

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

**BEFORE,
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA Nos.5850 & 5851/Del/2014
(ASSESSMENT YEARS: 2011-12 & 2012-13)**

ACIT, Central Circle-13, Room No.332, ARA Centre, Jhandewalan Extn., New Delhi.	Vs.	M/s Claridges Hotels Pvt. Ltd., 12, Aurangzeb Road New Delhi. PAN-AAACC 0022B
(Appellant)		(Respondent)

**Cross Objection Nos.162 & 163/Del/2015
(Arising out of ITA No.5850 & 5851/Del/2014)
(ASSESSMENT YEARS: 2011-12 & 2012-13)**

M/s Claridges Hotels Pvt. Ltd., 12, Aurangzeb Road, New Delhi PAN-AAACC 0022B	Vs.	ACIT, Central Circle-13, Room No.332, ARA Centre, Jhandewalan Extn., New Delhi
(Appellant)		(Respondent)

**ITA No.4302/Del/2016
(ASSESSMENT YEAR: 2013-14)**

ACIT, Central Circle-13, Room No.332, ARA Centre, Jhandewalan Extn., New Delhi.	Vs.	M/s Claridges Hotels Pvt. Ltd., 12, Aurangzeb Road New Delhi. PAN-AAACC 0022B
(Appellant)		(Respondent)

Appellant By	Ms. Bharti Sharma, CA
Respondent by	Ms. Nidhi Srivastava, CIT-DR

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

ITA No. 5850/Del/2014 is the Department's appeal against the order dated 11.08.2014 passed by the Learned Commissioner of Income Tax (Appeals)-1, New Delhi {CIT(A)} for Assessment Year 2011-12. The Cross Objection No.162/Del/2015 is the assessee's Cross Objection against the said appeal of the Department. ITA No.5851/Del/2014 is the Department's appeal against order dated 11.08.2014 passed by the Ld. CIT(A)-1, New Delhi for Assessment Year 2012-13 and Cross Objection No.163/Del/2015 is the assessee's Cross Objection against the said appeal of the Department. ITA No.4302/Del/2016 is the Department's appeal against order dated 18.05.2016 passed by the Ld. CIT (A)-23, New Delhi for Assessment Year 2013-14. All these Appeals and Cross Objections were heard together and they are being disposed of by this common order for the sake of convenience.

2.0 The brief facts of the case are that the assessee is a private limited company running Hotels under the name & style of "The Claridges". A search

and seizure operation u/s 132 of the Income Tax Act, 1961 (hereinafter called 'the Act') was carried out at the residential and business premises of Mr. Suresh Nanda, his family members and business associates etc. on 24.02.2012. M/s Claridges Hotel was also covered u/s 132 of the Income Tax Act, 1961.

2.1.0 The assessment for Assessment Year 2011-12 was made u/s 153A of the Act vide order dated 29.03.2014 determining the total income at Rs.12,51,74,139/-, wherein the following additions/disallowances were made:

S. No.	Disallowance	Amount (Rs.)
a)	Payment made to Mrs. Sonali Punj	Rs. 75,00,000/-
b)	Additional disallowance u/s 14A r.w Rule 8D	Rs. 2,90,10,000/-
c)	Depreciation on cars	Rs. 30,65,998/-
d)	Ad-hoc addition of repair & maintenance on car	Rs. 20,00,000/-
e)	Depreciation on gym equipment	Rs. 1,48,791/-

2.1.1 The assessee preferred an appeal before the Ld. CIT (A) and the Ld. CIT (A) deleted all the additions except sustaining the disallowance u/s 14A of the Act to the extent of Rs.37,43,326/- and upholding the disallowance of depreciation on gym equipment of Rs.1,48,791/-. The Ld. CIT (A) also did not adjudicate the assessee's ground relating to ad-hoc addition of Rs.20 lacs made on account of repair-maintenance of car.

2.1.2 Against the order of the Ld. CIT (A), the Department has approached the ITAT. The assessee has also approached the ITAT by filing Cross Objections.

The grounds taken in the Department's appeal and the assessee's cross objections are as under:

“ITA No.5850/Del/2014

1. *The order of the Ld. CIT (A) is not correct in law and facts.*
2. *On the facts and circumstances of the case the ld. CIT (A) has erred in law in deleting the addition of Rs.75,00,000/- made by AO on account of disallowance of salary payment to Smt. Sonali Punj.*
3. *On the facts and circumstances of the case the Ld. CIT(A) has erred in law in deleting the addition of Rs.2,52,66,674/- made by AO out of total disallowance of Rs.2,90,10,000/- made u/d 14A read with Rule 8D of the Income Tax Act.*
4. *On the facts and circumstances of the case the Ld. CIT(A) has erred in law in deleting the addition of Rs.30,65,998/- made by AO on account of disallowance of depreciation and car running expenses.*

Cross Objection No.162/Del/2015

1. *That the order u/s 153A of the Act dated 29.03.2014 passed by the Ld. AO is bad on facts and in law.*
2. *That on the facts and in the circumstances of the case, the Ld CIT (A) has erred in not considering the that the additions were made u/s 153A despite the fact that there was no incriminating document found during the course of search.*
3. *That the Ld. CIT (A) has erred in sustaining the disallowance by restricting it to the extent of exempt income earned of Rs 37,42,327/- u/s 14A read with rule 8D of Income tax Rules, 1962 ignoring the appellant's contention that no disallowance is called for exceeding Rs 19,88,395/- sou motto disallowed by appellant in its return of income*

4. That the Ld. CIT (A) has erred in sustaining the disallowance depreciation of Rs.1,48,791/- claimed on gym equipments alleged to have been installed at the premises of Managing Director.

5. That the on the facts and circumstance of the case, the Ld CIT(A) has erred in adjudicating the ground of addition of an ad hoc amount of Rs 20,00,000/- in respect of alleged expenses on running and maintenance of cars.

2.2.0 In Assessment Year 2012-13, the assessment was completed u/s 143(3) of the Act vide order dated 29.03.2014 determining the total income at Rs. 7,99,80,731/- as against the returned of income of Rs.4,59,51,500/ after making the following additions and disallowances:

S. No.	Disallowance	Amount (Rs.)
a)	Payment made to Ms. Sonali Nanda	Rs. 90,00,000/-
b)	Payment made to M/s Apex Enterprises	Rs. 35,65,792/-
c)	Additional disallowance u/s 14A r.w Rule 8D	Rs. 1,62,44,330/-
d)	Depreciation on cars and ad hoc Addition of Rs. 20 lakh on account of running & maintenance expenses	Rs. 45,42 ,637/-
e)	Unexplained cash	Rs. 5,50,000/-

2.2.1 The assessee's appeal before the Ld. CIT (A) was partly allowed in as much as the Ld. CIT (A) deleted all the additions except disallowance of depreciation on gym equipment amounting to Rs.1,26,472/-. Against the order of the Ld. CIT (A), the Department has filed an appeal and the assessee has preferred memorandum of Cross Objections. The Grounds

raised in the appeal and the Cross Objections are as under:

ITA No.5851/Del/2014

1. *The order of Ld. CIT (A) is not correct in law and facts.*
2. *On the facts and circumstances of the case the Ld. CIT (A) has erred in law in deleting the addition of Rs.90,00,000/- made by AO on account of disallowance of salary payment to Smt. Sonali Punj.*
3. *On the facts and circumstances of the case the Ld. CIT (A) has erred in law in deleting the addition of Rs.35,65,792/- made by AO on account of disallowance of payment to M/s Apex Enterprises.*
4. *On the facts and circumstances of the case the Ld. CIT (A) has erred in law in deleting the addition of Rs. 1,62,44,330/- made by AO on account of disallowance u/s 14A read with Rule 8D of the Income Tax Act.*
5. *On the facts and circumstances of the case the Ld. CIT (A) has erred in law in deleting the addition of Rs.45,42,637/- made by AO on account of disallowance of depreciation and car running expenses.*
6. *On the facts and circumstances of the case the Ld. CIT (A) has erred in law in deleting the addition of Rs.5,50,000/- made by AO on account of unexplained cash.*
7. *The appellant craves leave to add, amend any/all the grounds of appeal before or during the course of hearing of the appeal.*

Cross Objection No.163/Del/2015

1. *That the order u/s 153A of the Act dated 29.03.2014 passed by the Id. AO is bad on facts and in law.*
2. *That on the facts and in the circumstances of the case, the Id CIT(A) has erred in not considering the that the additions were*

made u/s 153A despite the fact that there was no incriminating document found during the course of search.

3. *That the Id. CIT (A) has erred in sustaining the disallowance depreciation of Rs. 1,26,637/- claimed on gym equipments alleged to have been installed at the premises of Managing Director.”*

2.3.0 In Assessment Year 2013-14, the assessment was completed u/s 143(3) of the Act vide order dated 25.02.2016 determining the total income at Rs.4,83,95,727/- as against the return of income of Rs.3,23,66,849/- after making the following additions/disallowances.

S. No.	Disallowance	Amount (Rs.)
a)	Payment made to Ms. Sonali Nanda	Rs. 67,00,000/-
b)	Additional disallowance u/s 14A r.w. Rule 8D	Rs. 92,78,887/-

2.3.1 The assessee's appeal against order of the Ld. CIT (A) was allowed *in toto*. Against the said order of the Ld. CIT (A), now the Department has approached this Tribunal and has raised the following grounds of appeal:

ITA No.4302/Del/2016

1. *The order of the Ld. CIT (A) is not correct in law and on facts.*
2. *On the facts and circumstances of the case the Ld. CIT(A) has erred in law in deleting the addition of Rs.67,50,000/- on account of*

payment made to Sonali Punj.

3. On the facts and circumstances of the case the Ld. CIT(A) has erred in law in deleting the addition of Rs.92,78,878/- on account of disallowance made u/s 14A r.w.r.8D.

The appellant craves leave to add, amend any/all the grounds of appeal before or during the course of hearing of the appeal.”

3.0 The Ld. Sr. DR took the Department's appeal for Assessment Year 2011-12 as the lead case and submitted that the ground No.2 of Department's appeal challenged the deletion of disallowance of salary paid to M/s Sonali Nanda. It was submitted that the Assessing Officer had made the disallowance on the ground that she had been appointed only by virtue of being the daughter of Mr. Suresh Nanda. It was also submitted that she was not selected through open offer and that she was not experienced and had not submitted any details of her employment other than being employed in the Claridges. The Ld. Sr. DR submitted that the Ld. CIT (A) had deleted the disallowance without considering the observations of the Assessing Officer.

3.1 Arguing on Ground No.3 of the Department's appeal, which was also relating to Ground No.3 of assessee's cross objection and which

pertained to disallowance of Rs.2,90,10,000/- u/s 14A of the Act, the Ld. Sr. DR submitted that the assessee company had earned dividend income of Rs.57,31,722/- during the year under consideration but had made a *suo moto* disallowance of only Rs.19,88,395/- in its return of income. It was submitted that in such circumstances, the Assessing Officer was right in calculating the disallowance in terms of provisions of Rule -8D of the Income Tax Rules, 1962 and the total disallowance had been calculated at Rs.3,09,98,396/- and after giving benefit of *suo moto* disallowance of Rs.19,88,395/-, the impugned disallowance was made. It was submitted that the Ld. CIT (A) had erred in restricting the disallowance to the exempt income only. The Sr. DR placed his reliance on the computation of disallowance made by the Assessing Officer in this regard.

3.2 With respect to Ground No.4 of Department's appeal against deletion of disallowance of depreciation on car amounting to Rs.10,65,998/- and also ground No.5 of assessee's Cross Objections challenging the *ad hoc* addition of Rs.20 lacs on account of car running expenses, the Ld. Sr. DR submitted that the Assessing Officer had disallowed the depreciation on cars since these cars were found at the

residences of Mr. Suresh Nanda and Mr. Sanjeev Nanda during the course of search and it could not be demonstrated that these cars had any link to the business of the assessee company. The Ld. SR. DR also submitted that it was for this reason that an *ad hoc* addition of Rs.20 lacs had also been made by the Assessing Officer on account of repairs and maintenance/running of these cars. The Ld. Sr. DR submitted that the Ld. CIT (A) had incorrectly deleted these disallowances.

3.3 With respect to Ground No.2 of Department's appeal for Assessment Year 2012-13, the Ld. Sr. DR submitted that this ground was identical to Ground No.2 of Departmental Appeal in Assessment Year 2011-12 i.e., it pertained to the payment of salary to Ms. Sonali Nanda and the arguments were identical.

3.4 With respect to Ground No.3 of the Department's Appeal in Assessment Year 2012-13, the Ld. Sr. DR submitted that the same pertained to disallowance of payment made to M/s Apex Enterprises amounting to Rs.35,65,792/-. The Sr. DR submitted that the disallowance had been made by the Assessing Officer because no tax had deducted at source on the payment made to M/s Apex Enterprises and because no

justification of the payment made also could be given by the assessee. It was also submitted that Mr. Sanjeev Nanda, S/o Mr. Suresh Nanda had a controlling interest in M/s Apex Enterprises and it was for this reason that the payment had been made.

3.5 Coming to Ground No.4 of the Department's appeal pertaining to disallowance of Rs.1,62,44,330/- u/s 14A of the Act, it was submitted the disallowance had been made in terms of Rule-8D of the Income Tax Rules,1962 r.w.s 14A of the Act and the Ld. CIT (A) was incorrect in deleting the entire disallowance.

3.6 With respect to Ground No.5 of the Department's appeal regarding depreciation on cars amounting to Rs.45,42,637/-, it was submitted that this ground was identical to ground No.4 in the Department's appeal for Assessment Year 2011-12 and that the arguments were also identical.

3.7 With respect to Ground No.6 of Department's appeal pertaining to deletion of addition of Rs.5,50,000/- on account of unexplained cash found during the search, it was submitted that since this cash had been found during the course of search and no explanation was submitted

regarding the same by the assessee, addition had rightly been made by the Assessing Officer.

3.8 Coming to Department's appeal for Assessment Year 2013-14, the Ld. Sr. DR submitted that Ground No.2 was again identical to Ground No.2 in Assessment Years 2011-12 and 2012-13 and challenged the deletion of disallowance of Rs.67,50,000/- being payment of salary made to Ms. Sonali Nanda. The Ld. Sr. DR submitted that the arguments would be the same in this year also.

3.9 With respect to Ground No.3 in Department's appeal for Assessment Year 2013-14, the Ld. Sr. DR submitted that this is pertains to disallowance of Rs.92,78,878/- u/s 14A of the Act. It was submitted that the disallowance had been made by the Assessing Officer in terms of the provisions of Rule-8D of the Income Tax Rules, 1962 and he placed reliance on the findings and computation of the Assessing Officer in this regard.

