. DR that facts of the case under consideration are distinguishable from A.Y. 1997-98 and 1998-99 are not sustainable.

63. In A.Y. 1999-2000 and 2001-02, the revenue has challenged the modification made by Ld. CIT(A) in the assessment order to the extent of hardware ratio of 70:30 as against 60:40 made by the AO and has also challenged the finding of the CIT(A) in restricting the attribution to 50% of the profit from supply of hardware in A.Y. 2002-03 and 2003-04. The revenue has also challenged the finding of Ld. CIT(A) in attributing 20% of profits to activity of the PE in India for supply of hardware and attributing 20% of profits to activity of PE in India for supply of operating system software.

64. We are of the considered view that in view of our findings in preceding paras when the revenue has failed to prove that there exists PE of the assessee these grounds raised by the revenue have become infructuous being consequential in nature.

65. **ITA no. 1005/Del/2010 In A.Y. 2003-04**

Assessee has raised ground no. 7 that the Ld. CIT(A) has erred in upholding the action of the Ld. Assessing Officer who has arbitrarily imputed Rs. 50,000,000/- as income from vendor financing and taxed the same in the hands of the assessee in India as business income, without providing any justification for imputation of the said income and without seeking any information and detail from the assessee nor providing any opportunity to the assessee to contest such addition.

66. AO / CIT(A) have imputed Rs. 50,000,000/-as income from vendor financing and taxed the same in the hands of assessee in India as business income. Ld. AR for the assessee contended that AO as well as the CIT(A) have not given any justification for imputation of said income nor sought any information and detail from the assessee nor provided any opportunity to the assessee to contest this addition.

67. The Ld. AR for the assessee further contended that this issue is covered vide order passed by Special Bench II and drew our attention towards para 62 page 91 of the order.

68. Bare perusal of para 62 at page 91 of the order passed by Special Bench II goes to prove that identical issue as to taxability of interest from vendor financing has been dealt with and decided in favour of the assessee. Operative part of the finding of Special bench II are extracted for ready perusal as under :-

> *"62. Now coming to the last issue of taxability of interest from vendor financing, we find that the Assessing Officer in his order has made the addition on the ground that the assessee provided credit facilities to its customers for which it should have charged the interest on the same. For coming to this conclusion, he has referred to one clause given in paragraph 6.9 of the contract between the assessee and Modi Telstra to conclude that purchaser were liable to pay interest at 18 per cent, for each day elapsed from the due date of actual payment. Thus, the only reason for making such an addition was existence of a particular clause in the agreement signed between the assessee and some of the Indian Cellular Operators. The learned Commissioner of Income-tax (Appeals) too has confirmed the said addition on the ground that, since the assessee is following a mercantile system of accounting and as per the contract the assessee was entitled to receive such interest, and therefore, same should have been accounted for and in support he has relied upon the judgment of the hon'ble Supreme Court*

in the case of State Bank of Travancore (supra), learned counsel for the assessee had submitted that the said judgment has already been distinguished in the subsequent judgment of the hon'ble Supreme Court in the case of UCO Bank v. CIT (supra) and secondly, only the real income can be brought to tax and not something on hypothetical basis, because there has to be corresponding liability to the other party to whom the income becomes due and here such a clause was never enforced by the parties. Already the arguments of both the parties have been incorporated in earlier part of the order; therefore, same is not being discussed again.

63. After considering the relevant finding and rival contentions, we find that, it has not been brought on record that in any of the contract the assessee had charged any interest on delayed payment or providing any credit facilities to its customers or any customer has paid any such amount for each day elapsed from the due date to the actual payment. Once none of the parties have either acknowledged the debt or any corresponding liability of the other party to pay, then it cannot be held that any income should be taxed on notional basis which has neither accrued nor received by the assessee. Whence the benefit of credit period given to the customers has neither accrued to the assessee nor acknowledged by the other person, then it cannot be said that interest on notional basis

should be calculated for the purpose of taxation. Otherwise, it is a well settled proposition that income cannot be generated, actual or accrued if no income has actually been accrued or received to the assessee. There has to be some income which has resulted to the assessee and even though in books, entries have been made about hypothetical income which does not materialised at all cannot be brought to tax. The Income-tax is levy on real income, i.e., the profits arrived on commercial principles. The assessed must have received or acquired a right to receive the income before it can be taxed. In other words, there must be a debt owed to it by somebody if it is to be taxed on accrual basis unless a debt has been created in favour of the assessee by somebody it cannot be said that income has accrued to it or it has a right to receive the income. This proposition has been well settled by the hon'ble Supreme Court in the case of E. D. Sassoon and Co. Ltd. v. CIT [1954] 26 ITR 27 (SC), CIT v. Ashokbhai Chimanbhai [1965] 56 ITR 42 (SC), CIT v. Messrs. Shoorji Vallabhdas and Co. [1962] 46 ITR 144 (SC) and Godhra Electricity Co. Ltd. v. CIT [1997] 225 ITR 746 (SC). Further, the judgment of the hon'ble Supreme Court in the case of State Bank of Travancore v. CIT reported in [1986] 158 ITR 102 (SC) which has been relied upon by the learned Commissioner of Income-tax (Appeals), has not been treated to be correct enunciation of law by the hon'ble Supreme Court in the

case of Godhra Electricity Co. Ltd. v. CIT [1997] 225 ITR 746 (SC) and UCO Bank v. CIT (supra). Here in the present case, the assessee itself has not treated the amount of interest to be due from any of the telecomm operators either recognised as a debt or as a legal claim. Even the conduct of the parties show thatsuch a clause even though may have been agreed upon has never been enforced or acted upon. In such a situation, in our opinion, the amount of interest cannot construe a debt due to the assessee. Further, the assessee has not debited the account of any customer with interest which can be treated as income of the assessee. Nowhere has it been held by the Assessing Officer/Commissioner of Income-tax (Appeals) that such an interest is legally claimable right against the Indian customers in respect of interest on delayed credit period on vendor financing. Thus, we hold that when the assessee has neither treated the amount to be legally claimed nor has acknowledged any debt due too on its customer as delayed payment then it cannot be held that any interest accrued to the assessee, and therefore, such a notional charging of interest for. each day elapsed from the due date to the actual payment cannot be held to be taxable to the assessee. This proposition has also been now well upheld by the hon'ble Supreme Court in the case of CIT v. Excel Industries Ltd. [2013] 358 ITR 295 (SC). Hence, no income can be said to accrue to the assessee on account of delayed payments as neither

there was any corresponding liability on any of the debtors nor the assessee had claimed any entitlement on such an interest. Accordingly, this issue is also decided in favour of the assessee."

69. So following the decision rendered by Special Bench II in assessee's own case for 1997-98, 1998-99. We are of the considered view that the assessee has not treated the amount to be legally claimed nor has acknowledged any debt due to its customer as delayed payment no income can be said to accrue to the assessee on account of delayed payment as neither there was any corresponding liability on any of the debtors nor the assessee had claimed any entitlement on such an interest. So AO/CIT(A) have erred in imputing Rs. 50,000,000/- as income from vendor financing for the purpose of taxability in the hands of assessee in India as business income.

70 . In view of what has been discussed above, we are of the considered view that following the decision rendered by SB-1 and SB-II which is applicable to the facts and circumstances of the cases at hand on account of identical facts, existence of fixed place PE of assessee in India is not established, consequently appeals filed by the assessee bearing ITA no. ITA No. 2135, 2136

2137/Del/2005 & ITA NO. 1004, 1005/Del/2010 are hereby allowed and the appeal filed by the revenue bearing ITA no. 2286, 2287, 2288/Del./ 2005 & 1234, 1235/Del./2010 are hereby dismissed.

Order pronounced in open court on this 29th March, 2019.

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

Dated: 29 /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	
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	