IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : B : NEW DELHI
(Through Virtual Hearing)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.918/Del/2010
Assessment Year: 2006-07

ACIT, Central Circle 13, New Delhi.	Vs	ELEL Hotels & Investment Ltd., C/o Ajay Wadhwa, W-107, Ground Floor, Greater Kailash-1, New Delhi. PAN: AAACE2846D
(Appellant)		(Respondent)

Assessee by	:	Shri Ajay Wadhwa, Advocate & Ms Ragini Handa, CA
Revenue by	:	Ms Nidhi Srivastava, CIT-DR
Date of Hearing	:	18.12.2020
Date of Pronouncement	:	16.02.2021

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 30th December, 2009 of the CIT(A)-2, New Delhi, relating to the assessment year 2006-07.

2. This is the second round of litigation before the Tribunal.

3. Facts of the case, in brief, are that the assessee is the owner of óHotel Sea Rockô at Band Stand, B.J. Road, Bandra (West), Mumbai. It filed its return of income on 21st October, 2006 declaring a loss of Rs.39,39,710/- and has paid an aggregate tax of Rs.9,15,785/- on book profit u/s 115JB of the Act. A search and seizure operation u/s 132 of the IT act was conducted in the group cases of Shri Suresh Nanda on 28th February, 2007. The premises of M/s ELEL Hotel and Investment Ltd. (i.e., the assessee) at 9th Floor, Hotel Sea Rock at Band Stand, B.J. Road, Bandra (West), Mumbai and other related premises were also covered. In response to notice u/s 153A of the Act dated 09.09.2008, the assessee filed the return of income declaring loss of Rs.5,08,73,700/- along with balance sheet, computation of income and audit report on 18.11.2008. This difference in the return of income was attributed to the changed claim of depreciation. In the original return, the depreciation was claimed to the tune of Rs.3,08,93,616/- whereas the claim increased in the return filed pursuant to the notice u/s 153A of the Act to Rs.7,78,27,608/-. The AO passed the order u/s 143(3) r.w. section 153A r.w.s 153B of the IT Act, 1961 on 31st December, 2008 determining the total income of the assessee at Rs.2,85,42,450/- as against the returned loss of Rs.5,08,73,700/- wherein he made various additions/disallowances. Against the assessment order, the assessee filed an appeal before the CIT(A). During the course of proceedings before the ld.CIT(A), the assessee was allowed to raise a ground that the amount paid by it to ITC Ltd. at the time of termination of the agreement with ITC Ltd. ought to be

allowed as a revenue expenditure. The ld.CIT(A), vide order dated 30th December, 2009 came to the following conclusion:-

ñ6.3.2. Based on the above discussions, ground No. 3 is decided as under:

(a) There was existence of business during the year.

(b) An income of Rs.2,02,67,668/- on account of royalty accrued to the appellant during the year and the same has to be added towards its total income (though not added by AO.)

(c) The hotel building has been used for the purposes of business during the year and therefore depreciation is allowable.

(d) The claim of payment made to ITC Ltd as revenue expenditure cannot be allowed.

(e) The claim of acquiring intangible asset by way of payment of Rs.30.86 crores to ITC Ltd cannot be allowed.

(f) The payment made to ITC Ltd of Rs.30.86 crores has rightly been capitalized by the appellant towards hotel building and depreciation @ 10% applicable to the hotel building has to be allowed as was claimed by the appellant in original return of income.ò

4. Aggrieved by the above order, the assessee as well as the Revenue filed appeal before the Tribunal which was disposed of by the Tribunal vide order dated 5th August, 2011. Before the Tribunal, the assessee made three without prejudice arguments in the following order of preference:-

(a) The expenditure is revenue in nature;

(b) The expenditure is for acquiring an intangible asset; and

(c) The payment is made for improving the title of the hotel building.

5. So far as the argument that the expenditure is revenue in nature, the Tribunal came to the conclusion that since on account of payment made to ITC Ltd. ôthe assesseeôs business acquired a new lease of life after paying the aforesaid amount, it can only be held to be an expenditure of capital nature.ô

6. The Tribunal proceeded to consider the second alternate plea that the payment had led to acquisition of intangible asset and came to the conclusion that the payment cannot be said to be for acquisition of intangible asset. The Tribunal, finally at para 24.16 of the order held that the nature of payment i.e., it is for acquiring peaceful possession of the premises and it has enhanced right of the assessee to use the premises in any manner it desires which was otherwise encumbered upto 30.06.2011. Therefore, the payment can only be attributed to the hotel building and accordingly it is entitled to depreciation at the rate applicable to hotel building. Against the order of the ITAT, the Revenue preferred an appeal before the Hon'ble High Court wherein the following substantial question of law were framed:-

> ñ(i) Whether the Income Tax Appellate Tribunal was right in holding that the respondent-assessee is entitled to depreciation on Rs.30.86 crores @10 % as building?
>
> (ii) Whether the Income Tax Appellate Tribunal was right in holding and setting aside the findings of the Assessing Officer that income shown by the

assessee as business income should be taxed as income from house property or as income from other sources?

[The contention of the respondent-assessee that the Assessing Officer had not examined and objected to depreciation as building will be also decided while examining the aforesaid question No.(i)].ò

7. The Hon'ble High Court has discussed this issue and restored the issue to the file of the Tribunal by observing as under:-

ñ6. The AO passed an assessment order on 31st December, 2008 under Section 143 (3) read with Section 153-A of the Act assessing the total income of the Assessee at Rs.2,85,42,450/-, as against the returned loss of Rs.5,08,73,700/-. Against the aforementioned assessment order, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) [ÄCIT (A)"]. During the course of the proceedings before the CIT (A), the Assessee was allowed to raise a ground that the amount paid by it to ITC Limited at the time of termination of the agreement with ITC Limited, ought to be allowed, as a revenue expenditure. In the order dated 30th December, 2009, the CIT (A) came to the following conclusions:

ñ6.3.2. Based on the above discussions, ground No. 3 is decided as under:

(a) There was existence of business during the year.
(b) An income of Rs.2,02,67,668/- on account of royalty accrued to the appellant during the year and the same has to be added towards its total income (though not added by AO.)
(c) The hotel building has been used for the purposes of business during the year and therefore depreciation is allowable.
(d) The claim of payment made to ITC Ltd as revenue expenditure cannot be allowed.
(e) The claim of acquiring intangible asset by way of payment of Rs.30.86 crores to ITC Ltd cannot be allowed.
(f) The payment made to ITC Ltd of Rs.30.86 crores has rightly been capitalized by the appellant towards hotel building and depreciation @ 10% applicable to the hotel building has to be allowed as was claimed by the appellant in original return of income.ò

7. Aggrieved by the above order, both the Assessee and the Revenue filed appeals before the ITAT, which were disposed of by a common impugned order (which incidentally was also common to the appeals for the AY 2005- 06). It is seen from paragraph 24.6 of the impugned order of the ITAT that the counsel

for the Assessee made three Ăwithout prejudice" arguments before it in the following order of preference:

(a) The expenditure is revenue in nature;
(b) The expenditure is for acquiring an intangible asset; and
(c) The payment is made for improving the title of the hotel building.

8. The discussion on the aspect whether the payment made to ITC Limited was capital in nature starts from paragraph 24.11 of the impugned order. The ITAT came to the conclusion that since on account of the aforementioned payment to ITC Limited ñthe Assessee"s business acquired a new lease of lifeò it could ñonly be held to be an expenditure of capital in natureò.

9. The ITAT then proceeded to consider the second alternative plea that the payment had led to acquisition of intangible asset. The ITAT in the impugned order came to the conclusion that ñthe payment cannot be said to be for acquisition of any intangible assetò. It appears that the ITAT, in view of its finding that the expenditure was capital in nature, did not consider it necessary to answer the first of the three submissions of the Assessee, viz., that the expenditure was revenue expenditure and should be allowed as such.

10. Even when the above questions of law were framed before this Court by the order dated 22nd August 2013, it appears that no specific question as such was framed on this aspect.

11. However, it is pointed out by Mr S. Ganesh, learned Senior Counsel appearing for the Assessee, that if Question (i) is to be answered in favour of the Revenue i.e. by holding that the ITAT was in error in holding that the Assessee was entitled to depreciation on Rs.30.86 crores at 10% as building then the corollary would be that the said expenditure has to be treated as revenue expenditure.

