

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI
(Through Video Conferencing)**

**BEFORE,
SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.5462/Del/2018
(ASSESSMENT YEAR 2008-09)**

M/s Nortel Networks India Pvt. Ltd. G-41, Ground Floor West Patel Nagar New Delhi-110 008 PAN-AABCN 1424B (Appellant)	Vs.	Dy. CIT, Circle-18(2), New Delhi (Respondent)
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Appellant By	Sh. Deepak Chopra & Sh. Harpreet S. Ajmani, Adv.
Respondent by	Sh. H.K.Choudhary, CIT-DR
Date of Hearing	11.11.2021
Date of Pronouncement	09.02.2022

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the assessee against order dated 27.06.2018 passed by the Learned Commissioner of Income Tax (Appeals)-28, New Delhi {CIT(A)} and pertains to Assessment Year 2008-09.

2.0 The sole issue raised by the assessee is the non-grant of deduction in respect to excess revenue taxed for its contract with

Bharat Sanchar Nigam Limited (“BSNL”). The factual matrix of the case is that this is the second round of litigation before this Tribunal and earlier vide order dated 25.02.2014, this Tribunal had restored the matter for *de novo* adjudication to the file of Assessing Officer (AO) whilst observing as follows:

“11.10 Both the parties agreed that facts and issues involved with regard to computation of revenue to be recognized under the BSNL project in AYs 2007-08 and 2008-09 are similar to the facts and issues involved in AY 2006-07. ITAT vide its order dated March 2, 2012, for AY 2006-07 in assessee’s own case has set aside this issue of BSNL revenue and remanded it back to the file of the AO for re-adjudication.

11.11 Ld. Counsel for assessee further stated that the matter for AY 2006-07 has not yet been re-adjudicated by the AO. Since the relevant details submitted by the assessee have been overlooked by the AO and DRP in these years and the earlier years’ revenue recognition has important bearing on the years in question. After hearing both the parties and perusing material available on record, we deem it appropriate to set aside the orders of the AO on the issues, i.e. revenue under BSNL project including percentage of completion, and remand it back to the file of the AO for re-adjudication. Needless to say that the assessee will be given adequate opportunity of being heard and to provide necessary details / working in this behalf.

The AO shall consider the same afresh in accordance with law. These grounds of the assessee are allowed for statistical purposes.”

2.1 Post the aforesaid decision of this Tribunal, the Assessing Officer passed the appeal effect order dated 26.06.2015 under section 143(3) read with section 254 of the Income Tax Act, 1961 (“Act”) and observed:

“8.9 I have carefully considered the assessee’s reply on this issue. Regarding the recognition of revenue from BSNL project, the assessee has stated that though this office had correctly determined the total revenue to be recognized over the life of the BSNL (Phase IV) project (i.e. from AYs 2005-06 to 2008-09) in the assessment order for the subject AY (which is same as computed by Nortel India), yet this office did not allow deduction for the revenues already taxed in the assessment orders upto AY 2007-08, which in fact exceed the total revenue of the project. The assessee has also furnished information in tabular form to show that the revenue from BSNL project has been assessed in excess in the earlier years.

8.10. On this issue, it is observed that as already discussed in the foregoing paras of this order, the Hon’ble ITAT vide order dated 25.02.2014 in ITA No. 4765/Del/2011 took notice of the fact that the issue of the recognition of revenue from BSNL project had been restored to the AO for AY 2006-07 by the ITAT vide the earlier order dated 02.03.2012. At this

stage, the ITAT was informed by the Ld. Counsel for the assessee that the restored matter for AY 2006-07 was pending adjudication before the AO. Accordingly, the ITAT restored the issue regarding recognition of revenue from BSNL project including percentage of completion to the file of AO to adjudicate this issue afresh, however, the remand proceedings for AY 2006-07 stood already concluded by this office vide order u/s 254/143(3) passed on 31.03.2014. The Hon'ble ITAT's subsequent order dated 25.02.2014 for AYs 2007-08 & 2008-09 was received in the office of CIT, Delhi-5, New Delhi on 11.06.2014.

