

**IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA**

**BEFORE SHRI A. T. VARKEY, JM & DR. A.L.SAINI, AM**

**ITA No.125/Kol/2015**  
(Assessment Year: 2011-12)

<b>DCIT, Circle-33, Kolkata</b>	<b>Vs.</b>	<b>M/s India Housing</b>  2A, Sahara India Sadan, Shakespeare Sarani, Kolkata – 700071.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABFI8377B		
<b>(Revenue/Department)</b>	<b>..</b>	<b>(Assessee)</b>

**Cross Objection No.16/Kol/2015**  
(A/O ITA No.125/Kol/2015)  
(Assessment Year: 2011-12)

<b>M/s India Housing</b>  2A, Sahara India Sadan, Shakespeare Sarani, Kolkata – 700071.	<b>Vs.</b>	<b>DCIT, Circle-33, Kolkata</b>
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABFI8377B		
<b>(Cross-objector)</b>	<b>..</b>	<b>(Revenue/Department)</b>

**ITA No.380/Kol/2016**  
(Assessment Year: 2012-13)

<b>DCIT, Circle-54, Kolkata</b>	<b>Vs.</b>	<b>M/s India Housing</b>  2A, Sahara India Sadan, Shakespeare Sarani, Kolkata – 700071.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABFI8377B		
<b>(Revenue/Department)</b>	<b>..</b>	<b>(Assessee)</b>

Assessee by : Shri J. P. Khaitan, Sr. Adv. & Pratyush Jhunjunwala, Adv.  
Revenue/Department by : Dr. P. K. Srihari, CIT(DR) & Supriyo Halder

सुनवाई की तारीख / **Date of Hearing** : 18/09/2019

घोषणा की तारीख/**Date of Pronouncement** : 11/12/2019

## **आदेश / ORDER**

### **Per Dr. Arjun Lal Saini, AM:**

The captioned two appeals filed by the Revenue pertaining to assessment year 2011-12 and 2012-13 are directed against the separate orders passed by the commissioner of Income Tax (Appeals), in appeal No.69/CIT(A)-XIX/Addl.Cir,R-33/Kol/14-15 and appeal No.559/CIT(A)-9/Cir-33/2014-15/Kol, dated 05.11.2014 and 31.12.2015 respectively. The Cross Objection filed by the assessee pertaining to assessment year 2011-12 is directed against the order passed by the commissioner of Income Tax (Appeals), in appeal No.69/CIT(A)-XIX/Addl.Cir,R-33/Kol/14-15, dated 05.11.2014.

2. Since these two appeals filed by the Revenue and cross objection filed by the assessee pertain to same assessee, identical issues are involved, therefore, these have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity. For the sake of convenience, the grounds as well as the facts narrated in ITA No.125/Kol/2015, for assessment Year 2011-12, have been taken into consideration for deciding the above appeals *en masse*.

3. Ground No. 1 and 2 raised by the Revenue in ITA No.125/Kol/2015 for A.Y.2011-12 and Ground No. 1 and 2 raised by the Revenue in ITA No.380/Kol/2016, for A.Y.2012-13 are common and identical which relate to disallowance of notional interest of Rs.3,54,24,205/- pertaining to one of the partners of M/s Carlton Hotel (P) Ltd.

4. The facts of the case which can be stated quite shortly are as follows: Assessee is a partnership firm and has three partners. The particulars of partners are given below:

(i)..Carlton Hotel Private Limited- Share 5%

(ii).Sahara India Commercial Corporation Limited-Share 90%

(iii) I. Ahmed-Share 5%

The first partner namely, Carlton Hotel Private Limited, shall bring in the share capital in the form of land admeasuring 2,40,000/- sq.fit, as per point No.1 of the said party and no other capital in the form of investment brought in by the First Party. As per agreement, the construction of the commercial project shall be carried out by the party in the second part and entire cost of construction shall be borne by the party second part only. The assessing officer has gone through the various clauses of partnership deed and observed that no partner can create a liability against the firm or withdraw any amount more than their respective shares.

Thereafter, the assessing officer has gone through the Balance Sheet of the firm and Partner`s Current Account and noticed that partner mentioned at part 1 namely, Carlton Hotel Private Limited is having closing debit balance of Rs.29,24,00,917/- and the opening debit balance of the said amount in the beginning of the year was Rs.29,80,02,499/- and the said debit balance is coming from year after year. The AO also noted that the assessee firm was paying about 12% interest on the capital borrowed from banks. Therefore, AO asked the assessee that why one of the partners is diverting the funds for the activities other than the mentioned partnership deed. In response, the assessee firm submitted reply to the assessing officer, vide letter dated 24.03.2014 stating as follows:

*“The overall capital of the partners of the firm is not a debit balance and also stated that it is a prerogative of the partners inter se the arrangement and unless and until the partners overall capital and current account does not show a debit balance”*

However, assessing officer rejected the contention of the assessee and held that interest on money`s borrowed by the firm and advanced by it in turn to its partners has been held to be inadmissible. Therefore, interest earned @ 12% should be charged against the average debit balance of the partner and added back to the income of the assessee firm. Hence, the AO made addition of Rs.3,54,24,205/- on account of interest paid on the borrowed capital which was

diverted by one of the partners which is as per average debit balance of current account of Carlton Hotels Pvt. Ltd.

5. Aggrieved by the stand so taken by the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has deleted the addition of Rs.3,54,24,205/- holding that it is a notional income and the debit balance in the partner`s current account has been carried forward from the past several years and there were no additions made on this count by the AO in those years.

6. Aggrieved by the order of the Id. CIT(A), the Revenue is in appeal before us.

7. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials brought on record. Before us, Ld. DR for the Revenue has vehemently submitted that Assessing officer in para 3 of the assessment order has discussed the terms of the partnership deed entered into between the partners and has analyzed the same. After reciting the terms of the partnership deed at page 3 of the assessment order in the first para he has reached to the conclusions that the partners cannot go beyond shares mentioned in the agreement and withdraw any benefit from the existing assets and liabilities of the firm. The Id DR pointed out that assessing officer also referred to clause 14 and 16 of the partnership deed and has reached to his conclusion that the partners are not entitled to withdraw money more than their respective shares. The Ld DR further stated that interest on money`s borrowed by the firm and advanced by it in turn to its partners should be inadmissible, therefore, interest earned @ 12% should be charged against the average debit balance of the partner and hence AO has rightly added back of Rs.3,54,24,205/- to the income of the assessee firm, therefore order of the AO must be sustained.

On the other hand, Id Counsel submitted before us that as per the partnership Act, 1952, the partners can carry on any business jointly and can also act upon in the manner as they deem fit in the interse relationship between themselves. The partnership deed at no stage lays down that any interest will be payable either on their capital account or on their current account. Once the firm is not paying any interest to the partners on the credit balance as appearing in the partner's capital account and their current account, there arises no occasion of imputing any interest on the debit balance in any of the partner's capital account more particularly when overall capital in current account of the partners show a credit balance. Then Id Counsel took us through clause No.10 of the partnership deed which reads as follows:

*Clause 10: "No interest will be charged or paid to the partners in respect of balances standing to the debit or credit of their capital account".*

As regards withdrawal/Capital contribution, Id Counsel submitted that once there was no stipulation of charging any interest and then until and unless the partners overall current and capital account combined together does not show a debit balance, no adverse inference should have been called for. The Ld. Counsel further stated that the assessee had filled summary of partner's capital account for the current year as well as preceding three years before the assessing officer which go on to show that no withdrawals have been effected by the partners who had debit balance in their account rather yearly profits were being credited to the account and the debit balance was reduced from year to year. Moreover, the debit balance in one of the partner's current account i.e. M/s Calton Hotel Pvt. Ltd is appearing for last several years and the case of the assessee has been under scrutiny and in none of the earlier years any such hypothetical income was taxed in the hands of the assessee firm. Therefore, Id Counsel prayed the Bench that order of Id CIT(A) should be upheld.

8. We note that as per clause 10 of the Partnership Deed, no interest was to be charged or paid to the partners in respect of balances standing to the debit or

credit of their capital account. As per Partnership Act, 1952, the partners can carry on any business jointly and can also act upon in the manner as they deem fit in the inter se relationship between them. We note that the debit balance in one of the partner's current account i.e, Carlton Hotel (P) Ltd, is appearing for last several years and the case of the assessee has been under scrutiny and in none of the earlier years any such hypothetical income has been subjected to tax in the hands of the assessee and therefore, following the principle of consistency, there being no change in the facts and circumstances during the year under consideration, there is no justification of the AO in imputing interest income on the debit balance of the said partner and subjecting the same to tax in the hands of the assessee.

We note that it is a well settled legal position that factual matters which permeate through more than one assessment year, if the Revenue has accepted a particular's view or proposition in the past, it is not open for the Revenue to take an entirely contrary or different stand in a later year on the same issue, involving identical facts unless and until a cogent case is made out by the Assessing Officer on the basis of change in facts. For that we rely on the order of the Hon'ble Supreme Court in Radhasoami Satsang vs. CIT 193 ITR 321 (SC), wherein it was held as follows:

*"We are aware of the fact that, strictly speaking, res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. On these reasoning, in the absence of any material change justifying the Revenue to take a different view of the matter - and, if there was no change, it was in support of the assessee - we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken."*

We are of the view that the above cited precedents on principle of consistency are squarely applicable to the assessee under consideration.

9. We note that Ld CIT(A) has deleted the addition made by AO observing the followings;

*“4.3.4. With regard to point (d) on the matter of bringing to tax a notional income, the contention of the assessee's AR seems to hold much water in as much as the provision of section 5 of the Act does not provide any room for bringing to tax any income by way of notional income.*

*4.3.6. With regard to point (f) on the matter of debit balance of one of the partners, I find that the impugned debit balance is not a new finding by the AO, rather it has been carried forward from the past several years and there were no additions made on this count by the AO in those years. No doubt the principle of Res Judicata does not apply to Income Tax proceedings but however, the principle of Consistency has to be adopted when there is no change in the material facts and circumstances of the assessee's case.*

*4.3.7. With regard to point (g), the matter has already been dealt with in para 4.3.3.*

*5. On analyzing the entire gamut of the issue with respect to the material facts on record along with the legal aspects involved and my findings as in the foregoing, ultimately, I find that bringing to tax an amount which is of notional in nature and which was never earned by the assessee cannot stand the test of jurisprudence in the tax regime. Considering the entire facts and circumstances, I do not find any justification in the action of the AO on both facts and law and hence, the addition made on this count is directed to be deleted.”*

We have gone through the order of Id CIT(A) and we note that the conclusions arrived at by the CIT(A) are, correct and admit no interference by us. We, approve and confirm the order of the CIT(A).

10. The assessee filed cross objection in CO.No.16/Kol/2015, for A.Y.2011-12 which supports to the order of Id CIT(A). Since we have confirmed the order of Id CIT(A), therefore, Cross objections filed by the assessee become infructuous.

11. Now we shall take Ground No. 3 of Revenue's appeal for Assessment Year 2012-13; in ITA No.380/Kol/2016. Ground No.3 raised by the Revenue relates to disallowance of management charges and supervision of Rs.6,00,00,000/-. The ground No.3 raised by the Revenue is as follows:

3. *"That in the facts and circumstances of the case Ld. CIT(A) has erred in deleting the disallowance of the management charges and Supervision charges despite the finding of the AO that there was no basis for charging such basis for charging such charges and were merely book entries."*

12. The brief facts qua the issue are that during the scrutiny assessment, the AO noticed that the assessee firm has paid Supervision charges to the tune of Rs.6,00,00,000/- to M/s Sahara Prime City Ltd, which is one of the group concerns of Sahara India Parivar. It was noted by AO from the records that this concept of paying Supervision charges has stated by the assessee from the A.Y. 2009-10. Prior to that the assessee itself maintained the supervision and the charges were much as compared to this year. The Table below gives clear picture of futility of Supervision charges.

F.Yr.	Gross Receipts	Mall management charges paid	Supervision charges payment	Remark
F.Yr.2011-12	43,91,09,583	10,57,79,827	6,00,00,000/-	Supervision charges over and above Mall management expense
F.Yr.2010-11	41,76,75,424	8,58,54,650	NIL	
F.Yr.2009-10	37,74,01,053	13,00,91,672/-	5,40,00,000/-	Supervision charges over and above Mall management expense
F.Yr.2008-09	37,51,51,425	6,89,94,389/-	NIL	

The AO noticed from the above table that the assessee has not been adopting a constant approach towards payment of Mall Management charges and Supervision charges and almost equal amount of Gross receipts the assessee claiming supervision charges which is unreasonable. The AO was of the view that the assessee was claiming Supervision charges at his whims and caprice. In the F.Yr. 2010-11 total receipts were comparable to F.Yr. 2011-12 but the Mall management charge has increased substantially and Supervision charge has increased drastically from "0" to "6,00,00,000/-". The AO observed that it is

unusual that the business of the Mall could be conducted in the previous year without incurring Supervision charges but required a payment to the extent of Rs.6,00,00,000/- in the current year. Moreover, ongoing through the accounts it was observed that in fact no amount of Supervision Charge has been physically paid to M/s Sahara Prime City Limited. All the payments were a mere book entry only. Letter was written by AO to M/s Sahara Prime City Limited regarding the service provided by it to India Housing but no reply was received. Last year there was no payment of supervision charge and during the year under consideration the company has not received any charges in the whole year casts a doubt on the genuinity of expense of the assessee. No conclusive evidence and reasoning to support the claim could be produced in the course of assessment proceedings. So, this claim of the assessee was considered by AO to be superfluous and not related to his business. Hence the AO disallowed Rs. 6,00,00,000/-.

13. Aggrieved by the stand so taken by the Assessing Officer, the assessee carried the matter in appeal before the CIT(A) who has deleted the addition made by AO. Aggrieved by the order of the Id. CIT(A), the Revenue is in appeal before us.

14. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials brought on record. Ld. DR submits before us that in para 4 of the assessment order the Id. Assessing Officer has drawn a chart showing the gross receipts of the assessee, mall management charges paid and supervision charges paid and thereafter he has observed that the assessee has claimed supervision charges at his whims and caprice as no payment was made in the preceding year. Further AO has observed that the supervision charges have not been actually paid but it is merely a book entry and he has written a letter to Sahara Prime City Ltd. regarding service provided by it to India Housing and no reply was received and, therefore, no conclusive evidence has been filed by the

assessee during the assessment stage therefore this issue should be remitted back to the file of the assessing officer for fresh adjudication.

On the other hand, Id Counsel submitted before us that the assessee firm constitutes of the following partners, namely:(1). M/s. Sahara India Commercial Corporation Ltd. (2).M/s Carlton Hotel Private Limited and (3). Mr. I. Ahmad. Mr. I. Ahmad is not a working partner and the other two partners are companies registered under the Companies Act, 1956. There is no staff deployed by the mall for looking after its day-to-day management as substantial amount of man-power and technical services are required in the overall supervision of the Mall which comprise of land escaping, parking, plant & Machinery and equipment maintenance, fire fighting system, security, air-conditioning, provision of water, electricity sewerage, signage, lift Escalator etc. The assessee firm had entered into an agreement with M/s Sahara Prime City Ltd. which was applicable for one year. This agreement was entered into w.e.f. 01.04.2009 and pursuant to the aforesaid agreement a sum of Rs.5,40,000/- was paid to M/s Sahara Prime City Ltd. This agreement was operative for one year. In the subsequent year i.e. previous year relevant to assessment year 2011-12, the assessee firm deputed its own staff and decided not to renew the aforesaid agreement. However, finding it difficult to carry on the business of management of mall another agreement was entered into on 01.04.2011 with Sahara prime City Ltd. in which scope of overall supervision services have been described in detail. For the management of Mall and technical maintenance, sub-contracts were given to outside agencies but there was no "establishment" available with the assessee firm to make an overall supervision of the Mall which was having about 2,50,000 sp. ft. area. Consequently, it was decided by the partners that for an overall supervision agent may be appointed and an agreement was entered into with M/s. Sahara Prime City Ltd. for the purposes thereof. As per the said agreement a sum of Rs. 6,00,00,000/- was paid to M/s. Sahara Prime City Ltd. for overall supervision of the Mall and also to keep control over the various contractors who were engaged for providing day-to-day services in the Mall. Earlier the assessee firm was having its own employees as it was carrying on the business of construction and

sale of space in the Mall but since in the previous year relevant to A.Y. 2009-10 the assessee firm had capitalised its stock-in-trade and has treated it as an investment-building/fixed asset and was deriving rental income there from, no employees were kept for looking after the Mall management because of which the agreement was entered into by the assessee firm as the assessee firm was deriving income from Mall cleaning, Mall management, Mall supervision, Mall safety and security, Holding of Carnival etc. which require presence of substantial amount of man-power on a regular basis.

15. We note that the supervision charges have been paid by assessee as per an agreement. The assessee has deducted tax at source while making payment. The payment was made through banking channel. The Id. Assessing Officer was aware about the assessee's agreement. The assessee has paid service tax on the mall management expenses and, therefore, there arises no occasion of doubting genuineness of the expenses. The Id. Assessing Officer has not demonstrated as to how the expenditure incurred by the assessee for giving overall mall management supervision work to M/s. Sahara Prime City Ltd. was in excess of the fair market value of service or facility or was not as per legitimate needs of the business of the assessee. The maintenance of huge mall having area of 2,50,000 sq. ft., the assessee has to incur management supervision charges. Moreover, AO has not rejected books of accounts of the assessee and assessment is framed by AO under section 143(3) of the Act. Based on the factual position narrated above, we are of the view that there is no infirmity in the order of Id CIT(A). We note that for eligibility of an allowance u/s 37(1) of the Act, there should be a nexus between the expenditure and the purpose of the business and the expenditure should have been wholly and exclusively laid out for that purpose. Once these facts are established, the revenue cannot justifiably claim to put itself in the arm chair of business man or in a position of the Board of Directors and assumed the role of ascertaining how much is reasonable expenditure having regard to the circumstances of the case. We note that the assessee has incurred management supervision charges for the purpose of business and if the expenditure is incurred

bona fide in relation to business activity then it would be an allowable expenditure. That being so, we decline to interfere in the order passed by Id CIT(A), his order on this issue is hereby accepted and grounds of appeal raised by the Revenue is dismissed.

16. In the result, the appeal filed by the Revenue is dismissed and cross objection filed by the assessee are also dismissed being rendered infructuous.

Order pronounced in the open court on this 11/12/2019.

Sd/- (A. T. VARKEY)	Sd/- (A. L. SAINI)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

Dated: 11/12/2019

RS, Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Assessee- M/s India Housing
2. प्रत्यर्थी / The Revenue.- (i) DCIT, Circle-33, Kolkata  
(ii) DCIT, Circle-54, Kolkata
3. आयकर आयुक्त(अपील) / The CIT(A) , Kolkata. [sent through email]
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata [sent through email]
6. गार्ड फाईल / Guard file.

//True Copy//

By Order

Assistant Registrar,  
I.T.A.T, Kolkata Benches,  
Kolkata.