

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

RESERVED ON: 15.05.2024

DELIVERED ON: 27.06.2024

PRESENT:

THE HON'BLE MR. JUSTICE SURYA PRAKASH KESARWANI

AND

THE HON'BLE MR. JUSTICE RAJARSHI BHARADWAJ

ITA 125 of 2018

PRINCIPAL COMMISSIONER OF INCOME TAX-3, KOLKATA

VERSUS

M/S. ITC LIMITED

Appearance:

Mr. Omnarayan Rai, Adv.
Mr. Prithu Dudhoria, Adv.

.....for the Appellant

Mr. J. P. Khaitan, Sr. Adv.
Ms. Nilanjana Banerjee Pal, Adv.

.....for the Respondent

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A.F.R

JUDGMENT

Surya Prakash Kesarwani, J.:

1. Heard Sri Om Narayan Rai, learned senior standing counsel assisted by Sri Prithu Dudheria, learned junior standing counsel for the appellant and Sri J.P. Khaitan, learned senior advocate assisted by Ms. Nilanjana Banerjee Pal, learned advocate for the respondent.

Facts:-

2. The respondent assessee is engaged in various business activities. For the assessment year 2006-07 it disclosed in its return total income of Rs. 3041,42,53,870/- which was revised by return of Income dated 19.03.2008 to Rs. 3040,47,74,966/-. In assessment proceedings one of the additions made by the assessment officer was of Rs. 32.42 crore received by the assessee from EREL under an award/consent terms dated 11.05.2005 which the assessee claimed as long term capital gains while the assessing officer treated it as revenue receipt. The CIT (A) and the ITAT held it to be long term capital gain. Hence the revenue has filed the present appeal asserting that the aforesaid receipt of Rs. 32.40 crore is revenue receipt and not long term capital gain.



3. Under an agreement dated 03.05.1986, the owner namely, M/s. ELEL Hotels & Investment Ltd. (hereinafter referred to as 'ELEL') granted licence to the respondent herein i.e., ITC to operate the hotel 'Sea Rock' from the first day of July, 1986 for a period of 25 years with an option to renew the licence for a further period of 25 years on giving notice to ELEL of such intention of not less than 24 months before the expiry of the licence. The **licence fees was to be calculated and paid @ 23% on the gross turnover of the Sea Rock Hotel to ELEL for each financial year**, subject to certain conditions. The respondent had right to terminate the contract by giving not less than 24 calendar months notice to ELEL. The respondent, ITC was not having any right, title or interest in the hotel in question. Clause 18.2 of the agreement provides that 'notwithstanding the foregoing, if ITC claims tenancy or leasehold interest in ELEL's property or any part thereof or any right, title or interest inconsistent with or contrary to the sole and exclusive ownership and possession of ELEL of the property or any of its assets including additions, renovations or refurbishings made hereafter, ELEL shall be entitled to call upon ITC to purchase the Hotel at or the mutually agreed price of Rs.15 lakhs per room irrespective of its use or Rs.75 crores whichever is higher and upon ELEL exercising such option under written intimation to ITC, ITC shall



be bound and liable to purchase the Hotel and pay the consideration monies at the rate aforesaid in ten annual instalments subject to ITC setting off the deposit of Rs.7.75 crores pro rata from each of the said annual instalments together with interest @15% per annum without prejudice to ELEL's right to receive the licence fees in addition to interest stated hereinabove as agreed between ITC and ELEL till such time entire purchase price is paid to ELEL.

4. Subsequently, the respondent entered with ELEL a settlement agreement dated 11.05.2005 under which civil litigations going on in certain civil suits and some other disputes were settled on a consideration of Rs.43.10 crores out of which the settlement amount relating to the licence in question as referable to the agreement dated 03.05.1986, was determined at Rs.32.42 crores which was again reduced in writing by an award of the sole Arbitrator (Mr. H. Suresh) dated 11.05.2005.
5. The aforesaid amount of Rs.32.42 crores is the amount in dispute in the present appeal. While the respondent, ITC treated this amount as a capital receipt and accordingly paid tax on capital gain. The Assessing Officer treated it as revenue receipt and according levied tax by assessment order dated 31.12.2009 under Section 143(3) of the Income Tax Act, 1961 (hereinafter



referred to as 'the Act, 1961') relating to the assessment year 2006-07.

6. In appeal filed by the respondent ITC before the CIT[Appeal], the appeal was allowed and the receipt of the aforesaid amount of Rs.32.42 crores was held to be a capital receipt. Aggrieved with the order of the CIT[A], the revenue filed an appeal being ITA Nos.253 and 336/KOL/2011 which has been dismissed by the Income Tax Appellate Tribunal, Kolkata Bench "B".

7. Aggrieved with the aforesaid impugned order of the ITAT, the revenue has filed the present appeal which has been admitted by this court by order dated 12.7.2018, on the following **substantial question of law:**

"Whether receipt of money by the Assessee on account of relinquishment of its right to operate a hotel as a licensee would constitute capital receipt exposing the Assessee to capital gains tax or the same shall be treated as business receipt?"

Operating Licence Agreement dated 03.05.1986:-

8. The licence agreement in question is most relevant for the purposes of the controversy involved in this Appeal which is reproduced below:-

"THIS AGREEMENT made at Bombay this third day of MAY One Thousand Nine Hundred and Eighty Six between EDEL HOTELS &



INVESTMENTS LIMITED, a Company having its registered office at Hotel SeaRock, registered under the Indian Companies Act, (hereinafter referred to as "EHIL") of the One Part and I.T.C. Limited, a Company having its registered office at Virginia House, 37, Chowringhee, Calcutta 700071, and registered under the Indian Companies Act (hereinafter referred to as "ITC") and having its regional Headquarters at Bombay of the Other Part.

WHEREAS:-

(a) EHIL, has informed ITC that they are seized and possessed of and otherwise fully entitled to the "Searock Hotel" located at Land's End, Bandstand, Bandra, Bombay 400 050, and more particularly described in the Schedule hereto :

*(b) **ITC** on the aforesaid representation has **entered into this Operating Licence Agreement** on the terms and conditions hereafter mentioned.*

*(c) **ITC is already rendering services** to SeaRock Hotel (hereafter referred to as "the said Hotel") under an Agreement dated 1st October 1983, which by this presents stands superseded with effect from 1st July, 1986.*

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

ARTICLE I: DEFINITION

For the purpose of this Agreement the terms and expressions defined hereunder in this Article shall have the meanings herein specified unless the context otherwise required.

*1.1. "**Hotel**" shall mean the premises consisting of all areas both Land and Sea, leased to Messrs. Luthria & Lalchandani by the Government of the State of Maharashtra under an instrument of lease dated 5.5.1976 and sub-leased to EHIL by Messrs. Luthria & Lalchandani by instrument dated 3rd August 1976 and the entire structure erected on the lands and all building equipments installed therein presently named as Hotel SeaRock, Playmate Club and Rock International Club (which is closed now) for the*



purpose of the Hotel, including, but not limited to, all plumbing, heating and lighting equipment, elevators, air-conditioning equipment, exterior and interior designs, telephone equipment, furniture and equipment, operating supplies, and all related facilities, constructed, installed or kept in or appurtenant to the Hotel, as also all additions, alterations, extensions modifications thereto, as may be effected, but excluding Suite 2144, Studio Sea Rock and Registered office of the Company.

1.2 "Furniture and Equipment" shall mean all furniture, furnishings and moveable equipment, except operating supplies, at any time installed or kept in the Hotel for use in connection with the operation of the Hotel.

*1.3 **"Operating Supplies"** shall mean all silver, linen, chine, cutlery, glass, cooking utensils, guest room supplies and consumable supplies, **used or intended for use in connection with the operation of the Hotel.***

1.4 "Agreement" or "This Agreement" shall mean this instrument as originally executed and delivered, if amended or supplemented as so amended or supplemented.

1.5 The "Term of the Agreement" shall mean the term of this Agreement as hereinafter provided in Article IV but subject to earlier termination or determination thereof in terms of Article XVII hereof.

*1.6 The term **"Gross Turnover"** of the said Hotel means total amount of revenue as herein below defined. "Revenue" shall mean revenue on account of rooms, restaurants, banquet parties, poolside, snack bar, bar-b-cue, public rooms, function rooms, laundry, shopping area rental, entertainment show, counter space, show windows, showcases, barber shop and beauty shop, as well as any other income **which directly accrues from operating the said Hotel but after excluding therefrom:***



(a) commissions or discounts, paid or payable to Travel Agents, Tour Operators, Group Leaders, Credit Card Companies/Agencies, making bookings in the said Hotel;

(b) Complimentaries on account of Rooms, Food & Beverages, etc. as decided by Regional Director of Welcomgroup;

(c) Receipts of Capital nature:

(d) Sales Tax, Luxury Tax and other taxes, levies and assessments pertaining to and levied upon the operating of the Hotel including without limitation the sales of the Hotel which are leviable at present or may be levied by the Government from time to time;

(e) Service Charge collected on behalf of the employees and staff.

It is agreed that Bad Debts will be to the cost of ITC.

1.7 "Financial Year" shall mean the year from 1st July to 30th June or the year to coincide with the Financial Year of ITC.

1.8 The term "**Auditors**" shall mean the **statutory Auditors appointed by EHIL**, including Messrs. Lovelock & Lewes and or A.J. Kotwal & Co., or such other Auditors as EHIL may appoint **in consultation with ITC from time to time.**

1.9 The term "non-operational period" shall, mean the period during which the Hotel becomes non-operational due to acts of force majeure such as but not limited to fire, earthquake, floods, acts of God, Industrial unrest and disputes, war, calamities, requisition by the Government, etc.

1.10 The term "Licence Fee" shall mean the amounts agreed to be paid to EHIL under this Agreement as per Article V.

ARTICLE II:



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

2.2 It is hereby expressly agreed and understood by the parties that this agreement shall and is meant to confer full and unfettered right to ITC to operate the said Hotel subject to no breach of any of the terms on the part of ITC under this agreement. EHIL hereby irrevocably during the subsistence of this agreement or any renewal thereof, authorise: ITC to do and execute all such acts, deeds, matters, things and documents **to conduct and operate the said Hotel**, the intention being that ITC shall have an unfettered right **to run the said Hotel**, so long as ITC does not commit any breach or default of any terms agreed under these presents.

2.3 EHIL shall execute from time to time or as may be required by ITC one or more specific **powers of Attorney** or such other documents or instruments as ITC may require in order **to conduct, operate and run the said Hotel**. ITC hereby indemnifies and keeps EHIL indemnified against any loss or damage EHIL may sustain or any costs, charges and expenses EHIL may suffer as a result of any irregular or illegal or malafide exercise of the powers in the Power of Attorney to be executed by EHIL in favour of ITC.

2.4 **These Powers of Attorneys will not include powers to borrow, sell or mortgage Hotel and EHIL's property.**

ARTICLE III: EMPLOYMENT OF WORKMEN, STAFF, ETC.

3. **All workmen, employees and members of the staff including managerial staff as may be decided by ITC shall be on the payroll of EHIL and their salaries, wages and other emoluments and perquisites shall be granted and disbursed**



by ITC, but expressly for and on behalf of EHIL at ITC cost and EHIL hereby expressly and irrevocably authorises ITC to recruit such workmen, employees and members of the managerial staff and terminate their service as ITC may in their absolute discretion think fit. At the time of termination of this agreement any Manager of EHIL appointed by ITC and not required by EHIL shall be taken over by ITC and transferred from CHIL at ITC's cost. The salaries and retrenchment compensation, perquisites, and other claims etc. payable to workmen, employees and members of the staff will be a part of operating expenses to be borne and paid by ITC, and ITC indemnifies EHIL against any claim or loss suffered by EHIL on above account for the periods after the commencement of this agreement.

ARTICLE IV: DURATION OF THE AGREEMENT

4.1 The Licence hereby granted shall be in force for a period of 25 years commencing from the 1st day of July 1986 subject to ITC not committing any breach of terms and conditions of this agreement.

4.2 ITC shall have the option to renew this Licence for the said Hotel for a further period of 25 years on giving notice in writing of such intention to EHIL of not less than 24 months before the expiration of the licence hereby granted and EHIL shall renew such Licence on the same terms and conditions as are herein contained, provided that at the time of such renewal there is no continuing breach of the terms of this Agreement on the part of ITC which remains to be remedied.

ARTICLE V: LICENCE FEE

5.1 **ITC shall pay to EHIL a Licence Fee calculated at the rate of 23% (twenty three per cent) on the gross turnover of SeaRock Hotel to EHIL per each financial year, such gross turnover to be certified by the Auditors, and the same shall be final and binding on the parties.**



5.2 ITC shall pay the Licence Fee in arrears. The Licence Fee will become due and payable to EHIL when the Licence Fee accumulates to Rupees One Crore calculated as per Article 5.1 and such payment shall be made by ITC within ten days from the date of such accumulation. The Auditors Certificate in this behalf will be final and binding on the parties.

5.3 The payment of such fee shall be secured, by an irrevocable revolving Bank Guarantee in favour of EHIL for an amount of Rs. 1.50 crores (Rupees One Crores Fifty Lakhs only) during the tenure of the agreement from time to time.

5.4 **ITC will endeavour that minimum annual growth of 5% (five percent) of the gross turnover over the base year, i.e. the year ending 30th June 1986, is achieved from year to year and should in any financial year such growth be not achieved, over the base year, then and in such cases ITC will pay EHIL Licence Fee at the stipulated rate of 23% (twenty three percent) of the gross turnover and an additional 2% (two percent) on gross turnover for that financial year in which growth falls short by 5% (five percent) over the base year. Provided, that should the growth in any financial year be 5% (fifteen percent) or more over the growth which should have been achieved under the foregoing provision, then ITC shall be entitled to deduct from the Licence Fee the amount equivalent to 0.75% (i.e. the net Licence Fee payable will be 22.25%) of the gross turnover payable to EHIL and if the growth is 20% (twenty percent) or more as stated herein, then the deduction in fee will be 1% (i.e. the net Licence Fee payable will be 22%).**

ARTICLE VI: SECURITY DEPOSIT

6.1 ITC shall place as **Security Deposit for the specific performance of this agreement** immediately on signing of the Agreement the sum of Rs. 7.75 crores (Rupees Seven Crores and Seventy Five Lakhs) **interest-free said Deposit will be adjusted and appropriated towards payment of Licence Fee for the last 24 months or thereabout prior to the expiry or**



termination of this Agreement. *Provided that ITC is hereby expressly authorised by EHIL to pay in liquidation of EHIL's indebtedness to Financial Institutions (e.g. IFCI, IDBI, ICICI) out of the said Deposit of Rs. 7.75 Crores (Rupees Seven Crores Seventy Five Lakhs) a sum of Rs. 60 Lakhs (Rupees Sixty Lakhs), together with any interest accrued thereon. The Security Deposit shall not be adjusted and appropriated towards payment of Licence Fee for the last 24 months if this Agreement is renewed for a further period of 25 years in which case the Security Deposit will continue to remain as Security Deposit with EHIL during the renewed period of 25 years with a similar provision for adjustment of Deposit against Licence Fee in terms of Article 6.1.*

6.2 Before placing the aforesaid Security Deposit of Rs. 7.75 Crores (Rupees Seven Crores Seventy Five Lakhs) mentioned in Article VI above, ITC shall deduct an amount of Rs.1.75 Crores (Rupees One Crore Seventy Five Lakhs) placed as Security Deposit under the said superseded Agreement dated 1st October 1983.

ARTICLE VII: ASSISTANCE BY ITC FOR BANKING FACILITIES

7.1 **ITC shall either advance to EHIL a loan of Rs. 3.50 Crores** (Rupees Three Crores and Fifty Lakhs) at the interest rate at which ITC borrows from its Bankers including all costs and charges incidental thereto, **or ITC may arrange for EHIL banking facilities in the like amount of Rs. 3.50 crores** on such terms and conditions as the Bank may require including creation of Security on the Assets of EHIL. **EHIL shall bear all costs of and expenses relating to such banking facilities.**

7.2 **The aforesaid advance of Rs. 3.50 Crores** (Rupees Three Crores and Fifty Lakhs) if advanced by ITC, together with interest together with all costs and expenses relating thereto **shall be immediately adjusted against monthly Licence Fee referred to in Article V above.**

7.3 If, however, instead of extending the said advance, ITC arranges banking facilities as provided in Clause 7.1 above, then



such facilities shall be for a duration of 18 months from the date hereof and the said advance shall be adjusted immediately against the monthly Licence Fee until liquidation of the advance.

ARTICLE VIII: PERMISSIONS, LICENCES, ETC.

8.1 EHIL agrees to leave with ITC all Agreements, Permissions, and Licences for purpose of operating the said Hotel and will assist ITC in obtaining such other Permissions and Licences as may be required from time to time.

8.2 **EHIL agrees that it will be EHIL's responsibility to keep in force and renew all Licences and permissions** and ITC agrees to pay the Fees for these renewals, and perform terms and conditions of all Licences and Permissions applicable to the said Hotel and keep them in force and alive on EHIL's behalf.

8.3 EHIL agrees to assign their Agreement in to dated 19.10.1984 with Sheraton International Inc. (Sheraton) to ITC subject to the approval of Sheraton, and ITC shall be authorised to alter, amend, renew or cancel the agreement in terms thereof. ITC indemnifies EHIL against any loss or claim arising from any such action on the part of ITC.

8.4 All of the terms and provisions of this Agreement shall be binding upon and innure to the benefit of the parties hereto and their respective successors and assigns.

ARTICLE IX: RENOVATIONS AND REFURBISHINGS ETC.

9. All renovations, alterations, refurbishings, equipment replacements and capital expenditure shall be undertaken by ITC at its own cost. **The said movable Assets will belong to ITC and depreciation on the same will be claimed by ITC.** However, it is mutually agreed that in the event of termination of this Agreement in the manner referred to in Article XVII below or on **expiry of this Agreement by efflux of time the Assets will belong to EHIL and ITC shall have no right to them.** An inventory of Fixed Assets belonging to EHIL as on the 1st day of July 1986 will be prepared and in the event of replacement of all or



any of these Assets by ITC the Assets so replaced shall belong to EHIL on the termination of this Agreement or upon expiry by efflux of time. In the event ITC replaces any item of machinery or equipment then ITC shall be entitled to dispose off any replaced machinery and EHIL authorises ITC to recover such sale proceeds.

ARTICLE X : INSURANCE

10.1 EHIL covenants and agrees that it will procure and maintain at all times during the subsistence of this Agreement or any renewal thereof, adequate insurance against fire and all other risks and calamities as mutually agreed. The policies for such insurance shall include ITC as EHIL's nominee. Insurance premium shall be paid and borne by ITC subject to Article XI hereunder. EHIL shall deliver to ITC notarially certified copies of policies and produce for inspection receipts for the insurance premium. ITC will take out a Loss of Profit Insurance as per the terms of the Insurance Company with the objective of reimbursing the monthly Licence Fee payable to EHIL in terms of Article V. Premium will be paid by ITC.

10.2 EHIL and ITC shall take all necessary precautions to prevent the policy or policies of insurance from lapsing or being cancelled or invalidated.

10.3 Neither party shall settle or refer to arbitration any claim under any of the foregoing policies without the prior written consent of the other party.

ARTICLE XI: TITLE TO THE HOTEL AND OTHER COVENANTS RELATING THERETO

*11. EHIL hereby authorises ITC to pay all rents, rates and taxes and insurance premium as well as take out appropriate insurance policies on EHIL's behalf at ITC's cost throughout the subsistence of this agreement. Provided, however, that a block amount of **Rs.10 Lakhs (Rupees Ten Lakhs) per annum shall be borne by EHIL during the pendency of the agreement to meet expenses towards Rents, Rates, Taxes and Insurance.** EHIL shall pay the said sum of Rs.10 Lakhs (Rupees Ten Lakhs) per annum to ITC*



at the end of each financial year. Provided, however, that Income Tax, Wealth Tax on EHIL'S Licence Fees, and Profits from all other sources shall be.

ARTICLE XII: ASSIGNMENT

12. **ITC shall have right to assign or transfer all rights and benefits of this Agreement to any of the ITC Group of Companies only, and none else** but without in any way absolving ITC from its monetary obligations and warranties Bank Guarantees under these presents, and obtains necessary formal confirmation from the said Assignees that they will abide by all the terms and conditions of these presents.

ARTICLE XIII: ASSETS AND LIABILITIES

13. It is agreed between EHIL and ITC that the current Assets and Liabilities of the said Hotel will be as per a statement to be drawn up and agreed to by both EHIL and ITC reflecting the state of affairs as on 30th June 1983. The Net Working Capital figures as on 1st July, 1986 will be recorded and at the end of the licence period or termination the Net Working Capital will be determined, evaluated and recorded. The difference in Net Working Capital will be mutually settled by the parties. **ITC on termination of this Agreement under any circumstances shall return to EHIL all the above Assets in good condition subject to normal wear and tear/ shown in the statement /as or their replacement at the end of the period.**

ARTICLE XIV: DISCLOSURE

14. EHIL shall disclose the existence of this Agreement to any Lender, Financial Institution and/or Banker etc. as may be required.

ARTICLE XV: LIABILITIES

15. **Nothing contained herein shall be construed to make the parties hereto partners or joint venturers or to render either, party hereto liable for the debts and obligations of the other party hereto except as herein expressly provided.**



ARTICLE XVI: ARBITRATION

16. All questions, differences and disputes arising between the parties hereto relating to any matter under or touching this Agreement will be referred to arbitration in accordance with and subject, to the Arbitration Act, 1940 or any statutory re-enactment or modification thereof. The venue of Arbitration shall be Bombay and the courts in Bombay alone shall have jurisdiction over such arbitration.

ARTICLE XVII : MISCELLANEOUS

17.1 In non-operational period due to acts of force majeure such as but not limited to fire, earthquake, floods, acts of God, Industrial unrest and disputes, war, calamities, requisition by the Government, etc., as a result of which the said Hotel is closed or otherwise becomes non-operational, Licence Fee will cease to be payable to EHIL by ITC. But the same shall be payable to EHIL from the Loss of Profit Insurance claim. The period during which the said Hotel remains closed or otherwise becomes non-operational as aforesaid, the said 5% (five percent) growth in Gross Turnover as mentioned in Clause 5.4 shall be excluded.

17.2 **EHIL will be entitled to terminate this Agreement if the growth in turnover is less than the average of 5% (five percent) over the aggregate period of 10 years.** It is, however, agreed that the 5% (five percent) growth computation will be excluded from the said computation during the non-operational period or periods. The Security Deposit of Rs. 7.75 Crores (Rupees Seven Crores Seventy Five Lakhs) will be returned by EHIL to ITC immediately as recited in Article 17.3.

17.3 EHIL will be entitled to terminate this Agreement if there is any continuing default in payment of the Licence Fee or Bank Guarantee becomes invalid or ineffective for any reason or ITC commits a breach of any terms and conditions of this Agreement or an order is made or resolution passed for compulsory or voluntary of ITC. winding up EHIL before exercising the said right will give a notice of not less than three calendar months to ITC to rectify the said default. In case the said default is not so rectified, EHIL will



terminate the Agreement without further notice. **The Security Deposit of Rs. 7.75 Crores** (Rupees Seven Crores Seventy Five Lakhs) **will be returned by EHIL to ITC immediately after deducting therefrom all unpaid Licence Fee and other dues agreed by the parties under this Agreement, including any unpaid bills for which EHIL is held legally liable subject to Article 13 above.**

17.4 Notwithstanding anything herein contained, ITC will be entitled to terminate the contract by giving to EHIL not less the 24 calendar months notice and the Security Deposit lying with EHIL will be adjusted towards the payment of the Licence Fee to EHIL, during this period, and any balance lying with EHIL shall be refunded to ITC.

17.5 ITC shall have the first option to take the Dubbing Theatre on a leasing agreement.

17.6 ITC will continue to pay within the due date Expenses for the lease arrangement entered into with Sundaram Finance Limited only.

17.7 EHIL shall regularly pay interest and other dues in respect of loans taken by EHIL for the purpose of the said Hotel. Should there be any breach of any of the terms and conditions then and in such case EHIL shall indemnify and keep indemnified ITC from and against all actions, claims, demands, costs, charges and expenses.

17.8 ITC shall operate and run the Hotel in accordance with all applicable laws, ordinances, regulations, rules, etc.

17.9 **ITC shall pay and discharge all operating expenses,** charges, fees and taxes that may be levied or imposed by any authorities in respect of the said Hotel except Income Tax, Wealth Tax, etc. payable by EHIL under the provisions of the Income Tax Act/Wealth Tax Act. etc.



17.10 ITC shall diligently and faithfully operate and run the Hotel with due regard to the safety and security and preservation of the Hotel and all property and assets of EHIL.

17.11 ITC shall indemnify and keep indemnified EHIL from and against non-payment of any amounts payable and debts and liabilities in respect of the Hotel and likewise EHIL shall indemnify and keep indemnified ITC from and against all liabilities, debts, or obligations against EHIL in respect of the Hotel.

17.12 The Gross Turnover of the Hotel will be ITC's Income which shall be applied for payment of Licence Fee, payable to EHIL and all operating expenses. Proper records thereof shall be maintained by ITC, and shall be open for inspection to EHIL.

17.13 ITC shall provide on a monthly basis statements/ returns of the Gross Turnover and the requisite papers in support thereof and, permit EHIL to inspect the books of accounts, records, etc.

17.14 ITC shall not sell, lease, mortgage, charge or encumber any of the property or assets of EHIL and keep them free from all attachments, claims, demands, etc., and likewise EHIL shall not sell, mortgage, charge or encumber any of the Hotel property to the detriment of ITC.

17.15 EHIL will make available the entire Terrace Floor within three months of signing of this Agreement to enable ITC to extend the Hotel facilities and/or guest rooms. The registered office and M.D.'s secretary shall be shifted to new block.

17.16 ITC shall not do any act, deed, matter or thing whereby the insurance coverage under any of the Policies of Insurance is prejudiced or adversely affected or becomes ineffective or invalid.

ARTICLE XVIII: NO TENANCY RIGHTS CREATED



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

18.2 Notwithstanding the foregoing, if ITC claims tenancy or leasehold interest in EHIL's property or any part thereof or any right, title or interest inconsistent with or contrary to the sole and exclusive ownership and possession of EHIL of the property or any of its assets including additions, renovations or refurbishings made hereafter, **EHIL shall be entitled to call upon ITC to purchase the Hotel at or the mutually agreed price of Rs. 15 Lakhs (Rupees Fifteen Lakhs) per room irrespective of its use or Rs. 75 Crores (Rupees 'Seventy Five Crores) whichever is higher and upon EHIL exercising such option under written intimation to ITC, ITC shall be bound and liable to purchase the Hotel and pay the consideration monies at the rate aforesaid in 10 (ten) annual instalments subject to ITC setting off the deposit of Rs. 7.75 Crores (Rupees Seven Crores Seventy Five Lakhs) pro-rata from each of the said annual instalments together with interest at the rate of 15% per annum without prejudice to EHIL's right to receive the Licence Fee in addition to interest stated hereinabove as agreed between ITC and EHIL till such time entire purchase price is paid to EHIL as recited hereinabove.**

ARTICLE XIX: ADDITIONAL F.S.I.

19. EHIL agrees that any F.S.I. of the said Hotel not consumed as of today or which may become available here- after at any time



shall be used only on expanding the activities of the Hotel. EHIL has authorised ITC to carry on any construction including lifts as per sanction of the BMC attached. **Total construction including additional construction shall be the property of EHIL.** EHIL authorises ITC to instal the elevators in accordance with the plans approved by BMC. **The cost of civil construction for erecting the lifts and lift lobbies shall be to the account of EHIL and EHIL shall reimburse ITC within 10 days from the completion of the work as certified by the Auditors.**

20. EHIL shall not be entitled to sell and/or deal with or dispose off or mortgage or charge the Hotel or any part thereof to the detriment of ITC.

21. The Bank Guarantee will be absolute, irrevocable, unconditional, revolving and continuing during the tenure of this Agreement and thereafter as provided in the Clause 22 of these presents and will guarantee regular and prompt payment of the Licence Fee to EHIL under Clause 5 of these presents immediately upon demand and without.

22. The said Bank Guarantee shall also guarantee to EHIL payment of the Licence Fee in the manner aforesaid notwithstanding termination or expiry of the Agreement by efflux of time if ITC fails or refuses to leave or remove themselves and their workmen and agents from the Hotel and such Bank Guarantee for payment of Licence Fee will continue until ITC actually leaves the property and provides EHIL with a declaration that they have done so without claiming any right title or interest in the Hotel or other property and Assets of EHIL.

IN WITNESS WHEREOF the Parties hereto have hereunto set their hands the day and year first above written.

THE FIRST SCHEDULE ABOVE REFERRED TO: All that piece and parcel of land bearing Survey No. B 1150 and measuring 30960 sq. mtrs., which includes land-in-sea and the boundaries of the same are:-



On the North - Arabian Sea

On the South - Arabian Sea

On the West - Arabian Sea

On 'the East - Byramji Jijibhoy Road

The Extract from the property Register Card is attached hereto.

THE SECOND SCHEDULE ABOVE REFERRED TO:

As per the Statement to be drawn up and agreed to by the parties.”

9. The Settlement Agreement dated 11.05.2005 between ELEL and ITC is reproduced below:-

“SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT made this 11th day of May Two Thousand and five between:

ELEL HOTELS AND INVESTMENTS LIMITED, a Company incorporated under the provisions of the Companies Act, 1956 and having its Registered Office at 9th Floor, Hotel Sea Rock, Behramji Jeejeebhoy Road, Bandstand, Bandra (W), Mumbai- 400 050, hereinafter called "**ELEL**" (which expression shall unless it be repugnant to the context or meaning thereof be deemed to include its successors and assigns);

AND

ITC LIMITED, an existing Company under the provisions of the Companies Act, 1956 Howe and having its Registered Office at Virginia House, 37, J.L. Nehru Road, Kolkata - 700 071, hereinafter referred to as "**ITC**" (which expression shall unless it be repugnant to



the context or meaning thereof be deemed to include its successors and assigns);

ELEL and **ITC** are also referred to herein individually as "Party" and collectively as "Parties".

WHEREAS:

1) Pursuant to certain licence / operating agreement(s) between Parties [the last of which is an Operating Licence Agreement ("Operating Licence") of May 3, 1986] in respect of Hotel Searock, including Playmate Club and Rock International Club (both non-operational) located at Land's End, Bandstand, Bandra, Bombay 400 050 (the "Hotel") ITC operated the Hotel (Rock - International Club was non-operational from inception," the Playmate Club has been non-operational for some years);

2) ELEL, with the consent of the owners, has permitted ITC to use and occupy Flat No. 101 and Flat No. 102 situated at Bandra Tideways Co-operative Housing Society Ltd., St. John Baptist Road, Bandra (West), Mumbai-400 050 (collectively the "**Flats**" and individually the "**Flat**");

3) **Various disputes have arisen between the Parties in relation to / concerning the Hotel and/or the Operating Licence** in respect of which Suit No. 3885 of 1993, Suit No.3886 of 1993, Suit No.1877 of 1995 and Suit No. 3832 of 1995 (collectively the "Suits" and individually the "Suit") have been filed before the High Court, Mumbai;

4) By Order (s) dated December 21, 1998 **the disputes covered by the Suits** (excluding Suit No. 3832 of 1995) **have been referred to arbitration (the "Arbitration") of Mr. Justice H. Suresh (Retd.) (the "Arbitrator")**;

5) **The Parties have fully and finally compromised, adjusted and settled all Disputes and desire to record the terms thereof by this Settlement Agreement;**



IN CONSIDERATION of the mutual covenants and other good consideration (the sufficiency and validity of which each Party acknowledges) this Settlement Agreement **RECORDS AND CONFIRMS:**

DEFINITIONS

1. In this Settlement Agreement, unless the context otherwise requires:

a) "Affiliate" means:-

(i) in relation to a Party, any Person controlling or controlled by or under common control with the Party; and

(ii) specifically, in relation to ELEM:-

(I) means each of Excalibur Assets and Capital Management Pvt. Ltd. ('Excalibur') and Sheena Investment Pvt. Ltd. ('Sheena') both with registered offices at 9th floor, Hotel Searock, Behramji Jeejeebhoy Road, Bandstand, Bandra (West), Mumbai-400 050,

(II) means Shyam Bhajanmal Luthria, Stanford Investments and Properties Private Limited and Deepak Shyam Luthria and

(III) includes any Person claiming by through under or in trust for (whether by way of sale disposal assignment relinquishment or otherwise) any present or former shareholder(s) or director(s) or any of his/her/their Relative(s) or legal representatives of the Persons mentioned in (ii) (I) and (II) above;

b) "Arbitration" has the meaning assigned in Recital 4;

c) "Arbitrator" has the meaning assigned in Recital 4;

d) "Award" shall mean the award of the Arbitrator on the Consent Terms;

e) "Consent Terms" has the meaning assigned in Clause 4;



f) **"Disputes"** means **all allegations, claims, counter-claims and disputes forming the subject matter of the Suits and/or the Arbitration and includes all allegations, claims, counterclaims and/or demands between the Parties, of any nature, arising, in any manner, out of or touching or relating to the Hotel and/or any and all arrangements / understandings / agreements relating to the Hotel including the Operating Licence;**

g) "Effects" mean signage materials and other goods and property bearing the 'ITC' or 'Welcomgroup' or other name(s) / brand(s)/ logo(s)/ mark(s) used by or belonging to ITC;

h) "Employees" has the meaning assigned in Clause 23;

i) "Flat(s)" has the meaning assigned in Recital 2;

j) "Hotel" has the meaning assigned in Recital 1;

k) "Licence(s)" means all statutory consents, licences, approvals and authorisations relating to the operation of the Hotel;

l) "Person" means a natural or juristic entity and includes any partnership, trust or other association;

m) "Record" means files papers books of accounts vouchers and documents including data stored in any electronic form used by or belonging to ITC;

n) "Relative" shall have the meaning as ascribed by the Companies Act, 1956 including any repeal and reenactment thereof;

o) "Settlement Agreement" means this Settlement Agreement together with all Schedules/Annexures;

P) "Stores" has the meaning assigned in Clause 19;



q) "Suits" has the meaning assigned in Recital 3;

1.1 Words elsewhere defined / explained in the Agreement shall have the meaning so ascribed;

1.2 Words denoting the singular shall include the plural and vice versa;

1.3 Words denoting any gender include all genders;

1.4 Unless the context otherwise requires reference to clause sub-clause or schedule or annexure is to a clause sub-clause or schedule or annexure (as the case may be) of or to this Settlement Agreement;

SETTLEMENT

2. **All Disputes are fully and finally adjusted, compromised and settled.** No Disputes or claims whatsoever are now outstanding between the Parties (including any director(s)/officer (s)/ employee (s) of the other Party);"

3. **This Settlement Agreement is by way of settlement compromise and adjustment and is not** (nor shall it be construed as) **an admission of wrongdoing by either ELEL or of ITC.**

CONSENT TERMS

4. **The Parties shall promptly sign the terms set out in Annexure A (the "Consent Terms") and with diligence request and obtain the Award from the Arbitrator. The terms of Annexure A shall form an integral part of this Settlement Agreement.**

AWARD

5. Each Party shall use its best endeavor to obtain the Award on signing of the Consent Terms.



6. On the Award the Parties shall obtain / submit to a decree and for the purpose each Party shall take all requisite steps with due diligence.

IMPLEMENTATION AND BINDING EFFICACY

7. **On execution of this Settlement Agreement each Party shall** with diligence do all that is reasonably required to fulfil and implement the Settlement Agreement including passing of the Award, decree(s) thereon and withdrawal of the Suits.

8. Notwithstanding any delay in the making of the Award or passing of any decree(s) on the Award this Settlement Agreement shall be fully binding on and enforceable against each of ELEL and ITC and any Person claiming by, under, through, or in trust for any Party.

9. **ITC will promptly withdraw unconditionally** and with no order as to costs **Suit No. 3886 of 1993 and Suit No. 1877 of 1995** and **ELEL will promptly withdraw unconditionally** and with no order as to costs **Suit No. 3885 of 1993 and Suit No. 3832 of 1995** on the files of the High Court, Mumbai. Each of ITC and ELEL shall be eligible to refund of court fees as permitted by law.

10. Fees of the Arbitrator shall be borne and paid equally by each of ELEL and ITC. Each of ELEL and ITC shall bear and pay its own costs and expenses of or relating to the Arbitration and of the Suits.

TERMINATION OF OPERATION AND INCIDENTAL MATTERS

11. **All arrangements**, understandings and agreements relating to the Hotel **including the Operating Licence shall stand terminated** with effect from the date of execution of this Settlement Agreement with no claim of any nature whatsoever remaining outstanding between ELEL and ITC.

12. ITC will withdraw its management personnel from the Hotel and deliver possession to ELEL of the Hotel on as is where is basis subject to the possession / control of the Court Receiver, High Court, Mumbai, in respect of certain portion of the Hotel and also subject to the occupation of the Hotel by guests / occupants.



13. *In respect of the guests staying in the Hotel, billing will be apportioned. For the period upto the execution of the Consent Terms ITC will be entitled to bill recover and appropriate the amounts billed. Thereafter ELEL will bill recover and appropriate.*

14. *ELEL has received from ITC (either directly or through payments made by ITC to the income tax authorities pursuant to orders of such authorities) fees in respect of operation of the Hotel. ELEL has no further claim against ITC towards any further licence fees and waives the same, if any.*

15. *All powers of attorney (if any) or other authority of any nature conferred or delegated by ELEL to ITC or by ITC to ELEL will stand revoked and cancelled with effect from the date of execution of this Settlement Agreement.*

16. *ELEL acknowledges and confirms that ITC is exclusively entitled to the Effects and the Record. ELEL shall not use any of the Effects or the Record for any purpose nor have nor raise, at any time, any claims to or in relation to the Effects or the Record or any of them. ITC shall have reasonable access to the Hotel for a period of thirty (30) days from the execution of this Settlement Agreement for removal of the Effects and of the Record. Pending removal by ITC, ELEL shall take reasonable care of the Effects and of the Record. In the event that ITC is unable to have access to the Hotel and remove the Effects and Records as aforementioned, the time period during which ITC is entitled to such access shall stand extended appropriately.*

17. *ELEL has no claim whatsoever in respect of the 'ITC' / 'Welcomgroup' or other name(s) / brand(s)/logo(s) / mark(s) used by ITC and ELEL shall not, in the course of trade or otherwise use any of such name(s) / brand(s)/logo(s)/ mark(s) or attempt to register the same or otherwise claim any rights in any of the brand(s) /logo(s)/ mark(s).*

18. *ITC acknowledges and confirms that it has no claim to the Flats or either of them. ELEL confirms that R.M. Luthria and Luthria Brothers*



Trust are the owners ("Owners") of the Flats and ELEL has the authority of the Owners pursuant to which it confirms:

18.1 ELEL has inspected the Flats and satisfied itself as to the state and condition;

18.2 No amount whatsoever is payable by ITC or recoverable by the Owners from ITC whether for rent licence fees compensation or otherwise in relation to the Flats or either of them;

18.3 ITC will deliver vacant possession of the Flats to the Owners thereof or to ELEL if ELEL provides to ITC the written instructions of the Owners of each Flat within ninety (90) days from the date hereof. If ELEL does not produce the aforementioned written instructions from the Owners within the specified ninety (90) days, no claim shall lie against ITC in respect of the Flats.

19. ITC shall not remove from the Hotel certain consumables hitherto purchased by ITC for the purposes of the Hotel ("Stores") as provided in the Consent Terms.

20. ELEL has inspected and verified the condition and state of the Hotel as also the condition, state, quality and sufficiency of the Stores and is satisfied on all counts and confirms that no claims lie / shall lie against ITC.

21. ITC has not made any representation nor offered any warranties as to the condition, state or otherwise of the Hotel (nor any part thereof) nor the Flats (nor any part thereof) nor the condition, state, quality or sufficiency of the Stores. All warranties or conditions (if any) howsoever implied shall be expressly excluded (and in any event waived by ELEL).

22. ELEL has paid to ITC and ITC has received from ELEL an aggregate sum of Rs.43,1000,000/- (Rupees forty three crores and ten lakhs only) as provided in the Consent Terms.



23. **ITC has** provided to ELEL a list of employees engaged in respect of the Hotel (the "Employees") as set out in Annexure B. **ELEL acknowledges that such Employees are employees of ELEL.**

24. Payment of salary and emoluments including statutory contribution (Employee Payment) shall be pro rated. ITC confirms that the salaries payable to the Employees upto 30th April, 2005 have been paid. ITC has paid to ELEL a sum equivalent to Employee Payment for the period 1st May, 2005 to the date of this Settlement Agreement. After this date ELEL will be liable for Employee Payment. ELEL will timely disburse to the Employees the Employee Payment for the month of May 2005. All revisions (if any) in respect of Employee Payment agreed or implemented by ELEL (even if relating to any period prior to the date of the Consent Terms) shall be to the account of and borne by ELEL.

25. ITC has provided to ELEL the list of pending litigation in relation to the Hotel as per list set out in Annexure C. ELEL will take over and be responsible for the conduct/defence of such litigation. ITC shall provide all reasonable cooperation as may be required for the conduct/defence of such litigation for a period of six months from the date hereof.

ELEL INDEMNITY

26. ELEL will indemnify and keep indemnified at all times ITC (including its directors, officers and employees) against all claims, demands and actions and consequences thereof including reasonable legal / professional fees and costs from any Person(s) (including but not limited to any present or former shareholder(s)/ director(s)/ their Relatives of ELEL or any Affiliate(s) of ELEL or any present or former shareholder(s)/ director(s) / Relatives of any Affiliate(s) or any Person claiming through, under or in trust for them (whether by sale / assignment or otherwise).

26.1 ELEL's indemnity shall cover any and all claims, demands, actions and liability howsoever arising out of or relating to:



i) the Hotel and/or any and all arrangements / understandings / agreements relating to the Hotel including but not limited to the Operating Licence;

ii) any pending/threatened / apprehended litigation by / against ELEL and/or Affiliate(s) to which ITC is / may be a party or may otherwise impact on ITC and/or any pending / threatened / apprehended litigation by any Affiliate(s) against ITC;

iii) the occupation of the Flats by ITC and the surrender of the Flats by ITC in implementation of this Settlement Agreement;

iv) the execution and / or implementation of this Settlement Agreement and/or the Consent Terms including (but not limited to) the competence and ability of ELEL to execute and implement the Settlement Agreement and the Consent Terms;

v) any breach of ELEL representation(s) / warranty(ies) as contained in this Settlement Agreement;

vi) any representation(s) / warranty(ies) of ELEL as contained in this Settlement Agreement being incomplete or incorrect;

vii) the litigation listed in Annexure C;

viii) any claim of any of the Employees (individually a Claim and collectively the Claims);

26.2 Any Claim(s) will be notified to ELEL. ELEL will promptly assume the defence of Claim(s) at its cost through legal counsel reasonably acceptable to ITC.

26.3 ITC shall be entitled to participate in the conduct or defence of any Claim through legal counsel of ITC's selection. In such event, reasonable legal and professional fees and costs shall be reimbursed by ELEL to ITC.



26.4 ELEL's indemnity obligations shall arise on any Person making or raising any Claim and shall be discharged by ELEL such that ITC (or any of its director(s), officer(s), employees) are not out of pocket nor required to make any payment towards or relating to any Claim.

ITC IDEMNITY

27. ITC will indemnify ELEL in respect of the claim of any statutory authority for non-payment of any fees relating to any Licence for the period of operation of the Hotel by ITC under the Operating Licence Agreement.

INSURANCE POLICIES

28. ITC shall terminate the policies of insurance as provided in the Consent Terms and ELEL shall be entitled to take out such policies of insurance as ELEL considers appropriate.

CONFIDENTIALITY

29. Each Party shall maintain confidential this Settlement Agreement and shall refrain from any comment or announcement (in any media whatsoever) in relation to the contents of this Settlement Agreement;

29.1 Nothing contained in this clause shall preclude either Party:

29.1.1 From enforcing this Settlement Agreement (including but not limited to obtaining the Award) or relying upon this Settlement Agreement as a defence; or,

29.1.2 From making any disclosure to comply with law or order or direction of any court or tribunal (provided such disclosure is restricted to the minimum permissible extent and the disclosing Party has provided to the non-disclosing Party a reasoned opinion of legal counsel vouching for the need for such disclosure);

29.2 The confidentiality obligations contained in this Clause shall not apply to any disclosure after the information has come into the public domain (otherwise than by reason of a breach by the disclosing Party).



ASSIGNMENT

30. Neither the rights nor the obligations under this Settlement Agreement shall be transferred or assigned by either Party except with the prior written consent of the other Party. The other Party may accord or withhold such consent (including subject to any condition(s)) as it deems appropriate without assigning any reason.

CO-OPERATION

31. Each Party shall diligently co-operate with the other Party to implement and effectuate this Settlement Agreement.

JURISDICTION

32. Courts in Mumbai shall have exclusive jurisdiction in respect of any dispute or claim relating to this Settlement Agreement.

EFFECTIVE DATE

33. This Settlement Agreement is effective from the date hereof.

MUTUAL REPRESENTATIONS

34. Each Party represents and warrants that:

34.1 Consent(s), if any, required by either Party to enter into and implement this Settlement Agreement and Consent Terms have been obtained by such Party and such consent(s) have been validly obtained and have not been withdrawn or revoked or suspended and will remain effective through implementation;

34.2 This Settlement Agreement constitutes legal and binding obligations enforceable in accordance with its terms.

ELEL REPRESENTATION

35. ELEL represents and warrants that:

35.1 notwithstanding any pending / threatened / apprehended litigation and any orders passed therein or undertaking(s) given or statement(s) recorded therein ELEL is competent to and has the ability to execute and implement this Settlement Agreement and/or the Consent Terms and neither such execution nor such implementation is / will be in breach of any order(s)/



undertaking(s) given / statement(s) recorded. ELEL represents that no amounts received under any Memorandum of Understanding or Share Purchase Agreement have been utilized for the purpose of this settlement, nor have they been utilized in paying the amount to ITC under the Consent Terms and this Settlement Agreement;

35.2 the executant of this Settlement Agreement and of the Consent Terms is / will be duly authorized to represent and bind ELEL;

35.3 the owner(s) of the Flats are Affiliate(s) of ELEL;

35.4 the owner(s) of the Flats have authorized and empowered ELEL to enter into and implement this Settlement Agreement so far as concerns each of the Flats;

35.5 the authority conferred by the owners is valid and subsisting and shall so remain through the implementation of this Settlement Agreement.

COMPROMISE AND ADJUSTMENT

36. This Settlement Agreement and the Consent Terms are by way of settlement compromise and adjustment. This Settlement Agreement and the Consent Terms are not nor shall be construed as an admission of wrongdoing by either of ELEL or of ITC.

37. Neither ELEL nor ITC have any claim whatsoever outstanding by or against each other (including any director(s)/ officer(s)/ employee(s) of the other) relating in any manner to the Hotel and / or relating in any manner to any and all arrangements/understandings / agreements including the Operating Licence and whether forming the subject matter of Suits or the arbitration or otherwise.

*38. **ITC will promptly withdraw unconditionally** and with no order as to costs Suit No. 3886 of 1993 and Suit No. 1877 of 1995 on the files of the High Court, Mumbai and **ELEL will promptly withdraw unconditionally** and with no orders as to costs Suit No. 3885 of 1993 and Suit No. 3832 of 1995 on the files of the High Court,*



Mumbai. Each of ITC and ELEL shall be eligible to refund of court fees as permitted by law.

39. This settlement compromise and adjustment as per this Settlement Agreement constitutes valid and binding obligations effective and executable in terms hereof and thereof and no claims of any nature are outstanding by or against any Party. **Each Party to the fullest extent permissible in law waives any or all claims against the other** excluding only claims (if any) for breach of this Settlement Agreement.

Dated this 11th day of May, 2005.

Common Seal of ELEL HOTELS AND INVESTMENTS LIMITED
been hereunto affixed pursuant to a resolution of its Board of
Directors passed at the meeting held on 29th April 2005 in the
presence of Mr. KISHORE LUTHRIA and Mr. MAHESH
LUTHRIA,
Directors.

For ITC LIMITED

Authorised Signatory.”

10. Pursuant to the aforesaid Settlement Agreement, the ELEL and ITC arrived at ‘Consent Terms’ recorded by the Arbitrator, as under:-

“BEFORE THE LEARNED SOLE ARBITRATOR

MR. H. SURESH (RETD.)

*In the matter of the arbitration between
Ellel Hotels and Investments Limited and ITC Limited*

C O N S E N T T E R M S

*In these Consent Terms "**Disputes**" means all disputes between
Ellel Hotels and Investments Ltd. ("Ellel") and ITC Ltd. ("ITC") in
any manner arising out of or touching or relating to Hotel Sea*



Rock including Playmate Club and Rock International Club (both non-operational) situated at Land's End, Bandra, Bandstand, Mumbai 400 050 on land bearing CTS No.B/1150 and B/1153 (hereinafter the 'Hotel') and / or any and all arrangements / understandings / agreements relating to the Hotel including the Operating Licence Agreement, dated May 3, 1986 ('Operating Licence') and claims / counter-claims / disputes in Suit Nos.3832 of 1995 and 3885 of 1993, Suit No.3886 of 1993 and Suit No.1877 of 1995 on the files of the High Court, Mumbai ('Suits') and before the learned Arbitrator.

2) All Disputes are hereby finally compromised and settled.

3) Declared that:

a. All arrangements understandings and agreements relating to the Hotel including the Operating Licence stand terminated with effect from the date hereof with no claim of any nature whatsoever remaining outstanding between Elel and ITC and / or any Person claiming through, under or in trust for either of Elel or ITC;

b. All allegations made by or against Elel and ITC by the other, whether in the arbitration or in the Suits referred to in clause 1 above, stand withdrawn;

c. (i) All powers of attorney (if any) or other authority of any nature conferred or delegated by Elel to ITC stand revoked and cancelled with effect from the date hereof;

(ii) Any authorisation or consent or power of attorney given by ITC in favour of Elel or any of its Directors or officers stand revoked and cancelled with effect from the date hereof;

d. Elel acknowledges that all actions (including omissions) taken or implemented hitherto by ITC pursuant to powers of attorney (if any) or other authority of any nature conferred or delegated by Elel to ITC are in proper exercise of powers conferred on / delegated to ITC by Elel and are binding on Elel;



e.(i) All statutory consents, licences, approvals and authorisations (collectively the '**Licences**' and individually the '**Licence**') relating to the operation of the Hotel standing in the name of Elel have been handed over by ITC to Elel on execution of these Consent Terms and Elel has received all such Licenses as per list **Annexure A**;

(ii) In respect of Licence(s) standing in the name of ITC as per list **Annexure B**, ITC consents to such licence being transferred to / endorsed in favour of Elel or, if such transfer / endorsement is not permissible, ITC shall surrender / cancel such Licence(s) promptly;

(iii) Fees and other charges (if any) relating to the transfer / endorsement of Licence(s) shall be to the account of and borne and paid by Elel. Refund of security or other deposits (if any paid by ITC) in respect of Licence(s) as may be surrendered / cancelled by ITC shall be to the account of and appropriated by ITC;

f. On or before the execution hereof ITC has –

(i) (to the extent reasonably achievable) removed all signage materials and other goods and property bearing the 'TTC' or 'Welcomgroup' brand(s)/logo(s)/ mark(s) or any other brand(s) / logo(s) / mark(s) belonging to or used by ITC (the "Effects") and files papers books of accounts vouchers and documents including data stored in any electronic form (the "Record");

(ii) and withdrawn its management personnel from the Hotel; and

(iii) delivered possession of the Hotel on as is where is basis subject to the possession control of the Court Receiver, High Court, Mumbai in respect of certain portions of the Hotel and also subject to the occupation of guests / occupants of the Hotel;

g.(i) ITC shall on reasonable prior intimation to Elel have reasonable access to the Hotel for a period of thirty (30) days from the date hereof to remove Effects and Record and Elel will co-operate with ITC to enable removal of such Effects and Record by ITC;



(ii) Elel shall take reasonable care of the Effects and of the Record. Elel shall not use any such Effects and Record for any purpose;

h.(i) ITC declares and Elel acknowledges that the Hotel is still occupied;

(ii) ITC further declares and Elel further acknowledges that ITC has made bookings/reservations for patrons / guests upto May 18, 2005. No advances have been received by ITC in respect of such bookings;

(iii) Elel will service the patrons/guests presently occupying the Hotel and will honour bookings / reservations made by ITC upto May 18, 2005. Billing for the period on and after the date hereof shall be done and collected and appropriated by Elel;

(iv) ITC will cancel all reservations and booking (if any) made for the period subsequent to May 18, 2005;

i. (i) Elel has no claim whatsoever in respect of the 'ITC' / 'Welcomgroup' / other brand(s)/logo(s)/mark(s) belonging to or used by ITC; and

(ii) Elel shall not, in the course of trade or otherwise use any of the said brand(s)/logo(s)/mark(s) and shall not attempt to register the same or otherwise claim any rights in any of the brand(s)/logo(s)/mark(s);

j. On and from the date of these Consent Terms neither of Elel nor ITC shall claim to be associated with the other for or in relation to the Hotel or otherwise in the course of business and neither of them shall make any claim or representation as being associated with the other;

k. ITC has not removed from the Hotel certain consumables, spares etc., hitherto purchased by ITC for the purposes of the Hotel ("Stores") as per list Annexure C;



l. Prior to the execution hereof, Elel has inspected and verified the condition and state of the Hotel as also the condition, state, quality and sufficiency of the Stores;

m. Elel confirms and acknowledges that-

(i) Elel has received possession and is in exclusive possession of the Hotel;

(ii) that possession of the Hotel and of the Stores has been delivered by ITC to Elel on as is where is basis and condition;

(iii) Elel does not have and shall not raise any claim whatsoever against ITC in respect of or relating to the Hotel and/or the Stores and / or the Effects or Record or any portion or part thereof;

(iv) If and to the extent Elel is at law entitled to receive / recover any payments under/in respect of insurance Policy No. 21300/11/93/0019 and Policy No. 21300/11/93/0020 for the year 1992-93, ITC has no objection to Elel receiving such payment from Oriental Insurance Company;

*(v) Elel has received from ITC (either directly or through payments made by ITC to the Income Tax authorities pursuant to orders of the tax authorities) fees in respect of operation of the Hotel upto the date hereof and **Elel has no further claim against ITC towards any further licence fees and waives the same, if any;***

(vi) ITC has made no representation nor offered any warranties as to the condition, state or otherwise of the Hotel (nor any part thereof) nor the condition, state, quality or sufficiency of the Stores;

(vii) All warranties or conditions (if any) howsoever implied at law are expressly excluded (and in any event waived by Elel);

n. On or before the execution hereof Elel has paid to ITC and ITC has received from Elel:



(i) *The sum of Rs.7.75 crores (Rupees Seven Crores and Seventy Five lacs only) as and by way of refund of interest free security deposit under the Operating Licence;*

(ii) *The sum of Rs.2.29 crores (Rupees two crores twenty-nine lakhs only) as and by way of reimbursement of expenses;*

(iii) *The sum of Rs.64 lakhs (Rupees sixty four lakhs only) by way of reimbursement of the cost of Stores as set out in Annexure C held by ITC for the purposes of the Hotel;*

(iv) ***The sum of Rs.32.42 crores (Rupees thirty two crores forty two lakhs only) as and by way of relinquishment of rights to operate the Hotel under the Operating Licence;***

o. ITC has provided to Elel a list of employees engaged in respect of the Hotel (the "Employees") as set out in Annexure D. Elel acknowledges that such employees are employees of Elel;

p. Litigation in relation to the Hotel is pending as per list set out in Annexure E. Papers in relation to such litigation have been handed over by ITC to Elel on or prior to the execution of these Consent Terms. On and after the date of these Consent Terms Elel shall be solely responsible for the conduct / defence of such litigation. ITC shall provide all reasonable cooperation as may be required for the conduct/ defence of such litigation for a period of six months from the date hereof,

q. Elel will indemnify and keep indemnified at all times ITC (including its directors, officers and employees) against all claims, demands, actions and consequences thereof (including reasonable legal / professional fees and costs) from any Person(s) including (but not limited to) any present or former shareholder(s)/ director(s) of Elel or any Person claiming so to be or any Affiliate(s) of Elel or any present or former shareholder(s)/ director(s) of Affiliate(s) or any Person claiming so to be;



Affiliate means any Person controlling or controlled by or under common control with Elel and includes any present or former shareholder(s) or director(s) or any of his/her/their Relative(s) or any Person claiming by, through, under or in trust for (whether by way of sale, disposal, assignment, relinquishment or otherwise) from any of them;

Person means a natural or juristic entity and includes any partnership, trust or other association;

Relative has the meaning ascribed by the Companies Act, 1956 including any amendment / repeal and re-enactment thereof;

r(1). Elel's indemnity shall cover any and all claims, demands and actions of any Person(s) (and any liability consequent thereto) howsoever arising out of or relating to:

r(1)(a) the Hotel and/or any and all arrangements / understandings / 1 agreements relating to the Hotel including but not limited to the Operating Licence;

r(1)(b) any pending / threatened / apprehended litigation by / against Elel and/or Affiliate(s) to which ITC is / may be a party or which may otherwise impact on ITC and/ or any pending /threatened apprehended litigation proceedings by any Affiliate(s) against ITC;

r(1)(c) the execution and / or implementation of the settlement, compromise and adjudgment and/or these Consent Terms including (but not limited to) the competence and ability of Elel to execute and implement the settlement, compromise and adjustment and Consent Terms/ the validity and / or breach or alleged breach thereof or hereof;

r(1)(d) any breach of Elel representation(s) / warranty(ies) as contained in the settlement, compromise and adjustment and these Consent Terms;



r(1)(e) any representation(s) / warranty(ies) of Elel as contained in the . Consent Terms being incomplete or incorrect;

r(1)(f) all litigation referred to in Annexure E;

r(1)(g) any claim of any of the Employees;

r(1)(h) any claim of any statutory authority for non-payment of any fees relating to any Licence or non-compliance with any statutory provision / condition required to be complied with by Elel in relation to the Hotel;

(Individually a Claim and collectively the Claims)

r(2). Any Claim(s) received by ITC will be notified to Elel which shall be promptly defended by Elel at its cost through legal counsel reasonably acceptable to ITC;

r(3). ITC shall be entitled to participate in the conduct or defence of any claim through legal counsel of ITC's selection. In such event reasonable legal and professional fees and costs shall be reimbursed by Elel to ITC;

r(4). Elel's indemnity obligations shall arise on any Person making or raising any claim or demand or commencing any action or initiating any proceedings and shall be discharged by Elel such that ITC (or any of its director(s), officer(s), employees) are not out of pocket nor required to make any payment towards or relating to any claim;

s. ITC confirms to Elel that all fees relating to any Licence in relation to the operation of the Hotel have been paid upto the date of the Consent Terms. ITC will indemnify Elel in respect of the claims of any statutory authority for non-payment of fees relating to any Licence for the period of operation of the Hotel by ITC under the Operating Licence Agreement;

t. Payments in respect of contracts entered into by ITC in relation to the operation of the Hotel will be made by ITC upto the date of the Consent Terms;



u. ITC has terminated / cancelled the policies of insurance in relation to the Hotel as set out in Annexure F. Elcl shall after the date of the Consent Terms take out such policies of insurance as Elcl considers appropriate;

v. Elcl represents and warrants:

(i) Notwithstanding any pending / threatened / apprehended litigation and any orders passed therein or undertaking(s) given / statement(s) recorded therein Elcl is competent to and has the ability to execute and implement the settlement, compromise and adjustment and these Consent Terms and neither such execution nor such implementation is / will be in breach of any order(s)/ undertaking(s) given / statement(s) recorded;

(ii) Consents (if any required) to enter into and implement the settlement, compromise and adjustment and these Consent Terms have been obtained and such consents are currently valid and subsisting and will so remain through implementation;

(iii) The executant of the settlement, compromise and adjustment and these Consent Terms is duly authorised to represent and bind Elcl.

4) Fees of the learned Arbitrator shall be borne and paid equally by each of Elcl and ITC. Each of Elcl and ITC shall bear and pay its own costs and expenses of or relating to the arbitration and of the Suits.

Dated 11th day of May, 2005.

For **Elcl Hotels & Investments Limited** For **ITC Ltd.**

Sd/-

Sd/-

Director

Sd/-

Sd-

Advocate for Elcl hotels & Investments Ltd.

Advocate for LTC Ltd."



Submission on behalf of the appellant:-

11. Sri Om Narayan Rai, learned senior standing counsel for the appellant has carried us to various findings recorded by the Assessing Officer in the assessment order, terms of agreement dated 3.5.1986, settlement agreement dated 11.5.2005 and the consent terms recorded by the sole Arbitrator dated 11.5.2005. He submits as under:-

i) The agreement dated 3.5.1986 was part of business activity being carried out by ELEL and ITC Ltd., even prior to the agreement dated 3.5.1986 and thus the receipt in question is a revenue receipt.

ii) The agreement dated 3.5.1986 is a licence and it does not confer any right, title or interest in the respondent ITC Ltd. The receipt of Rs.32.42 crores was the result of a business transaction. No question can arise for relinquishment of any right, title or interest in the immovable property in question. Under the circumstances, by no stretch of imagination, the receipt of Rs.32.42 crores can be said to be capital receipt. On the contrary, on bare reading of various clauses of the agreement dated 3.5.1986, it is clearly a revenue receipt. Licence in question excluded any interest in the property i.e., the hotel. Licence has not conferred upon the



respondent any right, title or interest in the property in question. Hence, the amount received by the respondent under settlement is not a capital receipt but a revenue receipt.

iii) In support of his submission he relies upon judgment of Hon'ble Supreme Court/High Courts as follows :

I. 1959 SCC OnLine SC 62 : AIR 1959 SC 1262

(Associated Hotels of India Ltd. Vs. R. N. Kapoor);
[para 28];

II. (2014) 2 SCC 657 *(Yazdani International Private Limited vs. Auroglobal Comtrade Private Limited & Others);* [para 43];

III. 1959 SUPP [1] SCR 110 : AIR 1959 SC 291 : (1959) 35 ITR 148 *(Commissioner of Income Tax, Nagpur vs. Rai Bahadur Jairam Vaji & Others);* [para 11];

IV. (1964) 53 ITR 261 : 1964 SCC OnLine SC 205
(Kettlewell Bullen And Co. Ltd. Vs. Commissioner of Income Tax, Calcutta); [paras 15, 20, 21, 26 and 36];



V. **[1999] 3 SCC 127** (*Oberoi Hotel Pvt. Ltd. Vs. Commissioner of Income Tax*, [paras 7 & 11];

VI. **[1991] 2 SCC 180** (*Puran Singh Sahni vs. Smt. Sundari Bhagwandas Kripalani & Ors.*); [paras 12 to 19, 24 and 30];

VII. **[2007] 290 ITR 562 : 2007 SCC OnLine MP 699 : (2007) 209 CTR 115** (*Eastern Air Products P. Ltd. Vs. Commissioner of Income Tax*, [paras 29 and 30] ;

VIII. **2012 SCC OnLine Bom 2139 : (2013) 256 CTR 252** (*Larsen & Toubro Ltd. Vs. Commissioner of Income Tax*, [paras 25 and 28] ;

IX. **(1972) 4 SCC 124** (*M/s. Karam Chand Thapar & Bros. Pvt. Ltd. Vs. The Commissioner of Income Tax (Central), Calcutta*) [paras 1 to 4] ;

X. **(1969) 2 SCC 471** (*Ahmed G.H. Ariff & Ors. Vs. Commissioner of Wealth Tax, Calcutta*); [para 8];



XI. **AIR 1959 SC 498** (*Rameshwar Proshad Khandelwal & Ors. Vs. Commissioners, Land Reforms & Jagirs, Madhya Bharat & Ors.*);

Submission on behalf of the respondent:-

12. Sri J. P. Khaitan, learned senior Advocate assisted by Ms. Nilanjana Banerjee Pal submits as under:-

i) Agreement in question dated 3rd May, 1986 is a license and thus an asset whereby right to run and operate hotel was conferred upon the respondent/assessee. Therefore, such a right under the license/agreement in question dated 3rd May, 1986 would constitute a capital asset under Section 2 (14) of the Income Tax Act, 1961 and its relinquishment by agreement dated 11.05.2005 followed by consent terms/award by the sole Arbitrator dated 11th May, 2005 would constitute transfer of capital asset within the meaning the Section 2 (47) of the Act, 1961.

ii) The aforesaid transfer being transfer of a long term capital asset for Rs.32.42 crores resulted in a long term capital gain under Section 45 of the Act, 1961 and the respondent/assessee has paid long term capital gain tax. The Tribunal has not committed any manifest error of law to hold the transfer in question to be transfer of a



capital asset attracting long term capital gain under Section 45 of the Act, 1961.

iii) While Clause 18.1 of the agreement dated 03.05.1986 does not confer any right, title or interest or tenancy or lease or other interest in ELEL's properties or assets created or intended to be created in favour of the ITC and the only intention of the parties is that ITC will be authorized to conduct, operate and run the said hotel on the stipulated terms and conditions **yet Clause 18.2** conferred some type of right upon the respondent ITC that in the event the ELEL calls upon the ITC to purchase the hotel then it shall be purchased by the ITC at the mutually price is specified. Therefore, ELEL could have called upon the ITC to purchase the hotel and in that event ITC was bound to purchase it. Although, this power has not been exercised by ELEL, yet it confers some type of right upon the respondent ITC in the hotel property in question which has been relinquished by the settlement agreement dated 11th May, 2005.

iv) The right to property in question under the agreement dated 3rd May, 1986, is a property right. The right so conferred under the agreement is a property right. This



right has been transferred by way of relinquishment resulting in a long-term capital gain. The word "property" has not been defined in the Act 1961, therefore, ordinary meaning to the word "property" has to be derived so as to come conclusion whether to the transfer of "right to operate Hotel" under the agreement dated 03.05.1986 is a property. Reliance is placed upon the judgement of the Hon'ble Supreme Court in *Ahmed G. H. Ariff VS. CWT*, (1969)2 SCC 471 (para 5 and 8) and in view thereof the right in question created under the aforesaid agreement dated 3rd May, 1986, is a property within the meaning of Section 2 (14) of the Act 1961.

v) In support of his submission, learned Senior Advocate has relied upon the judgement of Hon'ble Supreme court in *Ahmed G. H. Ariff (Supra)*, *Techno Shares And Stocks Ltd. Vs. Commissioner of Income Tax*, [2010] 327 ITR 323 (SC) (para 19), *Oberoi Hotel Pvt. Ltd. Vs. Commissioner of Income Tax* (1999) 3 SCC 127, and a decision of Madhya Pradesh High Court in *Commissioner of Income Tax Vs. Smt. Laxmidevi Ratani* (2008) 296 ITR 363, so as to demonstrate that the right to operate hotel in question under the agreement dated 03.05.1986 is a



"property" within the meaning of Section 2 (14) of the Act 1961.

vi) Further referring to the judgment of Hon'ble Supreme Court in the case of *Oberoi Hotel Pvt. Ltd. Vs. Commissioner of Income Tax* reported in **(1999) 3 SCC 127** (paras 7 to 11), it is contended that the Hon'ble Supreme Court has examined two types of situations; firstly, **compensation paid in respect of rights arising under the trading contract** and, secondly, **Where the compensation is paid as a solacium for loss of office.**

In the first type of cases the receipt would be revenue receipt whereas in the second type of cases receipt would be capital receipt. In the present set of facts, the agreement dated 3rd May, 1986 was not a trading contract but was conferring a right to the respondent/assessee to operate hotel. Therefore, Rs.32.42 crores received by the respondent/ ITC from the EREL was not a revenue receipt but a capital receipt for loss of source of income. Reliance is placed upon a judgment of Delhi high Court in *Abhipra Capital Limited Vs. Deputy Commissioner of Income Tax (investigation)* reported in **[2018 402 ITR 1 (Delhi)]** (paras 12 and 13) and a judgment of this Court in *Oberoi hotels (P.) Ltd. Vs.*



Commissioner of income Tax reported in **[2024] 158 Taxmann. Com 284 (Cal.)** (paras 7 to 12), and judgement of Delhi High Court in *Khanna and annadhanam vs. Commissioner of Income Tax* reported in **[2013] 351 ITR 110 (Delhi)** (paras 2,5,6 and 7).

Vii) The judgment relied upon by learned Counsel for the appellant are distinguishable on facts of the present case and the correct position of law is stated as submitted and also as reflected from the judgements relied by the respondent/assessee.

Discussions and Findings:-

13. Before we proceed to examine the terms and nature of contract involved in the present appeal and rival submissions of the learned counsels for the parties. It would be appropriate to reproduce the relevant provisions of the Act, 1961 as under:-

Section 2(14) of The Income Tax Act 1961:-

“(14)"capital asset" means—

(a)property of any kind held by an assessee, whether or not connected with his business or profession;

(b)any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992);



[(c) any unit linked insurance policy to which exemption under clause (10D) of section 10 does not apply on account of the applicability of the fourth and fifth provisos thereof,]but does not include—

(i)any stock-in-trade [other than the securities referred to in sub-clause (b)], consumable stores or raw materials held for the purposes of his business or profession ;

(ii)personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him, but excludes—(a)jewellery; (b)archaeological collections;

(c)drawings;

(d)paintings;

(e)sculptures; or

(f)any work of art.

Explanation 1.—For the purposes of this sub-clause, "jewellery" includes—

(a)ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;

(b)precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel.

Explanation 2.—For the purposes of this clause—

(a)the expression "Foreign Institutional Investor" shall have the meaning assigned to it in clause (a) of the Explanation to section 115AD;

(b)the expression "securities" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(iii)agricultural land in India, not being land situate—

(a)in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand ; or

(b)in any area within the distance, measured aerially,—



(I)not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

(II)not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or

(III)not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.Explanation.—For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;

[\(iv\)](#) 6½ per cent Gold Bonds, 1977, or 7 per cent Gold Bonds, 1980, or National Defence Gold Bonds, 1980, issued by the Central Government;

[\(v\)](#) Special Bearer Bonds, 1991, issued by the Central Government ;

[\(vi\)](#) Gold Deposit Bonds issued under the Gold Deposit Scheme, 1999 or deposit certificates issued under the Gold Monetisation Scheme, 2015 notified by the Central Government.

Explanation.—For the removal of doubts, it is hereby clarified that "property" includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever;”

Section 2(29)AA of The Income Tax Act 1961:-

“[(29AA)] "long-term capital asset" means a **capital asset** which is not a short-term capital asset ;”

Section 2(29)B of The Income Tax Act 1961:-

“(29B) "long-term capital gain" means capital gain arising from the transfer of a long-term capital asset;”

Section 2 (47) of The Income Tax Act 1961:-

“(47) “"transfer", in relation to a capital asset, includes,—
(i) the sale, exchange or relinquishment of the asset ; or



(ii) the extinguishment of any rights therein ; or
 (iii) the compulsory acquisition thereof under any law ; or
 (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or
 (iva) the maturity or redemption of a zero coupon bond; or
 (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or
 (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.
 Explanation 1.—For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA.

Explanation 2.—For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;

[(47A) "virtual digital asset" means—

(a) any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account including its use in any financial transaction or investment, but not limited to investment scheme; and can be transferred, stored or traded electronically;



(b) a non-fungible token or any other token of similar nature, by whatever name called;

(c) any other digital asset, as the Central Government may, by notification in the Official Gazette specify:

Provided that the Central Government may, by notification in the Official Gazette, exclude any digital asset from the definition of virtual digital asset subject to such conditions as may be specified therein.

Explanation.—For the purposes of this clause,—

(a) "non-fungible token" means such digital asset as the Central Government may, by notification in the Official Gazette, specify;

(b) the expressions "currency", "foreign currency" and "Indian currency" shall have the same meanings as respectively assigned to them in clauses (h), (m) and (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999);]"

Section 45 (1) of The Income Tax Act 1961:-

“(1) Any profit or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in Sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to Income Tax under the head “Capital Gain”, and shall be deemed to be the income of the previous year in which the transfer took place”.

Section 48 of The Income Tax Act 1961:-

“48. Mode of computation. -The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:-

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto:

(iii) in case of value of any money or capital asset received by a specified person from a specified entity referred to in subsection (4) of



section 45, the amount chargeable to income-tax as income of such specified entity under that sub-section which is attributable to the capital asset being transferred by the specified entity, calculated in the prescribed manner:]

Provided

Provided

Provided

Provided

Provided

Provided

Provided

[Explanation. - For the purposes of this section,-

(i)"foreign currency.....;

(ii)the conversion of Indian currency into foreign currency

(iii)"indexed cost of acquisition"

(iv)"indexed cost of any improvement.....

(v)["Cost Inflation Index","]

14. Section 2(14) of the Act 1961 defines the term "Capital Asset" to mean (a) **property of any kind** held by an assessee, whether or not connect with his business or profession. The word **property** has not been defined under the Act. In *Ahmed G.H. Ariff & Ors. Vs. Commissioner of Wealth Tax, Calcutta (1969) 2 SCC 471* (para 8) Hon'ble Supreme Court explained the meaning of the word "property" as under:-

"8. Now **"property"** is a term of the widest import and subject to any limitation which the context may require, **it signifies every possible interest which a person can clearly hold or enjoy**. The meaning of the word "property" has come up for examination before this Court in a number of cases. Reference may be made to one of them in which the question arose whether Mahantship or Shebaitship which combines elements of office and property would fall within the ambit



of the word “property” as used in Article 19(1)(f) of the Constitution. It was observed in the *Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [(1954) SCR 1005, 1019] that there was no reason why that word should not be given a liberal and wide connotation and should not be extended to those well-recognised types of **interests which had the insignia or characteristic of proprietary right**. Although Mahantship was not heritable like the ordinary property, it was still held that the Mahant was entitled to claim protection of Article 19(1)(f) of the Constitution. It is stated in the *Halsbury' Law of England*, Vol. 32, 3rd Edn., pages 534 that an annuity (which is a certain sum of money payable yearly either as a personal obligation of the grantor or out of property not consisting exclusively of land) can be an item of property separate and distinct from the beneficial interests therein and from the funds and other property producing it. It is property capable of passing on a death and can be separately valued for the purpose of estate duty.”

(Emphasis Supplied)

15. The word ‘license’ has not been defined under the Act of 1961. It has been defined under Section 52 of the Easement Act, 1882, as under:-

“52. Lincece, Defined-Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something **which would, in the absence of such right, be unlawful**, and such right does not amount to an easement or an interest in the property, the right is called a licence”

16. In *Yazdani International Private Limited vs. Auroglobal Comtrade Private Limited & Anr.* **(2014) 2 SCC 657** (para 43) Hon’ble Supreme Court held that a license by definition does not creates



any interest in the property. It only gives a right to use the immovable property of the grantor, to the grantee. There is no transfer of any interest in such property in such property in favour of the grantee.

17. In *Associated Hotels of India Ltd. Vs. R.N. Kapoor* (1959 SCC OnLine SC 62 : AIR 1959 SC 1262 (para 28) Hon'ble Supreme Court considering distinction between lease and licence and held as under:-

"28. There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. Whereas Section 52 of the Indian Easements Act defines a licence thus:

"Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."



*Under the aforesaid section, **if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts.*** The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in *Errington v. Errington* [(1952) 1 All ER 149] , wherein Lord Denning reviewing the case-law on the subject summarizes the result of his discussion thus at p. 155:

“The result of all these cases is that, although a person who is let into exclusive possession is, prima facie, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.”

The court of appeal again in *Cobb v. Lane* [(1952) 1 All ER 1199] considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At p. 1201, Somervell, L.J. stated:

“... the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties.”

Denning, L.J. said much to the same effect at p. 1202:



“The question in all these cases is one of intention : Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?”

The following propositions may, therefore, be taken as well

established : (1) To ascertain whether a document creates a licence

or lease, the substance of the document must be preferred to the form;

(2) the real test is the intention of the parties — whether they intended

to create a lease or a licence; (3) if the document creates an interest in

*the property, it is a lease; **but, if it only permits another to make***

use of the property, of which the legal possession continues

with the owner, it is a licence; and (4) if under the document a

party gets exclusive possession of the property, prima facie, he is

considered to be a tenant; but circumstances may be established

which negative the intention to create a lease. Judged by the said

tests, it is not possible to hold that the document is one of licence.

Certainly it does not confer only a bare personal privilege on

the respondent to make use of the rooms. It puts him in

exclusive possession of them, untrammelled by the control and

free from the directions of the appellants. The covenants are

those that are usually found or expected to be included in a lease

deed. The right of the respondent to transfer his interest under the

document, although with the consent of the appellants, is destructive

of any theory of licence. The solitary circumstance that the rooms let

out in the present case or situated in a building wherein a hotel is run

cannot make any difference in the character of the holding. The

intention of the parties is clearly manifest, and the clever phraseology

used or the ingenuity of the document-writer hardly conceals the real

intent. I, therefore, hold that under the document there was transfer of



a right to enjoy the two rooms, and, therefore, it created a tenancy in favour of the respondent.”

(Emphasis Supplied)

18. Learned counsel for the respondent has heavily relied upon the judgement of Hon'ble Supreme Court in *M/S. Techno Shares & Stocks Ltd vs Commissioner Of Income Tax-Iv* **2010 V-327 ITR 323 SC** (para 19) and Section 32 (1) (II) of the Act 1961 to contend that depreciation is admissible in respect of a license used for the purpose of business of profession. In the aforesaid case Hon'ble Supreme Court dealt with the right to nominate a membership card of Bombay Stock Exchange and in the light of the provision of Section 32 of the Act 1961, held it to be a "license". In the present set of facts the question of nomination or transfer of license is not involved. Even at the time of execution of the operating license agreement in question no amount was paid by ITC to ELEL as cost of acquisition of license.

19. M/S ELEL had entered into an "operating license agreement" with M/S ITC Ltd. dated 03.05.1986. As per this agreement the respondent/assesse (hereinafter referred to 'ITC') had earlier entered under an agreement with ELEL agreement dated



01.10.1983 to render services to “SeaRock Hotel” belonging to the ELEL, which was superseded by the aforesaid “operating license agreement” dated 03.05.1986 with effect from 01.07.1986. As per **clause 2.1** of the agreement the ELEL has granted license to ITC to operate the aforesaid hotel i.e. to run the hotel for which ELEL had executed one or more power of attorney to ITC with a rider in **Clause 2.4** of the agreement that the Power of Attorney will not include powers to borrow, sell or mortgage Hotel and ELEL’s property. As per **Clause 3** all workmen, employees and members of the staff including managerial staff as may be decided by ITC shall be on the payroll of ELEL and their salaries, wages and other emoluments and perquisites shall be granted and disbursed by ITC on behalf of ELEL and the payment so made shall be part of operating expenses to be borne and paid by ITC. **Thus the entire employees and members of the staff including managerial staff of the hotel engaged for running of the hotel were employees of the ELEL whose salaries/wages were to be paid by the ITC on behalf of the ELEL as operating expenses. As per Article V** the ITC shall pay to EHIL a Licence Fee calculated @ 23% (twenty three per cent) on the gross turnover of the Hotel to EHIL for each financial year. The term “Gross Turnover” has



been defined in Clause 1.6 of the agreement. Article V of the agreement also contains Clause 5.4 that ITC will endeavour that minimum annual growth of 5% (five percent) of the gross turnover over the base year, i.e. the year ending 30th June 1986, is achieved from year to year and if such growth is not achieved in any financial year then ITC will pay to ELEL an additional 2 per cent at the gross turnover but where the growth in any financial year is 15 per cent or more then ITC will be entitled to deduct from the Licence Fee the amount equivalent to 0.75% and the net Licence Fee payable will be 22.25%. If the growth is 20 per cent or more in any financial year then deduction in fees will be 1 per cent. **Thus, the license fees payable by the ITC to ELEL for operating the Hotel was linked with the gross turnover.** No premium or any non-refundable amount was paid by the ITC to ELEL under the operating license agreement. **As per Clause 6.1,** the ITC merely deposited adjustable security amount of Rs. 7.75 Crores to be appropriated towards payment of license fees for the last 24 months prior to the expiry or termination of the agreement. **As per Article VII** the ITC facilitated the ELEL for a bank loan of Rs. 3.50 Crores to be adjusted against monthly license fees referred in Article V until liquidation of the advance. As per Article **IX**, depreciation of the



movable asset installed by the ITC shall be claimed by the ITC and on expiry of the agreement by efflux of time asset shall belong to the ELEL and ITC shall have no right in them. As per **Article XI** all rents, rates and taxes and insurance premium of the hotel was to be paid by the ITC throughout the subsistence of the agreement and a block amount of Rs. 10 lakh per annum was to be borne by the ELEL to meet the said expenses. As per **Article XII** ITC shall have right to assign or transfer all rights and benefits of this Agreement to any of the ITC Group of Companies only, and none else. As Per **Article XIII** a statement of all current assets and liabilities of the hotel was drawn up and accordingly the networking capital figures as on 1st July, 1986 was recorded (Networking Capital) which was to be determined evaluated and recorded and the difference in networking capital was to be mutually settled by the parties. On termination of the agreement the ITC was to return ELEL all the above Assets in good condition subject to normal wear and tear. **Article XV** provides that nothing contained in the agreement shall be construed to make the parties hereto partners or joint venturers or to render either, party hereto liable for the debts and obligations of the other party hereto except as expressly provided. As per **Article XVII** ITC shall operate and run the



Hotel in accordance with all applicable laws, ordinances, regulations, rules, etc.; shall pay and discharge all operating expenses, charges, fees and taxes; shall operate hotel with due regard to safety preservation and security all properties and assets of ELEL; shall provide monthly basis statements/ returns of the Gross Turnover to ELEL and permit ELEL to inspect the books of accounts, records, etc. and **shall not sell, lease, mortgage, charge or encumber any of the property or assets of ELEL). Article XVIII clearly stipulates that no interest or no tenancy or lease or other interest in EHIL's properties or assets is created or intended to be created in favour of ITC,** the intention of the parties is that ITC will be authorised to conduct/operate and run the said Hotel on the stipulated terms and conditions and the properties and assets as defined in the schedule are and will continue to be the exclusive property and assets of ELEL and the legal ownership thereof shall be of ELEL but in the event the ITC claims any right, title or interest inconsistent with or contrary to the sole and exclusive ownership and possession of ELEL of the properties or any of its assets then **EHIL shall be entitled to call upon ITC to purchase the Hotel at or the mutually agreed price of Rs. 15 Lakhs (Rupees Fifteen Lakhs) per room irrespective of its use or**



Rs. 75 Crores (Rupees 'Seventy Five Crores) whichever is higher and upon EHIL exercising such option under written intimation to ITC, ITC shall be bound and liable to purchase the Hotel and pay the consideration monies at the aforesaid rate.

20. Thus from the agreement dated 03.05.1986 it is evident that under the agreement the ITC was authorised to run and operate hotel with all the employees, staff including managerial staff of the ELEL. No right, title or interest of any kind was created by the ELEL in favour of the ITC in any of the assets/properties of ELEL (Hotel) to carry on the aforesaid commercial activity of operating the hotel. The ELEL was to get 23% of the gross turnover as license fees (subject to some variation as provided in clause V). Considering the terms of the licence operating agreement in its entirety, it is a **Trading contract**.

21. The settlement agreement dated 11.05.2005 between ELEL and ITC shows that **to fully and finally adjust, compromise and settle disputes** between the parties, **the settlement agreement was entered**. Clause I(f) of the settlement agreement defines “disputes” to mean that all allegations, claims, counter-claims



and disputes forming the subject matter of the Suits and/or the Arbitration and includes all allegations, claims, counterclaims and/or demands between the Parties, of any nature, arising, in any manner, **out of or touching or relating to the Hotel** and/or any and all arrangements / understandings / agreements **relating to the Hotel** including the Operating Licence. As per clause (2), (3) and (4) of the Settlement Agreement, all disputes are finally adjusted, compromised and settled will not be an admission of wrongdoing by either ELEL or ITC who shall promptly sign the terms set out in "Consent Terms" and obtain the Award from the Arbitrator. As per **Article XIX** the ITC shall not remove from the Hotel certain consumables purchased by the ITC for the purposes of the Hotel ("Stores") as provided in the Consent Terms. To end the disputes, as per **Clause 22**, ELEL has paid to ITC Rs. 43.10 Crores which included **Rs. 32.42 Crores** by way of relinquishment of rights to operate the Hotel under the operating license.

22. The aforesaid sum of Rs. 32.42 Crores was received by the ITC from the ELEL for relinquishment of right to operate Hotel under the operating license as mentioned in Clause 3 (n) (iv) of the Consent Terms. The question involved in the present appeal is



as to **whether the aforesaid amount of Rs. 32.42 Crores is a capital receipt or a revenue receipt.**

23. On examination of operating license agreement we have found that the ITC has been rendering services to the ELEL to run the Hotel belonging to ELEL since the year 1983 running the Hotel under the commercial contract dated 03.05.1986. It was collecting the entire revenue arising from business operation of the Hotel, incurring expenditures in operation of the Hotel and was paying to ELEL certain percentage of gross turnover as ELEL's share in revenue generated from running the Hotel. **Thus the license operating agreement dated 03.05.1986 is clearly a trading contract** and the receipts of ELEL under the said agreement being the business receipts have always been revenue in nature. The ITC never had any right title or interest in the Hotel or properties of ELEL. The settlement agreement dated 11.05.2005 was entered between the parties to settle number of disputes, claims and counter claims between the parties including those which were pending in courts. The termination of operating license agreement was part of the settlement of dispute. **To run or operate Hotel is one of the business activity of the ITC under it was also running the Hotel in**



question belonging to ELEL. The amount in question i.e. Rs. 32.42 crores was part of 'Award' received by the ITC to finally adjust, compromise and settle all disputes, allegations, claims, counter claims and case pending in counts arising out of or relating to operating licence Agreement to run Hotel in question. The amount so received under the Award (consent terms) by the ITC in the matter of a Trading Contract, to settle all disputes, claims and counter claims, is certainly not the transfer of any capital asset.

24. In *Commissioner of Income Tax, Nagpur vs. Rai Bahadur Jairam Vaigi, & Ors.* **AIR 1959 SC 291** (Para 11) Hon'ble Supreme Court considered the question **"whether** in the circumstances of the case **the sum of Rs 2,500,000 received by the assessee as damages or compensation for the premature termination of the contract is income** assessable within the meaning of the Indian Income Tax Act." and **held it to be a trading receipt, as under :-**

*"11. Examining the facts of the present case in the light of the above decisions, the question to be considered is **whether the contract dated May 9, 1940, was entered into by the respondent in the usual course of his business. If it was, then the amount paid for the termination of the contract must be held to be a trading receipt.** That the respondent has been carrying on business in the*



*production and supply of limestone is amply established. The record shows that he had been supplying limestone and dolomite to the Bengal Iron Company, Ltd., from about the year 1920 and that the contracts of 1935 were entered into only in the carrying on of that business. Vide para 4 in the plaint in Suit No. 211 of 1940 already referred to. **The contract of May 9, 1940, was made in settlement of the rights under those contracts.** It is to be noted that under the agreement dated August 2, 1941, under which he received a sum of Rs 2,50,000, he also secured a contract for the supply of limestone for a period of 12 years. On these facts, it is impossible to come to any conclusion other than that the contract in question was entered into by the respondent in the ordinary course of his business. The learned Judges in the Court below observe that the assessee was not a dealer in, though he was a supplier of limestone. This appears to us to be a distinction without a difference. Moreover, it would be wholly immaterial for the present purpose whether the respondent was a dealer in or supplier of limestone, as, in either view, he would be carrying on business and the contract in question would be one entered into in the carrying on of that business. We should also observe that the statement that the respondent was only a supplier but not a dealer in limestone does not appear to be quite accurate on the facts. Under clause 13 of the agreement dated May 9, 1940, the respondent had the right to work other quarries of his own, and the evidence shows that he did supply limestone so quarried to other purchasers."*

(Emphasis Supplied)



25. In *Kettlewell Bullen & Co. Ltd. Vs. Commissioner of Income Tax, Calcutta* (1964) 53 ITR 261 : (1964) SCC OnLine SC 205 (para 15 and 31) Hon'ble Supreme Court considered termination of contract of agency and termination of a trading contract held as under:-

*"15. These cases illustrate the principle that **compensation for injury to trading operations, arising from breach of contract or in consequence** of exercise of sovereign rights, **is revenue**. These cases must, however, be distinguished from another class of cases where compensation is paid as a solatium for loss of office. Such compensation may be regarded as capital or revenue : **it would be regarded as capital, if it is for loss of a asset of enduring value to the assessee**, but not where payment is received in settlement of loss in a trading transaction.*

*31.....Venkatarama Aiyar, J., observed, in an agency contract the actual business consists of dealings between the principal and his customers, and the work of the agent is only to bring about the business : What he does is not the business itself, but something which is intimately and directly linked up with it. The agency may, therefore, be viewed as the apparatus which leads to the business rather than the business itself. Considered in this light the agency right can be held to be of the nature of a capital asset invested in business. **But this cannot be said of a contract entered into in the ordinary course of business. Such a contract is part of the business itself, not something outside it, and any receipt on account of such a contract can only be a trading receipt. Because compensation paid on the cancellation of a trading contract differs in character from compensation paid for cancellation of an agency contract, it should not be understood that the latter is always, and as a matter of law, to be held to be a capital receipt.** An "agency contract which has the character of a capital asset in the hands of one person may assume the character of a trading receipt (asset) in the hands of another, as for example, when the agent is found to make a trade of acquiring agencies and*



dealing with them". Therefore, when the question arises whether the payment of compensation for termination of an agency is a capital or a revenue receipt, it must be considered whether the agency was in the nature of a capital asset in the hands of the agent, or whether it was only part of his stock-in-trade. The learned Judge also observed that **payments made in settlement of rights under a trading contract are trading receipts and are assessable to revenue**, but where a trader is prevented from doing so by external authority in exercise of a paramount power and is awarded compensation therefor, whether the receipt is a capital receipt or a revenue receipt will depend upon whether it is compensation for injury inflicted on a capital asset or on stock-in-trade.

(Emphasis Supplied)

26. In *M/s. Karam Chand Thapar & Bros. Private Ltd vs. The Commissioner of Income Tax (General), Calcutta* (1972) 4 SCC 124 (Para 10) Hon'ble Supreme Court considered amount received as compensation for loss of office or agency (not trading contract) and following the law laid down in *Kettlewell Bullen & Co. Limited (supra)*, held as under :-

"10. The question whether a particular income arising from the termination of one of the agencies of a multi-agency concern is a capital receipt or a revenue receipt is undoubtedly a difficult question to be answered. The difficulty is inherent in the problem itself. Decisions on this question are numerous. But none of them have laid down a precise principle of universal application but various workable rules have been evolved for guidance. **One of us speaking for the Court in Kettlewell Bullen Co. case has laid down the following guidelines for finding out the true nature of such a receipt. The relevant observations read thus:**

"Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor



deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue; where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt.”

(Emphasis Supplied)

27. In *Oberoi Hotel Pvt. Ltd. Vs. Commissioner of Income Tax (1999)*
3 SCC 127 (para 6 and 9) Hon'ble Supreme Court held as under:-

“6. Applying the aforesaid test laid down by this Court in the present case, in our view the Tribunal was right in arriving at a conclusion that it was a capital receipt. The reason is that as provided in Article XVIII of the first agreement, the assessee was having an option or right or lien, if the owner desired to transfer the Hotel or lease a part of the Hotel to any other person, the same was required to be offered first to the assessee (Operator) or its nominee. This right to exercise its option was given up by a supplementary agreement which was executed in September 1975 between the Receiver and the assessee. It was agreed that the Receiver would be at liberty to sell or otherwise dispose of the said property at such price and on such terms as he may deem fit and was not under any obligation requiring the purchaser thereof to enter into any agreement with the Operator (assessee) for the purpose of operating and managing the Hotel or otherwise and in its return, the agreed consideration was as stated above in clause 10. On the basis of the said agreement, the assessee has received the amount in question. The amount was received because the assessee had given up its right to purchase and/or to operate the property. Further it is a loss of source of income



to the assessee and that right is determined for consideration. Obviously therefore, it is a capital receipt and not a revenue receipt.

9. After considering various decisions it was further held as under:

*“These cases illustrate the principle that **compensation for injury to trading operations, arising from breach of contract or in consequence of exercise of sovereign rights, is revenue.** These cases must, however, be distinguished from another class of cases where compensation is paid as a solatium for loss of office. Such compensation may be regarded as capital or revenue: it would be regarded as capital, if it is for loss of an asset of enduring value to the assessee, but not where payment is received in settlement of loss in a trading transaction.”*

10. After analysing a number of cases, the Court observed that the following satisfactory measure of consistency in the principle is disclosed:

(Emphasis Supplied)

28. In *Larsen & Toubro Ltd. Vs. commissioner of Income Tax (2012)* **SCC OnLine Bom 2139** (para 25 and 28) Hon’ble Supreme Court considered the receipt of termination of distributorship agreement and held it to be revenue receipt, as under:—

*“25. Upon the expiry of the distributorship agreement, the assessee was free to enter into similar agreements with any other party. It is not the assessee's case that it was incapable of or was unable to do so for any reason. **The assessee has not established that its trading structure even in respect of activities similar to the said distributorship agreement with HBB were impaired. In this regard it is important to recall that in the recital to the distributorship agreement it is stated that the assessee was “actively engaged in the business of sale and distribution of several engineering and electrical products throughout the territory of the Republic of India”.***

*28. **The distributorship agreement was a part of the assessee's business.** At the cost of repetition, in the recital to the distributorship*



*agreement, it is stated that the assessee was “actively engaged in the business of sale and distribution of several engineering and electrical products throughout the territory of the Republic of India”. **The termination thereof and the compensation allegedly paid in respect thereof were also only a part of the normal running of the business of the assessee.”***

(Emphasis Supplied)

29. Vide in *Commissioner of Income Tax, UP., Lucknow vs. Gangadhar Bajinath, Generalganj, Kanpur (1972) 4 SCC 28* (para 14) Hon'ble Supreme Court noted that one way of distinguishable capital from revenue receipts, is to take the classical economists distinction between fixed capital and circulating capital receipts in respect of former is capital while the later is not. Fixed capital is what is retained by the owner and turned to profit while circulating capital is parted with in order to yield profit. The ITC had not any fixed capital investment to run the hotel under the “Operating Licence Agreement”. On the other hand from perusal of various clauses of the agreement it appears that the ITC has introduced some circulating capital to run the hotel. Therefore, from Classical Economists distinction point of view also, the receipts of Rs. 32.42 crore by the ITC from the ELEL being not for transfer or loss of any capital asset but at best in lieu of circulating capital introduced to operate the hotel, is "revenue receipt" arising from



the trading contract i.e. "Operating Liscence Agreement". Mere use of the word "relinquishment" in the "Settlement Agreement" and in the "Consent Terms" without disclosing any rights in any capital asset or relinquishment any rights in any capital assets, is not decisive rather establishes that the receipt is not capital receipt.

30. From perusal of recital of the "Operating Liscence Agreement" it is evident that the ITC was rendering services to the ELEL to run the hotel in question under an agreement dated 01.10.1983 which was superseded by the aforesaid "Operating Liscence Agreement" dated 03.05.1986 which resulted in a trading cum service contract. The "Operating Liscence Agreement" was entered by the ITC with the ELEL in the usual course of its various business activities including running /operating the Hotel. Total income disclosed by the respondent assessee for the assessment year in question was Rs. 3040.48 crores while disputed receipt is merely 32.42 crores. No right of any kind in the Hotel in question were conferred upon the ITC under the Liscence Operating Agreement dated 03.05.1986 except to run the hotel on certain terms and conditions with ensured income to the ELEL as part of businesses activity. All the employees required to run the hotel were employees of the ELEL. The termination of agreement was the result of



settlement/compromise of all claims, counterclaims and disputes relating to the aforesaid business contract and in lieu thereof the ITC received Rs. 32.42 crores from ELEL and not in lieu of its rights in any capital assets. The aforesaid amount was part of the award by the Arbitrator as per consent terms. Thus the amount of Rs. 32.42 crores received by the ITC as per consent terms to settle/ compromise all dispute or in any case in the form of compensation for loss of trading operation of running the hotel under the agreement and not for loss of any asset of enduring value. Under Article XVII of the “Operating Liscence Agreement” the ELEL had the sovereign right to terminate the agreement. Thus, the termination of the “Operating Liscence Agreement” and payment of Rs. 32.42 crores by the ELEL to the ITC was revenue receipt in hands of the ITC and not capital receipt and consequently formed part of total income of the ITC.

31. In view of the above discussions we hold that the sum of Rs. 32.42 crores received by the respondent assessee shall not fall under long term capital gain. The findings recorded by the ITAT that the aforesaid sum of Rs. 32.42 crores constituted long term capital gain is perverse. The impugned order of the ITAT to the extent it relates to the aforesaid sum of Rs. 32.42 crore cannot be sustained.



32. For all the reasons afore stated the substantial question of law is answered in favour of the Revenue/Appellant and against the respondent assessee. It is held that the receipt in question of Rs. 32.42 crores in the hands of the respondent assessee is revenue receipt and not capital receipt. Accordingly the impugned order dated 22.03.2017 in ITA No. 336/Kal/2011 passed by the ITAT holding Rs. 32.42 crores to be long term capital gain is set aside. The present appeal is allowed to the extent indicated above.

(SURYA PRAKASH KESARWANI, J.)

I agree

(RAJARSHI BHARADWAJ, J)