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

Reserved on: 14th December, 2015
Date of Decision: 21st January, 2016

\+ **ITA 353/2003**

M/s. AGGARWAL AND MODI ENTERPRISES
(CINEMA PROJECT) CO. PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Ms. Suruchi Agarwal, Senior Standing Counsel with Ms. Vibhooti Malhotra, Junior Standing Counsel and Ms. Radhika Gupta, Advocate.

**With**

\+ **ITA 354/2003**

M/s. AGGARWAL AND MODI ENTERPRISES
(CINEMA PROJECT) CO. PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Ms. Suruchi Agarwal, Senior Standing Counsel with Ms. Vibhooti Malhotra, Junior Standing Counsel and Ms. Radhika Gupta, Advocate.

**With**

\+ **ITA 355/2003**

M/s. AGGARWAL AND MODI ENTERPRISES
(CINEMA PROJECT) CO. PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Ms. Suruchi Agarwal, Senior Standing Counsel with Ms. Vibhooti Malhotra, Junior Standing Counsel and Ms. Radhika Gupta, Advocate.

**With**

\+ **ITA 767/2006**

M/s. AGGARWAL AND MODI ENTERPRISES
(CINEMA PROJECT) PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

C.I.T. ..... Respondent
Through: Mr. Zoheb Hossain, Junior Standing Counsel for Mr. Rohit Madan, Senior Standing Counsel.

**With**

\+ **ITA 769/2006**

M/s. AGGARWAL AND MODI ENTERPRISES

(CINEMA PROJECT) PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Zoheb Hossain, Junior Standing Counsel for Mr. Rohit Madan, Senior Standing Counsel.

**With**

\+ **ITA 770/2006**

M/s. AGGARWAL AND MODI ENTERPRISES
(CINEMA PROJECT) PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Zoheb Hossain, Junior Standing Counsel for Mr. Rohit Madan, Senior Standing Counsel.

**With**

\+ **ITA 801/2006**

M/s. AGGARWAL AND MODI ENTERPRISES
(CINEMA PROJECT) PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Zoheb Hossain, Junior Standing Counsel for Mr. Rohit Madan, Senior Standing Counsel.

**With**

\+ **ITA 876/2006**

M/s. AGGARWAL AND MODI ENTERPRISES (CINEMA PROJECT) PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Zoheb Hossain, Junior Standing Counsel for Mr. Rohit Madan, Senior Standing Counsel.

**With**

\+ **ITA 1122/2007**

AGGARWAL AND MODI ENTERPRISES (CINEMA PROJECT) CO. PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Zoheb Hossain, Junior Standing Counsel for Mr. Rohit Madan, Senior Standing Counsel.

**With**

\+ **ITA 1123/2007**

M/s. AGGARWAL AND MODI ENTERPRISES
(CINEMA PROJECT) CO. PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with
Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Zoheb Hossain, Junior Standing
Counsel for Mr. Rohit Madan, Senior
Standing Counsel.

**With**

\+ **ITA 1273/2009**

M/s. AGGARWAL AND MODI ENTERPRISES
(CINEMA PROJECT) PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with
Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Zoheb Hossain, Junior Standing
Counsel for Mr. Rohit Madan, Senior
Standing Counsel.

**With**

\+ **ITA 1274/2009**

M/s. AGGARWAL AND MODI ENTERPRISES
(CINEMA PROJECT) PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with

Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Zoheb Hossain, Junior Standing Counsel for Mr. Rohit Madan, Senior Standing Counsel.

**And**

\+ **ITA 1277/2009**

M/s. AGGARWAL AND MODI ENTERPRISES (CINEMA PROJECT) PVT. LTD ..... Appellant
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Zoheb Hossain, Junior Standing Counsel for Mr. Rohit Madan, Senior Standing Counsel.

**CORAM:**
**JUSTICE S. MURALIDHAR**
**JUSTICE VIBHU BAKHRU**

**J U D G M E N T**

**% 21.01.2016**

1. These are thirteen appeals by the Assessee under Section 260A of the Income Tax Act, 1961 ('the Act') pertaining to Assessment Years (AYs) 1987-88 to 1992-93, 1995-96, 1997-98 to 2001-2002 and 2003-2004. The question of law framed by the Court vide its order dated 21st September, 2004 in ITA Nos. 353, 354 and 355 of 2003, which is similar to the ones

framed in the other appeals, reads as under:

> "Whether the Income Tax Appellate Tribunal was correct in law in reversing the order of the Commissioner of Income Tax (Appeals) and confirming the disallowance of the amount on account of liability of licence fee and on account of interest on arrears of licence fee payable to N.D.M.C. for running the business at Chanakya Cinema?"

***Background Facts***

2. The Assessee was engaged in the business of running a cinema hall in the name of Chanakya Cinema at Yashwant Place, which belonged to the New Delhi Municipal Council ('NDMC'). In terms of an Agreement dated 16th September, 1970 entered into with the NDMC, the Assessee obtained a licence for running a cinema hall for a period of ten (10) years (i.e., from 1st October, 1970 to 30th September, 1980) against payment of licence fee of Rs. 5,51,111/- per annum. Clause 1 of the Agreement gave an option to the Assessee to get his licence renewed for a further period of ten (10) years on the terms and conditions to be mutually agreed to between the parties.

3. The Assessee applied for renewal of the licence on 11th January, 1980. A week prior to the expiry of ten years, on 23rd September 1980, a fresh Licence Agreement was entered into between the Assessee and the NDMC. The annual licence fee was increased to Rs. 13,50,000/- payable in twelve equal monthly instalments. The Assessee is stated to have paid the licence fee from October, 1980 to March, 1981 under protest.

***The various rounds of litigation***

4. On 9th April 1981, the Assessee filed Suit No. 295/1981 in the Court of the Sub Judge, First Class, Delhi. In the said suit, the Assessee challenged

the increase in the licence fee and also sought a stay against dispossession. By an order dated 10th April 1981, the learned Sub Judge, First Class granted an interim stay restraining NDMC from termination of the licence. By a further order dated 22nd January 1982, the learned Sub Judge, First Class confirmed the stay and restrained NDMC from recovering the enhanced amount of the licence fee till the final disposal of the suit.

5. Aggrieved by the aforementioned order, the NDMC filed an appeal in the Court of Senior Sub Judge, Delhi, who by an order dated 10th May 1982, set aside the injunction granted by the learned Sub Judge, First Class. Aggrieved by this, the Assessee filed a Civil Revision No. 1054/1982 in the High Court, which by an order dated 30th November 1982, set aside the order dated 10th May, 1982 of the Additional Senior Sub Judge and restored the order dated 10th April, 1981 of the Sub Judge, First Class.

6. In the meanwhile a resolution was passed by the NDMC on 25th March, 1981, whereby it was decided that licenses generally would be renewed for an additional licence fee of 30 per cent over the original licence fee. The Assessee then filed an application seeking amendment of the plaint in Suit No. 295/1981. While allowing the amendment by an order dated 28th February 1983, the learned Sub Judge, Third Class also restrained the NDMC from disturbing the status quo at 30 per cent of the enhanced rate of licence fee till a decision in the Suit.

7. The NDMC then filed an appeal being MCA No. 37/1984 before the learned Additional Senior Sub Judge challenging the aforementioned order dated 28th February 1983 of the Sub Judge, Third Class. The Additional

Senior Sub Judge by an order dated 11th February 1985, reversed the order dated 28th February, 1983 of the Sub Judge and vacated the injunction. The Assessee then filed a Revision Petition, being CR No. 206/1985 in the High Court which by an order dated 14th January 1987, set aside the order dated 11th February, 1985 of the Additional Senior Sub Judge and directed that the Assessee would be entitled to status quo and carry on the business of running Chanakya Cinema on payment of an additional 30 per cent licence fee till the disposal of the suit by the Sub Judge, First Class. The review application filed by the NDMC being CM (RA) No.18/1987 was dismissed by the High Court by an order dated 21st October, 1987.

8. With the second agreement having come to an end on 30th September, 1990 and the NDMC not having renewed the licence, the Assessee filed Civil Writ No. 3244/1992 in the High Court for renewal of the licence in terms of the clause in the Agreement dated 23rd September 1980 which gave it an option for renewal. By an order dated 21st September 1992, the High Court while issuing notice in the writ petition directed status quo to be maintained regarding possession of Chanakya Cinema. By a subsequent order dated 10th February 1993, the interim order was made absolute till the decision in the petition. Subsequently by order dated 25th May 2001, the High Court vacated the aforementioned interim order while observing that the NDMC would not be prevented from considering the Assessee's proposals dated 15th March, 2001 and 5th April, 2001.

9. The Assessee filed a further writ petition CW No. 773/2002 seeking directions for renewal of the licence beyond 30th September, 2000. An

interim order was passed in the said writ petition on 20th March, 2002 to the effect that the Assessee would not be dispossessed and that no coercive steps would be taken against it.

10. In the meanwhile the NDMC initiated proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 ('PP Act') against the Assessee by issuing notices dated 19th March 2002/8th April, 2002 under Sections 5 and 7 of the PP Act requiring the Assessee to show cause why an eviction order should not be passed against it.

11. In the pending writ petition, i.e., CW No. 773/2002, an order was passed on 24th September 2002 recording the statement of NDMC that it would not, during the pendency of the said writ petition, pursue the proceedings under the PP Act. Consequently, by the order dated 10th October 2002 the Estate Officer, NDMC stayed further proceedings under the PP Act.

12. In the meanwhile, writ petition CW No. 773/2002 itself came to be dismissed by an order dated 8th August 2003 with the High Court directing the Assessee to vacate the premises on or before 30th September 2003. The appeal filed by the Assessee being LPA No. 596 of 2003 against the order dated 8th August 2003 came up for hearing on 23rd September 2003 on which date the Division Bench of the High Court passed an interim direction for maintaining status quo. This was subject to the Assessee undertaking that it would abide by the order that may be passed by the High Court. In the said LPA the High Court called for the records of the suit, the civil revision petition and both the decided and pending writ petitions by its order dated 29th October 2003. The interim orders were continued.

13. LPA No. 596 of 2003 was dismissed by the Division Bench on 30th August 2005. It was held that the Assessee could not have any legitimate expectation regarding renewal of the licence and in any event not in perpetuity as they bid with open eyes for a license which was to be for a duration of 10 years with the agreement providing only one renewal.

14. The Assessee's Special Leave Petition (Civil) No. 21183 of 2005 challenging the aforementioned order dated 30th August 2005 was registered as Civil Appeal No. 4002 of 2007 in the Supreme Court. The said appeal was dismissed on 31st August 2007 with the Supreme Court granting time to the Assessee till 31st December 2007 to vacate the premises. The question of dues owed by the Assessee to NDMC was not decided since it was still pending adjudication. The proceedings under the PP Act revived with notices being issued under Sections 5 and 7 thereof on 15th April 2009. It is stated that these proceedings are still pending adjudication.

***Proceedings under the Income Tax Act***

15. Turning now to the proceedings under the Act, for AYs 1982-83 and 1983-84, the Assessee filed its return claiming deduction of Rs. 10,17,130 and Rs. 13,50,000 respectively towards licence fee payable to the NDMC and this was allowed by the Assessing Officer ('AO') and the assessment order for the said AYs became final.

16. For AY 1984-85 to 1986-87 apart from licence fee of Rs. 13,50,000 claimed by the Assessee in terms of the Agreement dated 23rd September 1980 as expenditure, an additional sum was claimed towards payment of

interest. In the case of the amounts claimed towards payment of interest, for AY 1984-85 a sum of Rs. 2,03,860.86 plus Rs. 1282.20 aggregating to Rs. 2,05,143 was claimed, for AY 1985-96 a sum of Rs. 3,40,022.92 was claimed and for AY 1986-87 a sum of Rs. 4,09,432.80 plus Rs. 15,075, aggregating to Rs. 4,24,507.80 was claimed. All these items of expenditure towards licence fee as well as interest as claimed by the Assessee were allowed by the AO. For three AYs, i.e., 1984-85 to 1986-87 these orders were allowed to be become final.

17. For AY 1987-88, the Assessee claimed deduction of Rs. 13,50,000 towards licence fee payable and a further sum of Rs. 5,13,282.28 towards interest. The amount actually paid to the NDMC towards rent was Rs. 7,16,472 in terms of the interim order passed in the suit as upheld by the High Court. The AO allowed the licence fee actually paid and thereby disallowed the licence fee to the extent of Rs. 6,63,556. The interest amount claimed in the sum of Rs. 5,13,282, not having been actually paid by the Assessee, was disallowed.

18. Against this order, the Assessee went in appeal before the CIT (A) who by an order dated 24th October 1990 reversed the order of the AO and deleted the additions made by the AO. The CIT (A) agreed with the Assessee that the amounts payable to NDMC towards liability had already accrued and deleted the addition made by the AO. The CIT (A) referred to the decision in ***Kedarnath Jute Manufacturing Co. Ltd. v. Additional Commissioner of Income Tax (1971) 82 ITR 363 (SC)***.

19. Aggrieved by the order of the CIT (A), the Revenue went in appeal before the ITAT. By an order dated 31st October 2002 the ITAT reversed the order of the CIT (A) sustaining the additions made by the AO. ITA No. 354 of 2003 filed by the Assessee in this Court pertains to AY 1987-88.

20. It must be mentioned at this stage that the order passed by the ITAT on 31st October 2002 allowing the Revenue's appeal was common to the other appeals of the Revenue for AYs 1988-89 and 1989-90. For the said AYs as well, the facts are more or less similar with the AO disallowing the licence fee to the extent not actually paid to NDMC and the interest amounts as claimed by the Assessee.

21. For AYs 1990-91, 1991-92 and 1992-93, the AO following the orders of the earlier years and disallowed the deduction of the licence fee to the extent not paid to NDMC and interest amount. Thereafter, the orders of the CIT (A) accepting the Assessee's plea were reversed by the ITAT by its common order dated 21st October 2005. The said common order was also common to AYs 1995-96 and 1998-99.

22. As regards AYs 1993-94 and 1994-95 the Assessee's claim for licence fee in the sum of Rs. 13,50,000 (after apart from the head office rent of Rs. 30,000) as well as the claim for interest was fully allowed by the AO. For some reason, the Revenue did not question the said orders by invoking powers under Section 263 of the Act and therefore the assessment orders for the said two AYs, i.e., 1993-94 and 1994-95 became final.

23. However for the AY 1995-96 the AO again disallowed licence fee to the

extent not paid as well as the interest amounts claimed. Whereas for the AY 1998-99, the AO allowed the license fee claimed completely while disallowing the interest amounts claimed. For both the AYs, i.e., 1995-96 and 1998-99, again the CIT (A) allowed the Assessee's appeal whereas ITAT reversed it and allowed the Revenue's appeal by the common order dated 21st October 2005.

24. For AY 1996-97, the Assessee claimed for both licence fee of Rs. 13,50,000 (after apart from the head office rent of Rs. 30,000) as well as interest amount which were all fully allowed by the AO. This order has again not been questioned by the Revenue under Section 263 of the Act and therefore became final for the said AYs.

25. The very next year, i.e., AY 1997-98, the AO again adopted a different approach. The entire licence fee of Rs. 13,50,000 and head office rent of Rs. 90,000 as claimed by the Assessee was fully allowed. However, the interest amount claimed in the sum of Rs. 10,43,701 was disallowed. The CIT (A) dismissed the Assessee's appeal by an order dated 27th November 2007 following the orders of the ITAT in the Assessee's own case in previous AYs (i.e., ITAT orders dated 31st October 2002 and 21st October 2005). The ITAT by its order dated 25th May 2009 affirmed this order of the CIT (A).

26. It must be mentioned at this stage that the order passed by the CIT (A) on 27th November 2007 for AY 1997-98 was common to that AY as well as AYs 1999-00 and 2003-04. The order of the ITAT dated 25th May 2009 which affirmed the order of the CIT (A) was again common to three AYs, i.e., 1997-98, 1999-00 and 2003-04. The ITA Nos. 1273, 1274 and 1277 of

2009 have been filed by the Assessee in this Court against the said common order dated 25th May 2009 passed by the ITAT.

27. For AYs 2000-01 and 2001-02, the AO followed the decision of the ITAT in the Assessee's case for the previous AYs (i.e., ITAT orders dated 31st October 2002 and 21st October 2005) and disallowed the claim for interest while fully allowing the claim for License fee. This was upheld by the CIT(A) and in turn affirmed by the order of the ITAT dated 20th December 2006.

28. The above narration is incomplete without adverting to the facts in respect of the intervening AYs. For AY 2002-03, the entire licence fee of Rs. 54,30,450 and head office rent of Rs. 1,80,000 as well as the interest amount of Rs. 7,39,440.01 was fully allowed as deducted by the AO. This order was not questioned by the Revenue any further.

29. From AYs 2004-05 to 2008-09, the licence fee in the sum of Rs. 47,66,196, the head office rent of Rs. 1,80,000 and provision of interest amount in the sum of Rs. 7,19,078.18 was allowed in its entirety by the AO and the orders for the said AYs from 2004-05 to 2008-09 were not questioned by the Revenue under Section 263 of the Act. Therefore, the said assessment orders attained finality.

30. The upshot of the narration of facts is that the AO allowed the amount of licence fee and interest in its entirety as claimed by the Assessee for AYs 1993-94, 1994-95, 1996-97, 2002-03 and 2004-05 to 2008-09. Also, the AO allowed the licence fee as claimed by the Assessee, in the sum of Rs.

13,50,000 for AYs 1993-94, 1994-95, 1996-97 to 2001-02, a sum of Rs. 54,30,450 for AY 2002-03, a sum of Rs. 45,49,548 for AY 2003-04, a sum of Rs. 47,66,196 for AYs 2004-05 to 2007-08 and a sum of Rs. 35,74,647 for AY 2008-09.

***Submissions of Senior counsel for the Assessee***

31. This Court has heard the submissions of Mr. C.S. Aggarwal, learned Senior counsel for the Appellant and Ms. Suruchi Aggarwal, learned Senior standing counsel and Mr. Zoheb Hossain, learned Junior standing counsel for the Revenue respectively.

32. It is submitted by Mr. C.S. Aggarwal, learned Senior counsel for the Appellant-Assessee that the AO made an error in disallowing the licence fee payable only on the ground that the Assessee had disputed its liability by initiating proceedings in the lower courts "as well as in this Court" and obtaining interim orders on the strength of which it was required to pay an additional 30% of the licence fee that is due till the disposal of the suit by the Sub Judge.

33. Mr. Aggarwal pointed out that the Assessee was maintaining its accounts on the basis of the mercantile system. In terms thereof, a liability already accrued, though liable to be discharged at a future date, would be properly claimed for deduction while working out the profits and accounts in the business. It is not necessary that the deduction should be allowed only after the amount was actually paid. A condition, whose fulfilment might result in the reduction or even extinction of such liability, would not have the effect of converting that liability into a contingent liability. According to him, the

liability owed in the form of licence fee and interest to the NDMC was an 'ascertained' liability. What the Assessee's challenge, according to him, was towards the enhancement of the licence fee and this was not to deny the liability to pay the licence fee in terms of the original agreement entered into with NDMC.

34. Mr. Aggarwal placed reliance on the decision of this Court in ***R.C. Gupta v. Commissioner of Income Tax (2008) 298 ITR 161 (Del)*** and the decisions referred therein namely, ***Kedarnath Jute Manufacturing Co. Ltd. & CIT (1971)82 ITR 363 (SC), J.K. Synthetics Limited v. O.S. Bajpai, ITO (1976) 105 ITR 864 (All), Swadeshi Cotton Mill Co. Ltd. v. CIT (1980) 125 ITR 33 (All), Union of India v. J.K. Synthetics Ltd. (1993) 199 ITR 14 (SC)*** and ***Bharat Earth Movers v. CIT (2000) 245 ITR 428 (SC).*** A reference was also made to the decisions in ***Calcutta Co. Ltd. v. Commissioner of Income Tax, West Bengal (1959) 37 ITR 1(SC)***, ***CIT v. S.P. Jaiswal Estates (P) Ltd. (1995) 214 ITR 448 (Cal)*** and ***CIT v. Dalmia Dairy Industries Ltd. (1991) 189 ITR 167 (Del).***

35. Mr. Aggarwal also stressed on the principle of consistency and pointed out that there were 14 AYs in which the case of the Assessee was accepted *in toto* by the Revenue and that there was no questioning of the orders of the AO in which the entire amounts that were payable towards licence fee as well as the provision of interest as claimed by the Assessee was allowed. This was the position as regards AYs 1982-83 to 1986-87, 1993-94, 1994-95, 1996-97, 2002-03, 2004-05 to 2008-09. Mr. Aggarwal referred to the decision in ***CIT v. Excel International Limited (2013) 358 ITR 295 (SC)***

which affirmed the earlier decision of the Supreme Court in ***Radhasoami Satsang Saomi Bagh v. CIT (1992)193 ITR 321(SC)***.

***Submissions of counsel for the Revenue***

36. It was submitted by Ms. Suruchi Aggarwal and Mr. Zoheb Hussain, learned counsels for the Revenue, that it was not open to the Assessee to approbate and reprobate as regards its liability to pay the licence fee**.** When it came to the question of actually paying the licence fee to the NDMC the Assessee sought to avoid its liability. Having taken such a stand in the suit as well as in the writ petition before the High Court, the Assessee should not be allowed to contend that its liability for payment of the licence fee and interest on the arrear of licence fee was an ascertained liability. As long as the interim order of the High Court granted *status quo*, which was at the instance of the Assessee itself, the Assessee was not under any obligation to make payment of the licence fee and therefore, avoided making such payment. It is accordingly, submitted that the AO was fully justified in disallowing the claim for deduction of licence fee and the corresponding interest to the extent it was not actually paid by the Assessee to NDMC.

37. As regards the claim for consistency, it is pointed out that each assessment orders have to be separately considered. As far as the five three years are concerned, i.e., 1982-83 to 1986-87, with the Assessee having not successfully challenged its liability to make payment, the AO was justified in allowing the amount as claimed by the Assessee towards payment of licence fee and interest towards arrears of licence fee. However, from 1987-88 the scenario changed with the Assessee's challenge to the enhanced

demand for licence fee being decided by the High court vide its order dated 14th January 1987. It is only with this decision that it made it clear that the Assessee was entitled to a status quo and that it was liable to pay only original licence fees of Rs. 5,51,111 plus an additional 30%, i.e., Rs. 1,65,333/- which worked out to Rs. 7,16,444/ - per annum.

38. It is further submitted that the orders for any other AYs where the entire amount as claimed by the Assessee towards licence fee has been allowed will not make a difference to the legal position that the Assessee would not be entitled for claim of deduction for licence fee which in fact is not paid to NDMC. It is further contended that a distinction has to be made between a statutory liability and a liability based upon a contractual obligation. It is only in the case of a statutory liability that the actual quantification or ascertainment of liability would not postpone the accrual thereof in the mercantile system of accounting. The decision in ***Kedarnath Jute Manufacturing*** (supra) is sought to be distinguished on the ground that it was rendered in the context of sales tax liability which was a statutory liability whereas in the present case the Assessee's liability is contractual. It is further submitted that with the Assessee having seriously disputed its contractual liability, such liability could not be said to have become ascertained or crystallized till the question is finally settled by the Court. With the suit questioning legality of the agreement dated 20th September 1980 yet to be finally adjudicated by the Court, till the time of the assessments in question, the AO was justified in permitting deduction only to the extent of original licence fee plus 30%.

***Ascertained or accrued liability***

39. The question as to when a liability can be said to be ascertained one has arisen in the context of both a statutory liability and a contractual liability. An example of a statutory liability is the case of ***Kedarnath Jute Manufacturing Co. Ltd.*** (*supra*). There the Assessee followed the mercantile system of accounting. The relevant AY was 1955-56. The Assessee had in the calendar year 1954, i.e., the relevant previous year, incurred a liability of Rs. 1,49,776/- on account of sales tax determined as payable by the Sales Tax Authorities on the sales made by it. The sales tax demand had already been raised. The Assessee had contested the sales tax liability by filing an appeal. It had also not made any provision in its books as regards payment of the said amount. On these two grounds, the AO rejected the Assessee's claim for deduction. Holding for the Assessee, the Supreme Court held that although the sales tax liability could not be enforced till the quantification was effected in the assessment proceedings, since the Assessee had followed the mercantile system of accounting it was entitled to deduct from the profits and gains of the business such liability which had accrued during the period for which the profits and gains were being computed. It was held that the liability did not cease to be a liability only because the Assessee had challenged it in the higher forum. Also the fact that the Assessee had failed to debit the liability in its books of accounts did not prevent it to claim the said sum as deduction either under Section 10(1) or under Section 10(2)(xv) of the Income Tax Act, 1922. It was held "whether the Assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the Assessee might take of his rights; nor can the existence or absence of entries

in his books of account be decisive or conclusive in the matter."

40. This was in line with the earlier decision in ***Calcutta Co. Ltd. v. Commissioner of Income Tax, West Bengal (1959) 37 ITR 1 (SC)*** where the Supreme Court explained that an Assessee following the mercantile system of accounting could claim a deduction of an estimated expenditure towards development of plots purchased by it even before actually incurring the expenditure. This was not a statutory liability but a contractual one. The Assessee in that case was a developer dealing in land and property. The Supreme Court noted that the relevant clauses of the sale deed spelt out the undertaking of the Assessee "to carry out the developments within six months from the date of the sale." It was noted that although the entire sale consideration was not received during the relevant AY, the Assessee had nevertheless entered it into the credit side of its books of accounts. Likewise it debited the estimated sum of expenditure towards development although "no part of that amount represented any expenditure actually made during that year." Explaining the mercantile system of accounting, the Court referred to an earlier decision in ***Keshav Mills Ltd. v. Commissioner of Income Tax, Bombay (1953) 23 ITR 230 (SC)*** in which it was described as under:

> "That system brings into credit what is due, immediately it becomes legally due and before it is actually received and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed."

41. The Supreme Court in ***Calcutta Co. Ltd. v. Commissioner of Income Tax, West Bengal*** (*supra*) proceeded to hold as under:

> "Inasmuch as the liability which had thus accrued during the accounting year was to be discharged at a future date the amount to be expended in the discharge of that liability would have to be estimated in order that under the mercantile system of accounting the amount could be debited before it was actually disbursed.
>
> The difficulty in the estimation thereof again would not convert an accrued liability into a conditional one, because it is always open to the Income-tax authorities concerned to arrive at a proper estimate thereof having regard to all the circumstances of the case."

42. The Supreme Court ***Calcutta Co. Ltd. v. Commissioner of Income Tax, West Bengal*** (*supra*) also explained that since the Assessee was being assessed in respect of the profits and gains of its business, the same could not be determined "unless and until the expenses of the obligations which have been incurred are set off against the receipts." It was observed as under:

> "The expression profits and gains has to be understood in its commercial sense and there can be no computation of such profits and gains until the expenditure which is necessary for the purpose of earning the receipts is deducted therefrom- whether the expenditure is actually incurred or the liability in respect thereof has accrued even though it may have to be discharged at some future date. As was observed by Lord Herschell in *Bussel v. Town and County Bank, Ltd. (1888) 13 App. Cas. 418*:
>
> > "The duty is to be charged upon 'a sum not less than the full amount of the balance of the profits or gains of the trade, manufacture, adventure, or concern'; and it appears to me that that language implies that for the purpose of arriving at the balance of profits all that expenditure which is necessary for the purposes of earning the

> receipts must be deducted, otherwise you do not arrive at the balance of profits, indeed, otherwise you do not ascertain, and' cannot ascertain, whether there is such a thing as profit or not. The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts. That seems to me to be the meaning of the word "profits" in relation to any trade or business. Unless and until you have ascertained that there is such a balance, nothing exists to which the name 'profits' can properly be applied."

43. In ***Bharat Earth Movers v. Commission of Income Tax*** (supra), the Supreme Court had an occasion to explain the distinction between accrued and contingent liability. There the Assessee Company had two sets of employees – one covered by the Employees State Insurance Scheme (described as 'staff') and the other not so covered (termed as 'officers'). The Assessee had floated beneficial schemes for its employees for encashment of leave in terms of which the officers were entitled to thirty days earned leave whereas the staff were entitled to eighteen days vacation leave. While the earned leave could be accumulated up to 240 days, the vacation leave could be accumulated up to 126 days. Either leave could be encashed subject to the ceiling on accumulation. There was an option to avail the accumulated leave or in lieu thereof to apply for encashment whereupon the staff or the officer concerned would be paid salary for the period of leave earned but not availed. A fund was created by the Assessee for meeting this liability and during the AY 1978-79, a sum of Rs. 62,25,483/- was set apart for the purpose of encashment of the leave. Although the ITAT held the Assessee to be entitled to claim the said sum as deduction, the High Court was of the view that it was not. The Supreme Court explained as under:

> "The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in present though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain."

44. The Supreme Court referred to an earlier decision in ***Metal Box Company of India Ltd. v. Their Workmen (1969) 73 ITR 53 (SC)*** in which *inter alia* it was explained as under:

> "(i) For an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid;
>
> (ii) Just as receipts, though not actual receipts but accrued due are brought in for income-tax assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business;
>
> (iii) A condition subsequent, the fulfilment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability;
>
> (iv) A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be made in a subsequent year if

it can be satisfactorily estimated."

45. The Supreme Court in ***Bharat Earth Movers v. Commission of Income Tax*** (*supra*) held that the provision made by the Assessee for meeting its liability under the leave encashment scheme would entitle it to deduction since it was not a contingent liability.

46. The above dictum was followed by this Court in ***R.C. Gupta v. Commissioner of Income Tax*** (*supra*). In that case the AO on scrutiny of the Assessee's trading account noticed that a sum of Rs. 50,761/- stood debited to the raw material account. The Assessee explained that this was payable to Hindustan Steel Limited (HSL) for purchases made on 22nd October, 1975 but in respect of which the Assessee had disputed its liability. A suit for recovery had been filed by the HSL against the Assessee. The AO disallowed the claim on the ground that the amount did not relate to any purchases made during the previous year relevant to the AY in question. While the CIT(A) allowed the Assessee's appeal holding that the liability had accrued during the accounting year ending 31st March, 1979, the ITAT reversed the CIT(A). Allowing the Assessee's appeal this Court explained that the liability was capable of being estimated with reasonable certainty where a recovery suit was filed by HSL. "Merely because the liability was not a statutory one it could not be said that the liability that was not an ascertained one but a contingent one."

47. A conspectus of the above decisions reveals that whether a liability is ascertained or contingent is dependent on the facts of each case. Merely

because a liability may be contractual or non-statutory would not make it incapable of being ascertained. Where an Assessee follows the mercantile system of accounting it is not necessary that the liability must have actually been incurred during the AY in question to enable the Assessee to claim it as an expense or deduction as the case may be. The crux of the matter is the reasonable certainty with which the liability can be ascertained.

48. Coming to the facts of the present case it is not as if the Assessee has disputed its liability to pay licence fee. In other words during the AYs in question it continued to pay the annual licence fee to the NDMC and in those years it was protected in terms of an interim order. What was being disputed by the Assessee in the suit initiated by it against the NDMC was the reasonableness of the enhancement of the licence fee at the stage of renewal of the licence. There is a distinction, therefore, to be drawn between disputing the liability as such and disputing the reasonableness of the enhancement of the licence fee.

49. What appears to have weighed with the CIT(A) as well as the ITAT in the impugned order in these cases is that in the suit filed by the Assessee an averment was made that it had not voluntarily signed on the Agreement dated 23rd September, 1980 and had averred that the Agreement having been "got signed by the NDMC authorities from the Directors under undue influence and coercion is illegal and not enforceable in law." What also weighed with the ITAT is that the Assessee could not on the one hand challenge the validity of the said agreement and on the other urge the Department to act upon it because it is beneficial to the Assessee.

50. There appears to be a misconception on the question regarding an accrued liability in the hands of the Assessee in the above circumstances. In terms of the interim orders passed by the Court which were conditional upon the Assessee making a certain payment, what was being made clear was that the Assessee's contention regarding legality of the renewed licence agreement was still to be determined. In other words, the Assessee could not, during the pendency of the suit, claim that it had no liability under the renewed licence agreement. It was granted interim protection on the express understanding that it would abide by the interim order of the Court which was in itself an acknowledgement that the liability under the renewed licence deeds continue as long as the suit is pending. However, the only concession was that the Assessee would pay the reduced licence fee for the renewed period which was 30 per cent over and above the original licence fee. In the circumstances, there was no question of there being no liability on the Assessee whatsoever for the renewal of the licence. Merely because the Assessee had chosen to challenge in Court the enhancement of the licence fee, which was permissible to be raised by it in accordance with law, did not preclude the Assessee, which was following the mercantile system of accounting, from claiming it as a liability during the AYs in question. The Court, therefore, does not, in view of the averments made by the Assessee in the pleadings in the suit filed by it against the NDMC, as a reason to preclude the Assessee from claiming the licence fee, the head office fee and the interest on arrears payable to the NDMC in terms of the renewed licence deed as a liability for the AYs concerned.

51. The ITAT also appears to have drawn a distinction between a statutory liability and a contractual liability and opined that a deduction in respect of the contractual liability would be permissible "only when the disputes are settled." This is contrary to the legal position as explained in the above decisions of the Courts. Even where a challenge is laid to a liability arising under a contract, by a challenger initiating legal proceedings, such challenger can still for the purposes of its accounts and for the purposes of computation of its income tax liability claim the entire amount under challenge as an accrued liability as long as such amount is ascertainable. Corresponding adjustments would be made in the year in which the suit is finally decided or the disputes settled. That, however, would not preclude the Assessee from claiming it as an ascertained liability.

***The rule of consistency***

52. The ground urged on behalf of the Assessee as regards consistency also merits acceptance. There is indeed a demonstrable inconsistency in the Revenue's stand in the matter. While the Assessee consistently claimed liability towards licence fee, the Revenue appears to have accepted it in its entirety some years and not in some others. In AYs 1982-83 to 1986-87, the AO fully allowed the amount as claimed in respect of the licence fee as well as interest by the Assessee in terms of the Agreement dated 23rd September, 1980. Without there being any particular change in the circumstances other than the order of the High Court confirming the interim order passed by the trial court, which position continued even in AY 1982-83, the AO restricted the allowance from AYs 1987-88 to 1992-93 to actual payment of licence fee made and disallowed the difference between the claimed amount and the

amount actually paid. Again, without there being any change in the circumstances in AYs 1993-94 and 1994-95, the Assessee's claim towards payment of licence fee as well as interest is fully allowed by the AO in terms of the Agreement. Again for one AY 1995-96, the AO did not fully allow the claim. In the very next AY, 1996-97, the claim was fully allowed. For AYs 1997-98 to 2001-2002, while the claim towards payment of licence fee was fully allowed in terms of the Agreement, the claim towards interest for arrears of rent was disallowed. Even as pointed out by the Assessee in 1997-98, the actual amount paid by it towards interest was in excess of the amount claimed by it and yet the interest amount actually paid was not allowed.

53. However, for AY 2002-2003, the amount as claimed by the Assessee towards licence fee and interest was fully allowed. In AY 2003-2004, the interest due against arrears of licence fee up to 30th September, 2002 was disallowed. In the last set of years, i.e., AYs 2004-2005 to 2008-2009, the Assessee's claim towards licence fee and interest was fully allowed. This is indeed an extraordinary case of the Revenue continuously changing its stand during the AYs in question. The Supreme Court in ***Radhasoami Satsang Saomi Bagh v. CIT*** (*supra*) commented upon the approach of the Revenue in changing its stand from one AY to another, as under:

> "16. We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

54. The Supreme Court in ***Radhasoami Satsang Saomi Bagh*** (*supra*) cited with approval the following observations of the Privy Council in ***Hoystead v.Commissioner of Taxation 1926 AC 155 (PC):***

> "Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."

55. This legal position was recently reiterated by the Supreme Court it in ***CIT v. Excel International Limited*** (*supra*) as under:

> "31. It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it."

56. Consequently on the rule of consistency, the case of the Revenue for the AYs in question cannot be accepted.

***Conclusion***

57. For the above reasons, the Court holds that the ITAT was in error in declining the plea of the Assessee for the AYs in question with regard to the full claim of the payment towards licence fee and interest on the arrears of licence fee. The question framed is answered in the negative, i.e., in favour of the Assessee and against the Revenue.

58. The impugned orders of the ITAT and the corresponding orders of the AO which were upheld by the ITAT are hereby set aside. The appeals are accordingly allowed, but with no order as to costs.

**S.MURALIDHAR, J.**

**VIBHU BAKHRU, J.**

**JANUARY 21, 2016**
*b'nesh/Rk*