$~1, 8, 9, 21, 22 & 53

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA Nos. 1213/2018, 1085/2018, 1086/2018, 1116/2018 & 1117/2018

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant

Through: Mr. Ruchir Bhatia, Sr. Standing Counsel.

versus

NORTEL NETWORK SINGAPORE PTE LTD. ..... Respondent

Through: Mr. Nageswar Rao and Mr. Purushottam Anand, Advocates.

ITA 1315/2018

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -2 ..... Appellant

Through: Mr. Ruchir Bhatia, Sr. Standing Counsel.

versus

NORTEL NETWORK SINGAPORE PTE LTD . ..... Respondent

Through: Mr. Nageswar Rao and Mr. Purushottam Anand, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

% 26.11.2018

The first issue and question raised by the Revenue in these appeals under Section 260A of the Income Tax Act, 1961 is covered by the decision of Delhi High Court in ***Nortel Networks India International Inc. Vs. Director of Income Tax,*** (2016) 386 ITR 353.

2. Learned counsel for the Revenue has submitted that the aforesaid decision interprets and applies the Double Taxation Avoidance Agreement between India and the United States of

America. In the present case, Double Taxation Avoidance Agreement between India and Singapore would be applicable. Our attention is drawn to clause 4 to Article 5 of the Double Taxation Avoidance Agreement between India and Singapore, which reads as under:-

> "4. An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it carries on supervisory activities in that Contracting State for a period of more than 183 days in any fiscal year in connection with a building site or construction, installation or assembly project which is being undertaken in that Contracting State."

3. We need not examine applicability of clause 4 to Article 5 for we find that the Assessing Officer in the assessment order has not factually elucidated and stated why and how the conditions mentioned for invoking this clause were satisfied. The requirements stipulated relate to supervisory activities, which should be for more than 183 days in a fiscal year. Learned Standing Counsel for the Revenue was unable to point out and state the relevant paragraph of the assessment order or the first appellate order recording that the condition of 183 days was satisfied. Our attention was drawn to paragraph 2d of the assessment order (page 252) of the paper book in ITA No.1086/2018, which reads as under:-

> "d. Under Article 5 (4) as the expats supervises the project of installation in India in terms of various agreements."

The aforesaid noting made by the Assessing Officer refers to Article 5 (4) and the factum that expats were supervising the project

of installation in India in terms of various agreements. It does not specifically point out and state how the conditions of clause 4 to Article 5 were satisfied.

4. Counsel for the respondent-assessee, who is present on advance notice, has also relied upon paragraph 74 of the decision in the case of ***Nortel Networks India International Inc.*** (supra). However, we need not examine and go into the said aspect in the absence of specific factual finding by the Assessing Officer with regard to satisfaction of the requirements stated in clause 4 to Article 5.

5. The second issue raised in these appeals is whether the payment for software was taxable as royalty under Article 12 of the India-Singapore Double Taxation Avoidance Agreement. This issue is also covered against the Revenue vide decision of Delhi High Court in ***Commissioner of Income Tax Vs. ZTE Corporation***, (2017) 392 ITR 80 (Del).

6. As the issues raised in the present appeal are covered against the Revenue, we hold that no substantial question of law arises for consideration. The appeals are dismissed without any order as to costs.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

NOVEMBER 26, 2018
NA/VKR