8.11 The position as on date is that addition of Rs. 55,46,10,230/- on account of lower recognition of revenue from BSNL project has already been made by the AO in the assessment order for AY 2006-07 and the assessee's appeal against the said order is pending before the Ld. CIT(A)-06, New Delhi vide Appeal No. 122/14-15 dated 20.05.2014. Although in the present proceedings, the assessee has categorically stated that this office has correctly assessed the revenue recognizable from BSNL project during AYs 2005-06 to 2007-08, yet the fact remains that the assessee has not accepted the AO's order for AY 2006-07 and its appeal is pending. Therefore, it would not be proper at this stage to reduce the recognizable revenue entirely in AY 2008-09, when the matter for AY 2006-07 is still sub-judice as on date. If the assessee gets relief in decision on its appeal, the consequential effect to the appellate order will be given in the relevant assessment year.

8.12 Regarding the issue of deduction on account of AMC cost, it is observed that the assessee has expressed satisfaction over the allowance of 1/3rd of AMC cost given by the AO in the original proceedings, however, at the same time, the assessee agitates taxing of AMC revenue during the subject AY 2008-09 on the ground that the same has already been taxed in the earlier years. The matching principle as pointed out by the assessee itself requires that revenue and cost must be matched to arrive at the true income.

8.13 The entire AMC revenue amounting to Rs. 44,36,24,597/- has been recognized by the assessee during the year under consideration, which means that going by percentage completion method, the revenue credited for the year @ 97.76% (percentage of completion for the subject AY) taken by the assessee would come to Rs. 43,36,87,406/-. Out of total AMC revenue of Rs. 44,36,24,597/- based on percentage completion method, 98.4605% of this revenue amounting to Rs. 43,67,94,996/- has already been taxed upto AY 2007-08. Hence, to set off double taxation, in compliance to the directions of the Hon'ble ITAT, the assessee's income is reduced by the amount of Rs. 43,67,94,996/-. At the same time, it is observed that the assessee has also claimed the entire deferred AMC cost amount to Rs. 66,45,67,172/- in the AY 2008-09. Following the matching principle, as the revenue is not being taxed in AY 2008-09, hence the corresponding cost is also disallowed. This would result in net addition of Rs.

22,77,72,176/- (i.e. Rs. 66,45,67,172 minus Rs. 43,67,94,996/-) on account of disallowance of AMC cost for the year under consideration.”

2.2 The assessee accepted the appeal effect order dated 26.06.2015 to the extent of determination of deduction on account of the AMC cost, however, it agitated the issue of recognition of revenue from BSNL project in appeal before the Ld. CIT(A) on the following grounds:

“1. Ground no. 1: Deduction for excess revenue taxed in earlier years:

1.1. On the facts and in the circumstances of the case and in law, the learned AO has erred in taxing excess revenue of INR 397,795,919 under the BSNL project since the same has already been taxed by him in the prior years.

2. Ground no. 2: Non-grant or credit for taxes paid under protest:

2.1. On the facts and in the circumstances of the case and in law, the learned AO has erred in not giving credit of taxes paid by the Appellant under protest amounting to INR 30,000,000.

3. Ground no. 3: Levy of penalty under section 271(1)(c) of the Act:

3. 1. *On the facts and in the circumstances of the case and in law, the learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act against the Appellant.”*

2.3 The Ld. CIT(A), vide impugned order dated 27.06.2018, disposed off the Assessee’s appeal and on issue of recognition of revenue from BSNL project observed as follows:

“3.1 I have considered the facts of the case and submissions of appellant in respect of the aforesaid ground raised by him. By giving the aforesaid chart, appellant has tried to establish that it is following the percentage completion method for the project with BSNL and till the end of present Financial Year i.e. upto 31st March, 2008, the work upto 97.76% of the total estimated revenue i.e. Rs. 1606,85,17,755/-, which comes to Rs.1570,82,26,462/- has already been completed and recognized by appellant but against it, the AO has already recognized the aggregate amount of Rs. 1629,35,75,658/ (Rs. 519,96,70,457/- + Rs.827,73,00,682/- + Rs. 281,66,04,519/-) from A.Y. 2005-06 to 2007-08 and taxed in the corresponding years. Thus, as per appellant, the AO has already taxed the revenue more than what the appellant has computed as per percentage completion method and, therefore, the excess amount taxed, should be reduced from the income of the year under consideration by giving the set off of the said income. The appellant has worked

out such excess revenue at Rs. 39,77,95,919/- as per the chart.

3.2 However, the perusal of the facts and details given by appellant reveal that the appellant has misled by giving the incorrect and selective figures of the revenue recognized and as taxed by the AO to arrive at the final figure. The perusal of assessment order of A.Y. 2005-06, which is the first year of the execution of project, reveals that total revenue under BSNL contract (based on purchase orders raised by BSNL) was estimated by appellant at Rs. 1617,62,89,128/-, not at Rs, 1606,85,17,755/- as claimed by him in the chart. Against it, as mentioned above, the aggregate amount of Rs. 1629,35,75,658/- has already been recognized by revenue for taxation in A.Y. 2005-06 to 2007-08 and this figure has reached finality after the decisions of ITAT/CIT(A) in respective years. However, taking onto consideration this excess recognition of revenue, the AO during the present assessment proceedings, has observed that the AMC revenue amounting to Rs. 44,36,24,597/- has been recognized by the assessee during the year under consideration but part of this revenue, which amounts of Rs. 43,67,94,996/-, has already been taxed upto A.Y. 2007-08. Therefore, to set off double taxation, he reduced this amount from the total income for the year under consideration. Thus, the net revenue of Rs. 1585,67,80,662/- (Rs. 1629,35,75,658/-, minus Rs. 43,67,94,996/-) has been recognized by AO till the end of the present assessment year against the total estimated revenue

of Rs. 1629,35,75,658/-. In view of these facts, it can be clearly seen that there is no excess revenue recognized and taxed by AO till the end of this assessment year, as claimed by appellant. Moreover, the project of appellant is not complete in the year under consideration as the appellant failed to furnish the copy of completion certificate in respect of the project and unless the project is complete the final figure of revenue (excess or short) cannot be arrived at in view of the project completion method. Therefore, the claim of the appellant that the excess revenue has already been recognized in its case and it should be reduced from its income of the present year, is a premature claim at this stage. In such situation, the ground taken by appellant is liable to be rejected and the income assessed by AO is upheld in accordance to project completion method. The ground taken by appellant fails.”

2.4 The assessee has again approached the Tribunal and has raised the following grounds of appeal:

“On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - 28, New Delhi [‘learned CIT(A)’] has erred in passing an order under section 250 of the Income Tax Act, 1961 (‘Act’) (‘impugned order’) confirming the order passed by the Deputy Commissioner of Income Tax, Circle 18(2), New Delhi (‘learned AO’) under section 254/143(3) of the Act for the subject AY, on the following grounds:

1. Ground no. 1: Non-grant of deduction for excess revenue taxed in earlier years:

1.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the order of the learned AO wherein excess revenue under the BSNL project amounting to INR 39,77,95,919 was taxed.

1.1.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) has failed to appreciate that for AYs 2005-06 to 2008-09, revenue of INR 15,70,82,26,462/- has been offered to tax by the Appellant under BSNL project on project completion basis, whereas the learned AO has taxed higher revenue of INR 16,10,60,22,380/- for the said AYs, resulting in taxation of excessive revenue amounting to INR 39,11,95,919 under BSNL project up to the subject AY.

1.1.2. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not appreciating that revenue to be recognised and taxed upto the subject AY cannot exceed the revenue of INR 15,70,82,26,462 which was recognised by the Appellant upto the subject AY based on percentage completion method which has also been accepted by the learned AO.

1.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in holding that the Appellant has misled by giving incorrect and selective figures of revenue recognised and as taxed by the learned AO.

1.2 On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in computing net revenue of INR 15,85,67,80,662 as revenue recognized by the learned AO upto the subject AY under BSNL project (instead of INR 16,10,60,22,380), by taking into consideration the revenue recognized till the prior year, i.e. till AY 2007-08 and completely ignoring the revenue of INR 24,92,41,718 recognized in the subject AY by the learned AO.

1.2.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in holding that there is no excess revenue taxed by the learned AO till the end of the subject AY as the AO has already reduced the amount of INR 43,67,94,996 in the subject AY, without appreciating the fact that there is excess taxation of revenue to the extent of INR 39,77,95,919 after taking into account the reduction of INR 43,67,94,996 which was made by the learned AO in the subject AY.

1.3 On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in holding that the claim of the Appellant to reduce excess taxed revenue under BSNL project is premature at this stage on the basis that the final figure of revenue cannot be arrived at unless the project is complete.

1.3.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) failed to appreciate that the project was almost (97.76%) complete in the subject AY and there is no difference

between revenue offered to tax by the Appellant and revenue taxed by the learned AO under the BSNL project in the subsequent AYs, hence subsequent years will not have any impact.

2. *Ground no. 2: Levy of penalty under section 271(1)(c) of the Act:*

On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not adjudicating the ground raised with respect to initiation of penalty proceedings under section 271 (1)(c) of the Act.

The appellant craves for leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.”

3.0 Before us, the Ld. Authorized Representative (“AR”) of the Assessee submitted that during the assessment year (“AY”) 2005-06, the Assessee entered into a long term contract with BSNL for supply of telecommunication network system on a turnkey basis, which was finalized in AY 2010-11. Under this contract, the Assessee was responsible for planning, engineering, supply, installation, testing and commissioning of GSM based cellular mobile network across North East-I and Southern Telecom Region

in India. Revenue recognition under the project with BSNL was done as per Percentage Completion Method (PCM).

3.1 It was further submitted that in the appeal effect order dated 26.06.2015, the Assessing Officer accepted that during the relevant period, estimate of revenue under BSNL project was INR 1606,85,17,755/- and that 97.76% of the project was completed, and, thus, the recognizable revenue of the Assessee from BSNL project was INR 1570,82,26,462/-. However, the Assessing Officer did not reduce the amount of revenue under BSNL project which had already been taxed in the prior assessment years, i.e. AYs 2005-06 to 2007-08, on the premise that the Assessee had not accepted the assessment order of earlier years and the matter was *sub-judice* before the appellate authorities, thereby resulting in taxation of excess revenue under BSNL project. It was further submitted that even the Ld. CIT(A) had agreed to the submission of the Assessee that the Assessing Officer had already recognized/taxed revenue of the Assessee from BSNL project for AY 2005-06 to AY 2007-08 at INR 1629,35,75,658/- [i.e., INR 519,96,70,457/- (AY 2005-06) + INR 827,73,00,682/- (AY 2006-07) + INR

281,66,04,519/- (AY 2007-08)]. The Ld. AR submitted that, however, without appreciating that the estimated revenue under the BSNL project is dynamic and keeps changing over the contract period, the Ld. CIT(A) erred in observing that the Assessee had given incorrect details and that there was mismatch in the total estimated revenue from BSNL contract *vis-a-vis* the assessment order of AY 2005-06 (i.e., sum of INR 1617,62,89,128/-) and as claimed by the Assessee (i.e., sum of INR 1606,85,17,755/-) in the relevant AY 2008-09.

3.2 A table showing the year-on-year variation in estimated revenue from the BSNL project for AY 2005-06 to AY 2008-09 was submitted whilst following Percentage Completion Method and the same is reproduced below:

Particulars	as on March 31, 2005	as on March 31, 2006	as on March 31, 2007	as on March 31, 2008
Estimated Revenue (after adjustment) under BSNL project	1617,62,89,128	1565,16,30,352	1572,37,81,635	1606,85,17,755

3.3 The Ld. AR referred to the appeal effect order dated 26.06.2015 and highlighted that the Assessing Officer has not disputed that the total estimated revenue under BSNL project for

the relevant AY 2008-09 was INR 1606,85,17,755/-. Whilst referring to internal Page 8 of the appeal effect order dated 26.06.2015, it was submitted that as on March 31, 2008, 97.76% of project was completed and, accordingly, the recognizable revenue of the project was INR 1570,82,26,462/- (i.e., 1606,85,17,755/-x 97.76%). In this background, he argued that this being the second round of litigation it was not open for the Ld. CIT(A) to refute uncontroverted facts.

3.4 The Ld. AR further submitted that the Ld. CIT(A) has also alleged that considering that the BSNL project was not completed during the relevant period, the claim of the Assessee was premature. In this regard, it was argued that, undisputedly, since the inception of the BSNL project (i.e., AY 2005-06) only percentage completion method has been applied by the Assesseeas well as the Assessing Officer both, therefore, it was not open for the Ld. CIT(A) to deviate from the consistent accounting policy on an *ad hoc* basis. The Ld. AR further pointed out that the proceedings for earlier assessment years (viz. AY 2006-07 and AY 2007-08) have been settled and have attained finality under the Direct Tax Vivid Se

Vishwas Act, 2020 whilst accepting the income assessed by the Assessing Officer. Further, even the proceeding for AY 2005-06 has attained finality. Even the subsequent years i.e., AY 2009-10 and AY 2010-11 have attained finality, as the Assessing officer accepted the position of the Assessee and no addition was made on this account in the assessment order.

3.5 The Ld. AR, whilst referring to the “Schedule L” to Profit & Loss Account at Page 127 of the paperbook and Annexure 3 to submission dated 19.12.2021 at Page 212 of paperbook, submitted that the Ld. CIT(A), in the impugned order, has inadvertently failed to take into account the revenue of INR 24,92,41,718 from BSNL project which was *suo moto* offered to tax by the Assessee and formed part of the total “income from operations” from sales and services of INR 114,25,07,931/- reflected in the audited financials. He argued that the revenue to be recognized and taxed upto AY 2008-09 cannot exceed the revenue of INR 1570,82,26,462/- which was recognized by the Assessee based on percentage completion method and which has also been uncontroverted by the Assessing Officer.

3.6 The Ld. AR also submitted a working to show that the total revenue taxed by the Assessing Officer with respect to the BSNL project for AY 2005-06 to AY 2008-09 is INR 1610,60,22,380/- [i.e. INR 1629,35,75,658/- (recognizable/taxable revenue from BSNL project for AYs 2005-06 to 2007-08 – approved by Ld. CIT(A) in Para 3.1 / 3.2 of its order) (less) INR 43,67,94,996/- (set off of AMC revenue by the Assessing Officer in appeal effect order as per directions of Tribunal) (add) INR 24,92,41,717/- (income from BSNL project which was *suo moto* offered by the Assessee and reflected in the audited Profit & Loss account] whereas the recognizable revenue from BSNL project till AY 2008-09 as per percentage completion method was INR 1570,82,26,461/-. Resultantly, an amount of INR 39,77,95,919/- [INR 1610,60,22,380/- (less) INR 1570,82,26,461/-] has been claimed as refund which was excessively taxed by the Assessing Officer and had led to double taxation.

4.0 The Ld. DR, on the other hand, relied on the findings of the Ld. CIT (A).

5.0 We have considered the rival submissions and have gone through the material placed on record. The present appeal revolves around a short compass as to how much revenue from BSNL project is liable to taxation during the relevant period, i.e., AY 2008-09? We note that the Assessee commenced the relevant BSNL project in the year 2005 and the same was finalized in the year 2010. The method of accounting adopted by the Assessee for recognition of revenue from the BSNL project i.e., percentage completion method was never disputed by the lower authorities. The Ld. AR has correctly highlighted that the limited grievance of the Assessing Officer in not accepting the reconciliation of the recognizable revenue from BSNL project till AY 2008-09 was that the matter for earlier years was *sub judice* before appellate authorities. This grievance now stands settled as the proceedings for earlier years (i.e., AY 2005-06 to AY 2007-08) have been settled and/or attained finality and, thus, the income assessed by the Assessing Officer is frozen.

5.1 We are of the considered opinion that whilst applying the percentage completion method, the estimated revenue of a project

would be dynamic year-on-year and would keep on changing over the contract period. Thus, the myopic view taken by the Ld. CIT(A) in comparing the total estimated revenue from BSNL contract *vis a vis* the assessment order of AY 2005-06 (i.e., sum of INR 1617,62,89,128/-) and as claimed by the Assessee (i.e., sum of INR 1606,85,17,755/-) in the relevant AY 2008-09, is baseless and devoid of merits. Our view is fortified by the judgment of the Hon'ble Supreme Court in CIT v. Bilahari Investment (P.) Ltd. (2008) 299 ITR 1 (SC), wherein, whilst enunciating the difference between completed contract method and percentage of completion method, it was observed as follows:

"15. Recognition/identification of income under the 1961 Act is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods. Completed contract method is one such method. Similarly, percentage of completion method is another such method.

16. Under completed contract method, the revenue is not recognised until the contract is complete. Under the said method, costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to P & L account. The

said method determines results only when contract is completed. This method leads to objective assessment of the results of the contract.

17. On the other hand, percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognised under this method is determined by reference to the stage of completion of the contract. The stage of completion can be looked at under this method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of contract."

5.2 We are of the opinion that the percentage completion method tries to attain periodic recognition of income in order to reflect current performance and, accordingly, the revenue recognized during AY 2005-06 to AY 2007-08 would be relevant for determining the recognizable revenue from BSNL project till AY 2008-09 and not the final figure when the project is actually completed, which would otherwise lead to impossibility of performance.

5.3 We also note that the Assessing Officer has not disputed that during the relevant period, estimate of revenue under BSNL project was INR 1606,85,17,755/- and 97.76% of the project was completed and, thus, the recognizable revenue of the Assessee from

BSNL project was INR 1570,82,26,462/-. Therefore, it was not open for the Ld. CIT(A) to take a contrary view in the remand proceedings without any corroborative evidence on record. This is second round of litigation before this Tribunal and all the necessary factual details are available on record. We, therefore, deem it appropriate to dwell into the merits of the working discussed in preceding paragraphs to compute the recognizable revenue from BSNL project up till AY 2008-09. Accordingly, after duly considering the material evidence on record and the order of the Ld. CIT(A) [viz. Paragraphs 3.1 and 3.2 of the order], we observe that the Ld. CIT(A) has missed to take into consideration the revenue of INR 24,92,41,718/- from BSNL project which was *suo moto* offered to tax by the Assessee and is also reflected in the audited financials. In this background, we approve the working submitted by the Ld. AR that the total revenue taxed by the Assessing Officer with respect to the BSNL project for AY 2005-06 to AY 2008-09 is INR 1610,60,22,380/- and the recognizable revenue from BSNL project for AY 2005-06 to AY 2008-09 as per percentage completion method is INR 1570,82,26,461/-. Accordingly, the Assessing Officer is

directed to grant relief to the Assessee to the extent of sum excessively taxed, so as to avoid double taxation. Resultantly, Ground/s No. 1 to 1.3.1 of the present appeal are allowed.

5.4 Ground No. 2 of the present appeal deals with levy of penalty under section 271(1)(c) of the Act and the same is disposed as not pressed.

6.0 In the final result, the appeal of the Assessee stands allowed.

Order pronounced on 09. 02. 2022.

Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Dated: 09/02/2022
PK/Ps

Copy forwarded to:

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

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI