

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI****BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER****I.T.A. No. 2527/DEL/2018 (A.Y 2014-15)
a/w STAY NO. 366/DEL/2020 (A.Y 2014-15)****(THROUGH VIDEO CONFERENCING)**

Nokia India Sales Pvt. Ltd. 807, New Delhi House, Barakhamba Road, New Delhi PAN: AACCN9141L (APPELLANT)	Vs	Addl. CIT Special Range-6 Room NO. 352, C. R. Building, I. P. Estate, New Delhi (RESPONDENT)
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I.T.A. No. 4425/DEL/2018 (A.Y 2014-15)

Nokia India Sales Pvt. Ltd. 807, New Delhi House, Barakhamba Road, New Delhi PAN: AACCN9141L (APPELLANT)	Vs	Addl. CIT Special Range-6 Room NO. 352, C. R. Building, I. P. Estate, New Delhi (RESPONDENT)
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Appellant by	Sh. Nageshwar Rao, Adv & Sh. Purushattam Anand, Adv.
Respondent by	Sh. Prabha Kant, CIT(DR)

Date of Hearing	05.01.2021
Date of Pronouncement	12.01.2021

ORDER**PER SUCHITRA KAMBLE, JM**

These two appeals are filed by the assessee and the Revenue against the order dated 22/2/2018 passed by CIT(A) -19, New Delhi For Assessment Year 2014-15.

2. The grounds of appeal are as under:-

I.T.A. No. 2527/DEL/2018 (Assessee's appeal)

"Appeal against the order passed under Section 250 of the Income Tax Act, 1961 ('the Act') dated February 22, 2018 for the Assessment Year 2014-15 by the learned Commissioner of Income Tax (Appeals)- XIX, New Delhi [CIT(A)]"

1. *That on the facts and circumstances of the case and in law, the learned CIT(A) has erred in disallowing the cost incurred by the Appellant on phones issued to employees, dealers and Care centers on free of cost ("FOC") basis, purportedly on the ground that the Appellant did not file details in support of its claim for such phones, even though the Appellant has placed stock withdrawal requisition forms and delivery related documents on sample basis for issuance of FOC phones before the AO.*

1.1. *That on the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned AO, in light of the fact that the learned AO treated the cost incurred by the Appellant on phones issued to employees, dealers and Care centers either as a capital expense or not allowable as a business expense under the provisions of Section 37(1) of the Act.*

1.2. *That on the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating that the cost of FOC phones issued to Care centers is in the nature of expenses incurred against defective phones and thus, allowable as business expense under the provisions of Section 37(1) of the Act.*

1.3. *That without prejudice to above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that the learned AO has not allowed tax depreciation on the cost of FOC phones issued to dealers, despite making a specific reference to the same in the assessment order dated December 26, 2016, thereby contradicting the aforesaid disallowance made by him.*

1.4. *That without prejudice to above, the learned CIT(A) has erred in not granting deduction of roll-over depreciation on the written down value of the FOC phones issued to dealers and employees, which were treated as capital assets by the learned AO in the hands of NISPL in AY 2013-14.*

2. *The Appellant craves leave to add, amend, alter, delete, rescind, forgo or withdraw any of the above grounds of appeal either before or during the hearing before the Hon'ble Tribunal. Further, the aforesaid grounds are mutually exclusive and without prejudice to each other.*

The above grounds are without prejudice to each other.”

I.T.A. No. 4425/DEL/2018 (Revenue's appeal)

1. *“Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of Rs. 1422,26,42,726/- u/s 40(a)(i) on account of non-deduction of tax on payment for embedded software/royalty when the amount is even taxable under India-Finland DTAA?*

2. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of Rs. 669,23,96,959/- u/s 40(a)(ia) on account of Trade Offers to HCL Infosystems Ltd. when the payment are in the nature of commission or services provided by HCL Infosystems Ltd. are in the nature of commission or- services provided by HCL Infosystems Ltd are in the nature of consultancy?*

3. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of Rs. 584,86,39,994/- u/s 40(a)(ia) on account of Trade offers to other distributors?*

4. *Whether on facts and in circumstances of the case, the ld. CIT(A) is legally justified in deleting disallowance of Rs. 19,52,32,441/- on account of Trade Price Protection where the assessee failed to adduce any cogent evidence to show that it is related to business of assessee company?*

5. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of Rs. 2,35,00,000/- on account of obsolescence of inventory when the assessee has no evidence to support the contention of provision of obsolete stock?*

6. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of Rs. 54,57,72,946/- on account of Advertisement & Publicity expenses even though such expenses are incurred for benefits of endorsing nature?"*

3. Nokia India Sales Private Limited (NISPL) was incorporated as Nokia Sales Services Private Ltd in December 2008. The name of the company was changed to Nokia India Sales Private Limited on March 18, 2011. The assessee company is an indirectly wholly owned subsidiary of Nokia Corporation Oy, Finland and is engaged in the business of marketing, distribution and sales of mobile phones (including accessories) and services. This business of the assessee was earlier handled by M/s Nokia India Pvt. Ltd. (NIPL), another subsidiary of Nokia Corporation OY, till about end of December, 2012 and in that sense NIPL is business predecessor to the assessee. The assessee filed e-return declaring total income of Rs.286,06,91,570/- on 30/11/2014 and revised return declaring Rs. 296,66,91,570/- on 8/2/2014. The Assessing Officer assessed total income of the assessee and computed the same after addition and disallowance as under:-

	Returned Income as per revised return	Rs. 296,66,91,570/-
Add:	Disallowance u/s 40(a)(i) for non-deduction of tax on payment for embedded software/royalty	Rs. 1422,26,42,726/-
	Disallowance of Trade Offers to HCL Infosystems Ltd	Rs. 669,23,96,959/-
	Disallowance of Trade Offers to other distributors	Rs. 584,86,39,994/-
	Disallowance of Trade Price Protection	Rs. 19,52,32,441/-
	Disallowance of Marketing Expenses (FOC phones)	Rs. 27,85,51,781/-
	Disallowance of obsolescence of inventory	Rs. 2,35,00,000/-
	Disallowance of Advertisement & Publicity expenses	Rs. 4,57,72,946/-
	Assessed Income	Rs. 3027,34,28,417/-

Thus, the Assessing Officer assessed the income of the assessee at Rs. 3027,34,28,417/-.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. Firstly, we are taking up the assessee's appeal. As regards to sole issue in assessee's appeal relating to disallowance of free of cost (FOC) phones issued to employees, dealers and Care centers, the Ld. AR submitted that NISPL issued Free of Cost (FOC) phones to Care centers, dealers and employees which are totally allowable as business expense under Section 37(1) of the Act. These handsets were issued to care centers as "Swap hand-sets" in the event the handset sold to the customer were found to be defective and could not be repaired during the warranty period. Similarly, phones were issued to distributors and re-distributors for display and promotional purposes and also to employees for official use and also to act as a passive/ demonstrative advertisement strategy for reaching out to customers at large. The details and break up of FOC phones are mentioned in the Assessment Order. NISPL also

duly followed and maintained record of FOC phones and also submitted duly filled in stock requisition forms to Assessing Officer, on sample basis, which included details of number and model of handsets required along with the purpose for which the same shall be used. The Assessing Officer held expenditure on FOC phones to be capital in nature and that Assessee can only claim depreciation on phones issued to the employees. The Assessing Officer heavily relied on earlier assessments in case of NIPL and specifically noted that facts are same and there was no reason to deviate from the earlier findings. The CIT(A) also upheld the additions by the Assessing Officer and held that there was no supporting documents to show that phones were actually issued. The Ld. AR submitted that the Tribunal has already adjudicate this issue in case of Nokia India Pvt. Ltd. same entity referred to by the Assessing Officer, vide order dated 30.01.2018 in ITA No. 2445/Del/2010 for AY 2003-04 which has also been upheld by Hon'ble jurisdictional High Court vide order dated 31 August 2018 in ITA 955/2018.

6. The Ld. DR submitted that the main ground of appeal of the assessee is against disallowance of free of cost phones allegedly given to employees, distributors and to customers as replacement of already sold phones. The assessee claimed that these expenses were incurred wholly and exclusively for the purpose of business hence must be allowed u/s 37. The Ld. DR submitted that before any expense is held to be allowable or disallowable, there has to be an expense and the assessee must prove with documentary evidence that it incurred expense. The Assessing Officer called for details with supporting evidence of expenditure claimed to have been incurred on supply of free of cost handsets. The Ld. DR further submitted that the assessee did not furnish details before the Assessing Officer as well as before the CIT(A). The CIT(A) in para 8.2 of the appellate order held as under:

"I find that the appellant could not file details in support of its claim that free of cost phones were issued to the employees, dealers etc. In absence of

supporting documents, I do not find any merit in the arguments of the appellant that these phones were actually issued."

Thus, the Ld. DR submitted that in absence of evidence such expenses cannot be allowed even if in earlier years such expenses were allowed.

7. We have heard both the parties and perused the material available on record. It is pertinent to note that the CIT(A) as well as the Assessing Officer has clearly mentioned in their respective order that no details in support of its claim was furnished by the assessee. From the perusal of the submissions of the assessee before the Assessing Officer and the CIT(A), it can be seen that only sample copies were given and extensive details of each party was not given before the Revenue authorities. Therefore, we direct the assessee to produce the details in consonance to the claim of the assessee before the Assessing Officer. Thus, we remand back this issue to the file of the Assessing Officer for taking into account the evidences for consideration of assessee's claim and thereafter passing the order as per the decision of the Tribunal in case of Nokia India Pvt. Ltd. same entity referred to by the Assessing Officer, vide order dated 30.01.2018 in ITA No. 2445/Del/2010 for AY 2003-04 which has also been upheld by Hon'ble jurisdictional High Court vide order dated 31 August 2018 in ITA 955/2018. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus, appeal of the assessee being ITA No. 2527/Del/2018 is partly allowed for statistical purpose.

8. Now we are taking up the Revenue's appeal. As regards to Ground No. 1 of the revenue's appeal, the Ld. DR relied upon the assessment order.

9. The Ld. AR submitted that in respect of taxability of software embedded in mobile phones, during the previous year relevant to the subject AY, the Appellant had paid an amount of Rs. 3555,66,06,815/- to Nokia Corporation

Finland ('Nokia Corp') towards consideration for purchase of finished mobile phones. The Assessing Officer, based on the assessment of NIPL for preceding years, proceeded with artificial splitting of the price of imported mobile phones into the price of embedded software and price of component in the ratio of 40:60. Thereafter, alleging that the artificial cost of embedded software such arrived is taxable as 'royalty' in India (both under the provisions of the Act and as well as India-Finland Tax Treaty), the Assessing Officer proceeded with making disallowance u/s 40(a)(i) of the Act of the impugned price of embedded software on the grounds that the assessee was liable to withhold tax at source thereon. The software embedded in the hardware (which is not supplied separately) is a standard operating software that can be used to activate and operate/ run the specific mobile handset supplied by Nokia Corp and is incapable of being traded by the assessee on a standalone basis. The Ld. AR submitted that the CIT(A) has recorded detailed reasons and deleted the addition following bindings decisions of Hon'ble jurisdictional High Court in case of DIT v. Ericsson A.B [2012] 343 1TR 470, CIT vs. Alcatel Lucent Canada [2015] 372 ITR 476 (Delhi HC) and others and has rightly held that consideration received by Assessee as a distributor of phones cannot be artificially split between price for hardware and software.

10. We have heard both the parties and perused the material available on record. It is pertinent to note that the CIT(A) has given a detailed finding as relates to non-deduction of tax at source under Section 195 for software embedded in mobile phones imported by the assessee during the previous year. The fact remains that the finished mobile phones were imported by the assessee from Nokia Corp for the purposes of sale against a lump-sum consideration and there was no separate payment made by the assessee towards the purchase of any software. The Revenue could not point out the distinguishing fact that there was a separate payment made for purchase of software embedded in mobile phones. The decision relied by the Ld. AR are apt

for the present assessee's case and the CIT(A) has rightly deleted this addition. There is no need to interfere with the findings of the CIT(A). Hence, Ground No. 1 of the Revenue's appeal is dismissed.

11. As regards to Ground No. 2 & 3 of the Revenue's appeal relating to deletion of disallowances u/s 40(a)(ia), the Ld. DR submitted that the assessee claimed that it gave trade discounts/trade offers to HCL and other distributors. This issue was also there in assessee's own case for A.Y 2013-14 in ITA No 7244/2017. On 18/9/2019 the Tribunal had given a written direction to the Assessing Officer to issue notice u/s 133(6) to HCL Infosystem Ltd. and to other distributors of the assessee to ascertain whether they had offered the discount received from the assessee as income in their return of income or not. Because of the lockdown the Assessing Officer has not submitted the report. The appeal for AY 2013-14 is still pending.

12. The Ld. AR submitted in respect of the disallowance of Trade offers/discounts extended to HCL Infosystems Ltd. and other distributors u/s 194H or Section 194J that in the impugned assessment order, the Assessing Officer has made a disallowance under Section 40(a)(ia) of the Act on account of alleged non-withholding of taxes by the assessee under section 194H of the Act on trade offers and discounts extended to HCL Infosystems Ltd. ('HCL') and to other distributors. The primary allegation of the Assessing Officer is that such trade offers and discounts provided by the assessee to HCL and other distributors are in the nature of income by way of commission' and hence, liable for TDS under Section 194H of the Act and the Assessing Officer has alternatively alleged that such trade offers and discounts fall under the definition of fee for technical services liable for deduction at source under section 194J of the Act. The Assessing Officer relied on the findings in earlier assessments in case of NIPL. The Ld. AR further submitted that as the Assessee operated in a highly competitive and price sensitive mobile

handset market, with rapidly evolving mobile products and technology, it extended discount schemes to its distributors from time to time as a part of its sales and marketing strategy, for promotion of sales of Nokia mobile phones across different regions. In business terminology, the discounts are called as 'trade offers'. The discounts/ trade offers provided by the assessee were in accordance with standard mobile handset industry practice and were critical to maintain its competitive edge in a highly price sensitive and competitive mobile handset industry. The Assessing Officer wrongly presumed that it is immaterial to consider whether the transactions between appellant and HCL are on principal to principal basis or principal to agent basis which was directly contrary to law laid down by Hon'ble Courts in the case of Ahmedabad Stamp Vendors Association v. UOI [2002] 257 ITR 202 (Gujarat) as affirmed by the Hon'ble Supreme Court reported in [2012] 348 1TR 378 (SC), CIT v. Singapore Airlines Ltd. & Ors. [(2009) 319 ITR 29] and others and the CIT(A) has only corrected the findings of the Assessing Officer in light of abovementioned binding decisions. The Assessing Officer relied on assessments in previous year in case of predecessor entity i.e. Nokia India Private Limited (NIPL) and the Tribunal has adjudicated this issue in favour of the assessee's in case of NIPL vide order dated 20 February 2020 in ITA Nos. 5791/Del/2015 & 5845/Del/2015 for the Assessment year 2010-11. This decision of AY 2010-11 has been followed by the Tribunal in order dated 17.08.2020 for AY 2011-12 and in order dated 15.10.2020 for AY 2008-09 and 2012-13. In respect of applicability of Section 194J of the Act, the Ld. AR submitted that the Assessing Officer alternatively alleged that consideration received from HCL is also taxable under Section 194J of the Act holding 'exchanging information' as provided under the Agreement to amount to marketing support services. The Ld. AR pointed out that the only transaction between assessee and HCL was for the purchase and sale of goods and no separate service was provided to attract Section 194J of the Act. The CIT (A) provision of Section 194J cannot include any constructive payment in the nature of trade offers as no consideration was

paid/payable to HCL/other distributors by the Assessee. The CIT(A) also rightly held that services under the Agreement (information exchange) were not towards the assessee, rather was undertaken by HCL/other distributors for themselves.

13. We have heard both the parties and perused the material available on record. From the perusal of the record it can be seen that in A.Y. 2013-14, the Tribunal has directed the Assessing Officer to issue notice u/s 133(6) to HCL Infosystem Ltd. and other distributors to ascertain whether they had offered the discount received from the assessee as income in their return of income or not. The interim direction was not complied by the Assessing Officer A.Y. 2013-14 despite having sufficient time. In the meanwhile, the position of facts relating to Nokia India Pvt. Ltd. wherein the similar issue was contested was decided in favour of the respective assessee and one of the parties in that case was HCL. The fact remains that the Assessing Officer in the present assessment year relied on assessments in previous year in case of predecessor entity i.e. Nokia India Private Limited (NIPL) and the Tribunal has adjudicated this issue in favour of the assessee's in case of NIPL vide order dated 20 February 2020 in ITA Nos. 5791/Del/2015 & 5845/Del/2015 for the Assessment year 2010-11. This decision of AY 2010-11 has been followed by the Tribunal in order dated 17.08.2020 for AY 2011-12 and in order dated 15.10.2020 for AY 2008-09 and 2012-13. The Tribunal in case of NIPL held as under:

“8. We have heard both the parties and perused all the relevant material available on record. It can be seen from Clause 2, 7, 8, 9, 14 and 19 of the “Agreement for the Supply of Cellular Mobile Phones” between HCL and the assessee that relationship between the assessee and HCL is that of principal to principal and not that of principal to agent. The discount which was offered to distributors is given for promotion of sales. This element cannot be treated as commission. There is absence of a principal-agent relationship and benefit

extended to distributors cannot be treated as commission under Section 194H of the Act. As regards to applicability of Section 194J of the Act, the Assessing Officer has not given any reasoning or finding to the extent that there is payment for technical service liable for withholding under Section 194J. Marketing activities have been undertaken by HCL on its own. Merely making an addition under Section 194J without the actual basis for the same on part of the Assessing Officer is not just and proper. The Ld. DR's contention that discounts were given by way of debit notes and the same were not adjusted or mentioned in the invoice generated upon original sales made by the assessee, does not seem tenable after going through the invoice and the debit notes. In fact, there is clear mention about the discount for sales promotion. Thus, on both the account the addition made by the Assessing Officer does not sustain. Ground No. 2 is allowed."

Besides this in the present assessment year, the CIT(A) has observed that one of the scheme documents shows that HCL is eligible for raising a credit note if it achieves prescribed sales target during a given month. The other scheme was in relation to rebate towards specific model of phone issued to select set of stores. These schemes are given to promote the sales and in effect given as reduction in the purchase consideration paid by the distributor. The assessee has also submitted the third party confirmations which was received by them from various distributors to demonstrate that the relationship between the assessee and its distributors is on principal-to-principal basis, and that trade offers/discounts have been extended by the assessee to them. Thus, the facts are identical in the present case as well to that of NIPL. Therefore, there is no need to interfere with the finding of the CIT(A) and in light of the decision of the Tribunal in NIPL, Ground Nos. 2 and 3 in revenues' appeal are dismissed

14. As regards to Ground No. 4 relating to deletion of Trade Price protection, the Ld. DR submitted that the Assessing Officer has dealt Ground Nos. 2 to 4 in Para 17 to 44 of the Assessment order. In Paras 39 to 42 the Assessing

Officer has mentioned that relevant evidence of any of these expenses were not furnished. The same are extracted below:

39. Perusal of the replies filed by the assessee reveals that the assessee provides protection to its distributors against "probable loss" that they may suffer due to fall in prices of handsets. No details were also provided as to whether the company conducts any stock audit in respect of the number and type of handsets lying with the distributors on which the price protection was allowed. Neither was any basis of rates was provided on which the purported price protection was being booked.

40. A perusal of the confirmations provided show that these are stereotyped confirmations received from the various parties. The language of these confirmations is almost the same, the telephone numbers of the distributors is not given in the confirmations and even date is not mentioned in the confirmation documents. This in itself creates doubts regarding the confirmations received. In these circumstances, the benefit of price protection charges claimed to have been paid to these parties cannot be given.

41. It is also pertinent to mention that the trade price protection allowed was not debited as an expense item in the Profit & Loss account but was directly adjusted from the total sales effected. Thus, it is not possible to verify the quantum of price protection allowed as no details are available as to how the company verifies the quantity/number of handsets with distributors at various levels (national/regional etc.) on which the price protection is to be allowed. Neither any copy of credit note nor any computation of price protection has been furnished. The other copies of e-mail provided by the assessee also do not contain any details of amounts / period / basis of computation/ approval of the concerned authorized person of the said price protection.

42. As no authenticated documentary evidence has been filed by the assessee

company to show that the assessee company has actually incurred such expenses Wholly and exclusively for the purpose of business necessity. Moreover, no specific agreements with any of its distributors or retailers or any of its front line business associates have been filed to show that the expenses have actually been incurred by the assessee company, which are allowable as revenue expenditure. Moreover, it is pertinent to state that trade offers were already being offered to its distributors and retailers by the assessee, which it was alleging to be in the nature of discount, thus, offering further price protection to its distributors and retailers etc. does not appear to be justified. Further, there was no evidence to show whether distributors were really liable for such compensation as the assessee is operating its own outlets in many places. Furthermore, it was also not explained as to how the price protection given by the assessee to its distributors and retailers has been passed on to their ultimate customers also.

Thus, the Ld. DR submitted that in absence of actual documentary evidence such expenses cannot be allowed.

15. The Ld. AR submitted that the assessee operated in a highly competitive and price sensitive market with rapidly evolving products and high technological obsolescence, wherein the sales of handsets offered by the assessee and its market share to a large extent depend upon the variety and prices of the handsets offered by the assessee and its competitors. Accordingly, NISPL compensated/ provided protection to its distributors against the loss suffered by the distributors on account of such reduction/ fall in the prices of handsets, known as TPP. Further, the Assessee also filed Party wise details of TPP expenses, along with independent confirmations obtained from distributors, during the course of the assessment proceedings before the Assessing Officer. However, the Assessing Officer proceeded to make the said disallowance purely on the basis of surmises and conjectures as alleged that

there was no mechanism to determine the amount of price protection and that the confirmations received from parties 'stereotyped confirmation' with similar language. The CIT(A) has rightly held that allegation of the Assessing Officer that confirmations were stereotyped is baseless in view of the fact that no specific format has been prescribed for such confirmations and that discounts in the form of TPP was result of commercial expediency and the Assessing Officer cannot step in the shoes of the business entity as laid down in binding judicial precedents. The Tribunal has adjudicated this issue in favour of the assessee's predecessor entity NIPL vide order dated 20.02.2020 for Assessment Year 2010-11 and this decision of Assessment Year 2010-11 has been followed by the Tribunal in order dated 17.08.2020 for AY 2011-12 and in order dated 15.10.2020 for AY 2008-09 and 2012-13.

16. We have heard both the parties and perused the material available on record. From the perusal of the records it can be seen that the Assessee filed Party wise details of Trade Price Protection expenses, along with independent confirmations obtained from distributors, during the course of the assessment proceedings before the learned assessing officer. The additional evidence was also filed before the CIT(A) and despite the opportunity given to the Assessing Officer, the Assessing Officer choose not to file remand report on this issue. Thus, the contention of the Ld. DR that no evidence was filed by the assessee appears to be incorrect. The Tribunal has adjudicated this issue in favour of the assessee's predecessor entity NIPL vide order dated 20.02.2020 for Assessment Year 2010-11 and this decision of Assessment Year 2010-11 has been followed by the Tribunal in order dated 17.08.2020 for AY 2011-12 and in order dated 15.10.2020 for AY 2008-09 and 2012-13. The Tribunal in NIPL case for A.Y. 2010-11 held as under:

"11. We have heard both the parties and perused all the relevant material available on record. It is market practice that if there is any change in prices of handsets by competitors, change in life of mobile model, change in

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

Thus, the issue is identical in the present assessee's case as well. The CIT(A) has also rightly held that based on the confirmations available from the distributors, the nature of Trade Price Protection cannot be said to be a bogus expense nor protection against a probable loss. Thus, Ground No. 4 of the Revenue's appeal is dismissed.

17. As regards to Ground No. 5 relating to ad-hoc disallowance of 25% of the amount of 'provision for obsolescence', the Ld. DR submitted that no documentary evidence of such obsolescence of inventory was furnished. Para 59 of the Assessment order reads as under:

“59. In the case at hand, as neither proper reasons nor evidences in support of the assessee's claim of the provision for stock written off were made, the claim of the assessee is liable to be rejected. It is not the argument of the Revenue that such expenses are not required for the purpose of the assessee's business. But, if the assessee does have to incur such expenses then it is obliged to prove that such expenses are wholly and exclusively for the purpose of the assessee's business along with evidences. However, in the year under consideration, the assessee company has merely submitted the details items which it claims have become obsolete, without any evidences as to how and why these items become obsolete. The assessee has also not submitted any evidence in support of its contention with regard to computation of provision of obsolete stock. The assessee failed to bring on record as to who had given approval and under what circumstances the stock was written off in the books of account. Further, there was no correspondence or letters between the operating personnel of the assessee company with regard to reasons and basis of stock written off, just a Global policy was submitted.”

Thus, the Ld. DR submitted that the actual documentary evidence was not furnished before the Assessing Officer.

18. The Ld. AR submitted that due to the nature of business Assessee was involved in and keeping in mind the technological evolvement/ advancement of mobile communication technology, substantial change in the models and designs, Assessee made a provision for obsolescence; however, the Assessing Officer disallowed 25% of the provision on ad hoc basis alleging that it was unascertained liability and no supporting document was provided except from Global policy of the Assessee. The Assessing Officer also relied on orders of DRP and the Tribunal in case of NIPL and noted that facts are similar. The CIT(A) has discussed the issue in detail and has referred to Paragraph 5 of Accounting Standard -2 on valuation of inventory issued by the ICAI, which

clarifies that inventories are required to be valued at lower of cost or net realizable value and has followed binding precedent of Hon'ble Supreme Court in case of Woodward Governor 312 ITR 254 (Supreme Court), wherein it has been held that amount debited to profit and loss account in accordance with the applicable accounting standards issued by ICAI, should be allowed for the purposes of the Act. The CIT(A) has also considered the method of provision at para 9.1 of the order and held that even statutory auditor have certified the quantum of provision to conclude that Assessee adopted scientific method of valuation and, therefore, the provision is allowable in view of binding decision of Hon'ble Supreme court in case of Rotork Control India Pvt. Ltd. Further, the issue has also been adjudicated and remanded to the file of the Assessing Officer by the Tribunal in case of NIPL for AY 2003-04 and the decision was also upheld by Hon'ble High Court.

19. We have heard both the parties and perused the material available on record. From the perusal of the records, it can be seen that the Assessing Officer relied on orders of DRP and the Tribunal in case of NIPL and noted that facts are similar. The Tribunal in NIPL held as under:

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

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

The CIT(A) observed in the present assessee's case that the Accounting Standard -2 on valuation of inventory issued by the ICAI, which clarifies that inventories are required to be valued at lower of cost or net realizable value and followed binding precedent of Hon'ble Supreme Court in case of Woodward Governor 312 ITR 254 (Supreme Court), wherein it has been held that amount debited to profit and loss account in accordance with the applicable accounting standards issued by ICAI, should be allowed for the purposes of the Act. The CIT(A) has also considered the method of provision at para 9.1 of the order and held that even statutory auditor have certified the quantum of provision to conclude that Assessee adopted scientific method of valuation and, therefore, the provision is allowable in view of binding decision of Hon'ble Supreme court in case of Rotork Control India Pvt. Ltd. The CIT(A) while deciding the issue clearly held that the assessee has mentioned these products in its books of accounts. But the fact remains whether the sale was not actually made in the present assessment year which is not emerging from the order of the CIT(A) and also that the Assessing Officer has also not given as to what is the reason for disallowance of 25% of the amount of provision for obsolescence on ad-hoc basis. Thus, it will be appropriate to remand back this issue to the file of the Assessing Officer with direction to determine and decide the same afresh in respect of the cost of obsolete items with reference to net realizable value. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground No. 5 is partly allowed for statistical purpose.

20. As regards Ground No. 6 relating to ad-hoc disallowance of 25% of advertisement expenditure alleging same to be capital in nature, the Ld. DR relied upon the Assessment Order.

21. The Ld. AR submitted that disallowance of ad-hoc 25% of the advertisement and publicity expenses have been made by the Assessing Officer without giving any valid show cause/ opportunity to the assessee. Thee said advertising expenses have been incurred by the assessee on conducting road shows, participation in industry events, product advertising in all forums of media channels which includes magazines, newspaper, television, radio etc. for attracting customers, making customers aware of the different type of mobile handsets sold by the Company and enhancing its sales in India and only represent expenses incurred wholly and exclusively for the purpose of the business of the assessee and therefore, fully allowable under section 37(1) of the Act. The Assessing Officer wrongly held that such expenditure give 'enduring benefit' to Assessee and leads to creation of goodwill reputation and credibility and capitalized 25% of advertisement expenses. The CIT(A) has rightly deleted the disallowance relying on the decision of Hon'ble jurisdictional Delhi High Court in case of CIT(A) Spice Distribution Ltd., ITA No. 597/2014, dated 19.09.2014 (Delhi) wherein Hon'ble court has held that advertisements do not have long lasting impact and is a day to day expense incurred for running the business. The Ld. AR submitted that the CIT(A) has only followed binding decision and has given reasoned order which does not require any interference from this Hon'ble Tribunal.

22. We have heard both the parties and perused the material available on record. The CIT(A) has observed that the assessee is engaged in trading of mobile handsets and its accessories and had claimed certain expenditure on advertisement as revenue expenditure. But the Assessing Officer treated the said expenditure as deferred revenue expenditure and allowed a proportion of advertising expenses. The CIT(A) relied upon the decision of the Hon'ble Delhi

High Court in case of Spice Distribution Ltd. wherein the Hon'ble High Court held that the said expenditure is revenue in nature. It is pertinent to note that the assessee incurred these expenses on conducting road shows, participation in industry events, product advertising in all forums of media for attracting customers which eventually leads to enhancement of sales of the assessee company in India. Thus, these expenses are incurred in relation to the business only and therefore, are revenue in nature. Hence, there is no need to interfere with the findings of the CIT(A). Ground No. 6 is dismissed.

23. The stay application filed by the assessee becomes infructuous, hence dismissed.

24. In result, the appeal of the assessee and the appeal of the Revenue are partly allowed for statistical purpose.

Order pronounced in the Open Court on this 12th Day of JANUARY, 2021

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 12/01/2021
*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