12. On the other hand, Ms Vibhooti Malhotra, learned Senior Standing Counsel appearing for the Revenue, submits that the ITAT did not have an occasion to actually examine whether the expenditure could at all be claimed as a revenue expenditure. She points out that without examining how the Assessee treated the amount in the original return filed by it i.e. the return filed prior to the return pursuant to the notice under Section 153-A of the Act, the ITAT could not have come to a conclusion, one way or the other.

13. It must be noticed at this stage that according to the Assessee, it made a claim of depreciation at 10% on the sum of Rs.30.86 treating as building, both in its original return as well as in the return filed pursuant to the notice received under Section 153-A of the Act. However, the alternative plea that this was revenue expenditure or that it was for acquisition of an intangible asset was raised by it for the first time before the CIT (A).

14. The Court finds merit in the contention that this aspect of the matter, viz., if the expenditure is not to be treated as Ăcapital expenditure", then it will have to be treated as Ărevenue expenditure" was perhaps not addressed in the manner it should have been treated by the ITAT. On this aspect, therefore, the Court considers it appropriate to remit the matter to the ITAT for decision afresh on the treatment to be accorded to the expenditure incurred by the Assessee of the aforementioned sum of Rs.30.86 crores and whether in particular, it should be treated as a Ărevenue expenditure" or as Ăcapital expenditure". The Court makes it clear that it has not expressed any view one way or the other on the respective contentions of the Revenue or the Assessee on the issue, and, it will be open to the ITAT, after examining the entire records, including the original return filed by the Assessee to come to a fresh decision independent of its earlier decisions and any observations in the instant order.

15. As far as the Question (ii) is concerned, the Court is of the view that the findings both of the CIT (A) as well as the ITAT are consistent that the only business of the Assessee was its hotel business and, therefore, the income shown by the Assessee should be treated as income from house property and not as income from other sources. Consequently, Question (ii) is answered in the affirmative i.e. in favour of the Assessee and against the Revenue.

16. The appeal i.e. ITA No. 918/Del/2010 is restored to the file of the ITAT for deciding the specific issue mentioned in para 14 of this order afresh in accordance with law. The appeal shall be listed for directions before the ITAT on 11th September, 2019. The ITAT will make endeavour to dispose of the appeal as expeditiously as possible and in any event within a period of six months from the date of receipt of a copy of this order.ò

8. Therefore, the only question to be decided by us as per the direction of the Hon'ble High Court as per para 14 of the order is as to whether the payment of Rs.30.86 crores paid by the assessee to ITC Ltd. should be treated as revenue expenditure or as capital expenditure.

9. The ld. Counsel for the assessee submitted that M/s ELEL Hotel & Investment Ltd. i.e., the assessee is the owner of a hotel known as Hotel Sea Rock in Mumbai which was being managed by ITC Ltd. under the Hotel Operator

Agreement effective from 1986 pursuant to which ITC Ltd., was in possession, control and management of the hotel property and the assessee was entitled to a certain percentage of the revenue, the balance being the remuneration of ITC Ltd. as an operator-cum-manager. Referring to page 39-60 of the paper book, which is the copy of Hotel Operator Agreement dated 03.05.1986 between the assessee and ITC Ltd., he submitted that the terms of the said agreement had not been exhausted and ITC Ltd. still possess rights of renewal. He submitted that in 1993 the hotel was severely damaged as a result of bomb blast during the riots in Mumbai. Pursuant to the damage, substantial number of rooms of the hotel became non-functional requiring extensive repair and renovation. Thereafter, disputes and differences arose between the assessee and ITC Ltd., with respect to responsibility to repair and restore the damaged portion and other consequential issues. Since then, the assessee had been in litigation with ITC Ltd. who had declined to make any payment to the assessee and was appropriating the entire revenue to its own account. Referring to settlement agreement dated 11th May, 2005 copy of which is placed at pages 61-73 of the paper book and the consent terms dated 11th May, 2005 copy of which is placed at pages 74-99 of the paper book, the ld. Counsel submitted that legal proceedings were undertaken both by the assessee company and ITC Ltd. and the disputes were eventually settled after a period of 12 years. He submitted that in such circumstances the assessee company out of commercial expediency terminated the operator-cum-management agreement and paid a sum of Rs.43.10 crores during assessment year 2006-07. Referring to page 67 of the paper book, he submitted that

as per the terms of the settlement, ITC Ltd. would hand over vacant and peaceful possession of hotel property. He submitted that the amount was accounted for in the books of account of the assessee as under:-

a)	Repayment of security deposit ITC	-	Rs.7.75 Cr.
b)	Reimbursement towards cost of stores acquired from ITC	-	0.64 Cr.
c)	Reimbursement towards transfer of various accounts	-	Rs.3.84 Cr.
d)	Towards Termination of operator agreement and Assessee Obtaining rights to operate the hotel	-	Rs.30.86 Cr.
	Total	-	43.10 crores

10. He submitted that the assessee in the return filed u/s 139(1) of the IT Act, 1961 had capitalized the amount under the head ôbuildingô stating that the said payment was towards the vacation of the building and accordingly claimed depreciation @ 10% on Rs.30.86 crores which can be verified from page 33 of the paper book. Consequent to search on 28.02.2007 and in response to notice u/s 153A, the payment was re-categorised as intangible asset depreciable @ 25% being in the nature of business and commercial rights. He submitted that during the course of assessment proceedings, the assessee made an alternate claim that the payment to ITC having been made to terminate an onerous agreement was wholly and exclusively for the purpose of business and was deductible u/s 37 of the IT Act. He submitted that the AO rejected all claims without giving any specific findings on this claim by simply stating that there was no business during the year and no asset had been used for the purpose of business actually or constructively. He failed to

record a finding as to whether payment to ITC Ltd. resulted into a depreciable asset, building or intangible and even if there was no business during the year depreciation should be allowed or not in subsequent years.

10. He submitted that the CIT(A) allowed depreciation on the asset stating that all the conditions to claim depreciation u/s 32 had been met and that the asset was in the nature of capital asset and was used for the purpose of business and the business was in existence during the year. The ld.CIT(A) further held that no new claim of deduction or allowance can be made by the assessee in section 153A proceedings as it was a completed assessment on the date of search. He also held that the payment made could not be said for acquiring óright to run the hotelô and even if it was treated as óright to manage and conduct businessô still this asset could not be intangible asset as defined u/s 32(1)(ii) of the Act. He further held that on merits also the payment to perfect a title or as a consideration for getting rid of defect in the title would be a capital payment.

10.1 Referring to the order of the Tribunal, he submitted that the Tribunal held that it was a case of re-possession of an asset leased to ITC Ltd. and it enhanced the right of the assessee to use the premises in any manner it desires which was otherwise encumbered upto 30.06.2011 and, therefore, the payment was attributable to hotel building and was entitled for depreciation at the rate applicable to hotel building. The Tribunal further held that the assessee can take a plea or claim for deduction in the return filed u/s 153A. It also held that the payment did not lead to acquisition of

any intangible asset. The Tribunal further held that the payment can only be attributed to hotel building as it enhanced the right of the assessee to use the premises in any manner it desires.

10.2 Referring to paras 9 to 14 of the order of the Hon'ble High Court dated 20th August, 2019, he submitted that now that the Hon'ble High Court has remitted the matter to the Tribunal for deciding afresh on treatment of the same stating that the Tribunal had not examined whether the expenditure was revenue and should be allowed. Therefore, the only question before the Tribunal is as to whether the above amount has to be treated as revenue expenditure or not.

11. The ld. Counsel for the assessee submitted that the compensation paid to ITC Ltd. should be allowed as a revenue expenditure. Referring to clause 2.1 of Article II of the Hotel Operator Agreement, copy of which is placed at page 41 of the paper book, he submitted that the Hotel Operator Agreement dated 3rd May, 1986 clearly states that the assessee has granted a licence to ITC Ltd. to operate the hotel. Therefore, this is not a lease and no property right has been transferred to ITC Ltd. Referring to Article IV of the Hotel Operator Agreement copy of which is placed at page 45 of the paper book, he submitted that the duration of the agreement has been defined which is 25 years commencing from 01.07.1986 subject to ITC Ltd. not committing any breach of terms and conditions of the agreement. The agreement was renewable at the option of ITC for a further period of 25 years. Referring to clause 18.1 of Article XVIII of the Hotel Operator Agreement, copy of which is

placed at page 56 of the paper book, he submitted that it is stated in the said agreement that the possession of the property is not delivered to ITC Ltd. and no interest or any tenancy or any other interest in the assesseeôs property or asset is created or intended to be created in favour of ITC Ltd. The assessee remains in possession of the property at all points of time and no tenancy or leasehold rights are created in favour of ITC Ltd. Referring to the decision of the Tribunal dated 5th August, 2011, the ld. Counsel drew the attention of the Bench to the argument of the ld. DR which find mention at page 60 of the said order and submitted that the ld. DR has argued that the payment was made to get vacant possession of the hotel and not for acquiring the right to run the hotel. Since the ld. DR has himself argued that this expenditure should not be treated as capital expenditure, therefore, the argument of the Department only supports the contention of the assessee that the said amount has to be treated as revenue in nature.

12. Referring to the point 11 of the settlement agreement dated 4th May, 2005 which appears at page 66 of the paper book, he submitted that it is stated in the said agreement that the licence will be terminated w.e.f. the date of settlement agreement with no claim of any nature remaining outstanding between the assessee and the ITC. It is also stated at point 12 at page 66 of the paper book that ITC will withdraw its management personnel from the hotel and deliver possession to the assessee. Referring to clause (iv) of point ón.ô of consent terms, copy of which is placed at page 78 of the paper book, he submitted that payment of Rs.32.42 crores

was only for relinquishment of rights under operating licence. He submitted that there was no addition to the capital asset and there was no change in the capital structure. He submitted that payment made for removal of restriction, obstruction or disability may result in acquiring benefits to the business, but that by itself would not acquire any capital asset. By getting freed from the ITC, the assessee did not acquire any advantage in the capital field. It did not result in starting any new business to enable it to continue its business without being hinged by the contract. The stage of parting with ownership in relation to the hotel in possession of ITC had not been reached. Since there was no question of acquiring a property, it cannot be said that the payment made was for having a benefit of enduring nature or any income yielding asset. He submitted that there is no addition to or expansion of the profit making apparatus of the assessee. The income earning machine remains what it was prior to payment of compensation. He submitted that there was no asset of an enduring nature involved, but, only an alternation in the mode of earning the money from the hotel and, therefore, the compensation paid had arisen out of business necessity. He submitted that the expenditure incurred for termination of the agreement was to avoid commercial inconveniences occurring in future and to facilitate the smooth functioning of the business i.e., in relation to the carrying on of the business in a profitable manner. He submitted that the assessee has acquired nothing new of enduring nature as it always had the asset of enduring nature. It was not a case where the assessee was acquiring for the first time something which it did not otherwise own or possess. It was, thus, a change in method of earning profits

from the hotel and not a transfer of any asset. He submitted that the agreement was terminated on business considerations and as a matter of commercial expediency and, therefore, such expenditure would be deductible u/s 37 of the Act.

13. The ld. Counsel submitted that after the cessation of the agreement with ITC Ltd., the business continued by means of Hotel Operator Agreement dated 11th May, 2005 between the assessee and Claridges Hotel Pvt. Ltd. (CHPL) The agreement continued to be operative till 31st July 2006 and after its termination the assessee operated, managed and continued to run the hotel in its own name till October, 2006 during 2007-08. He submitted that the agreement with CHPL is almost identical subject to some minor differences. The Department has, right from the beginning, treated such type of agreement as a business agreement and has added 23% of share of revenue receivable from ITC as business receipts. The ld. Counsel referred to the following decisions and submitted that the payment of Rs.30.86 crores paid to ITC Ltd. towards termination of operator agreement and assessee obtaining rights to operate the hotel has to be treated as Revenue expenditure in nature:-

i) Addl.CIT vs. J.S.S. (P) Ltd., (1984) 19 Taxman 521 (Delhi);

ii) Gopal Das Estates & Housing (P) Ltd. vs. CIT, (2019) 412 ITR 489 (Del);

iii) Shyam Buriap Company Ltd. vs. CIT (2016) 380 ITR 151 (Calcutta);

iv) Bikaner Gypsums Ltd. vs. CIT (1991) 187 ITR 39;

v) CIT vs. Associated Cement Companies Ltd. (1988) 172 ITR 257 (SC);

vi) Empire Jute Co. Ltd. vs. CIT (1980) 124 ITR 1 (SC);

vii) CIT vs. Ashok Leyland Ltd. (1972) 86 ITR 549 (SC);

viii) Airport Authority of India vs. CIT (2012) 340 ITR 407 (Del);

ix) CIT, Bombay vs. Airlines Hotel (P) Ltd.;

x) CIT vs. UTI Bank Ltd. (2013) 32 taxmann.com 282 (Gujarat);

xi) CIT vs. M/s Shriram Builcons Ltd. ITA No.39,53,60,65 of 2006.

xii) CIT vs. Motor Industries Co. Ltd. (1997) 223 ITR 112 (Karnataka);

xiii) CIT vs. Sales Magnesite (P) Ltd. (1995) 214 ITR 1 (Bombay);

xiv) CIT vs. Auto Distributors Ltd. (1994) 210 ITR 222 (Calcutta);

xv) CIT vs. Peico Electronics & Electricals (1992) 107 CTR Cal 240;

xvi) Cannanore Spinning & Weaving Mills Ltd. vs. CIT (1961) 42 ITR 528 (Ker.);

xvii) Ebrahim Aboobaker vs. CIT (1971) 81 ITR 664 (Bombay);

xviii) Motor Industries Co. Ltd. vs. Inspecting assistant Commissioner (1989) 31 ITD 350 (Bang) ITAT;

xix) CIT vs. B.L. Dhingra & Sons (1985) 153 ITR 167 (Del);

xx) P. Orr & Sons vs. CIT (1959) 35 ITR 556 (Mad);

xxi) L.H. Sugar Factory & Oil Mills (P) Ltd. vs. CIT (1980) 125 ITR 293 (SC);

xxii) Lakshmiji Sugar Mills Co. (P) Ltd. vs. CIT (1971) 82 ITR 376 (SC);

xxiii) CIT vs. Cominco Binani Zinc Ltd. (1993) 204 ITR 56 (Cal);

xxiv) CIT vs. Todi Tea Co. Ltd. (1999) 239 ITR 28 (Cal).

14. The ld. DR, on the other hand, submitted that the Tribunal has already dealt with all the three issues and has already held the payment to ITC Ltd. as capital in nature. He submitted that a perusal of Article 3 of the Agreement dated 3rd May, 1986 between ITC and the assessee shows that all workmen, employees, members of the staff including managerial staff as may be decided by ITC shall be on the pay roll of ELEL and their salaries, wages and other emoluments and perquisites shall be granted and disbursed by ITC. Thus, ITC is paying salary to all the staff and managerial personnel. Referring to Article IX of the said agreement, the ld. DR submitted that all the renovations, alterations, refurbishings, equipment replacements and capital expenditure shall be undertaken by ITC on its own cost. The said movable assets will belong to ITC Ltd. and depreciation on the same will be claimed by ITC. He submitted that even insurance is also paid by ITC. Thus, ITC is using the property and carrying on business and, therefore the assessee cannot claim the payment made to ITC as revenue in nature. He accordingly submitted that the order of the Tribunal holding the payment to be capital in nature should be upheld and the assessee should not be allowed to claim the expenditure as revenue in nature.

15. The ld. Counsel for the assessee in his rejoinder submitted that the matter has been remanded back by the Hon'ble Delhi High Court for being considered afresh by the Tribunal. Before the Hon'ble High Court, the issue was relating to the allowability of depreciation @ 10% on the above expenditure which was treated as a

part of the building. During the course of arguments the assessee also raised its claim that the expenditure should be considered as revenue in nature and be allowed in full. The Hon'ble High Court agreed with the contention of the assessee and set aside the matter by their order dated 20th August, 2019 directing that the matter be decided with an open mind as to whether depreciation @10% will be allowed or the entire expenditure to be revenue in nature. He accordingly submitted that the issue relating to admissibility of claim of this expenditure as revenue has already been adjudicated by the Hon'ble Delhi High Court and, therefore, the Tribunal has limited jurisdiction in the matter inasmuch as it has to decide as to whether it is capital in nature eligible for depreciation or revenue in nature to be allowable in full.

16. On a pointed query raised by the Bench as to whether the assessee can make a new claim in a search assessment when such claim was not made before the AO during the course of assessment proceedings, the ld. Counsel submitted that the search in the instant case took place on 28th February, 2007 and the assessment year involved is A.Y. 2006-07. The assessment was pending on the date of search and would be an assessment when any and every matter would be considered regardless of the incriminating material found during the course of search. He submitted that it is the settled law that the concluded assessments have to be restricted to the material found during the course of search and those assessments which have not been completed on the date of search are to be treated as regular assessment. Further, the assessment in the instant case was made u/s 143(3) of the Act and not u/s 153A.

17. Referring to the decision of the Hon'ble Bombay High Court in the case of PCIT vs. M/s JSW Steel Ltd., vide ITA 1934/2017, he submitted that the Hon'ble High Court in the said decision has held that where the assessment has not concluded, the assessee may while filing the return in pursuance of notice u/s 153A or even during assessment proceedings u/s 153A, raise any claim which was not raised during the filing of return u/s 139 of the Act. Hence, a fresh claim can be made. He submitted that even in the case of Kabul Chawla, the Hon'ble Delhi High Court very clearly held that the restricted scope of assessment is only in respect of assessment years that concluded on the date of search and all of the assessment years had to be treated as normal assessments subject to scrutiny. Referring to the following decisions, he submitted that a return filed u/s 153A(1) is to be treated as return furnished u/s 139 and once the AO accepts the revised return filed u/s 153A, the original return u/s 139 abates and becomes nonest . It has been held that section 153A is in the nature of a second chance given to the assessee which incidentally gives him an opportunity to make good omission, if any, in the original return and, therefore, an assessee can raise a fresh claim u/s 153A proceedings:-

a) PCIT vs. Neeraj Jindal (2017) 393 ITR 1 (Del);

b) CIT vs. B.G. Shirke Construction Technology Pvt. Ltd. (2017) 395 ITR 371 (Bom);

c) CIT vs. M/s Surya Merchants Ltd., ITA No.4309/Del/2013;

d) S. Splendor Landbase Ltd. vs. ACIT, ITA No.2461/Del/2016, order dated 6th June, 2018;

e) DCIT vs. Megha Engg. & Infrastructure Ltd., ITA No.607, 608, 609 & 610/H/2016, 1375/H/16, 1540/H/17ô

f) Akshar Developers vs. ACIT, ITA No.6242/Mum/2016 & ITA No.2676 to 2678/Mum/2017;

g) DCIT vs. Eversmile (2013) 33 taxmann.com 657 (Mumbai-Trib.);

h) ACIT, Central Cir.1(3) vs. V.N. Devadoss (2013) 32 taxmann.com 133;

i) Sanjay Nandlal Vyas vs. ITO, ITA Nos.771 to 774/PN/2010;

16. Without prejudice to the above, the ld. Counsel submitted that the issue relating to the claim of the assessee that the expenditure is revenue in nature was examined by the Tribunal, vide order dated 5th August, 2011. The Tribunal has rejected the claim on merits and had no objection to the same being raised on account of any legal infirmity or technical ground.

17. The ld. Counsel submitted that this is purely a legal claim which can be raised at any stage of the proceedings before any court provided it does not require any fresh facts. For the above proposition, he relied on the decision of the Honôble Supreme Court in the case of NTPC vs. CIT, 229 ITR 383. He accordingly submitted that the claim of the assessee that the payment made to ITC Ltd. amounting to Rs.30.86 crores is to be treated as revenue expenditure.

18. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find, the

assessee, in the instant case, is the owner of hotel known as ôHotel Sea Rockô at Band Stand, B.J. Road, Bandra (West), Mumbai which was being managed by ITC Ltd. under Hotel Operator Agreement effective from 1986 pursuant to which ITC Ltd. was in possession, control and management of the hotel property and the assessee was entitled to a certain percentage of the Revenue the balance being the remuneration of ITC Ltd. as an operator-cum-manager. In 1993, the hotel was severely damaged as a result of a bomb blast during the riots in Mumbai. Pursuant to the damage, substantial number of rooms of the hotel became non-functional requiring extensive repair and renovation. Subsequently, disputes and differences arose between the assessee and the ITC with respect to responsibility to restore the damaged portion and other consequential issues. Since then, the assessee had been in litigation with ITC Ltd. who declined to make any payment to the assessee and was appropriating the entire revenue to its account. After prolonged legal litigation, the disputes eventually settled after a period of 12 years and after the settlement agreement dated 11th May, 2005, copy of which is placed at pages 61-73 of the paper book and consent terms dated 11th May, 2005, copy of which is placed at pages 74 to 99 of the paper book. The assessee company, out of commercial expediency, terminated the operator-cum-management agreement and paid a sum of Rs.43.10 crore during A.Y. 2006-07 to ITC Ltd. As per the terms of the settlement, ITC could hand over the vacant and peaceful possession of hotel property after receipt of the amount the details of which are as under:-

a)	Repayment of security deposit ITC	-	Rs.7.75 Cr.
b)	Reimbursement towards cost of stores acquired from ITC	-	0.64 Cr.
c)	Reimbursement towards transfer of various accounts	-	Rs.3.84 Cr.
d)	Towards Termination of operator agreement and Assessee Obtaining rights to operate the hotel	-	Rs.30.86 Cr.
	Total	-	43.10 crores

19. The assessee in the return filed u/s 139(1) of the Act, capitalized the above amount under the head ôbuildingô stating that the said payment was towards vacation of the building and, accordingly, claimed depreciation @ 10% on Rs.30.86 crores which is evident from page 33 of the paper book. Consequent to search on 28th February, 2007 and in response to notice u/s 153A, the above payment was re-categorised as intangible asset depreciable @ 25% being in the nature of business and commercial rights which is evident from page 38 of the paper book. During the assessment proceedings, the assessee, apart from other things had submitted as under which finds mention at page 4 of the assessment order:-

> ñDuring the year under consideration the assessee, in the return u/s 139(1) had capitalized a sum of Rs. 30.86 crores under the head ôbuilding'. This amount represented the payment made to ITC Ltd., for termination of the operator/ Management agreement and taking over vacant possession of the property to enable, the assessee company to manage and. operate its own hotel. This payment being in the nature of vacation charges constitute the improvement to the assets, eligible for depreciation. Subsequently the auditors of the company have advised that the said payment constitutes payment for acquisition of intangible assets being the right to manage the hotel Accordingly, the assessee has modified its. claim by treating the same as intangible assets. In the alternative it is contended that the said payment resulting in an. improvement in the value of the building should be capitalized accordingly.ò

20. We find, the AO while rejecting the claim of the assessee at para 5 of the order has observed as under:-

> ñ5. The submission of the assessee company has been considered and not acceptable in view of the following facts. The assessee company was incorporated as a closely, held company on 19.06.1976. In the past, the assessee was engaged in the hotel activity till 1993 at Sea Rock Hotel. Thus, for about 14 years, there has not been any hotel business run by the assessee. The histories of the various disruptive events have been explained by the assessee in the notes to the accounts which included the line of litigations at the lower and higher judiciary on innumerable matters. On reading of the same, it will be clear that the entire dispute arose in respect of damages, retrieval of loss of profit, shareholdings and transfer of shares, capturing or retaining controlling interests etc. There is no mention anywhere to show that the assessee in fact has been doing any business of hotel after 1993,The reply of the assessee has been considered and the same is not acceptable as the company has not carried out any business activities itself during the year under consideration. The assessee was not doing any business of Hotel, itself. Further, the assets have also not been used for the purpose of business actually or constructively. Therefore, assessee is not entitled to claim the depreciation on assets to the tune of Rs. 7,78,27,608/- and same is disallowed. Disallowance on account of depreciation includes the depreciation claimed by the assessee in respect of payment made to M/s ITC Ltd. and capitalized by the assessee company under the head billing. The same is also disallowable but not discussed in detail here as it is already included in the total depreciation disallowed.ò

21. We find, the ld.CIT(A) allowed depreciation on the asset stating that all conditions to claim depreciation u/s 32 had been met and that the asset was in the nature of capital asset and was used for the purpose of business and the business was in existence during the year. As regards the claim of the assessee that the payment made to ITC is revenue in nature, the ld.CIT(A), relying on the decision of Hon'ble Supreme Court in the case of Goetz India Ltd. vs. CIT, reported in 284 ITR 323 held that the same cannot be entertained in assessment proceedings more so in 153A

proceedings. He, however, proceeded to decide the issue on merit and rejected the claim of revenue expenditure by holding as under:-

> ñ(ii).1. Even otherwise on merit also, this expenditure can not be said as revenue expenditure as has been held by the apex court in the case of V Jagmohan Rao VS. Commissioner of Income-tax and Excess Profits-tax [75 ITR 373 (SC)]. While answering the question as to whether amount paid by assessee to perfect a title or as consideration for getting rid of defect in the title would be a capital payment or revenue payment, Hon'ble Apex Court has held that same is towards capital payment. While delivering the decision Hon'ble Apex Court has further observed as under:-
>
> > ñé .it is well established that where money is paid to perfect a title or as consideration for getting rid of a defect in the title or a threat of litigation the payment would be capital payment and not revenue payment. What was essential to be seen was whether the amount of Rs.1,15,000 was paid for bringing into existence a right or asset of an enduring nature. In other words if the asset which was acquired was in its character a capital asset, then any sum paid to acquire it must surely be capital outlay. Money paid in consideration of the acquisition of a source of profit of income was capital expenditure both on principle and authority."
>
> (ii).2. If we analyse the facts of the present case in light of above decision, it will be noticed that the appellant company paid a sum of Rs.30.86 crores to ITC Ltd for terminating the onerous contract with ITC who was in possession control and management of the hotel property. The appellant company had been in litigation with ITC Ltd. who had declined to make any payment and was appropriating the entire revenue to its own account. Further, the hotel property due to lack of proper repair and renovation was also getting detonated. Thus, it will be seen that but for this payment the appellant was not in a position to get the hotel back in its possession for running and management in the manner in which it wanted. Therefore it can he said that this agreement with the ITC was in nature of defect in the title of the hotel property. In other words it can be said that the payment is basically made to ITC to clear the defect in title of the hotel and therefore this payment is in the nature of Money paid in consideration of re-acquisition of a source of profit of income. Therefore, the same is not revenue in nature. Thus, the facts of the present case are exactly identical as in the case of V Jagmohan Rao (supra). Thus, on merit also, the claim of appellant is not held to be correct.ò

22. He also held that the payment made could not be said for acquiring ôright to run the hotelô and even if it was treated as ôright to manage and conduct businessô still this asset could not be tangible asset as defined u/s 32(1)(ii) of the Act. We find, the Tribunal held that it was a case of re-possession of an asset leased to ITC Ltd. and it enhanced the right of the assessee to use the premises in any manner it desires which was otherwise encumbered upto 31st July, 2011 and, therefore, the payment was attributable to hotel building and was entitled for depreciation at the rate applicable to hotel building. Further, the Tribunal held that the assessee can take a new plea or claim deduction in the return filed u/s 153A and had also held that the payment did not lead to acquisition of any intangible asset. The Tribunal held that the payment can only be attributable to hotel building as it enhanced the right of the assessee to use the premises in any manner it desires.

23. Before the Hon'ble High Court, the issue was relating to the allowability of depreciation @ 10% on the above expenditure which was treated as a part of the building. During the course of arguments before the Hon'ble High Court, the assessee also raised its claim that the expenditure should be considered as revenue in nature and allowed in full. The Hon'ble High Court agreed with the contentions of the assessee and, accordingly, restored the issue to the file of the Tribunal directing that the matter be visited with an open mind as to whether depreciation @10% will be allowed or the entire expenditure is to be revenue in nature.

24. Therefore, the issue before the Tribunal now is confined to admissibility of claim of expenditure as revenue in nature or it is a capital expenditure.

25. We find Clause 2.1 of the Article II of the agreement dated 3rd May, 1996 between ITC Ltd. and the assessee reads as under:-

> ñARTICLE II
>
> 2.1 Subject to the terms and conditions herein contained EHIL hereby grants Licence to ITC to operate the said Hotel in terms of this agreement by maintaining ITCôs own books of Accounts from the 1st day of July 1986 for the purpose of running the said Hotel together with all related facilities during the subsistence of this agreement or any renewal thereof.ò

25.1 Similarly, clause 4.1 of Article IV reads as under:-

> ñARTICLE IV : DURATION OF THE AGREEEMNT:
>
> 4.1 The licence hereby granted shall be in force for a period of 23 years commencing from the 1st day of July 1986 subject to ITC not committing any breach of terms and conditions of this agreement.ò

25.2 We find, Clause 18.1 of the Article XVIII reads as under:-

> ñARTICLE XVIII : NO TENANCY RIGHTS CREATED
>
> 18.1 It is clearly agreed and understood between the parties that possession of the property is not delivered to ITC: under this Agreement and no interest or no tenancy or lease or other Interest in EHILôs properties or assets is created or intended to be created in favour of ITC, the intention of the parties being that ITC will be authorised to conduct; operate and run the said hotel on the terms, conditions and stipulations herein contained. It being clearly and distinctly understood that the property and assets as defined in the schedule are and will continue to be the exclusive property and asset of EHIL and the legal ownership thereof Shall be of EHIL, who are and shall be the exclusive owners and in legal possession of the entire Hotel with Operating Licence to ITC to operate Hotel SeaRock.ò

25.3. Similarly, the analysis of the settlement agreement dated 11th May, 2005 shows that the licence will be terminated w.e.f. the date of settlement agreement with no claim of any nature remaining outstanding between the assessee and ITC. The said clause reads as under:-

> ñTERMINATION OF OPERATION AND INCIDENTAL MATTERS
>
> 11. All arrangements, understandings, and agreements relating to the Hotel including the Operating Licence shall stand terminated with effect from the date of execution of this Settlement Agreement with no claim of any nature, whatsoever remaining outstanding between EL EL and ITC.ò

25.4. Similarly, at clause XII of the said agreement it is stated that ITC will withdraw its management personnel from the hotel and deliver possession to the assessee.

25.5. An analysis of the consent terms dated 11th May, 2005 with ITC Ltd., shows that at clause iv) of point n., it is mentioned that Rs.32.42 crore was only for relinquishment of rights to operate the hotel under operating licence. The relevant clause of the agreement reads as under:-

> ñThe sum of Rs.32.42 crore (Rupees Thirty two crores Forty two lakhs only) is and by way of relinquishment of rights to operate the hotel under the operating licence.ò

26. We, therefore, find merit in the arguments advanced by the ld. Counsel that when there was no addition to the capital asset and no change in the capital structure and there was no asset of any enduring nature involved, but, only an alteration in the mode of earning the money from the hotel, therefore, such compensation paid had

arisen out of business necessity and should be allowed as revenue in nature. The assessee, in our opinion, in the instant case, has acquired nothing new of enduring nature as it always held the asset of enduring nature. It was not a case where the assessee was acquiring for the first time something which it did not otherwise own or possess. It was, thus, a change in the method of earning profits from the hotel and not a transfer of any asset. We find merit in the argument of the ld. Counsel that the agreement was terminated on business considerations and as a matter of commercial expediency.

27. We find, the Hon'ble Delhi High Court in the case of Addl.CIT vs. J.S.S. (P) Ltd., (1984) 19 Taxman 521 (Delhi) has held as under:-

> "The assessee initially preferred to get a fixed return, and probably due to changed circumstances it decided that it would itself run the cinema. With a view to getting that benefit, it paid the compensation to KF for their loss of profits for the remaining period of the agreement. There was no asset o f an enduring nature involved, but only an alteration in the mode of earning the money from the cinema. Instead of getting Rs. 5.000 as a fixed yield from the KF who were running the cinemas, the assessee preferred to run the cinemas itself and took the chance of either making more or less from the box office. The expenditure of Rs.68,000 was, therefore, properly in the revenue field and not in the capital field. The Tribunal was, therefore, justified."