4.0 Per contra, the Ld. Authorized Representative (AR) submitted that as far as the issue of payment of salary to Mrs. Sonali Nanda was concerned, she was appointed as Senior Director in Corporate Communication w.e.f. 01.06.2010. She has additional responsibility of

marketing and promotion of food and beverage outlets with special focus on bakery promotion. It was submitted that Mrs. Sonali Nanda was instrumental in adding number of receipts which had become highly successful. It was submitted that apart from this she was also involved in public relations, advertisement, etc. She has excellent communication skills, good contacts and has pleasing personality which was helpful in discharge of her duties. It was submitted that apart from this, she has worked in a Hotel in Dubai and U.K and she also had an experience of running a restaurant by the name of 'Climax Tavern on the Greens' for almost five years. It was submitted that, therefore, it was incorrect on the part of the Assessing Officer to allege that she had no work experience and that she had been appointed only by virtue of being the daughter of Mr. Suresh Nanda. It was submitted that details and documents relating to the qualifications and work experience of Mrs. Sonali Nanda had been submitted before the Assessing Officer and that the same had been simply ignored by the Assessing Officer. It was further submitted that being the daughter of one of the shareholders cannot be a ground for disallowing the salary and that further there was no law requiring that employees have to be selected only through an open offer. The Ld. Authorized Representative

submitted that there was a failure on the part of the Assessing Officer to demonstrate that salary payment to Mrs. Sonali Nanda was not for the purpose of business. The Ld. Authorized Representative also submitted that the Assessing Officer cannot decide the reasonableness and the commercial expediency of any expenditure incurred by the assessee. The Ld. Authorized Representative also placed reliance on the order of the Ld. CIT (A) on the issue wherein the Ld. CIT (A) has observed that it was not in dispute that the salary paid had been taxed in the hands of Mrs. Sonali Nanda, there was no evidence to suggest that the payment of salary was made without any service being rendered and that the observations of the Assessing Officer were not based on any evidence.

4.1.0 Coming to Ground No.3 of Department's appeal and Ground No.3 of assessee's Cross Objections in Assessment Year 2011-12 pertaining to disallowance u/s 14A of the Act, the Ld. Authorized Representative submitted that the Assessing Officer had computed the disallowance without recording satisfaction as to why the voluntary disallowance of Rs.19,88,395/- made by the assessee was unsatisfactory considering the books of account. It was submitted that the Assessing Officer simply

proceeded to make the disallowance in terms of Rule-8D without recording any kind of satisfaction as required u/s 14A (2) of the Act. It was submitted that the Assessing Officer did not point out as to how the *suo moto* disallowance made by the assessee was not correct. It was submitted that there were plethora of judgments wherein it has been held that in absence of recording of satisfaction, the entire addition has to be deleted. It was further submitted that due to this reason, the Ld. CIT (A) was also incorrect in restricting the disallowance to the extent of exempt income. Without prejudice, the Ld. Authorized Representative also argued that no disallowance could have been made u/s 14A if no fresh investment had been made during the year under consideration and where there was availability of sufficient interest free funds with the assessee company.

4.1.1 With respect to the identical ground raised by the Department in Assessment Year 2012-13 wherein the Ld. CIT (A) had deleted the entire disallowance of Rs.1,62,44,330/-, the Ld. Authorized Representative submitted that, undisputedly, the assessee had not earned any exempt income during the year under consideration. It was also submitted that even though no exempt income had been earned during the year the

assessee had made a *suo moto* disallowance of Rs.6,70,000/-. It was submitted that appeal of the assessee on identical issue was allowed by the ITAT in assessee's own case for Assessment Years 2009-10 and 2010-11 wherein the ITAT had held that no disallowance can be made u/s 14A where the assessee had not earned any exempt income during the year. Reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of Cheminvest Ltd. vs. ACIT reported in 378 ITR 33 (Del).

4.1.2 In Assessment Year 2013-14 likewise, the Ld. Authorized Representative submitted that during the year under consideration the assessee had not earned any exempt income and, therefore, the disallowance of Rs.92,78,878/- made by the Assessing Officer had rightly been deleted by the Ld. CIT (A).

4.2.0 Arguing against ground No.4 of Department's appeal pertaining to deletion of disallowance of depreciation on cars amounting to Rs.10,65,998/- and also relating to ground No.5 of the assessee's Cross Objections regarding *ad hoc* addition of Rs.20 lacs on account of car running expenses in Assessment Year 2011-12, the Ld. Authorized Representative submitted that the issue was covered by the order of the

ITAT in assessee's own case for Assessment Years 2009-10 and 2010-11 and, therefore, the Ld. CIT (A) was correct in deleting the disallowance. It was further submitted that the Ld. CIT (A) had failed to adjudicate on the ground pertaining to the *ad hoc* disallowance pertaining to repairs and maintenance/running of cars which was also covered in assessee's favour by the order of the ITAT in assessee's own case for Assessment Years 2009-10 and 2010-11.

4.2.1 The Ld. Authorized Representative further submitted that in Department's appeal for Assessment Year 2012-13 also the issue was under challenge and likewise the same was also covered by the order of the Tribunal in assessee's own case.

