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

Reserved on: July 20, 2017
Decision on: August18, 2017

\+ **ITA No. 695/2010**

JAGDISH PRASAD GUPTA ..... Appellant

Through: Mr. C. S. Agarwal, Sr. Advocate with Mr. Rajeev Saxena, Mr. Shashwat Bajpai, Mr. Sharad Agarwal, Advocates.

versus

CIT ..... Respondent

Through:- Mr. Ashok K. Manchanda, Sr. Standing Counsel with Mr. Raghvendra Singh, Mr. Anand K. Singh, Advocates.

\+ **ITA No. 1535/2010**

CIT ..... Appellant

Through: Ms. Vibhooti Malhotra, Advocate

versus

JAGDISH PRASAD GUPTA ..... Respondent

Through: Mr. C. S. Agarwal, Sr. Advocate with Mr. Rajeev Saxena, Mr. Shashwat Bajpai, Mr. Sharad Agarwal, Advocates.

\+ **ITA No. 711/2011 & C.M. No. 6768/2012**

CIT ..... Appellant

Through: Ms. Vibhooti Malhotra, Advocate

versus

JAGDISH PRASAD GUPTA ..... Respondent

Through: Mr. C. S. Agarwal, Sr. Advocate with Mr. Rajeev Saxena, Mr. Shashwat Bajpai, Mr. Sharad Agarwal, Advocates.

\+ **ITA No. 787/2011 & C.M. No. 6765/2012**

CIT ..... Appellant
Through: Ms. Vibhooti Malhotra, Advocate

versus

JAGDISH PRASAD GUPTA ..... Respondent
Through: Mr. C. S. Agarwal, Sr. Advocate with Mr. Rajeev Saxena, Mr. Shashwat Bajpai, Mr. Sharad Agarwal, Advocates.

\+ **ITA No. 933/2011**

CIT ..... Appellant
Through:- Mr. Ashok K. Manchanda, Sr. Standing Counsel with Mr. Raghvendra Singh, Mr. Anand K. Singh, Advocates.

versus

JAGDISH PRASAD GUPTA ..... Respondent
Through: Mr. C. S. Agarwal, Sr. Advocate with Mr. Rajeev Saxena, Mr. Shashwat Bajpai, Mr. Sharad Agarwal, Advocates.

\+ **ITA No. 934/2011 & C.M. No. 6767/2012**

CIT ..... Appellant
Through: Mr. Ashok K. Manchanda, Sr. Standing Counsel with Mr. Raghvendra Singh, Mr. Anand K. Singh, Advocates.

versus

JAGDISH PRASAD GUPTA ..... Respondent
Through: Mr. C. S. Agarwal, Sr. Advocate with

Mr. Rajeev Saxena, Mr. Shashwat Bajpai, Mr. Sharad Agarwal, Advocates.

\+ **ITA No. 935/2011 & C.M. No. 6764/2012**

CIT ..... Appellant
Through: Mr. Ashok K. Manchanda, Sr. Standing Counsel with Mr. Raghvendra Singh, Mr. Anand K. Singh, Advocates.

versus

JAGDISH PRASAD GUPTA ..... Respondent
Through: Mr. C. S. Agarwal, Sr. Advocate with Mr. Rajeev Saxena, Mr. Shashwat Bajpai, Mr. Sharad Agarwal, Advocates.

\+ **ITA No. 936/2011 & C.M. No. 6766/2012**

CIT ..... Appellant
Through:- Mr. Ashok K. Manchanda, Sr. Standing Counsel with Mr. Raghvendra Singh, Mr. Anand K. Singh, Advocates.

versus

JAGDISH PRASAD GUPTA ..... Respondent
Through: Mr. C. S. Agarwal, Sr. Advocate with Mr. Rajeev Saxena, Mr. Shashwat Bajpai, Mr. Sharad Agarwal, Advocates.

\+ **ITA No. 424/2016**

PR. COMMISSIONER OF INCOME TAX-10 ..... Appellant
Through: Mr. Ashok K. Manchanda, Sr. Standing Counsel with Mr. Raghvendra Singh, Mr. Anand K. Singh, Advocates

versus

JAGDISH PRASHAD GUPTA ..... Respondent
Through: Mr. C. S. Agarwal, Sr. Advocate with

Mr. Rajeev Saxena, Mr. Shashwat Bajpai, Mr. Sharad Agarwal, Advocates.

CORAM: JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

J U D G M E N T

% 18.08.2017

Dr. S. Muralidhar, J.:

Introduction

1. These are nine appeals under Section 260A of the Income Tax Act, 1961 ('Act'), one by the Assessee and the others by the Revenue, directed against orders of the Income Tax Appellate Tribunal ('ITAT') which pertain to Assessment Years ('AY') 1997-98 to 2002-03, 2004-05, and 2009-10. In the appeals by the Revenue, cross-objections (C.O.) have been filed by the Assessee, i.e. Shri Jagdish Prasad Gupta, the proprietor of Pradeep Oil Corporation.

2. By an order dated 12th December, 2012, this Court had directed that the ITA No. 711 of 2011 pertaining to AY 1997-98 should be treated as the lead case. There is a common order of the ITAT dated 31st July, 2009 in the appeals filed by the Revenue for AYs 1997-98 to 2002-03. The Revenue's appeals for these AYs are ITA Nos. 711/2011, 787/2011, 936/2011, 934/2011, 933/2011 and 935/2011 respectively. For AY 2003-04, no appeal was filed by the Revenue. As regards AY 2004-05, the Revenue has filed ITA No. 1535/2010 and the Assessee has filed ITA No. 695/2010 against the order of the ITAT dated 22nd January, 2010. There is another appeal, being ITA No. 424/2016, filed by the Revenue against the order dated 1st February, 2016 passed by the ITAT for AY 2009-10. The details in a

tabular form of the relevant AY and the corresponding C.O./appeal by the Assessee and appeal by the Revenue are as under:

AY	Assessee's C.O. (CM) and Appeal	Revenue's ITA No.
1997-98	CM 6768/2012	711/2011
1998-99	CM 6765/2012	787/2011
1999-00	CM 6766/2012	936/2011
2000-01	CM 6767/2012	934/2011
2001-02	No appeal	933/2011
2002-03	CM 6764/2012	935/2011
2004-05	ITA 695/2010	1535/2011
2009-10	No appeal	424/2016

Background facts

3. The Assessee is the sole proprietor of M/s Pradip Oil Corporation. The Assessee, by way of an agreement dated 15th March 1975, was granted licence by the Northern Railway for use of a piece of Railway land measuring 41280 sq. ft. at a licence fee of Rs. 20,640/- per annum (p.a.). By another agreement, dated 3rd January 1978, the Assessee was granted licence for use of a further 62,156 sq. ft. of Railway land at a licence fee of Rs. 31,078/- p.a. An additional land of 2329 sq. ft. (equivalent to 216.35 sq. m.) was further granted under a memorandum. Thus the aggregate land measuring 9828.21 sq. m. (1,05,765 sq. ft.) was thus allotted at a licence fee of 50 paise per sq. ft. p.a.

4. The said lands were allotted for constructing and maintaining a depot for storage of petroleum products etc. On the said land the Assessee constructed

steel tanks in terms of the specifications of the Northern Railway authorities. The Assessee declared the income from storage and handling of petroleum products as his business income. Apart from this, the Assessee constructed various structures for maintaining the depot such as warehouse, cycle stand, storage room, platform, meter room, pump house, chemical rooms, stores, verandah etc. The warehouses were not optimally put to use by the Assessee. The warehousing facilities were made available for a rent to others and this was disclosed by the Assessee in his returns as income from house property from the AY 1984-85 onwards.

Revisions of licence fees

5. By a letter dated 8th February, 1980 the Northern Railway revised the licence fee for the 41280 sq.ft. plot to Rs. 1/- per sq.ft p.a. with effect from 5th January 1980. Likewise, the licence fee for the plot measuring 62,156 sq.ft. was revised to Rs. 1 per sq.ft. p.a. with effect from 1st January 1981. Subsequently, a letter dated 1st June, 1986 it was revised to Rs. 1. 50 per sq.ft p.a. by letter dated 23rd October 1986 to Rs. 4/- per sq.ft and by letter dated 19th February 1987 to Rs. 7.80 per sq.ft. On this basis the licence fee aggregated to Rs. 7,07,065/- p.a. in respect of the use of land.

6. On 23rd March 1988, the Northern Railway further enhanced the licence fee to Rs. 15.60 per sq.ft. i.e. Rs. 14,14,130 p.a. The Northern Railway further terminated the licence for use of the land on the ground that the Assessee had failed to deposit the licence fees. It directed the Assessee to remove the unauthorised structure erected on the Railway land and deliver vacant possession of the land to the Assistant Engineer, Northern Railway, Delhi. The letter stipulated that, upon failing to vacate the land within the

stipulated time, action under the Public Premises (Eviction of Unauthorised Persons) Act, 1971 ('PP Act') would be initiated apart from recovering damages at Rs. 14,14,130/- p.a. up to the date of vacation of the land. The letter further noted that the outstanding balance up to 31st March, 1986 stood at Rs. 18,11,036/- whilst Rs. 14,14,130/- was due as licence fee for the period from 1st April, 1986 to 31st March, 1988.

Proceedings before the Estate Officer

7. The Northern Railway applied to the Estate Officer (EO) under the PP Act praying for eviction of the Assessee from the land in question. The said application was disposed of by the EO by an order dated 28th March 1990. The following issues were framed by the EO for consideration:

> "(i) Whether the enhancement is due and if so to what extent and on what basis?
>
> (ii) Has the respondent paid the enhanced licence fee and if not, what is the effect on the present proceedings?
>
> (iii) Has the respondent made unauthorized construction in the premises and if so, to what extent, what is the effect on the present proceedings?
>
> (iv) Are the respondents in unauthorized occupation of Railway premises and if so are they liable to pay the damages?
>
> (v) What is the amount of damages the respondents are liable to pay?
>
> (vi) Relief"

8. By an order dated 28th March 1990 the EO disposed of the above application by holding in respect of each of the above issues as under:

(i) The enhancements were made by the Northern Railway too frequently and without legal basis. "In the absence of any definite policy in conformity with principles of natural justice and further with retrospective demands of the applicant contrary to the terms of agreement, no enhancement can be permitted." The Assessee was to continue to pay the licence fee in accordance with the licence agreement and the guidelines in terms of the circular dated 14th December 1985.

(ii) The Assessee had been paying the enhanced licence fee in terms of the document AW-1/3. However, "all subsequent frequent revisions in licence fee are contrary to law and terms of the agreement. The Respondent is not liable to pay the same and the present proceedings are liable to be dropped being neither enhancement is made in accordance with law nor is validly revised."

(iii) The Assessee is not in unauthorised occupation and not liable to pay damages.

(iv) The Railways have failed to prove the liability of the Assessee to pay damages.

(v) "The demand and the termination based thereon are not tenable in law and the licence of the respondent cannot be terminated as stated aforesaid....However, I may point out here that to avoid frivolous litigation, the applicant should form a definite policy in revising the licence fee for a considerable period on uniform basis by incorporating the law of principles

of natural justice to avoid unnecessary litigation thereby not causing losses of revenue to the railway administration under these circumstances and ensuring prompt and regular payment of licence fee by licencees."

Proceedings in this Court

9. An appeal against the above order was filed by the Northern Railway before the Additional District Judge (ADJ) which ultimately came to be dismissed on 18th December 2007 on the ground of maintainability. The writ petition filed by the Northern Railway in this Court challenging the above order, being W.P. (C) No. 8071 of 2008, was dismissed by a learned Single Judge on 25th November 2010. However, liberty was granted to the Northern Railway to initiate fresh proceedings against the assessee in accordance with law.

10. This was followed by the Northern Railway terminating the licence agreements by a letter dated 27th December 2010. The Assessee states that the Northern Railway thereafter demolished the installations, tanks warehouse etc. on 6th July 2011 and took forcible possession of the lands in question thereby causing huge losses to the Assessee. After the dismissal by this Court of the Assessee's writ petition challenging the above action and consequent appeal, the Assessee filed a SLP in the Supreme Court. The Assessee also filed a petition under Section 11 (6) of the Arbitration and Conciliation Act 1996 in this Court seeking the appointment of an independent Arbitrator.

11. Even while the said petition was pending the Northern Railway appointed its own arbitrator and sent to the Assessee under cover of a letter

dated 13th January 2015, a copy of the statement of claim dated 2nd September 2014 filed by it before the Sole Arbitrator appointed by it for the sum demanded in the notice dated 5th January 2012 issued to the Assessee. It is stated that the issue concerning the appointment of an independent Arbitrator is pending in the Supreme Court.

Further revisions of licence fees

12. Meanwhile, by a notice dated 25th July, 1995 the aggregate licence fee for the plots was enhanced to Rs. 360 per sq.m. i.e. 35,37,300/- p.a. with effect from 1st April 1986. By the said letter a demand was raised for the ten year period from 1st April 1986 to 31st March 1996 in the sum of Rs. 3,53,85,660 along with arrears for the period up to 31st March 1986 in the sum of Rs. 18,11,036 totalling Rs. 3,71,96, 696. It was stated that the payment would be subject to the decision in the case pending before the ADJ.

13. On 20th January 1999, the Northern Railway revised the licence fee taking the base rate at Rs. 2400 per sq.m. as on 1st January 1985. The outstanding demand was worked out as Rs. 13,13,78,484. By a letter dated 29th July 1999 the Northern Railway claimed damages at Rs. 1822. 80 per sq.m. which worked out, along with the arrears of licence fee, to Rs. 1,92,63,785. Thereafter, for each of the years from AYs 2002-03 till AY 2008-09 the Northern Railway issued letters demanding enhanced licence fees and damages. These letters contained a line which stated that payment would be subject to the decision in the pending case. In terms of a demand letter dated 5th January 2012, the total outstanding worked out to

Rs.45,42,20,091.

Tax treatment of claim of licence fee as deduction

14. Now to the tax treatment of the claim of the Assessee in its income tax returns of the enhanced licence fee as a deduction. The said claim was allowed by the Assessing Officer ('AO') for AY 1987-88. As and when the licence fee was enhanced, the deduction was claimed by the Assessee on such enhanced amount and was allowed by the AO continuously for AYs 1989-90 to 1994-95. In other words, for these AYs a sum of Rs. 13,32,286/- p.a. was allowed as deduction on account of enhanced licence fee. In three of the AYs i.e. AYs 1989-90, 1990-91 and 1993-94, the deduction was allowed after scrutiny under Section 143 (3) of the Act. For AYs 1995-96 to 1999-2000, the Assessee claimed deduction of Rs. 35,37,300/-p.a. as licence fee. In fact, for AY 1995-96 the Assessee also claimed, as a deduction, arrears of Rs. 1,63,83,337/- for the period from 1st April, 1984 to 31st March, 1994 after reducing the amount already claimed in those years. The AO, however, allowed the claim only the extent of Rs. 20,78,600/-.

15. In appeal, the Commissioner of Income Tax (Appeals) ['CIT(A)'], for AY 1995-96, allowed Rs. 14,58,497/- as licence fee and the arrears of Rs. 1,63,83,337/-. In a further appeal by the Assessee, the ITAT by order dated 22nd November 2004, allowed Rs. 14,58,497/- for the AY 1995-96 and directed the arrears to be allowed in the sum of Rs. 95,60,650/- in AYs 1987-88 to 1994-95 and Rs. 68,22,900/- in AY 1996-97. This order of the ITAT, for AY 1995-96, was given appeal effect by the AO by an order dated 22nd August, 2006. As a result, thereof, Rs. 11,95,055/- was allowed to be

claimed as arrears for AYs 1987-88 to 1995-96 and Rs. 68,22,900 was allowed for AY 1996-97.

16. For AYs 1996-97 to 1999-2000, the Assessee continued to claim Rs.35,37,300/- as licence fee. While the AO allowed Rs.1,05,570 being the licence fee actually paid by the Assessee, the CIT (A) allowed the amount as claimed by the Assessee in its entirety. For both AY 2000-01 and 2001-02, the Assessee claimed the enhanced licence fee of Rs.1,92,63,785.

17. The return for AY 2001-02 was processed under Section 143(3) of the Act and the claim was restricted by the AO by an order dated 19th March 2004 to Rs.1,05,570. The Assessee's appeal for AY 2001-02 was allowed by the CIT(A) and the entire amount of Rs. 1,92,63,785 as claimed by the Assessee was allowed as deduction.

18. Based on the AO's order for AY 2001-02, the assessment for AY 1997-98 was reopened under Section 147 of the Act by a notice dated 22nd March 2004. Likewise, the assessments for AYs 1998-99, 1999-2000, 2000-01 and 2002-03 were re-opened under Section 147 of the Act by a notice dated 20th May 2004.

19. By orders dated 30th March 2005 for AY 1997-98 and order dated 30th March 2006 for AYs 1998-99 to 2000-01 and 2002-03, the AO restricted the deduction of the licence fee to Rs.1,05,570. The Assessee's appeals against the aforesaid orders were allowed by the CIT (A) by order dated 12th July 2006 and the deductions towards licence fees as claimed by the Assessee were allowed. The Revenue’s consequent appeals for AYs 1997-98 to 2000-

01 and 2002-03 as well as the Revenue's appeal for AY 2001-02 were allowed by the ITAT by a common order dated 22nd July 2008.

This Court's order dated 11th December 2008

20. The Assessee then filed ITA Nos. 1349 to 1354 of 2008 pertaining to AYs 1997-98 to 2002-03) in this Court which were allowed by it by a common order dated 11th December 2008 which reads thus:

> "1. In these appeals the common order dated 22.07.2008 passed by the Income Tax Appellate Tribunal is in question. The issue sought to be raised in these appeals is whether the licence fee payable to the railways for use of land as a depot, could be regarded as an accrued liability or a contingent liability. It was pointed out by the learned counsel for the appellant/ assessee that before the Tribunal he had taken a specific plea that in the assessee's own case for the assessment year 1995-1996, which had been decided by the Tribunal vide its order dated 25.11.2004, the said licence fee has been construed to be an accrued liability and, therefore, allowable as an expenditure in the year of accrual. Unfortunately, the Tribunal has not returned any finding on this aspect of the matter.
>
> 2. Consequently, we feel that the impugned order requires to be set aside and the matters to be remanded to the Tribunal for a consideration on this aspect of the matter. According to the learned counsel for the appellant / assessee the matter stood concluded by virtue of the decision of the Tribunal in respect of the assessment year 1995-1996 and, therefore, there was no occasion for re-entering into the dispute of whether the licence fee payable was a contingent liability or an accrued liability. The learned counsel for the appellant/ assessee submits that the Tribunal ought to have followed its decision in respect of the assessment year 1995-1996 particularly when no appeal therefrom had been preferred by the revenue and the issue had become final.
>
> 3. Mr Jolly, who appears on behalf of the revenue, submits that he does not have any instructions whether any appeal has been preferred

from the order of the Tribunal pertaining to the assessment year 1995-1996. In any event, since we are remanding the matters to the Tribunal for a consideration on this aspect of the matter, the Tribunal would examine as to whether the revenue had preferred any appeal therefrom or not and the effect thereof.

4. The impugned order is set aside. The appeals are remanded to the Tribunal for a consideration afresh as per the directions given above. The matters be placed before the Tribunal on 15.01.2009 for further directions.

The appeals stand disposed of."

ITAT's order for AYs 1997-98 to 2002-03

21. On remand, the ITAT by the order dated 31st July 2009 confirmed the order of the CIT (A). The ITAT held that since the Revenue had not filed an appeal against its order dated 25th November 2004 for AY 1995-96 whereby it had accepted the plea of the Assessee that the enhanced licence fee was an accrued liability, the said order had to be followed in the subsequent AYs as well. The ITAT rejected the plea of the Revenue that in AY 1995-96 "the Assessee had consciously concealed certain facts" and, therefore, the said decision for AY 1995-96 could not be applied in the subsequent years. It observed that the specific direction of this Court, in its order dated 11th December 2008, was to consider whether any appeal had been preferred by the Revenue for the order in respect of AY 1995-96 and therefore, any further contention that the Assessee consciously concealed certain facts could not be examined by the ITAT. For the aforementioned reasons, the appeals filed by the Revenue and the cross-objections by the Assessee were both dismissed.

AYs 2003-04 to 2009-10

22. For AY 2003-04, the Revenue appears to have accepted the orders of the AO, the CIT(A) and the ITAT allowing the claimed amount of Rs. 35,37,300/-. The Revenue also has not filed any appeal in this Court for the said AY 2003-04.

23. For AYs 2002-03 to 2005-06 the Assessee claimed only Rs. 35,37,300/- p.a. as licence fee. The explanation offered by the Assessee for why he did not claim deduction of licence fee for these AYs in terms of the demand of enhanced fee as per the letter dated 20th January 1999 of the Northern Railway is that instead of claiming huge loss in the return, he preferred to pay taxes on the returned income. He thus reverted to claiming deduction of licence fee @ Rs. 360 per sq.m. on the basis of earlier notice dated 25th July 1995. Later, after receiving continuous notices from the Northern Railway and to avoid controversy, he claimed licence fee as per subsequent notices in AYs 2006-07 onwards.

24. For AY 2004-05, the CIT (A) allowed the claim of Rs. 35,37,300 made by the Assessee. As for the claim of Rs. 2,82,03,985/- made by the Assessee towards arrears, the CIT(A) rejected this claim on the basis that the claim only arose on 14th September, 2006, when the demand notice was issued by the Northern Railway. Thus the liability in that regard had not crystallized in the AY in question. After this order was confirmed by the ITAT, both the Revenue and the Assessee filed ITA Nos. 1535/2010 and 695/2010 respectively in this Court.

25. For AY 2009-10, the Assessee made a revised claim of Rs.2,77,27,252/- as deduction in terms of the demand by the Northern Railway. The AO allowed only Rs.1,05,570 as deduction towards licence fee. In appeal, the CIT (A) allowed the entire amount as claimed and this was upheld by the ITAT by the order dated 1st February, 2016, following its order dated 31st July 2009 for the earlier AYs. Aggrieved by this order the Revenue has filed ITA No. 424/2016.

Questions of law

26. The central question in all these appeals concerns the allowability of the claim by the Assessee of deduction of the sum representing the payment for use of lands allotted to it by the Northern Railway. The case of the Assessee is that since it follows the mercantile system of accounting, the enhanced licence fee is an accrued liability. The case of the Revenue on the other hand is that it is a contingent liability and not allowable as a deduction till the liability for the enhanced licence fee, which has been contested by the Assessee, actually crystallises.

27. Although a question of law was framed by the Court by order dated 11th January 2012 in some of the appeals, the questions of law were re-framed by the Court by order dated 27th November 2015. The said order reads as under:

> "1. These appeals by the Revenue under Section 260A of the Income Tax Act, 1961 are directed against the order dated 31st July 2009 passed by the Income Tax Appellate Tribunal ('ITAT) for the Assessment Years ('AYs) 1997-98 to 2000-01 and 2002-03.
>
> 2. As far as the Revenue is concerned the only question urged in its appeals is whether the licence fee payable by the Assessee to the Railways is an accrued liability?

3. However, as far as the Assessee is concerned, while he succeeded on the above issue before the ITAT, his grievance is that the ITAT has in the impugned order dated 31st July 2009 incorrectly understood the scope of the remand of the matter to it by the earlier order dated 11th December 2008 passed by this Court in ITA Nos. 1349 to 1354 of 2008 (*J.P. Gupta v. CIT*) and has erroneously negatived the Assessee's plea that the ITAT was also required to decide the issue of the validity of the assumption of jurisdiction under Section 147 of the Act and the consequent reopening of the assessment under Section 148 of the Act.

4. Aggrieved by the order dated 31st July 2009 to the extent the ITAT negatived the above plea, the Assessee filed appeals before this Court being ITA Nos. 98, 101,102,105 and 106 of 2012. The said appeals were by order dated 6th February 2012 permitted by this Court to be treated as cross objections to the Revenue's appeals against the order dated 31st July 2009 of the ITAT. That is how we have CM Nos. 6767, 6764, 6768, 6765 and 6766 of 2012 are listed with the above appeals of the Revenue.

5. On 11th January 2012, the Court framed the following question in the Revenue's appeal:

"Whether the order dated 31st July, 2009 of the Income Tax Appellate Tribunal is in conformity with and decides all aspects/issues remitted to them vide order dated 11th December, 2008 passed by the High Court and whether the tribunal was right in holding that the licence fee is an accrued liability?"

6. The above question is in fact in two parts and can be re-cast as under:

> (i) Whether the order dated 31st July 2009 is in conformity with and decides all aspects/issues remitted to them vide order dated 11th December, 2008 passed by the High Court
>
> (ii) Whether the ITAT was right in treating the licence fee as an

accrued liability?

7. As far as, question (i) above is concerned, a further question that would arise is: what should be the consequence, if the said question is answered in the negative i.e., if the Court holds that the ITAT's impugned order dated 31st July 2009 does not decide all the aspects/issues remitted to it by the order 11th December 2008 passed by this Court?

8. One obvious answer is that the matters would then have to be remanded to the ITAT to decide the issue that has been omitted to be decided viz., the validity of the assumption of jurisdiction under Section 147 of the Act. The other possible response is that since the matter has already been remanded once to the ITAT, instead of again remanding it to the ITAT, this Court should itself decide the said issue.

9. Having heard learned counsel for the parties, the Court is of the view that a further question should be framed with regard to the consequences of a possible negative answer to question (i) so that the resultant issue is decided by this Court itself.

10. Consequently the questions to be considered in these appeals of the Revenue as well as the cross-objections of the Assessee are reframed as under:

> (i) Whether the order dated 31st July 2009 of the ITAT is in conformity and decides all the aspects/issues remitted to it by order dated 11th December 2008 passed by this Court?
>
> (ii) If the answer to the above question is in the negative, was the assumption of jurisdiction under Section 147 of the Act for the AYs 1997-98 to 2000-01 and 2002-03, valid?
>
> (iii) Was the ITAT right in holding the licence fee payable to the Railways to be an accrued liability?

11. Learned counsel for the Revenue states that some more time might

be granted for addressing the re-framed questions.

12. List on 22nd January 2016."

28. The above questions as re-framed were in the Revenue's appeals for AYs 1997-98 to 2000-01 and 2002-03. In the Revenue's appeal for AY 2001-02 (ITA 933 of 2011) which did not involve the reopening of the assessment under Section 147 of the Act, the Assessee did not file any cross-objection. One issue raised by the Revenue in this appeal concerns the failure of the ITAT to follow the remand order dated 11th December 2008 of this Court and examine the circumstances under which the Revenue failed to challenge the ITAT's order dated 22nd November 2004 for AY 1995-96. Consequently for the said appeal the questions of law that are framed are:

> (i) Whether the order dated 31st July 2009 of the ITAT is in conformity and decides all the aspects/issues remitted to it by order dated 11th December 2008 passed by this Court?
>
> (ii) Was the ITAT right in holding the licence fee payable to the Railways to be an accrued liability"?

29. As far as AY 2004-05 is concerned, the Assessee's appeal is ITA 695 of 2010 and the Revenue's appeal is ITA 1535 of 2011. Both these appeals are, as already noted, directed against the common order dated 22nd January 2010 of the ITAT by which, both the Revenue's appeal as well as the Assessee's cross-objection against an order dated 5th February 2008 of the CIT (A) were dismissed. The CIT (A) had set aside the AO's order permitting a deduction of only Rs.1,05, 570 towards licence fee and allowed a deduction of Rs. 35,37,300. The CIT (A) also rejected the Assessee's enhanced claim of deduction of Rs. 2,82,03,985 by holding that since the

notice of the Northern Railway making that demand was served on the Assessee only on 14th September 2006 the liability had not crystallised during the AY in question i.e. 2004-05.

30. Although in ITA 695 of 2010 this Court had by an order dated 11th January 2012 framed a question, the question is required to be re-framed for both ITA 695 of 2010 and 1535 of 2011 as under:

> "Was the ITAT right in upholding the CIT (A) 's order whereby the deduction of Rs. 35,37,300 towards licence fee was allowed?"

31. ITA No. 424/2016, filed by the Revenue is against the order dated 1st February, 2016 passed by the ITAT for AY 2009-10. While admitting this appeal, the Court frames the following question of law for consideration:

> "Did the ITAT err in upholding CIT (A)'s order deleting the addition of Rs.2,76,21,682/- made by the AO by treating the licence fee as a contingent and not accrued liability?"

Submissions of learned counsel for the Revenue

32. Mr. Ashok Manchanda, learned Senior Standing Counsel for the Revenue, submitted as under:

(i) The order dated 28th March 1990 of the EO was entirely in favour of the Assessee and absolved it of any liability whatsoever to pay the enhanced licence fee. The pre-conditions for enhancing the licence fee in terms of the Railway circulars and guidelines were not met in the instant case and therefore the liability was only contingent. The right of the Northern

Railway to increase the licence fee is derived from the agreements dated 15th March, 1975 and 3rd January, 1978. It is "not unconditional or arbitrary and does not apply automatically." Reliance was placed on the decision in ***Oswal Agro Mills Ltd. v. CIT*** *[2014] 363 ITR 486 (Del)*. Reference was also made to the affidavit filed by the Assessee before the EO denying the liability to pay the enhanced licence fee as demanded by the Railways.

(ii) There was no stay of the EO's order despite successive challenges by the Northern Railway in the higher forums. Therefore, in terms of the decision dated 19th April 2017 of this Court in ITA No. 161 of 2016 (***National Agricultural Marketing Federation of India v. Commissioner of Income Tax, Delhi -IX***), there was no subsisting liability on the Assessee as regards enhanced licence fee.

(iii) The Assessee had not deposited a paisa more than Rs. 1,05,570/- with the Northern Railway towards licence fee notwithstanding the demand was in excess of Rs 45 crores. The Northern Railway Railways did not appear to have initiated steps to recover the enhanced licence fees. The only inference that could be drawn from the correspondence is that the amounts "were neither payable by the Assessee nor enforceable by the Railways."

(iv) The arrears for the period from 1st April, 1986 to 31st March, 1996 calculated by the Railways at Rs. 7.80 crore and all subsequent demands were actually a claim for damages. It was, therefore no better than a contingent liability. Reliance was placed on the decision in ***CIT v. Goverdhan Ltd. [1968] 69 ITR 675 (SC); Shree Sajjan Mills Ltd. v. Commissioner of Income Tax, M.P. [1985] 156 ITR 585 (SC); CIT v.***

Indian Smelting & Refinery Co. Ltd. [1998] 230 ITR 194 (Bom.) as affirmed in ***Indian Smelting & Refinery v. CIT [2001] 116 TAXMANN 606 (SC); Indian Molasses Co. (Private) Ltd. v. CIT [1959] 37 ITR 66 (SC); CIT v. Swadeshi Cotton & Flour Mills Pvt. Ltd. [1964] 53 ITR 134 (SC)***.

(v) The demand for enhanced licence fees was raised on the Assessee by the Northern Railway on 20th January, 1999 which fell in the accounting year relevant to AY 1999-00. Although the Assessee could have claimed this additional amount, as he did in the return for AY 1995-96 after receiving the letter dated 25th July 1995, the Assessee, in fact, did not claim either the enhanced licence fee of Rs. 1,75,12,416/- for AY 1999-00 or further arrears of about Rs.4.25 crore for earlier years. Instead, the Assessee only claimed Rs.35,37,300/- for AY 1999-2000. Thus, the Assessee himself was not following a consistent policy of claiming licence fee. If indeed the claim was based on accrual basis with the Assessee following the mercantile system, the Assessee would hardly forfeit the right to claim the said enhanced licence fee. The Assessee misrepresented before the Court that it was denying only the quantum and not the liability itself.

(vi) The Assessee withheld from the AO the fact of the EO's order dated 28th March, 1990 absolving him of any liability to pay enhanced licence fee and kept fraudulently availing the deduction based thereon. Even the judgment dated 18th December, 2007 of the learned ADJ, dismissing the appeal of the Railways, was not brought to the notice of the AO. Relying on the decisions in ***CIT v. Sun Engineering Works [1992] 198 ITR 297 (SC)***, it was contended that Section 148 of the Act was meant to bring escaped

income to tax and not to provide relief to the Assessee. In relation to the five AYs in respect of which the assessment was reopened under Section 147 of the Act, the Assesse was not, in fact assessed under Section 143 (3) of the Act. The returns were merely processed under Section 143 (1) of the Act. Thus, there was no question of change of opinion by the AO.

(vii) The order of the ITAT for AY 1995-96 was vitiated in law as the ITAT went beyond its jurisdiction to comment on the allowability of the arrears claimed for the subsequent AY 1996-97. This was a perverse conclusion reached by the ITAT ignoring the fraudulent acts and omissions of the Assessee. The said order dated 22nd November, 2004 was dishonestly procured by the Assessee and should well be ignored. Reliance was placed on the decision in ***A.V. Papayya Sastry v. Government of A.P. (2007) 4 SCC 221***. In the same breath it was contended that the said order and the orders dated 22nd July 2008 and 22nd January 2010 of the ITAT for multiple AYs and AY 2004-05 were in fact in favour of the Revenue inasmuch as they held that the liability to pay enhanced licence fee was only a contingent and not an accrued liability. Therefore, there was no need for the Revenue to challenge the order dated 22nd November 2004 of the ITAT for AY 1995-96.

(viii) In its order dated 31st July 2009 i paras 4, 7 and 8, the ITAT did discuss the reopening of the assessments under Section 148 of the Act and was within its rights to refuse to adjudicate the issue. Moreover even this Court by its order dated 11th December 2008 did not require the ITAT to examine this issue.

Submissions of learned Senior counsel for the Assessee

33. Mr. C.S. Agarwal, learned Senior Advocate appearing for the Assessee, pointed out that the order of the ITAT for AY 1995-96 disallowed the claim for that AY but directed it to be allowed to the year to which it pertained. This order became final with the Revenue not preferring an appeal against it. Even in the past, similar claims of deduction as an accrued and ascertained liability had been allowed in AYs 1990-91 to 1994-95. The claim of Rs. 13,32,286/-, representing ascertained liability for AYs 1991-92 and 1993-94 had been allowed under Section 143(3) of the Act by orders dated 31st August, 1992 and 29th November, 1995 respectively. He submitted that, on the rule of consistency as explained in several decisions, the Revenue could not possibly deny the claim by terming it as a contingent liability.

34. Mr. Agarwal stressed that the Assessee was not denying its liability but only questioning the quantification of the enhanced licence fees. The Assessee was following the mercantile system. Therefore, the liability is not contingent but an accrued one. In support of his submissions, he placed reliance on, *inter alia*, the decisions in ***Aggarwal and Modi Enterprises (Cinema Project) Co. Pvt. Ltd. v. CIT (2016) 381 ITR 469 (Del)*** and ***Agya Ram v. CIT (2016) 386 ITR 545 (Del)***.

35. On the principle of accrual of income, Mr. Aggarwal relied on the decisions in ***CIT, Bombay City-I v. M/s. Shoorji Vallabhdas & Co. [1962] 46 ITR 144 (SC); Morvi Industries Ltd. v. CIT (Central), Calcutta [1971] 82 ITR 835 (SC); Godhra Electricity Co. Ltd. v. CIT [1997] 225 ITR 746 (SC); CIT v. Excel Industries Ltd. (2013) 358 ITR 295 (SC)*** and ***E.D.***

Sassoon & Company Ltd. and Ors. v. CIT, Bombay City [1954] 26 ITR 27 (SC).

36. In support of his plea that, when there is a mercantile basis of maintenance of books of accounts, the same principles would have to apply for allowing the claim on accrual basis reliance was placed on ***CIT v. Woodward Governor India P. Ltd. [2009] 312 ITR 247 (SC); Keshav Mills Ltd. v. Commissioner of Income Tax, Bombay [1953] 23 ITR 230 (SC)*** and ***Taparia Tools Ltd. v. CIT [2015] 372 ITR 605 (SC)***. There may have been some inconsistency in the Assessee making a claim for enhanced licence fee in some of the AYs but a valid explanation was offered by the Assessee therefor. In any event there was no waiver by the Assessee to claim the deduction on accrual basis as it was indeed following the mercantile system of accounting.

37. Mr. Aggarwal disputed the contention of Mr. Manchanda that the order of the ITAT for AY 1995-96 was in favour of the Revenue. It was to the contrary. The said order allowed the deduction of Rs. 35,37,300/- as claimed by the Assessee in its entirety. Undeniably, the said order has not been challenged by the Revenue and has attained finality. In fact, appeal effect has also been given to the said order and yet there is no challenge. Mr Aggarwal also pointed out that the order dated 22nd July 2008 of the ITAT was set aside by this Court and cannot be relied upon by the Revenue.

38. Mr. Agarwal disputed the contention that the Assessee had kept back the fact of the EO's order from the AO or made any fraudulent claim for deduction of enhanced licence fee as alleged. He further disputed the

contention that the said order absolved the Assessee wholly from liability to pay the licence fee. Mr Aggarwal submitted that the essential requirement of Section 147 of the Act for reopening the assessment was not fulfilled in the present case. Reliance was placed on the decisions in ***Mohan Gupta (HUF) v. CIT (2014) 366 ITR 115 (Del)*** and ***ACIT v. Rajesh Jhaveri Stock Brokers P Ltd. (2007) 291 ITR 500 (SC)***. Mr. Aggarwal maintained that the impugned order dated 31st July 2009, of the ITAT, does not decide all the aspects remitted to it by the Court by the order dated 11th December, 2008. In particular, the validity of the reopening of the assessments under Section 147 of the Act was not examined.

Accrued or contingent liability?

39. The Court proposes to first examine the central issue that arises in the present appeal viz., is the liability of the Assessee to pay enhanced licence fee an accrued or a contingent liability?

40. To begin with, it is necessary to examine the basic concepts of 'accrued liability' and 'contingent liability'. This Court, in ***Aggarwal and Modi Enterprises (Cinema Project) Co. Pvt. Ltd. v. CIT*** *(supra)*, had occasion to examine, in depth, the said concept. Since the said decision does not appear to have been challenged further by the Revenue, the following passages in the said decision maybe usefully referred to for the purpose:

> "***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."

41. Turning to the facts of the present case, the undisputed fact is that the Assessee is following the mercantile system of accounting. It has to book the liability in the year in which it arises irrespective of whether it in fact discharges the liability in that year. In that sense, the liability to pay the enhanced licence fee would arise in the year in which demand is made or to which it relates irrespective of when the enhanced fee is actually paid by the Assessee. As explained in ***Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association*** (*supra*), the mere grant of stay of an order by a Court would not wipe away the liability.

42. In the present case, the liability of the Assessee to pay the enhanced licence fee has, far from being excused, sought to be enforced by the Northern Railway by repeated demands notwithstanding the EO's order dated 28th March 1990. As noted earlier, the Northern Railway has preferred claim for arrears of enhanced licence fees and damages to the tune of over Rs. 45 crores against the Assessee before the sole Arbitrator appointed by it. The demand is therefore very much alive and is subject matter of adjudication in arbitration proceedings.

43. The order dated 29th March, 1990 of the EO no doubt holds the termination notice dated 23rd March, 1988 and the claim for enhanced licence fee to be bad in law. However, it does not hold that there is no

liability on the Assessee to pay the enhanced licence fees as and when that is determined in accordance with law. The EO has in fact observed that the Northern Railway "should form a definite policy in revising the licence fee for a considerable period on uniform basis by incorporating the law of principles of natural justice to avoid unnecessary litigation thereby not causing losses of revenue to the railway administration under these circumstances and ensuring prompt and regular payment of licence fee by licencees." Also the EO ends the order by stating: "The applicant is free to revise the licence fee in accordance with the provisions of law and as per terms of agreement."

44. The order of the EO read in the correct perspective, requires the Northern Railway to follow the due process of law by giving a hearing to those adversely affected by the upward enhancement of liability before a decision is taken. Mr. Manchanda's characterisation of the said order, as negating the liability to pay the enhanced licence fee for all times to come does not flow on the above reading of the said order. On the other hand, it is more consistent with the plea of the Assessee that while he is not denying the liability to pay the licence fee he is only questioning the procedure involved in its revision which, according to him, is not in accordance with law. Consequently, the Court is also not able to agree with Mr. Manchanda that the Assessee has sought to mislead this Court by contending that he is not questioning the liability to pay licence fee but is only questioning the quantification or the quantum of the licence fee.

45. The facts of the present case are more or less similar to the facts in

Aggarwal and Modi Enterprises (Cinema Project) Co. Pvt. Ltd. v. CIT *(supra)* where it was held that the fact that there may have been a stay of the enhanced demand by a judicial order as an interim measure pending the final decision in the proceedings challenging the revision. That, however, would not amount to wiping out the liability itself.

46. While Mr. Manchanda may be right in pointing out that for AYs 2002-03 to 2005-06, the Assessee claimed only Rs. 35,37,300/- as deduction on the ground of enhanced licence fee although it could have claimed the further enhancement which had taken place by then, the fact remains that the enhanced liability claimed by the Railways by its letter dated 20th January 1999 and later by the letter dated 29th July 1999 subsisted and was being demanded. The explanation offered by the Assessee for this inconsistency in its claim is a plausible one. It does not deter from the position that being an accrued liability the enhanced licence fee can be claimed by it as a deduction in the year in which such liability arose.

47. In the arbitration proceedings, the claim of the Railways includes the claim for the enhanced licence fee as well as the arrears. The arbitration proceedings could end either in favour of the Railways or the Assessee. If it goes in favour of the Assessee it would then have no liability to pay such enhanced licence fee and in the year in which such final decision is rendered, the corresponding reversal of entries will have to take place in terms of Section 41(3) of the Act. All of this, in no way, extinguishes the liability of the Assessee to pay the licence fee. The Assessee would be justified in claiming the enhanced licence fee as deduction in the year in

which such enhancement has accrued even though the Assessee has not paid such enhanced licence fee in that year. This legal proposition is well settled.

48. In these proceedings, the Court is not required to determine whether the Northern Railway validly enhanced the licence fee from time to time. That would be the subject matter of the arbitration proceedings that are pending. What is to be seen is whether the liability to make that payment arose during the AYs in question. If it did, it would have to be allowed in that very year in which it arose if the Assessee is, as in the present case, following the mercantile system. As already noted the Railways has already filed its claim before the Arbitrator for the arrears of licence fees and 'damages'. As rightly held by the CIT (A), and concurred with by the ITAT in its order dated 31st July 2009, the mere characterisation by the Northern Railway of the amount claimed by it from the Assessee as 'damages' will not, in the context of the present case, make it any less an accrued liability. It is an expenditure incurred by the Assessee corresponding to the income he derives from using the land for the purposes of his business.

49. The Court is also not able to agree that the ITAT made a grievous error, in the order passed by it on 22nd November 2004, regarding the claim for enhanced licence fee as a deduction being allowable not in AY 1995-96 but in AY 1996-97. The argument that the ITAT may have exceeded its jurisdiction done not hold since the Revenue has, apart from not challenging the said order, implemented it fully by the consequent appeal effect order.

50. Mr Manchanda is not right in contending that the said order dated 22nd November 2004 of the ITAT for AY 1995-96 is in favour of the Revenue. A

careful reading of the said order in fact indicates to the contrary. The order dated 22nd July 2008 of the ITAT also does not help the Revenue any more since it has been set aside by this Court by the order dated 11th December 2008. The reason for the remand of the matters to the ITAT by the said order was that, according to this Court, the ITAT had not returned any finding on the issue whether the licence fee payable by the Assessee to the Railways for the use of the land could be regarded as an accrued liability or a contingent liability. This Court noted the specific plea of the Assessee that, for AY 1995-96, the ITAT had decided this issue in favour of the Assessee, by an order dated 25th November, 2004, construing the licence fee to be an accrued liability and, therefore, allowable as expenditure in the year of accrual.

51. For all of the above reasons the first issue is decided in favour of the assessee and against the Revenue by holding that the liability of the Assessee to pay enhanced licence fees for the AYs in question was an accrued liability which arose in the year in which demand was raised.

Reopening of assessments

52. The Court examines next the question of the validity of the assumption of jurisdiction under Section 147 of the Act by the notice dated 21st March, 1994 for AY 1997-98 and by the notice dated 20th May, 2004, for AY 1997-98 to 2000-01 and AY 2002-03.

53. At the outset the Court notes that indeed the ITAT on remand was required to examine this question which arose in the C.O.s filed by the Assessee in the appeals of the Revenue all of which were remanded to the ITAT by the order dated 11th December 2008 of this Court. Nevertheless,

the Court does not propose to remand the matters once again to the ITAT for this purpose.

54. The reopening of the assessments for the above AYs was premised on the failure by the Assessee to bring the EO's order dated 28th March 2000 to the notice of the AO. Further only on the basis of the AO's order dated 19th March 2004 for AY 2001-02 it has been inferred that there has been an escapement of income.

55. The fact is that in some of the AYs after the date of the EO's order, the assessments were completed under Section 143 (3) of the Act accepting the claim for enhanced licence fee on the basis of accrued liability. This has been already adverted to earlier in this order. There was therefore no fresh tangible material that came to light for the first time for the AO to form reasons to believe that income had escaped assessment. This Court has, therefore, no hesitation in coming to the conclusion that the assumption of jurisdiction under Section 147 of the Act seeking to reopen the assessment for the aforementioned AYs was not legally sustainable.

Conclusions

56.1 The questions framed by the Court by its order dated 27th November, 2015 in ITA Nos. ITA Nos. 711/2011, 787/2011, 936/2011, 934/2011, and 935/2011 for AYs 1997-98 to 2000-01 and 2002-03 are answered thus:

56.2 Question (i) is answered in the negative by holding that the order dated

31st July 2009 of the ITAT is in not conformity with and does not and decide all the aspects/issues remitted to it by order dated 11th December 2008 passed by this Court.

56.3 Question (ii) is answered in the negative i.e. in favour of the Assessee and against the Revenue by holding that the assumption of jurisdiction under Section 147 of the Act for the AYs 1997-98 to 2000-01 and 2002-03 was not valid.

56.4 Question (iii) is answered in the affirmative i.e. in favour of the Assessee and against the Revenue by holding that the ITAT was right in holding the enhanced licence fee payable to the Northern Railway was an accrued liability.

56.5. The Revenue's appeals ITA Nos. ITA Nos. 711/2011, 787/2011, 936/2011, 934/2011, and 935/2011 are dismissed and the corresponding C.Os/CMs of the Assessee are disposed of in the above terms.

57.1 The questions framed in Revenue's appeal for AY 2001-02, ITA 933 of 2011 are answered thus:

57.2 Question (i) is answered in the affirmative by holding that the order dated 31st July 2009 of the ITAT is in conformity with the order dated 11th December 2008 passed by this Court inasmuch as it does examine the circumstances under which the Revenue failed to challenge the order dated 22nd November 2008 of the ITAT for AY 1995-96 and the effect thereof.

57.3 Question (ii) is answered in the affirmative i.e. in favour of the Assessee and against the Revenue by holding that the ITAT is right in holding the licence fee payable to the Railways was an accrued liability. Resultantly the impugned order dated 31st July 2009 of the ITAT is affirmed and ITA 933 of 2011 is dismissed.

58. As far as the Assessee's appeal ITA 695 of 2010 and the Revenue's appeal ITA 1535 of 2011 for AY 2004-05 are concerned, the question framed is answered in the affirmative by holding that the ITAT was right in upholding the CIT (A)'s order whereby the deduction of Rs. 35,37,300 towards licence fee was allowed. Therefore, both Assessee's appeal ITA 695 of 2010 and the Revenue's appeal ITA 1535 of 2011 are dismissed.

59. The question framed in ITA No. 424/2016 by the Revenue for AY 2009-10 is answered in the negative i.e. in favour of the Assessee and against the Revenue by holding that the ITAT did not err in upholding CIT (A)'s order deleting the addition of Rs. 2,76,21,682/- made by the AO. The order dated 1st February, 2016 passed by the ITAT is accordingly affirmed and the appeal ITA 424 of 2016 by the Revenue is dismissed.

60. There shall be no order as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 18, 2017
dn/b'nesh