27.1 We find, the Hon'ble High Court in the case Gopal Das Estates & Housing (P) Ltd. vs. CIT, (2019) 412 ITR 489 (Del) has held as under:-

> "There is merit in the contention of the assessee that it had not 'repurchased the flats from the buyers.' The stage of parting with title/ownership in relation to commercial space allotted to the buyers had not been reached. The Assessing Officer himself noted that 'since the assessee has not sold the space which has been surrendered by the buyers/allottees, therefore, the compensation paid in lieu of surrender of rights in flats/space shown in work and progress in balance-sheet will enhance the value of work and progress.' [Para 24]

It was contended by the revenue that even if the compensation paid for the surrender of the flats is not treated as capital expenditure, it should form part of the valuation of stock. In reply, it was pointed out that the assessee has explained that, the reason for payment of compensation was that the IGF initially was approved by NDMC as 'airconditioned space' and, therefore, while booking that space, prospective buyers proceeded on the basis that it would be for commercial use. However, in terms of the completion certificate issued by the NDMC, the IGF was sanctioned as 'storage. ôft was for this reason that the buyers lost interest. The assessee then decided to return the advance received and also compensate the buyers since the buyers funds had remained with the assessee for some time. The assessee had sought to explain that this compensation corresponded to the increase in the resale value, [Para 25]

The mere fact that the space buyer's agreement or the allotment letter did not mandate payment of compensation would not come in the wav of the assessee treating such payment as 'revenue expenditure.' [Para 29]

Applying the law explained by the Supreme Court in Shahzada Nand & Sons v. CIT [1977] 108 ITR 358 (SC) and CIT v. Nainital Bank Ltd. [1966] 62 ITR 638 (SC) to the case in hand, the plausible conclusion is that the compensation paid by the assessee to the allottees of the commercial spaces for the surrender of their rights therein cannot be said to be disallowable on the ground of such payment having been made for 'extraneous considerations'. [Para 33]

In the instant case, the assessee has a plausible explanation for making such payment of compensation to protect its õbusiness interests.' While it is true that there was no 'contractual obligation' to make the payment, it is plain that the assessee was also looking to build its own reputation in the real estate market [Para 35]

Further the mere fact that the recipients treated the said payment as 'capital gainsô in their hands in their returns would not be relevant in deciding the issue whether the payment by the assessee should be treated as 'business expenditure. 'It is the point of view of the payer which is relevant. [Para 36]

The result of the above discussion is that the Court holds that the payment made by the assessee to the allottees of the flats for surrendering the rights therein should be allowed as business expenditure of the assessee. [Para 38]

Accordingly, the question of law framed is answered in affirmative i.e. in favour of the assessee and against the revenue by holding that the conclusion recorded by the Tribunal that the compensation was paid by the assessee for 'extraneous consideration' is perverse and contrary to the record. [Para 39]"

27.2. We find, the Hon'ble Calcutta High Court in the case of Shyam Buriap Company Ltd. vs. CIT (2016) 380 ITR 151 (Calcutta) has held as under:-

> "Though before the Tribunal the Memorandum was relied on to put forward the case that the income was part of the business and payment of compensation was to earn higher income, it was not at all considered....
>
> Again, the Assessing Officer and the Tribunal had rejected the claim of the assessee as there was no change in the facts of the case during the relevant assessment year. Though the assessee had claimed that the rental income earned by it was assessable under the head 'business' and the compensation way paid by it for obtaining possession from lessee/tenant, so as to earn a higher income, as an admissible revenue deduction, in spite of Memorandum permitting the assessee to carry on business by letting out properties, the Assessing Officer and the Tribunal ruled otherwise.
>
> Since the object in the Memorandum permitted the assessee to carry on business in letting out properties and as 85 per cent of the income of assessee was by way of deriving rent and lease rentals, income from rent constituted the business income of the appellant Since compensation was paid by the appellant, the landlord of the premises, to obtain possession from the lessee/tenant so as to earn a higher rental income, it had arisen out of business necessity and commercial expediency. Since there was no question of acquiring a property it cannot be said that the payment made was for having a benefit of enduring nature. Rather the compensation was paid to the existing tenants to have their portions vacated to have new, tenants with higher rent and thus to have a higher rental income which was a business activity permitted by the Memorandum. [Para 14]

27.3 We find, the Hon'ble Supreme Court in the case of Bikaner Gypsums Ltd. vs. CIT (1991) 187 ITR 39 has held as under:-

> "Where the assessee has an existing right to carry on a business, any expenditure made by it during the course of business for the purpose of removal of any restriction or obstruction or disability would he on revenue account, provided the expenditure does not acquire any capital asset Payments made for removal of restriction, obstruction or disability may result in acquiring benefits to the business, but that by itself would not acquire any capital asset The facts of each case have to be borne in mind in considering the question having regard to the nature of business,' its requirement and the nature of the advantage in commercial sense.

In the instant case, the assessee had been granted mining lease in respect of 4.27 square miles at Jamsar under which he had right to sink, dig, drive, quarry and extract mineral, i.e., the gypsum, and in that process he had right to dig the surface of the entire area leased out to him. Clause 3 of the Part III of the lease, however, placed a restriction on his right to mining operations from the Railway Area, but that area could also be operated by it for mining purposes with the permission of the authorities. The assessee had under the lease acquired full right to carry on mining operations in the entire area including the Railway Area. Under clause 3 he could carry on mining operations only after obtaining the permission of the authorities which had been granted by the Railway authorities. The payment of Rs. 3 lakhs was not made by the assessee for the grant of permission to carry on mining operations within the Railway Area, instead the payment was made towards the cost of removing the construction which obstructed the mining operations. The presence of the railway station and railway track was operating as an obstacle to the assessee's business of mining, the assessee made the payment to remove that obstruction to facilitate the mining operations. On the payment made to the Railway authorities the assessee did not acquire any fresh right to any mineral nor he acquired any capital asset instead the payment, was made by it for shifting the railway station and track which operated as hindrance and obstruction to the business of mining in a profitable manner. The assessee had already paid tender money, licence fee and other charges for securing the right of mining in respect of the entire area of 4.27 square miles including the right to mining under the Railway Area.

In considering the cases of mining business the nature of the lease, the purpose for which expenditure is made, its relation to the carrying on of the business in a profitable manner should he considered. In the instant case, existence o f railway station, yard and buildings on the surface of the demised land operated as an obstruction to the assessee's business of mining, The Railway authorities agreed to shift the Railway establishment to facilitate the assessee to carry on his business in a profitable manner and for that purpose the assessee paid a sum of Rs. 3 lakhs towards the cost of shifting the Railway construction. The payment made by the assessee was for removal of disability and obstacle and it did not bring into existence any advantage of an enduring nature. The Tribunal rightly allowed the expenditure on revenue account.

Accordingly, the order of the High Court was to be set aside and that of the Tribunal was to be restored."

27.4 We find, the Hon'ble Supreme Court in the case of CIT vs. Associated Cement Companies Ltd. (1988) 172 ITR 257 (SC) has held as under:-

"In the case of Empire Jute Co. Ltd. v. CIT [1980] 124 ITR 1. the Supreme Court observed that there may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may. nonetheless, be on revenue account and the cost of enduring benefit may break down. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more effectively or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account even though the advantage may endure for an indefinite future. In the instant case, the advantage which was secured by the assessee by making the expenditure in question was the securing of absolution or immunity from liability to pay municipal rates and taxes under normal conditions for a period of 15 years. If these liabilities had to be paid, the payments would have been on revenue account and, hence, the advantage secured was in the Field o f revenue and not capital. Further, as a result of the expenditure incurred, there was no addition to the capital assets o f the assessee and no change in its capital structure. The pipelines, etc., which might have been regarded as capital assets and which came into existence as a result of the expenditure incurred did not belong to the assessee but to the Municipality. In these circumstances, applying the principles laid down in Empire Jute Co. Ltd.'s case (supra), the impugned expenditure was clearly liable to be allowed as deduction from the profits under section 70(2)(xv)."

27.5 We find, the Hon'ble Supreme Court in the case of CIT vs. Ashok Leyland Ltd. (1972) 86 ITR 549 (SC) has held as under:-

"It has been laid down in a number of decision that when an expenditure is made with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, there is good reason (in the absence of special circumstances leading to the opposite conclusion] for treating such an expenditure as property attributable not to revenue but to capital.

From the facts found in the instant case it was clear that the managing agency was terminated on business considerations and as a matter of commercial expediency. There was no basis for holding that by terminating the managing agency, the company acquired any enduring benefit or any income yielding asset. It is true that by terminating the services of the managing agents, the company not only saved the expense that it would have had to incur in the relevant previous year but also for few more years to come. It would not be correct to say that by avoiding certain business expenditure, the company could be said to have acquired enduring benefits or acquired any income yielding

asset. Thus, the compensation paid for termination of the services of the managing agents was a revenue expenditure."

27.6 The Hon'ble Delhi High Court in the case of Airport Authority of India vs. CIT (2012) 340 ITR 407 (Del) has held as under:-

ñApplying the test laid down in CIT v. J.K. Synthetics Ltd. [2009] 309 ITR 371 / 176 Taxman 355 (Delhi) as well as the ratio of Bikaner Gypsums Ltd. v. CIT [1991] 187 ITR 39/[1990] 53 Taxman 279 (SC) to the facts of instant case, a conclusion would be that the expenditure in question by the assessee was revenue in nature. It is not in dispute that the land belongs to the assessee. Certain encroachers in all these airports had encroached upon the part of the land, in the schemes formulated by the Government for removal of these encroachers and rehabilitate them at other places, if the assessee had paid the amount, that amount is not for acquisition of new assets. The payment was made to facilitate its smooth functioning o f the business, i.e.. in relation to carrying on the business in a profitable manner. [Para 13]

Therefore, such an expenditure, if incurred by the assessee, would be on revenue account and is not capital in nature. [Para 14]

The Tribunal, however, proceeded to discuss the case on the basis that only a provision for such an expenditure was made and in fact there was no payment made in the assessment year(s) in question. It, thus, went on to determine whether it was a contingent liability to be accrued at a future date on the happening of certain events. The Tribunal first observed that the liability was not statutory in nature, if at all, it was contractual. Thereafter, it addressed the issue as to whether the liability was contractual in nature and was capable of fair ascertainment Taking note of Bikaner Gypsums Ltd. (supra], the Tribunal held that such an expenditure, if incurred in the year, would be revenue in nature. [Para 15]

However, the Tribunal stated that no such liability had been incurred or crystallized, it. held that though various meetings had taken place between the assessee and the Government, apart from making certain recommendations and estimating the likely expenditure, no agreement came into existence between the assessee and the hutment dwellers with or without the involvement of any third party and as no agreement between the assessee and hutment dwellers has been f led, no legally enforceable liability was fastened on the assessee in relevant year and, therefore, even under mercantile system of accounting, the assessee is not entitled to deduct the impugned amount simply because a provision was made. The Tribunal also took note of the submission of the assessee that it had, in fact, released a payment of Rs. 16.01 crore, but rejected

this plea on the ground that the date of release of the money and the person to whom the money had been paid had not been stated. [Para 16]

No doubt, having regard to the judgment of the Supreme Court in Bharat Earth Movers v CIT [2000] 112 Taxman 61, which laid down that the liability should have been actually incurred in the year and it should be capable of reasonable ascertainment, the assessee is to prove that such a liability bad actually been incurred and was capable of reasonable ascertainment, A finding of fact is arrived at that no such ascertainment of liability could be proved by the assessee. To that extent, the order of the Tribunal cannot be faulted with. However, it would be necessary to mention at this stage that certain documents were produced to show that amount of Rs.16,01 crores in the assessment year 1998-99 was, in fact, paid and similar amounts were paid in other years as well. Once it is held that such amounts are paid, these are admissible deductions being revenue in nature. The deduction would be allowed by the Assessing Officer only after the assessee furnishes proof of having made such a payment in the different assessment years in question, [Para 17]

The criteria laid down by the Tribunal that for admissibility of the expenditure there has to be an agreement between the assessee and the hutments dweller is clearly wrong. It is a matter of record that in these schemes no such agreement is actually arrived at between the persons who make the payment like the assessee herein and the hutments dwellers. Therefore, even if in a given case the assessee is able to show that, rehabilitation scheme was formulated by the Government and the assessee as beneficiary was asked to make the payment under the said scheme, that would be sufficient evidence to claim the deduction of expenditure as held by the Supreme Court in Bikaner Gypsums Ltd. (supra). However, it is found that in the instant case, a finding of fact is recorded by the Tribunal that no such scheme could be furnished by the assessee for which the assessee was supposed to make the provision. To that extent, therefore, the Tribunal is correct in its view. At the same time, following Bikaner Gypsums Ltd. (supra), this finding has become irrelevant as the deductions on the basis of actual payment, are to be allowed. [Para 18]."

27.7 We find, the Hon'ble Gujarat High Court in the case of CIT vs. UTI Bank Ltd. (2013) 32 taxmann.com 282 (Gujarat) has held as under:-

"3. Question 2 is with respect to the certain expenditure to the tune of Rs. 6 lacs approximately. The Tribunal observed as under:

ñ47. We have heard the rival contentions and perused the material on record. The factual matrix or the case is that the assessee had contracted with landlord to take a premise on lease for opening its branch though no formal agreement with the landlord was entered into. Based on the understanding, the landlord

had started the construction of the premises as per the requirement of the assessee. Before the construction was completed the assessee came to know of the proposed construction of overbridge over the said property. The assessee was of the view that overbridge will cause hindrance to conduct the business and services. Accordingly it decided to terminate the understanding with the landlord. Based on the negotiation and understanding, the assessee agreed to compensate the landlord for the work done it by paving the compensation and the landlord agreed to withdraw all the claims against the assessee. Accordingly the assessee compensated the landlord by making a payment of Rs. 6 lacs in full and final settlement of all its claims. The aforesaid facts are not disputed by the Revenue. From the facts it is clear that the transaction in respect of which the compensation was paid arose during the course of business and was for the purpose of business. The expense has been incurred by the assessee to protect its interest and in lieu of the claims that could have been raised by the landlord. The incurring of eexpenditure has not been doubted by the Revenue. The Apex Court in case of J.K, Wollen v. CIT [19691 72 ITR 612 (SC) has held that in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the IT Department. In view of the aforesaid facts and respectfully following the Apex Court we are of the view that the disallowance made by the AO was rightly deleted by CIT(A) and it does not call for any interference. In the result, this ground of the Revenue is rejected."

4, No question of law arises. Tax appeal is, therefore, dismissed."

27.8 We find, the Hon'ble Karnataka High Court in the case of CIT vs. Motor Industries Co. Ltd. (1997) 223 ITR 112 (Karnataka) has held as under:-

"Far from stating that the agreement was a step in implementation of the protocol it did not even make a reference to the same. This circumstance was significant looking to the fact that the protocol and the agreement were executed within a short span of less than 3 months apart, if the intention of the parties was to take only a step in aid of the implementation of the protocol there was no reason why the agreement should not have specifically said so. Prom a reading of the relevant clauses of the agreement it was apparent that the agreement did not recognise GEC's right to continue with the distributorship work beyond February 1977, no matter the protocol in principle recognised such a right. Further, a plain reading of clause 13 of the agreement showed that all agreements, whether verbal or written, subsisting between the parties immediately prior to the date of the agreement, relating to the sate and purchase of the products or otherwise, were specifically superseded and the assessee absolved of the liability of whatever kind for damages or otherwise arising out of the same. Apart from the fact that the language employed in clause 13 did not

admit of any exception in favour of any agreement, whether in the form of a protocol or otherwise, there was nothing to indicate that the protocol which too was broadly speaking, an agreement between the parties, was saved from overriding provisions of the agreement. The fact that similar provisions existed in the agreement earlier executed between the parties in the year 1967 too was no ground for ignoring the said provision or treating it as redundant. It is also pertinent to mention that except for the agreement of the year 1967 and the protocol dated 28-1-1972 there was no other agreement between the parties, whether oral or written, which could be superseded or was meant to be nullified by incorporating a provision like clause 13. It followed, therefore, that the protocol dated 28-1-1972 did not survive the rigours of clause 13 of the 1972 agreement and was, therefore, non est, as on the date the payment in question was made by the assessee.

For an expenditure to be an an allowable deduction under section 37, it is necessary that the same is laid out, or expended wholly and exclusively for the purpose of the business or profession and is not in the nature of a capital expenditure. The Act does not define the expression 'Capital expenditureô. The line of demarcation between what is a capital expenditure and what is not is so thin that it is often possible in a large number of cases to take either one of the views.

In the instant case, what the assessee achieved by making the payment was the removal of the restrictions under which it was carrying on the business in the sale of the manufactured products. The payment made by the assessee did not make any augmentation in the profit making structure hut simply brought about a change in the process by which the organisation operated or facilitated such operation. The finding returned by the Tribunal was that the assessee had taken a bona fide commercial decision to make the payment of the amount in question for otherwise it would have been faced with protracted litigation causing disruption in the distribution of its products. The Tribunal had found that the GEC had been operating in this territory for over 20 years and due to its dominance in the area was in a position to seriously prejudice the assesseeôs business if the distributorship were to be prematurely terminated without compensation. It had further held that the bona fides behind the decision taken by the assessee were established by the subsequent events, according to which, as against a projected profit at Rs. 1.50.000 the company made an actual profit at Rs. 1.96.000. With the said findings in the background, it was difficult to see how the view taken by the Tribunal could be said to be in any way erroneous. Thus, while the protocol dated 28-1-1972 stood superseded and the agreement itself did not entitle the GEC to insist upon a renewal with the result that strictly speaking GEC may not have had any legal claim against the assessee, yet in order to ensure a smooth transition from marketing through a sole distributor to a marketing by the company itself, the payment made to the erstwhile distributor was sufficiently justified by the considerations of commercial expediency. The payment was made without, touching the assesseeôs fixed

capital and only with a view to accelerating the take over of the GECôs territory. It was a payment which the assessee made for terminating a disadvantageous commercial relationship with GEC which relationship even though non¬existent on a true and strictly legatistic view of the matter was nevertheless, believed by the parties to be subsisting in a greater or lesser measure. From the point of view of the assessee the payment was considered expedient to remove a restriction in its right to operate in northern territory without any let or hindrance from the erstwhile sole distributor.

In view of the above, the Tribunal was right in holding that the payment of Rs, 99 lakhs by the assessee to GEC was an allowable deduction under section 37."

27.9 We find, the Hon'ble Bombay High Court in the case of CIT vs. Sales Magnesite (P) Ltd. (1995) 214 ITR 1 (Bombay) has held as under:-

"To hold it to he an expenditure allowable as a deduction under section 37, it is not essential that it should be necessary, legally or otherwise, to incur the same or that it should directly and immediately benefit the business of the assessee. Even expenditures incurred voluntarily on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business would be deductible under this section. The question whether it is necessary for commercial expediency or not is a question that has to be decided from the point of view of the businessman and not by the subjective standard of reasonableness of the revenue.

It was clear that the payment of the compensation made by the assessee to its erstwhile sole, selling agents for loss of sole selling agency was allowable as a deduction under section 37 in computation of the income of the assessee. The Tribunal, on consideration of the totality of the facts and circumstances the case, had come to a clear finding of fact that the payment was dictated by commercial expediency. This finding of fact having not been challenged on the ground of perversity or the like, it was not open to the revenue to contend that the payment of compensation by the assessee was not for business consideration but was a payment for extra commercial consideration.

On facts also there did not appear to be anything wrong or unusual in the payment of compensation to the sole selling agents for loss of office which they had been holding for more than three decades and claiming deduction of the same in computation of its total income. Therefore, the amount of compensation paid was allowable as deduction under section 37(1)."

27.10 We find, the Hon'ble Calcutta High Court in the case of CIT vs. Auto Distributors Ltd. (1994) 210 ITR 222 (Calcutta) has held as under:-

> "The assessee was all along holding FIRPO building on leasehold basis. It was the assessee who had let out a portion of the first floor of the said premises to Mr. C. This tenancy had also been revoked by Mr. C subsequently. The Textile Mills to which Mr. C had let out the said portion had no privity of contract with the assessee. The assessee did not acquire any leasehold rights in FIRPO building by making the payment to the Textile Mills. The assesses was in fact, already holding such leasehold rights. By making payment to the Textile Mills assessee was only able to remove the unauthorised occupants creating an impediment to the commercial exploitation of the lease right.
>
> If the assessee-company had taken legal proceedings against the Textile Mills, it would have incurred huge legal expenses and substantial time might have been spent in getting the leasehold premises vacated. By making payment of Rs. 6.96 lakhs, the assessee was able to remove the Textile Mills forthwith and to let out the very same space to a bank at a much higher rent and also received substantial deposits from the new tenant. These facts clearly supported the case of the assessee that the expenditure in question was a revenue expenditure and was laid out wholly and exclusively for the purpose of business of letting of properties. The assessee did not acquire any new asset right or advantage of an enduring nature bv making the said payment.
>
> Therefore, the Tribunal was justified in holding that the payment of Rs. 6.96 lakhs was an allowable business expenditure."

27.11 We find, the Hon'ble Calcutta High Court in the case of CIT vs. Peico Electronics & Electricals (1992) 107 CTR Cal 240, has held as under:-

> ñ2. The reason was that the assessee company could not carry on business with M/s. Vulcan industries and that such agreement was creating onerous burden on the assessee company. Therefore, by making a lump sum payment the assessee company wanted to get rid of this onerous burden.
>
> 4. The Tribunal, on the contrary, found that the assessee by paying the amount did not get any benefit of enduring nature. The payment was made as a result of this business expediency and to cut short losses which the assessee was to incur in the event, of continuation of the agreement and ultimately, the Tribunal was of the view that the assessees expenditure was revenue in nature. In his case the expenditure incurred for termination of the agreement was to avoid commercial inconveniences occurring in future. The payment that was made under the agreement was of revenue nature and after the agreement was

terminated, the payment that was made, did not bring into existence any capital of enduring nature. The whole expenditure was on the revenue account.

The contract was entered into in course of the usual business and the termination was made as the assessee thought it as the business prudence required it When such a termination was made and such usual termination compensation was paid, this termination did not affect in any manner whatsoever the frame work of the business as also the pattern of the business of the assessee.

27.12. We find, the Hon3ble Supreme Court in the case of the CIT vs. Ashok Leyland Ltd. report in (1972) 86 ITR 549 (SC) observed as follows:

"There is no doubt that, as a result of the termination of the services of the managing agents, the company got rid of its liability to pay office allowance as well as the commission it was required to pay under the Managing Agency Agreement not only during the accounting year hut also for a few years more, The expenditure thus saved undoubtedly swelled the profits of the company. From the facts found it is clear that the managing agency was terminated on business consideration and as a matter of commercial expediency. There is no basis for holding that by terminating the managing agency. the company acquired any enduring benefit for any income yielding asset. It is true that by terminating the services of the managing agents. the company not only saved the expense that it would have had to incur in the relevant previous year but also for few more years to come. It will not be correct to say that bv avoiding certain business expenditure, the company can be said to have acquired enduring benefits or acquired any income yielding asset."

27.13. The Supreme Court in that judgment noted with approval the decision of the Court of Appeal in the case of G. Scammell & Nephew Ltd. vs. Rowles (l940) 8 ITR (Suppl. 41 (CA) as follows:

"The Court of Appeal held that the expenditure incurred for the termination of a trading relationship in order to avoid losses occurring in the future through that relationship, whether pecuniary losses or commercial inconveniences, is just as much for the purposes of the trade as the making or the carrying into effect, of a trading agreement."

Accordingly, the question referred by the Department is answered in the affirmative and in favour of the assessee."

27.14 The Hon'ble Delhi High Court in the case of CIT vs. B.L. Dhingra & Sons (1985) 153 ITR 167 (Del), has held as under:-

> "The true nature of the impugned payment was repeated in the said clause of the agreement which said that it was made in order to compensate the vendors during the intervening period, namely, from the date of the handing over of the cinema property to the assessee to the registration of the sale deed. This compensation was in respect of the non-payment of the balance of the sale consideration. The impugned payment was made to procure, extension of time for performance of the complete agreement of and payment, of the balance consideration. If the requisite amount of consideration had been borrowed by the assessee from a stranger, then interest paid thereon would have been permissible. The impugned payment was incidental to the running of the cinema during the aforesaid intervening period. The payment, was calculated to effect from a practical and business point of view a small expenditure as against the retention of the balance of sale consideration after being put into possession of the entire cinema property. Thus, it was relatable to the use of the money representing the unpaid balance of consideration kept back by the assessee. Further, by making this payment the assessee had not acquired any new asset or an advantage for the enduring benefit of the business. Consequently, the Tribunal had rightly allowed the impugned payment as a revenue expenditure."

27.15 We find, the Hon'ble Supreme Court in the case of L.H. Sugar Factory & Oil Mills (P) Ltd. vs. CIT (1980) 125 ITR 293 (SC), has held as under:-

> "If the advantage consists merely in facilitating the assessee's business operations or enabling management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, eyen though the advantage may endure for in indefinite future. In the present case, no doubt the advantage secured for the business of the assessee was of a long duration inasmuch as it would lust so long as the roads continued to be in motorable condition, but it was not an advantage in the capital field, because no tangible or intangible assset was acquired by the assessee, nor was there any addition to or expansion of the profit-making apparatus of the assessee. The amount of Rs. 50,000 was contributed by the assessee for the purpose of facilitating the conduct of the business of the assessee and making it more efficient and profitable and it was clearly an expenditure on revenue account"

28. The various other decisions relied upon by the ld. Counsel in his synopsis also support his case to the proposition that the payment made to ITC Ltd. is allowable as revenue expenditure u/s 37 of the IT Act. The answer to the question referred to by the Hon'ble High Court to the Tribunal is accordingly answered in the affirmative, i.e., in favour of the assessee. The grounds raised by the Revenue are accordingly dismissed.

29. In the result, the appeal filed by the Revenue is dismissed.

The order pronounced in the open court on 16th February, 2021.

Sd/-	Sd/-
(SUDHANSHU SRIVASTAVA)	(R.K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 16th February, 2021.

dk

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi