Cj International Hotels Ltd., New Delhi vs Assessee on 5 February, 2016

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)

BEFORE SHRI A.T. VARKEY, JUDICIAL MEMBER
and
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.771/Del./2012
(ASSESSMENT YEAR : 2003-04)

ITA No.787/Del./2012
(ASSESSMENT YEAR : 2008-09)

ITA No.386/Del./2013
(ASSESSMENT YEAR : 2009-10)

M/s. C.J. International Hotels Ltd., Hotel Le - Meridian, 8, Windsor Place, Janpath, New Delhi. (PAN : AAACC0174E)	vs.	DCIT, Circle 3 (1), New Delhi.

ITA No.1107/Del./2012
(ASSESSMENT YEAR : 2008-09)

ITA No.218/Del./2013
(ASSESSMENT YEAR : 2009-10)

DCIT, Circle 3 (1), New Delhi.	vs.	M/s. C.J. International Hotels Ltd., Hotel Le - Meridian, 8, Windsor Place, Janpath, New Delhi. (PAN : AAACC0174E)
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri M.S. Syali, Senior Advocate and
Shri Tarandeep Singh, Advocate
REVENUE BY : Shri Sunil Chander Sharma, CIT DR

ORDER

PER A.T. VARKEY, JUDICIAL MEMBER :

ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 These cross appeals filed by the assessee and the revenue against the order passed by the CIT (Appeals)-VIII, New Delhi dated 20.12.2011 for AY 2008-09 and by the CIT (Appeals)-VI, New Delhi 18.10.2012 for AY 2009-10. For

Assessment Year 2003-04, only the assessee has preferred an appeal against the order of CIT(Appeals)-VIII, New Delhi dated 21.12.2011. All the five appeals were heard together by us. Since issues involved are common parties appearing before us admitted that appeals for A.Y. 2008-09 be taken as the lead case.

2. For Assessment Year 2008-09, assessee has filed an appeal in ITA No.787/Del/2012 whereas the Revenue has filed an appeal in ITA No.1107/Del/2012. We shall first take up for consideration appeal filed by the Revenue. The grounds of appeals are as follows :-

> "1. The Ld. CIT(A) has erred on facts and in law in deleting of Rs.6,96,49,795/- on account of notional income from house property.
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> 2. The Ld. CIT(A) has erred on facts and in law in deleting disallowance of Rs.7,33,602/- on account of interest on loan and advances.
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> 3. The Ld. CIT(A) has erred on facts and in law in deleting addition of Rs.27,768/- on account of extra depreciation claimed on computer peripherals.
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> 4. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."

3. In Ground No. 1 revenue is aggrieved by the action of Ld. CIT(A) in deleting the addition of Rs.6,96,49,795/- made by the AO on account of notional income under the head "Income from House Property". This issue is discussed at length by the AO at pages 1-8 of the assessment order. It is observed by the Ld. AO at page 6 of his order that identical addition was made by the tax department in assessee's own ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 case for A.Y. 2001-02 to A.Y. 2003-04. Ld. CIT(A) on the other hand notes that the similar addition made by the AO in case of assessee for earlier assessment years has been deleted by Tribunal vide order dated 24th July, 2007 which has subsequently been upheld by the jurisdictional High Court vide order dated 18th November, 2010. The addition has been deleted by the ld. CIT(A) following orders passed by jurisdictional high court in assessee's own case. During the course of hearing before us Ld. CIT(DR) stated that since the tax department has preferred an SLP before Hon'ble Apex Court against High Court order dated 18th November 2010 additions are being made by the Ld. AO in assessments for subsequent years in order to keep the matter alive. On the other hand Ld. AR for the assessee invited our attention to order passed by Tribunal in assessee's own case for A.Y. 2001-02 in ITA Nos.1519 & 1698/Del/2005 order dated 24th July, 2007 copy of which is enclosed at pages 175 to 199 of the paper book wherein this addition has been deleted by the Tribunal. Ld. AR also invited our attention to pages 200-203 of the paper book wherein the jurisdictional high court vide order reported in 197 Taxmann 230 (Del) has upheld the order of Tribunal deleting the addition. It is admitted before us that fact and circumstances of the issue involved is identical to earlier years. A perusal of order passed by the jurisdictional high court revels that the notional addition has been deleted by their Lordships observing as under :-

"4. With the consent of the learned counsel for the parties, we have heard the matter finally at this stage itself. The facts in brief leading to the aforesaid question of law may be recapitulated first. The assessee-company is running a five star hotel known as Hotel Le-Meridian Windsor Place, New Delhi. The lawn on which the ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 hotel is constructed belongs to NDMC and NDMC has executed a license deed in favour of the assessee granting licence for a period of 99 years for the running of the aforesaid hotel. After taking the said lawn on licence on the terms executed in the licence deed, the assessee had constructed the said hotel. Adjacent to the hotel, there is another building constructed on this very lawn, which is known as West Tower. This building is located in the same compound in which the Hotel building is located. Admittedly, this building is not used for hotel business of the assessee, but the apartments of this building were given on sub-licence basis to different parties for carrying on business as specified on the sub-licence agreements. The licence agreement which was entered into between the assessee and the NDMC permits the assessee to sub-licence the portion of the premises. It is on the basis of this authorization given in the licence deed that the assessee has sub-licenced offices and apartments in the West Tower to the various parties. The sub-licences given to these parties are for a period of 9 years and 11 months, which is renewable at the request for the sub-licensees. The assessee is not charging any rent lease or licence fee from these parties instead, the assessee has received interest free security deposits in the year of original sub-licence, which receipt was shown by the assessee-company as unsecured loan in its balance sheet. The sub-licence deeds, which are executed by the assessee with the sub-licensees also permit the sub-licensees to transfer the same to any other person on payment of transfer charges to the assessee-company. Thus, the sub-licensee is entitled to transfer the said sub-licence to third party as well. However, at the time of transfer of the said sub-licence, certain transfer charges are payable to the assessee-company. It is not in dispute that whenever these transfer charges are received by the assessee on transfer of sub-licence by the sub-licensee in favour of the third party, the assessee is showing these transfer charges as its income and is offering the same for tax.

5. The Assessing Officer (AO) found that almost all the sub-licensees had transferred their sub-licenses and various other persons were, thus, occupying these premises. Those persons have entered into the agreement with the sub-licensees as per which they were paying rents to the sub-licensees. It is also an admitted fact that the rents/licence fees received by the sub-licensees on these transfers to the occupiers has been shown as rental income and taxed at the hands of sub-licensees under the head 'income from house property'.

6. The Assessing Officer, however, asked the assessee to explain why property known as West Tower be not fixed on its annual letting value as per which section 23 of the Income-tax Act (hereinafter referred to as 'the Act'). To put it otherwise, the Assessing Officer wanted to fix annual letting value in respect of the said West Tower sub-licensed by the assessee by fixing its notional value and charging the tax thereupon under the head 'income from house property'. It is for this reason that the aforesaid show- cause notice was issued. The assessee in reply to the said notice raised various objections to the aforesaid proposed move of the Assessing Officer. Some of these objections included:

(a) The assessee was only a licensee in respect of the aforesaid premises and the actual owner was NDMC. Thus, the assessee was not the 'owner' of the premises. Therefore, provisions of section 23 of the Act are not applicable.

(b) It was also highlighted that in the previous years, the aforesaid arrangement as disclosed by the assessee was accepted by the Assessing Officer and therefore, ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 on the principle of consistency, such a move on the part of the Assessing Officer in fixing the annual letting value of the West Tower, when no actual rent/licence fee was received by the assessee, was not proper.

(c) The assessee had entered into sub-licence deeds in respect of those portions and it could not be deemed as 'letting' of the property and for this reason also provisions of section 22 of the Act would not be applicable, as the assessee continued to be in the legal occupation and possession.

(d) The use of the premises by the sub-licensees was to assist the assessee-

company in getting hotel accommodation booked for the guests, delegates of the sub-licensees, apart from the increase in catering and restaurants' activities used by the sub-licensees. Therefore, the use of certain portion by the sub-licensees was not for the purpose of or for the benefit of the business of the assessee-company.

7. The Assessing Officer, however, did not accept the aforesaid explanation furnished by the assessee. He was of the view that the license agreement with the NDMC was for a period of 99 years with the right of constructing and developing the property which makes the assessee-company owner of the property. He also opined that the assessee-company had sub-licensed the offices and apartments to various persons, some of whom had further sub-licensed the same; the assessee was not charging any rent, fees etc. on the sub-licensing of these properties, except interest free security deposits which were taken by the assessee at the time of sub- licence agreement. Therefore, it was proper, in such circumstances, to fix notional annual letting value of the premises and to charge tax thereupon insofar as the assessee is concerned.

8. We may also point out that in ITA No. 1254 of 2010, which pertains to the assessment year 1999-2000 originally no such addition was made. However, reassessment proceedings were started by issuance of notice under section 143(2) read with section 147 of the Act and the Tribunal quashed those reassessment proceedings. It is not necessary to go into the question as to whether reassessment proceedings were initiated or not inasmuch as on merit itself we have decided that such an addition was not proper.

9. The Assessing Officer thereafter took into consideration the rent/licence fee, which was paid by the occupiers to the sub-licensees to whom the assessee had sub- licensed the premises. The Assessing Officer on that basis calculated first care fee average and treated the same as annual letting value of the said West Tower and added the same under the head "income from house

property".

10. The assessee preferred appeal against this order before the CIT(A). In this appeal, the assessee took an additional ground predicated on the provisions of section 27(iii) read with section 269UA(f)(ii) of the Act and submitted that under those provisions, it would be a sub-licensee as deemed owner would be charged to tax in his hands. The CIT(A) considered this argument, which was purely a legal argument based on the interpretation of the aforesaid sections on admitted facts on record, but did not accept the aforesaid pleading. After considering other submissions of the appellant, which were raised before the Assessing Officer, the CIT(A) upheld the order of the Assessing Officer on this ground. In this scenario, the assessee preferred further appeal before the Income-tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'). This time, before the Tribunal, the assessee succeeded in its attempt to demonstrate that the assessee could not be ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 liable to pay any such tax fixing letting value on notional basis when, in fact, no such amount of rent/licence fee was received by the assessee. The Tribunal examined the licence agreement entered into between the NDMC and the assessee on the basis of which it has come to the conclusion that it is the NDMC, which is the "owner of the premises and remains to be the owner of the premises in question". The Tribunal has further accepted the submissions of the assessee that in view of the provisions of section 27(iii) of the Act, it is the sub-licensee who would be "deemed owner" of those premises which the sub-licensees whereof transferred to the present occupiers and those occupiers are paying rent/licence fee to the sub- licensees. On that basis, the Tribunal has set aside the addition made by the Assessing Officer and deleted this component of income holding that the same would not be chargeable to tax.

11. This is how the Department has filed the appeals pertaining to different assessment years. As pointed out above, though the issues before the Assessing Officer, CIT(A) as well as the Tribunal were numerous, in these appeals primarily one question of law which is formulated and reproduced above has been pressed by the Department.

12. For the aforesaid reasons, we are of the view that the approach of the Tribunal in deciding the aforesaid issue is perfectly justified. There is no reason to interfere with the same. We clarify that the assessee would not be entitled to depreciation on this purpose. We, thus, answer the question of law in favour of the assessee and against the Revenue, as a result thereof all these appeals are dismissed."

Respectfully following the decision of jurisdictional high court above ground No.1 of the Revenue appeal is dismissed.

4. In Ground No. 2 Revenue is aggrieved by the action of ld. CIT(A) in deleting disallowance of Rs.7,33,602/- out of interest expenditure claimed by the assessee. The said addition was made by the AO by observing as under :-

> "The assessee company charged interest @ 8% per annum from M/s Pure Drinks Ltd. whereas it has paid interest to banks at 12%. Cost of interest on these advances to M/s Pure Drinks Ltd. has been borne by the assessee company which has resulted

> into excess expense and the reduction of profit of the assessee company. The interest paid during the year to the banks as per the submissions given by the assessee company is Rs.7,33,602/-. Therefore, the interest paid to bank amounting to Rs.7,33,602/- is being disallowed and added to the total income of the assessee."

Being aggrieved by the aforesaid disallowance assessee filed an appeal before ld. CIT(A). During the course of appellate proceedings before CIT(A) assessee ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 submitted details of finance charges debited to the Profit & Loss Account. It was claimed by the assessee that during the year under consideration no interest cost was debited as expenditure in the Profit & Loss Account and hence there was no such claim made in the return of income. Considering the submissions made before him Ld. CIT(A) has held as under :-

> "On a careful consideration, I find that during the FY relevant to the AY under consideration, the appellant company has not paid any interest to the banks as stated by the ld. AO. The finance charges of Rs.7,33,602/- debited to the profit & loss a/c pertains to various services extended by the bankers to the appellant company. In such circumstances, no disallowance on account of advances made to M/s Pure Drinks Ltd. was liable to be made. Accordingly, the disallowance of Rs.7,33,602/- is being deleted."

During the course of hearing before us Ld. CIT (DR) was unable to rebut the above factual finding of Ld. CIT(A). Per contrary Ld. AR supported the finding of CIT(A) before us. After careful consideration of the issue we do not find any infirmity in the view adopted by CIT(A) and hence the same is upheld ground No.2 of the Revenue appeal is therefore dismissed.

5. In Ground No.3 the Revenue is aggrieved by the action of Ld. CIT(A) in deleting an addition of Rs.27,768/- on account of extra depreciation claimed on computer peripherals. Case records show that during the year under consideration assessee has claimed depreciation on computer peripherals at the rate of 60%, however, this was restricted by the Ld. AO to the rate of 15%. Ld. CIT(A) has deleted the disallowance by following the decision of Hon'ble Delhi High Court in the case of BSES Yamuna Power Ltd. reported in 358 ITR 47 (Del). During the ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 course of hearing Ld. AR invited our attention towards a recent pronouncement of Delhi High Court in the case of Orient Ceramics and Industries reported in 200 Taxmann 64 (Del) wherein, the Delhi High Court has reiterated the earlier view in case of BSES Yamuna (supra). After careful consideration of the case records we find no reason not to uphold the view taken by CIT(A) by following decision of jurisdictional high court noted above. As such ground No.3 of Revenue Appeal is also dismissed.

6. As a result, revenue appeal in ITA No.1107/Del/2012 is dismissed.

7. We shall now take up for consideration appeal filed by assessee in ITA No.787/Del/2012. In its appeal the assessee has raised following grounds:

"1. That on facts and in law the orders passed by Commissioner of Income Tax (Appeals) {hereinafter referred to as "the CIT(A)} and the Deputy Commissioner of Income Tax {hereinafter referred to as "AO"} are void and bad in law.

2. That on facts and in law, the AO / CIT(A) erred in making/upholding the disallowance of Rs.9,43,232/- u/s 14A of the Act r/2 Rule 8D of the Income Tax Rules, 1962.

2.1 That on facts and in law, the AO / CIT(A) erred in assuming jurisdiction u/s 14A r/w Rule 8D(2) without fulfilling the jurisdictional preconditions of resorting thereto.

3. That on facts and in law, the AO / CIT(A) erred in making/upholding the disallowance of license fee of Rs.12,00,00,000/- paid to NDMC during the year under consideration.

3.1 That on facts and in circumstances of the case and in law, the AO / CIT(A) erred in not considering the fact that payment of license fee of Rs.12,00,00,000/- to NMDC, in earlier years, has been disallowed by the AO himself.

4. That on facts and in law, the AO / CIT(A) erred in charging / upholding the charge of interest u/s 234B & 234D of the Income Tax Act, 1961."

8. Ground No.1 is general and does not require a specific adjudication.

ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013

9. In Ground Nos. 2 & 2.1 the assessee is aggrieved by the action of Ld. CIT(A) in upholding disallowance of Rs. 9,43,232/- made by the Ld. AO invoking provisions of section 14A of the Income Tax Act read with Rule 8D of the Income Tax Rules. Case records reveal that during the year under consideration assessee has earned dividend income of Rs.1,44,95,247/-. In the return of income no disallowance u/s 14A of the Act was made by the assessee. However, the Ld. AO in his order of assessment computed the said disallowance as per provision of Rule 8D at Rs.9,43,232/-. Ld. CIT(A) has also confirmed the same. During the course of hearing before us the main contention of Ld. AR was that the Assessing Officer did not record a dissatisfaction over the claim made by the assessee that it had not incurred any expenditure for the purpose of earning exempt income. It was submitted that recording of satisfaction having regard to books of account was a jurisdictional pre-requisite before invoking provision of Rule 8D. In support of his proposition the Ld. AR placed reliance on the decision rendered by Hon'ble Delhi High Court in the case of CIT vs. Taikisha Engineering India Ltd. reported in 370 ITR 338 (Del). We principally agree with the said contention of the assessee. The AO should have first examined the books of accounts of the assessee and only thereafter if he was not satisfied with the claimed by the assessee that it had not incurred any expenditure for the purpose of any exempt income that he could have invoked provisions of Rule 8D. In the instant case Ld. AO has failed to adopt this mandatory procedure. It is also seen that even the assessee has not been able to substantiate its claim before the lower ITA No.771, 787 &

1107/Del./2012 ITA No.218 & 386/Del./2013 authority. In our considered opinion this issue requires fresh examination at the end of the AO. Accordingly we set aside the order of Ld. CIT(A) on this issue and direct the AO to examine this issue afresh in light of discussions made supra.

10. In Grounds Nos.3 and 3.1 the assesse is aggrieved by the action of lower authorities in making a disallowance of Rs 12,00,00,000/- on account of license fees paid by the assesse to New Delhi Municipal Corporation (NDMC). Facts in brief in this regard are that in year 1982, a plot of land on which the Hotel "Le Meridian" is running was licensed by NDMC to the assessee for 99 years. Assessee in return was required to pay license fees to NDMC as per license deed executed between the parties on 14th July 1982. As per clause 3 of the said license deed the assessee was required to pay an annual license fee which was to be calculated at 21% of its gross turnover as certified by the statutory auditors per financial year with a minimum annual guarantee of Rs. 2.68 crores. Thereafter a dispute arose between the parties on the quantification of license fee payable by the assessee to NDMC as per license agreement. On this issue during the course of assessment year under consideration litigation was pending final adjudication before the Hon'ble Delhi High Court. Pending final adjudication of this Civil Suit, the Hon'ble Delhi High Court vide an interim order dated 6th February, 2002 directed the assessee to make payment of Rs. 1 crore per month to NDMC pending final adjudication of civil suit. In this order, it was held by the Hon'ble High Court as under:

> ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 "Mr Chandhiok, Sr Counsel for the appellants says that he will pay Rs.75 lakhs per month from February 2002 and if the appeal is not heard till the next date of hearing then he will pay Rs 1 crore per month from August 2002. List the matter on 8th April, 2002 in the category of "after notice miscellaneous matters".
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> Till the next date of hearing operation of the judgment is stayed. If the amount as stated by Sr Counsel for the appellant body is not paid month by month then this appeal shall be deemed to have been dismissed"

11. Premised above directions issued by Delhi High Court assesse claimed as deduction u/s 37(1) of the Act the amount of license fee of Rs 12 crores paid by it to NDMC during the year under consideration. The Ld AO however was unimpressed with the claim made. Ld AO was of the view that the amount paid to NDMC constituted a contingent liability and therefore he disallowed the same. In this regard it is held by the Ld AO in his order of assessment as under:

> "During the year under consideration the assessee had debited an amount of Rs.12,00,00,000/- in the P & L Account towards license fees paid to NDMC. As per schedule 14 note 2(iv) of notes to accounts the above payment has been classified as contingent liability which is an unascertained liability. It cannot be acceptable that on one hand a liability is shown as contingent liability and on the other it is claimed as an ascertained liability without sufficient material evidence in support of such a claim. Further it has been held in following case laws that :-

"Law in well settled that expenditure which is deductible for income tax purpose is towards a liability actually existing in the year of account.

Contingent liabilities do not constitute expenditure and cannot be the subject matter of deduction even under the mercantile system of accounting. The income tax law makes a distinction between the actual liability in praesenti and a liability de future which, for the time being, is only contingent.

The former is deductible but not the latter.

Indian Molasses Co. Pvt. Ltd. vs. CIT (1959) 37 ITR 66 (SC) See :

Standard Mills Co. Ltd. vs. CIT (1998) 2290 ITR 366 (Bom)."

ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 "Expenditure which is deductible for income tax purposes is one which is towards a liability actually existing at the time; but putting aside of money which may become expenditure on the happening of an event is not expenditure. Where the liability itself is contingent, as contrasted from payment being contingent, there can be no deduction.

CIT vs. Motor Industries Co. Ltd. (1998) 229 ITR 137 (Kar)."

"Sale of Commodity: Provision for warranty charges.

No evidence of actual expenditure in prior years.

The assessee made a provision as regards warranty charges payable under the terms of sale. It was stated that such a provision was made in the accounts to meet future requirements arising on account of the warranty clause in the sale of agreement. It was admitted by the assessee that the warranty provision made as against the liability had not crystalized against the assessee.

Consequently, holding the provision an unascertained liability, the assessing authority rejected the plea of the assessee.

The Tribunal allowed the deduction.

The assessee could not prove the actual incurrence of liability under the warranty clause on the basis of fixing a percentage on the turnover. In the absence of any details, accepting the claim of percentage on the turnover could not be sustained.

Provision for warranty charges was held not deductible. CIT vs. Totork Controls India Ltd. (2007) 293 ITR 311 (Mad)"

Thus it is clear that the claim of the assessee with regards payment to NDMC is in the nature of contingent liability and hence not allowable under the act and is added back to the income of the assessee."

12. Being aggrieved the assesse preferred an appeal to Ld CIT(A). Ld CIT(A) was of the view that License Deed dated 14th July 1982 was not in force during the course of year under consideration and hence he upheld the disallowance made by the Ld AO. In support of his conclusions Ld CIT(A) has extracted and forcefully relied upon show cause notice dated 12th November 1999 issued by NDMC to the assessee. Conclusions recorded by Ld CIT(A) are as under:

> "5.4 Thus, it may be seen that as per the show cause notice issued by the NDMC on 12.11.1999, there is no valid agreement between the NDMC and the assessee ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 company. Therefore, in the absence of any terms of payment of license fee, it is not understood as to how the appellant claims that the liability of Rs.12 crores was a present, ascertained and quantified liability. Further, even the statutory auditors have found it appropriate to qualify their audit report and this is why they have noted that the payment of Rs.12 crores is only a contingent liability. Therefore, in the present circumstances the claim of Rs.12 crores may be at best termed as a provision towards payment of license fee till the issue is finally adjudicated upon by the Hon'ble High Court.
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> Now coming to the directions of the Hon'ble High Court which have been heavily relied upon by the ld. Counsel for the appellant. On a careful consideration, I find that the Hon'ble Court has not issued any directions as such. A perusal of the order dated 06.02.2002 suggest that it was a suo-motto offer by Mr. A.S. Chandhiok, Senior Counsel for the appellant to pay Rs.1 crore per month from August, 2002. The Hon'ble Court has not commented anything about the merits of this offer and they have simply listed the matter for hearing on 8th April, 2002 in the category of "after noticed miscellaneous matters". Therefore, I am not in agreement with the ld. Counsel for the appellant that the payment of Rs.12 crores was made in terms of the court directions.
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> 5.5 In view of the aforesaid facts and having regard to the fact narrated in the show cause issued by the NDMC on 12.11.1999 that there has been no agreement executed between the assessee company and the NDMC after 31.03.1998, I have no hesitation in holding that the payment of Rs.12 crores by the appellant company to the NDMC was only a payment made on adhoc basis without there being any ascertainment of the actual liability. I also hold that the payment was neither in terms of any agreement nor the same was made in terms of any binding directions issued by the Hon'ble Delhi High Court. Accordingly, the disallowance made by the AO is being sustained."

13. Being further aggrieved the assessee is now in appeal before us. During the course of hearing before us Senior Counsel Shri M.S Syali submitted that both the lower authorities have not properly

appreciated the factual position of the case. At the outset it was submitted by the Ld Senior Counsel that CIT(A) after briefly narrating the preliminary facts relating to dispute regarding quantification of license fee at pages 9 and 10 of his order has then stopped short at the stage of issue of show cause notice dated 12th November 1999 by NDMC. It was his claim that Ld CIT(A) has omitted to take into consideration the events which transpired thereafter. Ld Senior Counsel referred before us interim order dated 18th May 2001 passed by Delhi High ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 Court in the main civil Suit i.e IA No. 3075/2000 in Suit No. 610/2000 to negate supposition of CIT(A) that License Deed dated 14th July 1982 was not in force during the course of year under consideration. It was submitted by him that being aggrieved by the show cause notice dated 12th November 1999 the assesse filed a Civil Suit before Delhi High Court which vide interim order dated 18th May 2001 refrained NDMC from interfering with rights of assesse to use the land for running a hotel subject to assesse paying NDMC license fee as per the formulae laid down by the Ld Single Judge in that order. In the written synopsis summarized dates chart of the litigation was submitted before us as under:

Date	Particulars	Hon'ble High C vide da 18.05 (pages 94 o
14-07-1982	License deed executed between NDMC and 'A'	58, last

07-12-1989 Notice was sent by NDMC to make payment of the arrears of 59, middle license fee amounting to Rs. 6,84,091,331.89 and to show cause why allotment of land be not cancelled.

06-03-1990 NDMC called upon the plaintiffs to stop the use of the plot of 59, last 7 lines land and hand over vacant possession and further pay the amount of more than Rs.13 crores being the arrears of license fee. 16-10-1990 Upon the aforesaid threats being given, the plaintiffs filed a suit 60, top Para being Suit No. 1193/90 under section 20 of the Arbitration Act, 1940 for appointment of an arbitrator. This suit for an ad-interim injunction was dismissed.

11-03-1991 An appeal was preferred against the judgment dated 16-10-1990 62, last para and during the pendency of this appeal, an out of Court settlement was arrived at between the parties which resulted in the execution of a Supplementary Agreement - installments ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 agreed upon 04-08-1995 Two further Supplementary Agreements executed between 64, 2nd Para & 31-03- parties. Amount of installments agreed upon vide Supplementary top 1998 Agreement dated 11-03-1991 increased.

- In between representations were made by 'A' with NDMC to 64, last Para -

reconsider amount of license fee as the amount being charged 65, top Para from 'A' was much more than what was being charged from other hotels. In this duration 'A' adhered to 1991 agreement. It

was claimed by 'A' that all dues towards license fee had been paid upto the year 2003.

28-06-1999 NDMC sent a show cause notice to the plaintiffs calling upon 65, middle them to deposit Rs.109,82,16,368/- already due to the NDMC upto 30th June 1999.

12-11-1999 Another show notice issued by NDMC (contents noted by 65, last five CIT(A) at pages 11 to 13 of his order) lines 07-03-2000 Writ of Certiorary WP(C) 7163/99 filed by 'A' seeking relief on 66 - 67 various issues including quashing of show cause notices dated 28-06-1999 and 12-11-1999. This writ was dismissed by High Court on the ground that matter involved disputed questions of fact and hence cannot be decided in a writ petition.

- Present Suit No. 610/2000 filed by 'A' for an injunction 67, top Para retraining NDMC from taking any action pursuant to show cause notices dated 28-06-1999 and 12-11-1999. 'A' also claimed a decree for specific performance of agreements. Along with Suit and application for temporary injunction was also filed. 18-05-2001 Interim order passed by a Single Judge of Delhi High Court in IA 93, last para No. 3075/2000 in Suit No, 610/2000 restraining NDMC from interfering with possession rights of 'A' subject to 'A' depositing entire license fee in the manner directed in this order.

Thereafter 06-02-2002 'A' challenged the interim order dated 18-05-2001 passed by the 95 Single Judge before a division bench of Delhi High Court. Division bench directed as under:

> "Mr Chandhiok, Sr Counsel for the appellants says that he will pay Rs 75 lakhs per month fro February 2002 and if the appeal is not heard till the next date of hearing then he will pay Rs 1 crore per month from August 2002.
>
> List the matter on 8th April, 2002 in the category of "after notice miscellaneous matters".

Till the next date of hearing operation of the judgment is ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 stayed.

If the amount as stated by Sr Counsel for the appellant body is not paid month by month then this appeal shall be deemed to have been dismissed"

> 21-04-2015 Suit No. 610/2000 disposed off by the Delhi High Court 108 - 109

14. Shri Syali further submitted that vide order dated 06th February 2002 while directing payment of Rs 1 cr per month the High Court had further held that "if the amount as stated by Sr. Counsel for the appellant today is not paid month by month then this appeal shall be deemed to have been dismissed". Under the circumstances it was claimed, that the assessee was mandatorily required to make the payments to NDMC to safeguard the hotel business being carried on by it. It was also submitted before us that in order dated 06th February 2002 it has nowhere been held by the High Court that in case the assessee succeeds in its claims then the amount of Rs 12 cr paid by it to NDMC

would be refundable to it. In this regard support was drawn from the decision of Hon'ble Apex in case of KCP Limited reported in 245 ITR 421(SC). Ld Senior Counsel thereafter submitted that identical claim has been allowed in case of assesse in past. In this regard he referred to assessment order passed by Ld AO for AY 2004-05 in which it is held by him as under:

> "License Fees During the year, the assessee has claimed an amount of Rs 14.41 Crores as License Fee paid to the NDMC. As per the agreement, the assessee is required to pay License fee @ 21 % of the turn over or 2.68 Crores whichever is higher to NDMC as per Clause 3 of the License Deed. It is noticed that the License fee payable by the assessee to the NDMC was in dispute and is pending in the Delhi High Court. The assessee was asked to explain since the License fee payable to NDMC is in dispute, why the same should not be disallowed. The assessee vide submissions ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 dated 20.12.06 stated that the License fee was paid as per the interim order dated 06.02.02 passed by the Hon'ble Delhi Court according to which, it had directed the assessee to pay Rs.1 Crore per month, which was examined. The assessee had stated that an additional amount of Rs. 2.41 Crores was paid as per Hon'ble Delhi Court's another order dated 18.05.01. On perusal of this order, it is noticed that the Hon'ble Delhi Court had not given any directions to the assessee to pay Rs 2.41 Crores to the assessee. However Hon'ble Delhi Court's order dated 06.02.02 was passed after the order dated 18.05.01, which the assessee referred. Hence the amount of Rs 2.41 Crores remained unascertained liability of the assessee and subjudice. Hence the same was disallowed and added back to the income of the assessee."

It was submitted by Shri Syali that to the extend of Rs 12 crores deduction on account of license fees paid to NDMC was himself allowed by AO in AY 2004-05 and in further appeal the excess amount of Rs 2.41 crores was allowed as deduction by CIT(A) whose order has been upheld by the Tribunal and High Court which has now become final. It was then submitted by Mr Syali that the Ld AO has wrongly concluded in his order that the statutory auditors have certified the expense as contingent. Referring to the relevant note appended to Audited Accounts for year ending March 2008 it was submitted by him that what is shown therein as contingent liability was the amount which may be payable to NDMC in future subject to outcome of litigation before High Court. It was submitted by the Shri Syali to the extend amount actually paid i.e Rs 12 crores it is stated by the auditors that the same is debited to the P&L account and hence there is no question this being contingent. Lastly, it was submitted by Shri Syali that subsequent events in the case vindicate the stand taken by the assesse. In this regard it was submitted that recently vide assessment order dated 18th March 2015 passed by the Ld AO for AY 2012-13 it has been held by him that the amount of Rs 12 crores paid by the assessee as license fees ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 to NDMC is not a contingent liability. Claim made for deduction of Rs 12 crores as a business expense has been was allowed by the Ld AO after taking into consideration clarification issued by NDMC vide letter dated 26th September, 2014.

15. Per contrary Ld CIT(DR) Shri Sunil Sharma vehemently supported the disallowance made by the Ld AO and upheld by Ld CIT(A). He not only placed reliance upon conclusions recorded by the Ld

AO in the assessment order and by Ld CIT(A). During the course of his submissions he referred to the final order dated 21st April 2015 passed by Delhi Court High Court disposing of the Civil Suit in which it is noted that a compromise is reached between assesse and NDMC upon payment of Rs 150.92 crores as arrears of license fees upto year 2013-14. It was submitted by him that the break up of this sum be sought from the assesse. The Ld Senior Counsel appearing for the assessee acceded to this request and he placed on record the necessary break-up. It was submitted by the Ld CIT(DR) that final adjudication regarding quantum of license fee payable to NDMC took place in April 2015 has therefore any payment prior to that made by the assesse to NDMC was only a contingent liability.

16. We have carefully considered the submissions made by both the parties and perused the material available on record. In our considered opinion looking to the facts of the present case appellant merits to succeed in its claim made for deduction of 12 crores as a legitimate business expense. Coming first to the allegation of Ld CIT(A) that License Deed dated 14th July 1982 was not in force during the course of ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 year under consideration. We concur with submissions of Shri Syali that Ld CIT(A) has erred in not taking into consideration events which transpired post issue of show cause notice dated 12th November 1999 by NDMC. Order dated 18th May 2001 passed by Ld Single Judge of Hon'ble Delhi High Court negates this presumption of Ld CIT(A). Ld Single Judge in its order has held as under:

> "On 25th September, 1998, however, the NDMC gave another notice to the plaintiffs upon them to pay the arrears of licence fee. It was stated that in case the entire outstanding dues were not deposited, action would be taken under the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act against the plaintiffs. On 28th June, 1999 the NDMC sent a show cause notice to the plaintiffs calling upon them to deposit Rs.109,82,16,368/- allegedly due to the NDMC upto 30th June, 1999. This was naturally disputed by the plaintiffs and it was asserted that licence fee upto the year 2003 stood paid and no amount was payable by them to the NDMC. Thereafter certain meetings took place between the parties, however, no amicable solution was arrived at between them. A notice dated 12th November, 1999 was then issued by the NDMC to the plaintiffs informing the plaintiffs that the re-valuation of the licence fee was neither possible nor warranted. A meeting of the plaintiffs representative also took place with the Chairman of the NDMC on 22nd November, 1999. Plaintiffs allege that in that meeting the Chairperson of the plaintiffs hotel agreed to pay a sum of Rs.3 crores on the clear understanding that an Independent agency / committee would be constituted by the NDMC to determine the fair and equitable quantum/rate of licence fee. However, the chairperson refused to have agreed to the appointment of any such committee and gave one week's time to the plaintiffs to make payment failing which it was threatened that the licence would be cancelled and possession of the hotel would be taken. On this threat being given, the Plaintiffs filed a petition being Civil Writ Petition No.7163/99 in this Court.
>
> In the aforesaid Writ Petition filed by the plaintiffs, they prayed for issue of a Writ of Certiorary or any other appropriate writ order or direction for quashing the show

cause notice dated 28th June, 1999 and 12th November, 1999 and for issue of an appropriate writ order or direction directing the respondents to constitute a committee of independent persons to evaluate the legitimate / fair licence fee payable in respect of the land having regard to the licence fee paid by other hotels which were similarly situate as well as the economic viability of the plaintiffs hotel consistent with the supplementary agreement dated 11th March, 1999. Certain other reliefs were also claimed in this Writ Petition. This petition was dismissed by A.K. Sikri, J. by order dated 7th March, 2000 on the ground that since the matter involved disputed questions of fact, the same cannot be decided in the writ petition. While dismissing the petition, the Court continued the interim order granted earlier till 31st March, 2000. Present suit was thereafter filed by the plaintiffs for an injunction restraining the defendant from taking any action pursuant to the show ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 cause notices mentioned above and from causing any obstruction to the amenities like water and electricity to the premises of the plaintiffs. Plaintiffs also claimed a decree for specific performance of the agreement dated 14th July, 1982 as allegedly modified by the agreements dated 11th March, 1991; 4th August, 1995 and 31st March, 1998. Along with the suit, an application for temporary injunction was also filed by the plaintiffs. By this order, I propose to dispose of this application of the plaintiffs for the grant of an ad-interim injunction.

....

The only question which remains to be considered is as to how this licence fee was to be calculated. While the case of the defendants is that the plaintiffs were required to pay 21% of the annual gross turn over of the hotel as disclosed by the balance sheets, the plaintiffs' case is that even assuming that the plaintiffs are required to pay the licence fee @ 21% of the gross turnover of the hotel, it has to be 21% of the gross turn over as certified by the certified auditors of the plaintiffs. The question is as to what is the gross turn over as certified by the certified auditors of the plaintiffs. A chart has been placed on record by the defendant-NDMC showing the annual gross turnover of the hotel from 1988-89 to 1998-99 and the amount of licence fee payable by the plaintiffs has been calculated in terms of the said annual gross turn over.

....

Though, it is mentioned in the agreement that it is the gross turnover of the hotel as certified by the certified auditors of the hotel on which the licence fee is payable by the plaintiffs, however, prima facie, in my view, plaintiffs may not be entitled to all the appropriations mentioned by the auditors in their certificates. Prima facie, it appears to the Court that only that income which is compulsorily payable by the plaintiffs in terms of an agreement which it might have arrived at with the third party or statutory liability necessarily payable may only have be deducted for the purpose of arriving at the gross turn over to the hotel. The franchisee fee payable is 3% by the

NDMC to the franchisee and it is only the 97% of the receipts which are received by the hotel. Prima facie, this 3% may have to be deducted from the room tariff. Luxury tax on behalf of the Government is also received by the hotel at the time of providing its services to the guests and since this tax does not come in the hands of the hotel, this may also have to be deducted from the gross turn over of the hotel. The other amount which may have to be deducted from out of the gross turn over of the hotel as shown in the balance sheets is the credit card commission as the amount which is received by the hotel on payments received through credit cards is net of commission charged by the credit card companies. Other component which may have to be deducted from the gross turn over is the interest income on the deposits with banks. The only other receipt to which the plaintiffs may be entitled to deduction is the telephone receipts. The plaintiffs may be said to be acting as agents for the Mahanagar Telephone Nigam Limited while the telecommunication services are provided to the guests. The payment, therefore, which is actually made to the Mahanagar Telephone Nigam Limited may have to be deducted form out of the gross amount which is received by the plaintiff for providing telecommunication services so that the balance amount received by the hotel is ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 taken as its income. Besides these deductions which, prima facie, may be permissible from the gross turnover of the hotel, in my view, the plaintiffs are not entitled to any other deduction from out of the gross turn over of the hotel. The cost of food and beverages is a part of running of the hotel and cannot, in my opinion, be deducted from out of the gross turn over of the hotel. If this is deducted from the gross turn over, what will be arrived at is the gross income and not the gross turn over. At this stage of decided this application the Court is not deciding finally as to what would be the gross turn over of the hotel on which it is liable to pay the licence fee and it is only a prima facie view of the Court that the aforesaid outgoings may have to be deducted from the gross turnover as reflected in the balance sheets.

Since, in my opinion, none of the supplementary agreements modified the terms of the agreement of 14th July, 1982, providing for payment of licence fee @ 21% of the gross turn over of the hotel, plaintiffs are, prima facie, liable to pay licence fee @ 21% of the gross turn over to be calculated on the basis of the gross turn over as mentioned in the balance sheets filed on record by the plaintiffs and deducting from this turn over the amount to be calculated in terms of the aforesaid paragraph. The plaintiff being prima-facie liable to pay licence fee at the rate of 21% of the gross turnover of the hotel, in my opinion, there is no question of the plaintiff suffering irreparable loss in case it has to pay the licence fee in terms of the agreement. Defendant-NDMC is a civic authority and for purposes of providing service to the people it requires funds. Public benefit in the present case outweighs the case of the plaintiffs in withholding the amount legitimately due to the NDMC. Balance of convenience clearly lies in favour of the larger public interest rather than in favour of the plaintiffs. The only indulgence to which the plaintiffs may be entitled is to pay the arrears of licence fee in installments. Since the amount which may be calculated on

> the basis of the above formula may be quite heavy, the plaintiffs will be at liberty to deposit the said amount in four equal quarterly installments, first of which will be paid within three weeks from the date of this order.
>
> I, accordingly, restrain dependent-NDMC, its agents and employees from interfering with the possession of the plaintiffs over the land and building situate at 1, Windsor Place, Janpath, New Delhi in any manner whatsoever and from disconnecting, withholding or causing to be withheld any amenities including water and / or electricity to the plaintiffs hotel, subject to the plaintiffs depositing the entire licence fee in the matter directed in this Order calculated @ 21% of the gross turnover of the hotel arrived at on the basis on the observations made in this order. Prima facie, I am also of the opinion that the plaintiff will also have to pay interest on this amount calculated for the time being at the rate of 10% p.a."

With these observations, the application of the plaintiffs stands disposed of. Any observation made in this order will not be taken as expression of opinion on the merits of the case."

ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 As can be seen from the interim directions issued by the Ld Single Judge parties were bound by the terms and conditions stipulated in License Deed dated 14th July 1982. The dispute solely rested on the interpretation of term "Gross Turnover as certified by the statutory auditors". To this the Ld Single Judge allowed certain exclusions. However assesse was not satisfied from this interim order since in its view it was entitled to further exclusions from Gross Turnover like sums collected for food and beverages, etc. It therefore preferred an appeal against this interim order before Division bench of High Court which vide order dated 06th February 2002 directed assesse to make payment of Rs 1 cr per month pending final disposal of the Civil Suit. Shri Syali rightly pointed out that there is no direction issued by the High Court in order dated 06th February 2002 that if assesse succeeds against its claims from NDMC then it shall be entitled to a refund of Rs 1 cr. This is very crucial. In absence of such a direction the payment of Rs 1 cr per month made by the assessee virtually partakes the character of a confirmed liability discharge of which (i.e to the extend of Rs 1 cr per month) is accepted by NDMC. In support of this Ld Senior Counsel has appropriately relied upon the decision of Hon'ble Apex Court in case of KCP Limited (supra) wherein it is held as under:

> "11. The learned senior counsel for the assessee-appellant relied on three decisions by different High Courts and submitted that in identical fact and circumstances, the price of the sugar realised in excess of the levy price was held not to be a trading receipt of the assessee and, hence, not liable to tax. The decisions so relied on are :
>
> CIT v. Mysore Sugar Co. Ltd. [1990] 183 ITR 113 / 51 Taxman 208 (Kar.), CIT v. Seksaria Biswan Sugar Factory (P.) Ltd. [1992] 195 ITR 778 /[1991] 59 Taxman 453 (Bom.) and CIT v. Chodavaram Co-operative Sugars Ltd. [1987] 163 ITR 420/ 30 Taxman 615 (AP). We have carefully perused the decisions. It is clear from the facts stated by the High Courts that in each of the cases, the assessee's right to ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 realise the excess price was the

> subject-matter of dispute pending in the High Court and the High Courts had passed different interim orders pursuant to which the respective assessees were collecting the excess price. Though the interim orders of the High Courts are differently worded in the three cases, one common feature of all the orders is that the realisation of the excess price by the respective assessees was hedged by several conditions, one of which was that the assessee shall refund the amount received in excess of the price fixed in the event of the pending dispute being decided adversely to the assessee by the Court. Thus, the receipt of the amount by the assessee was clearly associated with a liability to refund the amount which liability was ascertainable and quantified. Such is not the case at hand....."

17. We further observe that in past the tax department itself had allowed the claim made by the appellant. Baring reassessment proceedings for AY 2003-04, which too are premised upon a change of opinion (as held by us later in this order) the claim made by the appellant has been allowed in AYs 2004-05, 2005-06, 2006-07 and 2012-13. In fact in AY 2004-05 liability of Rs 12 crores being actually paid was held allowable as a deduction by the Ld AO himself and a dispute arose vis a vis additional Rs 2.41 crores paid to NDMC in that year. On this Hon'ble Delhi High Court for AY 2004-05 vide order dated 04th September 2009 in ITA No. 450/2011 has held as under:

> "8. The assessing officer had disallowed expenditure of Rs.2.41 crores out of expenditure of Rs.14.41 crores on the ground that it was contingent liability as there were disputes between the NDMC, the Licensor and the respondent relating to the licence fee. This was subject matter of litigation pending in Delhi high Court. The assessing officer has mentioned that Rs.2.41 crores was not paid by the assessee and he had made reference to two orders passed by the Delhi High Court dated 18.5.2001 and 6.2.2002. The respondent has stated in its letter dated 21.04.2003 that a cheque of Rs.2.41 crores drawn on Citi Bank dated 21st April, 2003 had been enclosed. CIT(A) held that the Assessing Officer was not justified in treating Rs.2.41 crores as unascertained / disputed liability and the disallowance of Rs.2.41 crores by the assessee officer was not justified. The Tribunal noted that by consequence of the letter dated 17th April, 2003 issued by NDMC the amount of Rs.2.41 crores came to be quantified and the amount paid had been in compliance of the said demand. The Tribunal upheld the order of CIT(A) and stated that the demand had specifically come into existence during the Assessment Year 2004-05 and consequently the same was allowed for the year 2004-05. Thus, the amount of ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 Rs.2.41 crores was paid by the respondent on 21.4.2003 and hence, was not a contingent liability Learned counsel for the appellant has not been able to controvert that the said finding is incorrect.
>
> In view of the aforesaid position, we are not inclined to entertain the present appeal on this ground."

Even as per the above decision of Hon'ble Jurisdictional High Court once liability is paid and accepted by NDMC then it cannot be termed as contingent. Appeal of revenue was dismissed at

admission stage itself as no question of law arose. We further note that in assessment order for AY 2012-13 again the claim made by the appellant has been allowed by the AO by observing as under:

> "5.5 I have carefully considered the submission made by the assessee. During the course of assessment proceedings Assessee was directed to submit as to why addition / disallowances made in past be not repeated. In reply vide submission dated 07.01.2015 and 28.02.2015 it was argued by the Assessee that vis-à-vis disallowance of license fee of Rs.12 crores paid to NDMC the predecessor assessing authorities have not properly appreciated the factual and legal position of the instant case. The Ld. AR clarified that the liability to pay license fee is not in dispute however, actual quantification of same is currently pending final adjudication by the Hon'ble Delhi High Court. Undisputedly, the liability to pay license fee is a contractual liability. NDMC vide a recent communication dated 26/9/14 has clarified as under :-
>
> "The Chairperson Hotel CJ International (Le-Meridien) Windsor Place, Janpath New Delhi - 110 001 Subject :- Submission of audited balance sheets and calculations of GTO for determination of License Fees to NDMC in respect of premises situated at Janpath Road, Windsor Place, New Delhi (known as Le-Meridien) Dear Madam, Please refer to your letter dated 11.09.2014 on the subject cited above, in the respect for the purposes of records, please note that the amount rendered as license fee in terms of Clause 3 of Agreement dated 14.07.1982 read with Supplementary Agreements thereto are irretrievable outflows adjustable as per your request against the principal license fee due. However, you may kindly note that the same are being accounted for under heading license fee (Prov.) in the accounts of NDMC.
>
> ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 From our records the following amounts have been paid and adjusted towards License Fees:

S. No.	Financial Year	License fee paid (Rs.)
1.	2002-03	11 Cr.
2.	2003-04 to 2013-14	12 Cr. Each year
3.	2014-15	i) Rs.4 Cr. ii) Rs.8 Cr. on 10.07.2014 iii) Rs.2.5 Cr. on 08.08.2014

> As per our records the above amounts have been duly credit in D & C register and ultimate liability towards license fee shall stand appropriately reduced. The above non-refundable payments are not in any way dependent upon outcome of pending litigation before Hon'ble High Court. Copy of latest bill is enclosed please. Yours

faithfully, Sd/-

Deputy Director (Estate) The above clarification issued by NDMC indicates that there was never an understanding between the parties characterizing payment of annual sum of Rs.12 crores as contingent in nature. Payments made as per Court order dated 6.2.2002 have always been treated by NDMC as non refundable and the dispute in the civil appeal before High Court relates only to any additional ability if any that can be attributable to the Assessee. NDMC after receipt of said sum has never doubted the rights of possession enjoyed by the Assessee for carrying on its business of running a five star hotel. After an exhaustive examination of the case records I find the payments of Rs.12 crores made by the Assessee to NDMC are of ascertainable legitimate business expenditure."

18. During the course of hearing Ld CIT(DR) requested assesse to furnish break up of Rs 150.09 cr finally paid by it as arrears upto year 2013-14 as per High Court directions dated 21st April 2015. In reply appellant submitted the following chart:

ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 The above break up further exonerates the claim made by the assessee. As per interim order dated 06th February 2002 assessee has been making payments to NDMC from FY 2001-02 onwards. For all these years i.e FYs 2001-02 FY 2013-14 even after payment of Rs 75 lakhs per month initially and Rs 1 crore per month thereafter the final liability determined in year 2015 was much more. Contingency if at all during FYs 2001-02 to 2013-14 was vis a vis Rs 150.09 cr which finally became determinable in year 2015. However for the year under consideration the payment of Rs 12 cr was a confirmed liability, which NDMC accepts as not being subject to further litigation before Delhi High Court. Considering the peculiar facts of the present case we therefore hold that the appellant was entitled to claim deduction of Rs 12 crores paid by it to NDMC as License Fees under License Deed dated 14th July 1984. Decisions relied upon by the Ld AO in his order of assessment are also not relevant since these are decisions wherein certain provisions made in books of accounts were sought to be claimed as a deduction, per contrary this is a case where liability actually being discharged is being claimed as deduction. We accordingly ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 hold that appellant merits succeeding in its claim. Ground Nos 3 and 3.1 are therefore allowed.

19. In ground no. 4 appellant challenges levy of interest u/s 234B and 234D. Levy of interest will be consequential in the instant case. No separate directions need be issued in this regard.

20. Appeal filed by the assessee in ITA No. 787/Del/2012 is therefore allowed for statistical purposes.

21. Revenue in its appeal for AY 2009-10 in ITA No. 218/Del/2013 has raised following grounds of appeal:

> "1. Whether the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.6,96,49,798/- made on account of income from house property :
>
> (a) The provisions of taxability of Annual letting value or property consisting of any building or lands appurtenant thereto are dealt in Sections 22 to 27 of Income Tax Act, 1961. As per the provisions of section 22 of the Income Tax Act, 1961. Annual value of property of which the assessee is owner is taxable under the head income from House Property except the portion of the property used by the owner of the property for the purposes of its own business or profession, the profit of which are chargeable to income tax.
>
> (b) The taxability of the property u/s 22 is that the said property shall not be in use of business of the assessee itself, the profit of which is taxable to income tax.

Here in this case, the assessee company has sub-licensed the offices and apartments to various persons some of whom have further sub-licensed. The assessee company is not charging any rent, fees, etc. on the sub-licensing of these properties, except thereof for security deposits which were taken by the assessee company at the time of sub-license agreement.

(c) The assessee company is not providing any services in the nature of hotel business such a catering, laundry, telephone, reception etc., to the occupants of West Tower. Further furnitures and fixtures in these offices and apartments pertain to the occupants only and they are the owner of the same.

2. Whether the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.1,53,268/- on account of extra depreciation on computer peripherals ignoring the facts that only the computers and computer software are eligible for depreciation of 60% and the same cannot be extended to computer accessories and peripherals."

ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 We have already considered both these issues while deciding revenue appeal for AY 2008-09 above in ITA No. 1107/Del/2012. Conclusions recorded by us in ITA No. 1107/Del/2012 would apply mutatis mutandis to ITA No. 218/Del/2013. As result revenue appeal in ITA No. 218/Del/2013 is dismissed.

22. Assessee in its appeal for AY 2009-10 in ITA No. 386/Del/2013 has raised following grounds of appeal:

> "1. That on facts and in law, CIT(A) erred in upholding the disallowance made by the AO on account of license fee of Rs.12,00,00,000/- paid to NDMC during the year under consideration.

2. That on facts and circumstances of the case levy of interest u/s 234B & 234D of the Income Tax Act, 1961 is bad in law.

3. That on facts and in law the Commissioner of Income Tax (Appeals) erred in upholding the order of AO partly and not allowing relief as claimed.

4. That on facts and in law the orders passed by the Assessing Officer {hereinabove referred to as the "AO" is bad in law and void ab initio."

Sole issue involved in this appeal pertains to disallowance of license fee of Rs 12 crores paid to NDMC during the year under consideration. We have also considered this issue in appeal filed by assesse for AY 2008-09 above in ITA no. 787/Del/2012. For reasons stated above claim made by the assesse is allowed. As a result appeal of assesse in ITA No. 386/Del/2013 is allowed.

23. For AY 2003-04 only assessee has filed an appeal in ITA No. 771/Del/2012. Following grounds of appeal have been raised by the assessee:

"1. That on facts and in law the Commissioner of Income Tax (Appeals) {hereinafter referred to as the "CIT(A)"} erred in upholding assumption of jurisdiction under section 147 of the Income-tax Act, 1961 {hereinafter referred to as "the Act"} by the Assessing Officer {hereinafter referred to as the "AO"}.

ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 1.1 That on facts and in law the CIT(A) erred in not appreciating that the prerequisites of assumption of valid jurisdiction in term of proviso to section 147 are not met rendering the reassessment orders passed thereto as bad in law. 1.2 That on facts and in law the CIT(A) erred in not appreciating that the impugned re-assessment proceedings were initiated by the AO as a result of a mere change of opinion on similar set of facts.

2. That on facts and in law, the CIT(A) erred in upholding the disallowance made by the AO on account of license fee of Rs 11,00,00,000/- paid to NDMC during the year under consideration.

3. That on facts and circumstances of the case levy of interest u/s 234B & 234D of the Income Tax Act, 1961 is bad in law.

3.1 That on facts and circumstances of the case AO erred in withdrawing interest u/s 244A of the Act

4. That on facts and in law the orders passed by both the AO and CIT(A) are bad in law and void ab initio."

24. Ground No. 2 of the appeal again pertains to allowability of deduction of Rs.11 crores paid to NDMC as license fees. We have also considered this issue in appeal filed by assesse for AY 2008-09

above in ITA no. 787/Del/2012. For reasons stated above claim made by the assesse is allowed. This ground is accordingly allowed.

25. In ground nos. 3 and 3.1 appellant challenges levy of interest u/s 234B and 234D and withdrawal of interest u/s 244A of the Act. Levy of interest will be consequential in the instant case. No separate directions need be issued in this regard.

26. Ground No. 4 is general in nature and does not require a specific adjudication.

27. This leaves us with ground no. 1 to 1.2 of the appeal challenging assumption of jurisdiction u/s 147 of the Act. Notice u/s 148 in this case was issued on 26th February 2010 i.e four years after the end of relevant assessment year. Original assessment in this case was framed by the Ld AO u/s 143(3) of the Act vide order dated 28th March ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 2006. Reasons for reopening the case recorded by the Ld AO u/s 148(2) of the Act are as under:

> "The return in this case for the AY 2003-04 was filed on 28.11.2003 declaring an income of Rs.1,14,49,935/- which was processed u/s 143(1) of the I.T. Act, 1961 on 06.03.2004. The case was selected for scrutiny and the asstt. Was completed u/s 143(3) of the Act on 20.08.2006 at an income of Rs.9,16,82,026/-. The perusal of asstt. Records for the AY 2003-04 reveals that the assessee had debited an amount of Rs.11,00,00,000/- in the P/L Account towards license fees paid to NDMC. It is revealed that as per schedule 14 note 2 (iii) of notes to accounts the above payment has been classified as contingent liability which is an unascertained liability and should have been added back. The I.T. Act, 1961 provides that - "a provision made in the accounts for an accrued or is known liability is an admissible deduction, while other provisions made do not qualify for deduction. It has been judicially held that for a loss to be deductible, it must have actually arisen and incurred and not merely anticipated as certain to occur in future.
>
> In view of above facts of the case, I have reason to believe that the income to the tune of 11,00,00,000/- has escaped assessment owing to the failure on part of assessee to disclose fully and truly material facts necessary for asstt. and hence notice u/s 148 is hereby issued for reopening asstt. u/s 147 of the I.T. Act for the AY 2003-04."

The reasons recorded depict that the sole issue on which the case of the appellant has been re-opened pertained to a claim for deduction of Rs 11 crores on account of license fee paid by the appellant to NDMC.

28. During the course of hearing before us Ld AR submitted that on this very issue a detailed enquiry was conducted by the Ld AO during the course of original assessment proceedings u/s 143(3) of the Act. In this regard Ld AR referred to questionnaires dated 09th December 2005 and 30th January 2006 issued by the Ld AO during the course of proceedings u/s 143(3) of the Act and the reply filed by the assesse vide submission dated 15th February 2006. It was accordingly claimed

by the ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 Ld AR that the reassessment proceedings are bad in law as the mandatory condition stipulated under proviso to section 147 of the Act is not satisfied in the instant case. It was moreover claimed that the reassessment proceedings are bad in law as the same have been initiated solely as a result of a change in opinion. Ld CIT(DR) per contrary supported initiation of reassessment proceedings u/s 147 of the Act by the Ld AO. Ld CIT(DR) also placed reliance upon order dated 10th September 2010 passed by the AO in accordance with ratio laid down by Hon'ble Apex Court in case of GKN Driveshaft's reported in 259 ITR 19(SC).

29. We have carefully considered the submissions made by both the parties and have also perused the case records carefully. It is undisputed that during the course of original assessment proceedings vide questionnaire dated 09th December 2005 in query no. 8 Ld AO directed the appellant to furnish copy of High Court order w.r.t the license fee paid to NDMC. Thereafter vide questionnaire dated 30th January 2006 the Ld AO directed the appellant to furnish a reply on the following query raised by him:

> "5. It is seen from the notes that the assessee company has paid payment aggregating to Rs.11 crores to NDMC basing on supplementary agreement and orders of the Hon'ble Delhi High Court, though the dispute is pending. The copy of the Delhi High Court order is also furnished and it is seen that the Hon'ble Delhi High Court has not specifically directed the assessee company to make the payment. It is also stated in the 'NOTES' that the loans and advances includes Rs.983.72 lacs paid to NDMC pursuant to agreement with NDMC and orders of Delhi High Court that this amount has been debited without prejudice to the company's rights to refund and interest. From the above, it is clear that the assessee company reserved the right to claim the refund and since the dispute was still pending, why the amount paid should not be disallowed."

ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 In reply vide submissions dated 15th February 2006 the appellant submitted following reply to the Ld AO:

> "In your letter dated 30.01.06, you have required the company to show why the amount paid of Rs 11.00 Crores to NDMC should not be disallowed. The Company is required to pay 21% of the turnover or Rs 2.68 Crores whichever is higher as License Fee to NDMC as per Clause 3 of the License Deed. On the turnover of Rs.6900.17 lacs the amount at 21% works out to Rs.1449.04 lacs. The company has claimed Rs 1100.00 lacs, which is less than the above. The matter is pending for adjudication before the Hon'ble Delhi High Court, pending final order we have been directed to pay Rs 75 lacs per month from February 2002 and Rs 1 Crore per month August, 2002 onwards. Since this amount has been paid to NDMC we feel that the final amount that may be decided as being payable to NDMC shall definitely be much more than this amount. Accordingly, the company has claimed this lesser amount. In the unlikely event of the amount being settled at a lesser amount, this expense will be reversed in the books of the company and the tax will be paid thereon. It is, therefore,

requested that the amount may kindly be allowed."

After considering the above reply submitted by the appellant no addition on account of payment of license fee was made by the AO while passing original order of assessment u/s 143(3) of the Act on 20th August 2006.

30. Case records clearly show that the issue as to whether license fee of Rs 11 cr paid by the appellant was an ascertained liability or not has already been examined by the Ld AO in the original assessment proceedings. Further in the original assessment proceedings the Ld AO was even made aware of note 2(iii) appended to the audited accounts as is clear from his questionnaire dated 30th January 2006. If this be so, then the reassessment proceedings clearly fall within the ambit of change of opinion and are therefore are bad in law. Recently Hon'ble Full Bench of Jurisdictional High ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 Court in case of Usha International Ltd reported in 348 ITR 485(Del) has held as under:

> "11. Accordingly, we hold that the following observations in Consolidated Photo & Finvest Ltd. (supra) do not reflect the correct legal position:
>
> "In the light of the authoritative pronouncements of the Supreme Court referred to above, which are binding upon us and the observations made by the High Court of Gujarat with which we find ourselves in respectful agreement, the action initiated by the Assessing Officer for reopening the assessment cannot be said to be either incompetent or otherwise improper to call for interference by a writ court. The Assessing Officer has in the reasoned order passed by him indicated the basis on which income exigible to tax had in his opinion escaped assessment. The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening completed assessments would be applicable only to situations where the Assessing

> Officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the Assessing Officer either generally or in the form of a reply to the questionnaire served upon the assessee. What is important is whether the Assessing Officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion."

12. The said observations have been rightly held to be contrary to the Full Bench decision of the Delhi High Court in Kelvinator of India Ltd. (supra) in Eicher Ltd.

ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 (supra). The said decision in Eicher Ltd. (supra) makes reference to the decision of KLM Royal Dutch Airlines v. Asstt. CIT [2007] 292 ITR 49/ 159 Taxman 191 (Delhi). KLM Royal Dutch Airlines case (supra) deals with some other issues on which we do not express or make any observation approving or disapproving. Some of these aspects have been considered and explained in other decisions in light of the judgment of the Supreme Court in the case of Rajesh Jhaveri Stock Brokers (P.) Ltd. (supra).

13. It is, therefore, clear from the aforesaid position that:

> (1) Reassessment proceedings can be validly initiated in case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion;
>
> (2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assesse.

Reassessment proceedings in the said cases will be hit by principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons."

Above ratio propounded by the jurisdictional High Court is clearly applicable to the instant case.

31. We moreover observe that there is also no failure or omission on part of appellant to disclose material facts to the Ld AO. This is a jurisdictional precondition, which must be satisfied as per proviso to section 147 of the Act. Facts relied upon by the Ld AO in support of his reasons to belief i.e note no. 2(iii) was duly considered by him during the course of original assessment. No fresh

facts have also come to the knowledge of Ld AO justifying a fresh initiation of action u/s 147 of the Act. It is trite law that when a specific query raised by the AO is replied to by the assessee during the course of original assessment then it cannot be said that there is any failure ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013 or omission attributable to the assesse. Jurisdictional High Court in case of Haryana Acrylic Mfg reported in 308 ITR 38(Del) has held as under:

> ".....Explanation I to section 147 also makes it clear that mere production before the Assessing Officer of account books or other evidence from which material evidence could, with due diligence have been discovered by the Assessing Officer, will not necessarily amount to disclosure within the meaning of the said proviso. This Explanation, however, does not mean that production of account books and other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not 'in any event' amount to disclosure within the meaning of the said proviso. The said Explanation only stipulates that such evidence will not necessarily 'amount to disclosure' within the meaning of the said proviso. However, we need not labour on this aspect any further inasmuch as we find that in this case, the Assessing Officer had made specific queries, inter alia, with regard to the share application money of Rs. 5 lakhs received from Hallmark Healthcare Limited. The petitioner had supplied, in the course of the original assessment proceedings all the relevant documents such as the share application money form, confirmation from the applicant and the bank statement relating to the receipt of the cheque No. 201845 dated 17-10-1997 from Hallmark Healthcare Limited. It is only thereafter that the assessment was completed by the Assessing Officer on 7-3-2001. We have already noted above that in the assessment order itself, the Assessing Officer has recorded that the details as required were filed and verified. This in itself indicates that the Assessing Officer had applied his mind to the issue of the share application money and had accepted the assessee's claim after due verification....."

32. For the reasons stated above we concur with the submission made by the appellant that the assumption of jurisdiction u/s 147 of the Act in this instant case by issuance of notice u/s 148 dated 26th February 2010 is bad in law. Ground Nos 1 to 1.2 are therefore allowed.

33. As a result appeal of assesse in ITA No. 771/Del/2012 is allowed.

ITA No.771, 787 & 1107/Del./2012 ITA No.218 & 386/Del./2013

34. To conclude, appeals filed by revenue in ITA Nos.1107/Del/2012 and 218/Del/2013 are dismissed. Appeal filed by assessee in ITA Nos.787/Del/ 2012 is partly allowed for statistical purposes, whereas appeals filled by assessee in ITA Nos.386/Del/2013 and 771/Del/2012 are allowed.

Order pronounced in open court on this 5th day of February, 2016.

SD/- SD/-

(PRASHANT MAHARISHI) (A.T. VARKEY)
ACCOUNTANT MEMBER JUDICIAL MEMBER

Dated the 5TH day of February, 2016
TS

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

AR, ITAT
NEW DELHI.