4.3.0 Coming to the remaining grounds in the assessee's Cross Objections, the Ld. Authorized Representative submitted that Ground No.4 in assessee's Cross Objection for Assessment Year 2011-12 and Ground No.3 in assessee's Cross Objection for Assessment Year 2012-12 were against the order of the Ld. CIT (A) in upholding the disallowance of depreciation on gym equipment. It was submitted that a similar disallowance was made in Assessment Years 2009-10 and 2010-11 and the

same had been deleted by the ITAT vide order dated 10.11.2017.

4.4.0 The Ld. Authorized Representative submitted that apart from this, the Department was challenging the deletion of addition pertaining to payment made to M/s Apex Enterprises amounting to Rs.35,65,792/- in Assessment Year 2012-13. It was submitted that M/s Apex Enterprises was managed by Mr. Sanjeev Nanda who is a British citizen and was a non-resident during Assessment Year 2012-13. It was submitted that he had earlier worked with the Claridges in various capacities and had deep understanding of its working and, therefore, the assessee company had sought to utilize the expertise and experience of Mr. Sanjeev Nanda by entering into an agreement with a company managed by him i.e., M/s. Apex Enterprises FZE, UAE. This company was appointed to explore opportunities for acquisition of hotels and procure management contracts to be executed under the Claridges brand name. It was submitted that it is not in dispute that Mr. Sanjeev Nanda had confirmed the receipt of fee and that the fee had been paid in terms of General Sales Agent Agreement dated 01.06.2011 entered into with M/s Apex Enterprises and another agreement dated 01.07.2011. The Ld. Authorized Representative also

submitted that these two agreements were also found during the course of search and, thus, this evidence was sacrosanct. It was further submitted that the Assessing Officer has not brought any evidence on record to prove that no service had been rendered. It was further submitted that no tax was required to be deducted at source on this payment in terms of Articles-14, 7 and 22.1 of the Double Taxation Avoidance Agreement between India and UAE. The Ld. Authorized Representative also relied on the findings of the Ld. CIT (A) on the issue.

4.5.0 Arguing against Ground No.5 of the Department's appeal challenging deletion of addition of Rs.5,50,000/- on account of unexplained cash found during the course of search, the Ld. Authorized Representative submitted that the same pertained to sale of scrap generated during renovation and normal course of operation of the business. It was also submitted that the same had been duly accounted for in the books of accounts in Assessment Year 2012-13. The Ld. Authorized Representative also placed reliance on the findings of the Ld. CIT (A) in this regard.

5.0 We have heard the rival submissions and have perused the material on record. We have also perused the impugned orders as well as

the Paper Books filed by the assessee company. We now take up the grounds raised by both the parties one by one.

5.1.0 The issue of payment of salary to Mrs. Sonali Nanda is common in all the three years under consideration and the Department has challenged the deletion of disallowance by the Ld. CIT (A). It is seen that the assessee has filed copies of various documents before the Assessing Officer as well as the Ld. CIT (A) to demonstrate that Mrs. Sonali Nanda was appointed in terms of appointment letter containing terms and conditions of service and also these documents substantiated that Mrs. Sonali Nanda had vast experience in areas of food and beverage, baking and promotional events. It is also not in dispute that Mrs. Sonali Nanda has duly reflected the salary paid to her return of income which has also been duly evidenced. It is seen that the Assessing Officer has proceeded to disallow the salary paid on the ground that she was employed only by virtue of her being the daughter of Mr. Suresh Nanda and that she had not been selected thorough her open offer. To our mind this cannot be considered a valid ground for making the impugned disallowance in as much as there is no law against employing the relatives or sons or

daughters of a shareholder/owner if they are otherwise duly qualified/experienced to hold the position. It is also to be noted that the Assessing Officer has not pointed out that the expenditure was not incurred for the purpose of business. In such a situation the disallowance made by the Assessing Officer has been rightly deleted by the Ld. CIT (A). We also note that the Assessing Officer cannot decide on the reasonableness and commercial expediency of a particular expenditure incurred by the assessee as has been laid down by the Hon'ble Apex Court in case of S.A. Builders reported in 288 ITR 01 (SC). The Hon'ble Court held as under:

"Once it is established that there was a nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself) the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profits."

5.1.1 Similarly, the Hon'ble Delhi High Court in the case of Dalmia Cement reported in 254 ITR 377 (Delhi) has held as under:

"Under section 37(1) of the Income-tax Act, 1961, the jurisdiction of the Revenue is confined to deciding the reality of the business expenditure, viz.,

whether the amount claimed as a deduction was factually expended or laid out and whether it was wholly and exclusively for the purpose of the business. It must not, however, suffer from the vice of collusiveness or colourable device. The reasonableness of the expenditure could be gone into only for the purpose of determining whether, in fact, the amount was spent. Once it is established that there was a nexus between the expenditure and the purpose of the business, the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profits."

5.1.2 It is seen that the assessee has given details regarding services rendered by Mrs. Sonali Nanda but the Assessing Officer has completely disregarded them. We also note that the Ld. CIT (A), while deleting disallowance in Assessment Year 2011-12, has noted that the payment of salary has not been disputed, it is not disputed that the salary paid has been taxed in the hands of Mrs. Sonali Nanda and there was no evidence to suggest that the payment of salary was without any service rendered. The Ld. CIT (A) also observed that the argument that the salary paid was on account of Mrs. Sonali Nanda being daughter of Mr. Suresh Nanda holds no matter in view of the overwhelming evidence produced and that the Revenue cannot proceed on consideration not based on any

evidence. In such circumstances and respectfully following the ratio of the judgments as stated above, we are unable to take a view different from the view taken by the Ld. CIT (A). Accordingly, Ground No.2 stands dismissed in all the three years under appeal.

5.2.0 Coming to the issue of disallowance u/s 14A of the Act, it is seen that in Assessment Year 2011-12, the assessee company had earned dividend income of Rs.57,31,722/- and the assessee company had made a *suo moto* disallowance of Rs.19,88,395/-. However, the Assessing Officer computed the disallowance at Rs.2,90,10,000/- after giving benefit of *suo moto* disallowance of Rs.19,88,395/- from the total figure of Rs.30,99,83,396/-. The Ld. CIT (A) restricted the disallowance of exempt income of Rs.57,31,722/-. It is the contention of the assessee that no satisfaction had been recorded by the Assessing Officer while making the impugned disallowance. We have gone through the impugned assessment order for AY 2011-12 and we note that the contention of the assessee is correct in as much as the Assessing Officer has simply stated that the Delhi Bench of ITAT in the case of ACIT vs. Cheminvest Ltd. had held that the disallowance u/s 14A can be made even if there is no exempt income

generated from that investment. Thereafter, the Assessing Officer has proceeded to compute the disallowance in terms of Rule 8D of the Income Tax Rules. However, the Assessing Officer has not pointed as to how the *suo moto* disallowance made by the assessee was incorrect. The Hon'ble Delhi High Court in the case of Maxopp Investment Ltd. vs. CIT reported in [2012] 347 ITR 272 (Del.) held as under:

“Scope of sub-sections (2) and (3) of Section 14A

Sub-Section (2) of section 14A provides the manner in which the Assessing Officer is to determine the amounting of expenditure incurred in relation to income which does not form part of the total income. However, if one examines the provision carefully, it would be found that the Assessing Officer is required to determine the amount of such expenditure only if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the Act. In other words, the requirement of the Assessing Officer embarking upon a determination of the amount of expenditure incurred in relation to exempt income would be triggered only if the Assessing Officer returns a finding that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Therefore, the condition precedent for the Assessing Officer entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the Assessing Officer must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Sub-section (3) is nothing but an offshoot of sub-section (2) of section 14A. Sub-section (3) applies to cases where the assessee claims that no expenditure has been incurred in relation to income which does not form part of the total income under the Act. In other words, sub-section (2) deals with cases where the assessee specifies a positive amount of expenditure in relation to income which does not form part

of the total income under the Act and sub-section (3) applies to cases where the assessee asserts that no expenditure had been incurred in relation to exempt income. In both cases, the Assessing Officer, if satisfied with the correctness of the claim of the assessee in respect of such expenditure or no expenditure, as the case may be, cannot embark upon a determination of the amount of expenditure in accordance with any prescribed method, as mentioned in sub-section (2) of section 14A. It is only if the Assessing Officer is not satisfied with the correctness of the claim of the assessee, in both cases, that the Assessing Officer gets jurisdiction to determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the Act in accordance with the prescribed method, the prescribed method being the method stipulated in rule 8D. While rejecting the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the Assessing Officer would have to indicate cogent reasons for the same. [Para 29]”

5.2.1 Thus, as per the Hon’ble Delhi High Court in Maxopp Investment Ltd. vs. CIT (supra), it is incumbent on the Assessing Officer to indicate cogent reason for rejecting the claim of the assessee with regard to expenditure or no expenditure, as the case may be, while proceeding to compute disallowance u/s 14A r.w. Rule 8D. However, such satisfaction is precariously absent in the assessment order. In such a situation, the disallowance made by the Assessing Officer cannot be upheld. Similarly, the action of the Ld. CIT (A) in restricting the disallowance to the exempt income also has no basis as there is no recording of satisfaction by the Assessing Officer as aforesaid. Therefore, ground No.3 of the Departmental appeal in Assessment Year 2011-12 stands dismissed whereas Ground

No.3 of assessee's Cross Objections in Assessment Year 20110-12 stands allowed. In effect, the *suo moto* disallowance by the assessee amounting to Rs.19,88,395/- only remains.

5.2.2 Coming to the Departmental grounds challenging the deletion of disallowance u/s 14A of the Act in Assessment Years 2012-13 and 2013-14, it is seen that, undisputedly, in both these years the assessee has not earned any exempt income. The Ld. CIT (A) has deleted the disallowance by duly noting the same. The issue of disallowance u/s 14A of the Act in absence of exempt income earned is no longer *res integra*. The Hon'ble Delhi High Court in the case of Cheminvest Ltd. vs. ACIT reported in 378 ITR 33 (Delhi) has held that where the assessee does not earn any exempt income during the year, no disallowance u/s 14A of the Act can be made. We also note that disallowances made in assessee's own case in Assessment Years 2009-10 and 2010-11 had been deleted by the Tribunal vide order dated 10.11.2017 on the ground that the assessee had not earned any exempt income during the year under consideration. The relevant observations of the ITAT are contained in para-5 of the said order and the same are reproduced herein under for a ready reference:

“5. After hearing both the parties and no perusal of the impugned orders, one very important fact which is permitting through is that, during the year assessee has not earned any exempt income and this fact has been noted by the AO also in the impugned assessment order as well as by the Ld. CIT (A) in the impugned order. The assessee had relied upon certain decisions before both the authorities contending that, if there is no exempt income, then no disallowance u/s 14A can be made. This fact is borne out from the discussions appearing on para 4.1 of the Ld. CIT (A) order. Hence assessee has not earned any exempt income, then no disallowance u/s 14A can be made in this year in view of the ratio and principle laid down by the Hon’ble Jurisdictional High Court in the case of Cheminvest Ltd. vs. ACIT, reported in 378 ITR 33 (Del). Thus, on this ground alone, we hold that the disallowance u/s 14A read with Rule 8D for sums amounting to Rs.9,71,73,724/- cannot be sustained and is directed to be deleted.”

5.2.3 Therefore, in view of the judgment of the Hon’ble Delhi High Court in the case of Cheminvest Ltd. vs. ACIT (supra) and the order of the ITAT in assessee’s own case in Assessment Years 2009-10 as quoted above, we uphold the findings of the Ld. CIT (A) on the issue in Assessment Years 2012-13 and 2013-14 and dismiss the grounds raised by the Department in this regard.

5.3.0 The next issue for our consideration in Department’s appeal for Assessment Year 2012-13 is depreciation of cars which had been disallowed by the Assessing Officer on the ground that these cars were found to be parked at the residences of Mr. Suresh Nanda and Mr. Sanjeev Nanda. Since, these cars were found to be parked at the residences, the

Assessing Officer also proceeded to make an *ad hoc* disallowance towards car running expenses also. It is seen that similar addition was made in Assessment Years 2009-10 and 2010-11 which was subsequently deleted by the ITAT vide order dated 10.11.2017. The relevant observations of the Tribunal are contained in paragraph-8 of the said order and the same is being reproduced hereunder for ready reference:

“8. After hearing both the parties and on the perusal of the relevant finding given in the impugned order, we find that so far as this disallowance of depreciation is concerned there is no dispute that these cars are assets of the assessee company which have been shown as part of the fixed assets in the balance sheet. Most of the cars are appearing as WDV In the schedule of fixed assets and depreciation has been claimed at Rs. 13,03,519/-. Once the cars are owned by the assessee company and is found to part of fixed assets then, ostensibly depreciation has to be allowed. The assessee before the AO as well as before the Ld. CIT (A) has categorically submitted that since renovation work was carried out at hotel premises, therefore, these cars were parked at the residence of Shri Suresh Nanda and his son Shri Sanjeev Nanda who held majority stake directly or indirectly in the assessee company. Mere parking of cars at the premises of these persons, cannot ipso facto lead to an inference that the depreciation has to be disallowed which otherwise are the assets of the assessee company. Assessee had also submitted that these cars were used purely and wholly for the purpose of hotel business and in absence of rebuttal of this explanation, depreciation cannot be disallowed and accordingly, we held Ld. CIT (A) has rightly allowed depreciation.”

5.3.1 Respectfully following the same, we uphold the order of the Ld. CIT (A) in deleting the said addition. The Department's grounds relating to the same stands dismissed in Assessment Years 2011-12 and 2012-13.

5.3.2 Apart from this, it is also seen that the Assessing Officer had made an *ad hoc* disallowance on account of running and maintenance expenses on car for the reason that these cars were found to be parked at the residence of Mr. Suresh Nanda and Mr. Sanjeev Nanda. This issue is also settled in the favour of the assessee by order of the Tribunal in Assessment Years 2009-10 and 2010-11 vide order dated 10.11.2017. The relevant observations of the Tribunal are contained in paragraph-13 of the said order and the same is being reproduced herein under for a ready reference:

“13. So far as the issue of adhoc disallowance of Rs. 20 lacs in respect of expenses of running and maintenance of cars, as discussed in the departmental appeal, the assessee owns various cars which are part of fixed assets and is being used for the purpose of hotel business of the assessee. The AO while making the disallowance has made purely adhoc disallowance without pin pointing any specific nature of expenditure which can be said to be not for the purpose of business. In the case of the company, which is running a five star hotel and using cars for its hotel business and maintaining all the records, the AO has to point out as to which part of the expenditure debited are not been verifiable. Simply because cars were parked for temporary period at the premises of promoters, it does not mean it were used for nonbusiness purpose. Such an adhoc disallowance cannot be sustained. Ld. CIT (A) has not examined this issue at all and gave a wrong finding of fact that AO has not made any such disallowance. Accordingly, we direct the deletion of such adhoc disallowance made by the A.O.”

5.3.3 Accordingly, since the Ld. CIT (A) has not adjudicated this issue, the Assessing Officer is directed to delete this *ad hoc*

disallowance.

5.4.0 In Assessment Year 2011-12, the only ground remaining pertains to ground No.4 of the assessee's Cross Objection which challenges the sustenance of disallowance of depreciation on Gym Equipment. It is seen that this issue is also covered in favour of the assessee by the order of the Tribunal in assessee's own case for Assessment Year 2009-10 and 2010-11 in paragraph 21 of the order. The relevant observations of the Tribunal are reproduced herein under:

“21. After hearing both the parties, we find that it is not in dispute that the equipment has been bought by the company and is appearing at the fixed assets in the balance sheet of the assessee company and said assets has been acquired during the running of hotel business. Then simply because it is being used by Managing Director it cannot be held to be for private use so as to warrant disallowance of depreciation. At the most if any equipment has been placed for exclusive use of Managing Director the same should be added as perquisite in the hands of the said Director but cannot be disallowed in the hands of the assessee company when this asset already forms part of the block of the assets and depreciation has been allowed earlier. Accordingly, we do not find any reason to sustain such disallowance and the same is directed to be deleted. ”

5.4.1 Accordingly, assessee's ground No.4 in its Cross Objection for Assessment Year 2010-11 and Ground No.3 in Assessee's Cross Objection for Assessment Year 2012-13 stand allowed.

5.5.0 In Assessment Year 2012-13, the Assessing Officer had also made a disallowance of Rs.35,65,792/- being payment made to M/s Apex Enterprises. It was the contention of the Assessing Officer that no tax had been deducted at source while making the payment and that the assessee could not justify the payment. It was also the allegation of the Assessing Officer that M/s Apex Enterprises has not brought any business to the assessee company and that the company was awarded contract for the reason that it was managed by Mr. Sanjeev Nanda, who was the son of Mr. Suresh Nanda. In this regard, it is seen that the assessee had duly filed General Sales Agent Agreement dated 01.06.2011 between the assessee company and M/s. Apex Enterprises FZE, UAE and also another agreement dated 01.07.2011 appointing this company as the consultant. Apart from this, correspondences between M/s Apex Enterprises and Claridges Hotels were also submitted before the Lower Authorities. It is also not in dispute that the Assessing Officer could not bring on record that no services were rendered by M/s Apex Enterprises. It is undisputed that no tax was required to be deducted at source on the impugned payment in view of Articles, 14, 7 and 22.1 of the DTAA between India and UAE. The Ld. CIT (A), while deleting the addition, observed that the agreements were found

during the course of search and seizure and that, undisputedly, there was evidence to indicate that efforts were made by M/s Apex Enterprises towards the fulfilment of the terms of the agreement. The Ld. CIT (A) also observed that although the efforts did not result into any concrete proposal materialising, failure to procure business does not lead to the conclusion that the transaction was not genuine. We agree with the observations of the Ld. CIT (A) on the issue. We also negate the allegation of the Assessing Officer that the contract was awarded only by virtue of Mr. Sanjeev Nanda being the Son of Mr. Suresh Nanda. Having perused the records and the evidences as well as assessment order, it is apparent that the Assessing Officer chose to ignore these evidences and proceeded to make the disallowance without any cogent reason. Accordingly, finding no reason to interfere with the order of the Ld. CIT (A) on the issue, we dismiss Ground No.3 of the Department's appeal in Assessment Year 2012-13.

5.6.0

The only ground remaining for adjudication is now Ground No.5 in the Department's appeal for Assessment Year 2012-13 which challenges the deletion of addition of Rs.5,50,000/- on account of unexplained cash found during the course of search. This cash was found

during the course of search and as per the Assessing Officer, no explanation was offered by the Assessing Officer in this regard. It was the assessee's submission that this cash pertained to cash received from sale of scrap generated during the renovation work as well as normal operations of the business. It was also submitted that this was duly accounted for in the books of account during the year under consideration. The Ld. CIT (A), while deleting the addition, has noted that although no specific explanation was given at the time of search, the seized cash had been separately reflected in the audited balance sheet and has also been included in the income from sale of scrap offered to tax amounting to Rs.14,08,000/- and, thus, the cash found and seized stood duly accounted for. This finding of fact has not been controverted as being perverse by the Ld. Sr. DR. In such a situation, this being a finding of fact by the Ld. CIT (A), we find no reason to interfere with such finding. Accordingly, Ground No.5 of Department's appeal for Assessment Year 2012-13 also stands dismissed.

6.0 In the final result, all the three appeals of the Department stand dismissed whereas both the Cross Objections of the assessee stand allowed.

Order pronounced on 15/01/2021.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 15/01/2021

Pk/Ps

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI