**ITEM NO. 09 (E-03)**

1. **Name of the Subject** :-

1.1 Operation and Management of Five Star Hotel Premises at 1, Man Singh Road after the expiry of the extended license period on 10 October 2012.

2. **Name of the Department** :

 2.1 Estate-I Department.

3. **Detailed History on the Subject** **Matter**:

3.1. This proposal was considered by the Council in its meetings held on 07.10.2011 and 25.07.2012. A copy each of these two Agenda Items is at **Annexure-‘A’ (See pages 109 – 116)** and **Annexure-‘B’ (See pages 117 – 121).**

3.2 In these meetings Council decided as under :-

1. Meeting of 07.10.2011
	1. *To accord sanction for extension of existing collaboration project and lease deed for one year up to 10.10.2012, subject to the condition that the Indian Hotel Corporation[IHCL] shall agree to pay license fee as per mutually agreed terms and conditions retrospectively w.e.f.11.10.2011.*
	2. *To accord sanction for further review and actions in accordance with the decision of Ministry of Urban Development, the legal advice the Committee’s recommendations and Consultant’s Reports.*
	3. *The Council also directed that the Department should work out the timelines for completing the above exercise and the Council be informed of the progress.*
	4. *It was also resolved by the Council that further action may be taken by the department in anticipation of confirmation of the minutes by the Council.*
2. Meeting of 25.07.2012
	1. *After considering the facts and circumstances of the case, it was resolved by the Council, by majority, that the Council may charge from the Licensee, M/s. IHC Ltd. License fee @ of 17.25% of the Gross turnover or Rs.21 crores a year for the period from 11.10.2011 to 10.10.2011, whichever is higher.*
	2. *The Council further directed that the final report of the Consultant appointed to recommend further course of action be brought before the Council at the earliest.*
	3. *It was also resolved by the Council that further action in the matter be taken by the department in anticipation of confirmation of the Minutes by the Council.*

3.3 The Report of Consultant and the opinion of the Addl. Solicitor General have been received and are being placed before the Council, through this Agenda Item.  **The Council is now required to take a decision in the matter**.

3.4 To arrive at a decision in the matter, it appears necessary to place before the Council history of the project and chronology of dates and events.

3.5 In early 1976, a piece of land measuring 3.78 acres at 1, Man Singh Road, along with structures was offered by the then Ministry of Works and Housing to N.D.M.C. to construct a hotel which should be available for the PATA Conference of 1978. The New Delhi Municipal Committee, as it then was constituted, accepted the offer of allotment of land to construct the Hotel. It appears from the Committee’s Agenda Item that a request from Indian Hotels Co. Ltd. was also pending with the Ministry of Works and Housing for allotment of this plot of land to IHCL for construction of a hotel. IHCL approached the New Delhi Municipal Committee to collaborate in construction of the hotel. An extract from the Agenda placed for consideration of the Committee in April, 1976 and its Resolution are extracted as under :- Quote

***“The offer of India Hotels Co. Ltd. appears to be quite favourable if compared with the return that we are getting from ITDC in respect of Akbar Hotel. There is also an advantage that entire initial expenditure of preparation, design and management and supervision of the project would be borne by IHC. Broad terms and conditions of joint participation can be discussed in detail and interest of the Committee can be ensured. It is for consideration and in the interest of the Committee to take the following decisions:-***

***i) Acceptance of the allotment of land by the Ministry of Works and Housing for the construction of a hotel on the terms and conditions as may be offered.***

***ii) Acceptance of the proposals of M/s. The Indian Hotels Co. Ltd. in principle, for participation jointly in the construction and running of the hotel.***

***iii) Discussing further details with M/s. The Indian Hotels Co. Ltd. in order to finalize a draft of the License deed for approval of the Committee.***

***Committee’s Resolution / Observation :***

***Resolved that :-***

***(i) The allotment of land by the Ministry of Works & Housing for the construction of a hotel on the terms and conditions as may be offered be accepted.***

***(ii) Proposals of M/s. The Indian Hotels Co. Ltd. For participation jointly in the construction and running of the hotel be accepted in principle.***

***(iii) Draft License deed to be executed with M/s. The Indian Hotels Co. Ltd. be discussed and finalized for approval of the Committee”. Unquote***

3.6 Copy of letter of allotment of land is **Annexure-‘I’ (See pages 122 – 124).**

3.7 A Collaboration Agreement was thereafter entered into between New Delhi Municipal Committee and IHCL. A copy of this agreement is at **Annexure-II (See pages 125 – 145).** After executing the Collaboration Agreement, a License deed was also drawn between the New Delhi Municipal Committee and IHCL **[Annexure-III See pages 146 - 160]**. IHCL was responsible for construction of the building on the plot of land allotted to the New Delhi Municipal Committee and cost to the extent of Rs. 475 lac was to be provided by the Committee. Through a Supplementary Deed, the cost of the land and building was fixed at Rs. 626 lac. Any expenses in addition to the above were to be met by IHCL.

3.8 Relevant clauses from this License Deed are as under :- Quote

 “*Clause-I - License*

*1. The Licensor has, subject to the provisions of sub-clause1 of Clause-II hereinafter, granted License to the Licensee to enter into and occupy the said hotel from a date to be mutually agreed upon for the purpose of running a hotel of acceptable standards together with all the related facilities and business appurtenant the ratio, for the furtherance and development of tourism in India.*

*2. In terms of the Collaboration Agreement entered into between NDMC and the Indian Hotels Company Limited on 18th December, 1976 at New Delhi [hereinafter called the Collaboration Agreement], the Licensor hereby agrees and allows the Licensee to commence hotel operations partially by the end of March, 1978 notwithstanding the fact that the hotel building is not completed in all respects in terms of the Collaboration Agreement provided a minimum of 40 guest rooms and one restaurant are ready for use and occupation.*

*Clause II – Term*

1. *The license hereby granted shall be in force a period of thirty three years commencing from the date of occupation of the hotel by the first paying guest subject to the condition that the Licensee shall be bound by and observe and perform all the terms and conditions contained in this license throughout the period of this license.*
2. *On expiry of the period of license of the said hotel building hereby granted, the Licensor shall have the option to grant the license for a further period on such terms and conditions as may be mutually agreed upon between the Licensor and the Licensee. If the Licensee shall be desirous of obtaining a License for a further period after the expiry of the present License, it shall give to the Licensor, a notice in writing of not less than sixty (60) days prior to the date of expiry of the present License for the consideration of the Licensor.*

*Clause – III – License Fee and Manner of Payment*

1. *In consideration of the Licensor granting to the Licensee, the License in respect of the said hotel building as hereinabove referred to, the Licensee shall pay to the Licensor as and by way of License fee an amount equivalent to 10-1/2 percent (ten and a half percent) of the gross income of the Licensee for every financial year of the Licensee as certified by the statutory auditors of the Licensee or a sum equivalent to 15% (fifteen percent) of the Licensor’s investment in the said hotel building, the terms of the Collaboration Agreement, whichever is higher. The liability for the payment of License fee as aforesaid shall commence from the date of commissioning of 300 rooms in the hotel or first day of December, 1978, whichever is earlier. The License fee in respect of the period which is less than a full financial year shall be paid by the Licensee to the Licensor on a prorate basis on the basis of the statement certified by the statutory auditors of the Licensee.*

*EXPLANATION : i) Financial Year: For the purpose of this Clause, the term ‘financial year’ of the Licensee shall mean the 12 month period commencing from the first day of April of any year and ending on the 31st day of March of the following year.*

*(ii) Gross Income : For the purpose of this Clause, the term ‘gross income’ of the Licensee for any financial year shall represent the total amount of income derived by the Licensee from the said hotel as certified by the statutory auditors of the Licensee. The gross income shall include receipt of income on account of rooms, restaurants, banquet parties, pool side snack bar, bar-be-que, room service, public rooms, function rooms, laundry, shop rentals, entertainment shows, counter spaces, show windows, showcases and barber and beauty shops. The gross income shall not include;*

1. *Income of the shops, counter spaces and any other area sub-Licensed by the Licensee to other persons or parties from whom the Licensee is only entitled to rental in respect of the area sub-Licensed.*
2. *Income from rooms shall be net income after adjusting the commissions or discounts paid or payable to travel agents, tour operators, group leaders or the agencies making the bookings of rooms in the said hotel.*
3. *Sales taxes, other taxes pertaining to sales and service charges collected on behalf of the employees.*

*2. Before a financial year comes to an end, the Licensee shall estimate the gross income from the said hotel for the ensuing financial year and accordingly estimate the amount of License fee payable by the Licensee to the Licensor as aforesaid. The License fee so estimated or the minimum annual guaranteed amount, whichever is higher, shall be paid by the Licensee to the Licensor in advance every year in twelve (12) equal monthly installments. The monthly installment will be paid on or before the 10th of the month for which it is due and payable.*

*3. The Licensee shall furnish to the Licensor every year, within a period of thirty(3) days of the date on which the audited accounts of the Licensee are approved and adopted at the Annual General Meeting of the shareholders of the Licensee, a statement duly certified by the statutory auditors of the Licensee appointed in pursuance of the relevant provisions of the Companies Act, 1956 giving break-up of the various items comprising the total income in relation to the business of the Licensee in the said hotel during the preceding financial year.*

*4. Within thirty(30) days of holding the Annual General Meeting of the shareholders of the Licensee in accordance with the provisions of Company Law at which the annual audited accounts of the Licensee are placed and approved, the Licensee shall pay to the Licensor the License fee falling short of the License fee becoming due and payable on annual audited income basis as certified by the statutory auditors on the basis of the License fee stipulated in sub-clause 1 here above and the estimated License fee paid to the Licensor as stipulated in sub-clause 2 hereinabove. Any amount of License fee paid in excess by the Licensee to the Licensor shall be adjusted from the next installments of License fee as due and payable by the Licensee to the Licensor.*

*5. Within thirty(30) days from the date of the Licensee commencing operations in the said hotel building, whether partially or fully, the Licensee shall furnish to the Licensor a Bank Guarantee underwritten by anyone of the nationalized banks having a branch in New Delhi equivalent to the amount of 3 months’ License fee as estimated by the Licensee, as and by way of security.*

 *Clause- VI – Possession of Hotel Building*

*1. The Licensor and the Licensee shall mutually fix the date on which the possession of the said hotel building shall be handed over to the Licensee for commissioning it as a hotel, whether partially or fully notwithstanding that the construction of the said hotel building in terms of the Collaboration Agreement has not been completed and the Licensor has not given the Completion Certificate in respect of the said hotel building to the Licensee. At the time of handing over possession of the said hotel building as aforesaid the Licensor and the Licensee will jointly make an inventory of the assets being handed over to the Licensee for partial or full commissioning of the hotel and the Licensee shall not contend thereafter that the hotel building or equipment, installations, fittings, fixtures, or any of the other assets listed in the inventory to be prepared as aforesaid are not complete in any respect whatsoever. If any change, addition or alteration be necessary, the Licensee shall do the same at its own cost after obtaining the Licensor’s written permission. The Licensor shall have no objection to the Licensee replacing any of the fittings and fixtures such as bath tubs, sanitary ware, lifts, doors etc. at the cost of the Licensee after giving intimation to the Licensor to this effect in writing.*

*2. The ownership of the said hotel [the land on which the said hotel is situated belongs to the Licensor] shall at all times vest in the Licensor, together, with all fittings, fixtures and other installations of immovable type or of the type the removal of which is likely to cause damage to the building. A list of such fittings, fixtures and installations shall be drawn jointly by the representatives of the Licensor and the Licensee before the Licensee takes over the hotel building for the purpose of running a hotel of acceptable standard therein.*

*3. All movable assets in the hotel building referred to in Schedule-III to the Collaboration Agreement as well as all other assets including assets such as air-conditioning compressors, air handling units, fan coil units, pumps, cooling towers, piping conduiting, electrical panels, lighting fixtures, diesel generating sets, water treatment plants, boilers, laundry equipment, kitchen equipment and other hotel equipment which the Licensee pays for an equips and furnishes the hotel building with, shall belong at all times to the Licensee. The Licensee shall be entitled to all rights, title and interest to or in respect of such assets throughout the currency of this agreement as well as upon its termination.*

*4. Upon the termination of this agreement, the Licensor may purchase the Licensee’s assets at reasonable prices to be mutually agreed upon between the Licensee and the Licensor.*

*Clause- IX – Future Expansion*

*During the period of the License hereby granted or the renewed period of the License, should it be necessary or expedient in the interest of furtherance and development of tourism in the Capital City – Delhi to expand or add to the facilities in the said hotel building in terms of additional guest rooms, function rooms, public areas, restaurant and other facilities either in the same premises and/or adjoining property, if and when made available, the Licensor hereby permits the Licensee to carry out such additions or expansion on the terms and conditions to be mutually agreed upon*

*Clause- X – Termination*

*If the Licensee commits a default in the payment of the License fee in the manner provided in this Deed of License or ceases to do business in the said hotel building or commits breach of any of the terms of this Deed willfully or otherwise, the Licensor may give a notice in writing to Licensee for remedying the breach and if the Licensee fails to do so within a period of thirty (30) days from the date of such notice, the Licensor may terminate the License without giving any further notice.*

*Clause- XII – Handing over possession of the Hotel Building to the Licensor*

*On the expiry of the License period and in the event of the License having been terminated earlier, the Licensee shall hand over the possession of the hotel building together with fittings and fixtures and all other installations belonging to the Licensor as per the Collaboration Agreement [excluding those items of the Licensor replaced by the Licensee in terms of the Deed of License heretofore] in the same conditions as far as practicable as at the time of taking them from the Licensor alongwith the installations as described in the Deed of License heretofore save normal wear and tear and modifications alongwith the building referred to in this Deed with its fittings and fixtures and all other installations as stipulated in this License heretofore, within thirty(30) days from the expiry of the License period or termination of the License deed as the case may be. The Licensee shall pay such damage charges for Overstayal in the premises from the date of expiry of the License period or from the date the License is terminated at the rate as may be determined by the Licensor from time to time and which shall not be less than the License fee paid immediately before the expiry of the License period and in the event of the License having been terminated earlier, the Licensee shall have the right to take away the Licensee’s assets including the assets referred to in Schedule-III to the Collaboration Agreement and all other assets belonging to the Licensee, which Licensee may voluntarily bring into the hotel at its own cost.* ***Unquote***

3.9 The License commenced from 11.10.1978 and was for a period of 33 years up to 10.10.2011. IHC was to pay a License fee of 15% of cost of 626 lacs or 10.5% of gross income whichever is higher. In addition House Tax of Rs.12 lacs and ground rent of about Rs.23 lacs were also payable on yearly basis.

3.10 IHCL has paid the License fee as per the License deed and minor disputes about charging of the interest during moratorium period and method of calculation of gross income and interest on the additional amount due have also been settled. During these 33 years, as against minimum License fee of less than Rs 3300 lac, IHC have paid License fee of about Rs 26000 lac. IHC have also incurred an expenditure of about Rs 13300 lac in this Hotel Project. **(Annexure-‘IV’ See page 161 - 162).**

3.11 As per requirement of Clause-II(2) of the License deed, IHC has exercised the option of grant of License for a further period on terms and conditions as may be mutually agreed upon and this option is under consideration of the Council. A copy of option dated 15 February, 2010 is at **Annexure-‘V’ (See page 163)**

3.12 On the date of completion of 33 years of License, no dues, no disputes or violations of the terms of the License are available on record.

3.13 Prior to establishment of New Delhi Municipal Council through the NDMC Act 1994, the New Delhi Municipal Committee, as it then was, was governed by the Punjab Municipal Act 1911. As per section 416(2)(a) of the NDMC Act, 1994 any License or permission granted under the Punjab Municipal Act 1911 and in force immediately before the establishment of the Council shall in so far as it is not inconsistent with the provisions of NDMC Act 1994, shall continue in force and deemed to have been made under the provisions of the N.D.M.C. Act 1994 unless and until it is superseded by any License or permission granted under the provisions of the NDMC Act 1994.

3.14 Under the N.D.M.C. Act 1994, Chapter-X relate to “Property and Contracts”. Section 141 relates to the disposal of immovable properties. The said section provides that the Chairperson may with the sanction of the Council, lease, sell, let out on hire or otherwise transfer any immovable property belonging to the Council. The consideration for which any immovable property may be sold, leased or otherwise transferred shall not be less than the value at which such immovable property could be sold, leased or otherwise transferred in normal and fair competition. As per sub-section (3) of this section, the sanction of the Council under this section may be given either generally or for any class of cases or specially for any particular case.

3.15 After the coming into force of the N.D.M.C. Act 1994, general guidelines to attend to cases of disposal of immovable property were not available. The Council in its Resolution of 19 March 1999, approved detailed guidelines on the subject. In respect of “special categories of properties” the approved guidelines as contained in clause 9 of the said resolution was that “hotels, cinemas and similar projects etc. may be governed as per mutually agreed terms and conditions as entered into by the Council from time to time”.

3.16 The above policy of 19 March 1999 was reconsidered by the Council in its meeting on 30 August 2000. Para 3 and 6(i) of the Agenda Item are relevant and are re-produced hereunder :- **Quote**

 ***“3 It has been observed that renewal in case of premises of hotels and the cinema complex is on mutually agreed term. The existing Estate Policy provides for determining terms and conditions as also License fee on mutually agreed terms as approved by N.D.M.C. vide its resolution No. 6 dated 18.3.99. Clause 9 for special categories reads as under :-***

***“Hotels / Cinemas and similar other projects may be governed as mutually agreed terms and conditions as entered into by the Council from time to time.”***

***(i) The above decision appears contradictory to section 141(2) of N.D.M.C. Act, which relates to the disposal of immovable property and puts an embargo on transfer of premises on non-competitive terms. The Section reads as under :-***

***“141(2) – The consideration for which any immovable property may be sold, leased or otherwise transferred shall not be less than the value at which such immovable property could be sold, leased or otherwise transferred in normal and fair competition.”***

***(ii) Thus, it is obvious from the above Section that its use should be allowed on payment of license fees determined on competitive basis. In case Council goes by the existing policy as stated above, the existing licensee can always involve the Council in unending disputes as it has happened in case of Chanakya Cinema in which the licensee started litigation against N.D.M.C. soon after obtaining the License. Same is the fate of premises licensed for hotel businesses where the licensees stress on irrational terms and drag the Council in various courts.***

***“6. In view of the above position, following proposal is laid before the Council for consideration and approval :-***

1. ***On the expiry of present term of licenses of hotels/cinemas and other similar commercial complexes, the licenses shall not be renewed. The fresh License shall be as per provisions of Section-141(2) of the N.D.M.C. Act, 1994.” Unquote***

3.17 The Council approved the proposal contained in para 6 of the Agenda Item that on the expiry of the term of License of the hotels/ cinemas and other similar commercial complexes, the Licenses shall not be renewed. A fresh License shall be as per provisions of section 141(2) of the N.D.M.C. Act 1994.

3.18 After the above resolution, the claim of further renewal of License of Chanakya Cinema Complex came up for consideration of the Council. In this case the premises were allotted on auction basis on License for a period of 10 years from 01.10.1970. It had a renewal clause for a period of 10 years. The renewed License deed was for a period of 10 years from 01st October 1980. It had no clause for further renewal. The New Delhi Municipal Committee, however, offered to the licensee to renew it for further period of 10 years on increased License fee. This was not accepted by the licensee and no License deed was executed and as such, from 01st October 1990, M/s. Aggarwal & Modi became unauthorized occupants. Instead of extending the License in 2000, the Council decided to develop Cinema Complex as a Multiplex. M/s. Aggarwal & Modi gave an offer to develop it as a Multiplex. This was not accepted by the New Delhi Municipal Council. Since the License had not been renewed and they were un-authorized occupants in the premises, an effort was made to take a vacant possession of the premises. M/s. Aggarwal & Modi filed a writ petition in the Delhi High court and challenged the Council’s Reso. of 30 August 2000 and claimed that provisions of section 141 are not attracted. The writ petition was dismissed by the Single Judge vide Judgement dt. 08th August 2003. However, the Court permitted petitioner to continue to occupy the premises up to 30th September 2003. The petitioner filed an LPA against the order of the Single Judge. The DB of the Delhi High Court vide judgement dt. 30 August 2005 dismissed the appeal and imposed a cost of Rs. 25,000/- on the appellant. The Appellants filed a Civil Appeal in the Supreme Court which was dismissed by the Supreme Court on 31st August 2007. Para 23 of the Supreme Court judgement is as under :- **Quote**

***“23. Disposal of public property partakes the character of trust and there is distinct demarcated approach for disposal of public property in contradiction to the disposal of private property i.e. it should be for public purpose and in public interest. Invitation for participation in public auction ensures transparency and it would be free from bias or discrimination and beyond reproach.” Unquote***

3.19 Facts of the case Aggarwal and Modi V/s NDMC differs from the case of M/s IHC Ltd. in the following respects

(i) Aggarwal and Modi were un-authorized occupants and were occupying the premises from 01.10.1990 without licence deed. IHCL are in occupation of premises by virtue of a valid licence deed which has been extended upto 10.10.2012

(ii) In case of Chanakya Cinema, the council had decided to convert it into a multiplex for which Aggarwal and Modi had no expertise. In the case of hotel at Man Singh Road, there is no proposal to change the usage of the building. IHCL has expertise to run similar hotel in Delhi and other places.

3.20 As referred to in Para-3.11 above, IHC has exercised option for consideration of Council, as available under Clause-II(2) of License and has sought grant of License for a further period after expiry of the present term of License and this option is for consideration of the Council the Licensor.

3.21 After receipt of the option from IHC, the Chairperson, NDMC on 27.07.2010 constituted a Committee headed by Financial Advisor and included Legal Advisor and Director(Estate-I) to suggest action to be taken on the option exercised by IHC. A copy of the said order is at **Annexure-‘VI’ (See pages 164 – 166)**. The Committee held its meeting from time to time and advised the Estate Department to first obtain legal opinion on the applicability of provision of section-141(2) of the NDMC Act and only if the property is not to be put to auction and is proposed to be given to IHC, would the Committee give its recommendations to grant License for a further period on mutually acceptable terms and conditions.

3.22 The Estate Department suggested to IHC to obtain a legal opinion about applicability of provision of Section-141(2) of the NDMC Act and also sought opinion from Standing Counsel of the Council. The opinion dated 26.11.2010 of Shri Harish Salve as obtained by the IHC is at **Annexure-‘VII’ (See pages 167 – 180)** and the opinion of the Standing Counsel Smt. Madhu Tewatia dated 15 March 2011 is at **Annexure-‘VIII’ (See pages 181 – 186)**. Shri Salve opined as under :- **Quote**

“

|  |  |
| --- | --- |
| **Question** | **Answer** |
| Whether the provisions of Sections141(2) of NDMC Act, 1994 will be attracted/applicable when the renewal/extension of the License of the Taj Mahal Hotel comes up for consideration by NDMC | Considering the nature of the transaction, the renewal of the License may not be governed by section-141(2) of the Act. Even if it is, the renewal of the License, the consideration of which is a share of revenue for the hotel property, cannot be considered to be a violation of section-141(2) of the Act. |
| Whether the resolution dated 30th August, 2000 passed by NDMC apropos the provisions of Section-141(2) shall be applicable to the case of the Taj Mahal Hotel when the License granted by NDMC to IHCL is considered for extension/renewal by NDMC? | The resolution would apply to situations of License simplicitor where property [land and/or buildings] of the NDMC are made available to other agencies for use. It cannot apply to a joint venture in which there is a revenue share arrangements. |
| Whether the judgement of Delhi High court in the Chanakya case, the appeal against which was also dismissed by the Supreme Court shall be applicable to the case of renewal/extension of License in respect of the Taj Mahal Hotel and if not, the reasons therefore ? | In the negative. |

”

**Unquote**

3.23 Smt. Madhu Tewatia, Standing Counsel opined as under :-

1. **Quote** “The Resolution of the Council may not therefore be applicable in terms Stricto Sensu as in the present case, the License term would require to be extended or renewed subject to mutually agreed terms which does not fall in the category of cessation of License and consequent of a fresh lease or License.” **Unquote**

2. **Quote** “The decision of the Supreme Court of India interpreting the provisions of section-141(2) and Resolution dated 30.08.2000 would not prohibit the continuation of the license arrangement of the NDMC with IHCL, the vital and dominant consideration always being maximum consideration for immovable property even in cases governing contractual rights inter-se the parties where the NDMC is to offer state grant. “Further, the Standing Counsel has also mentioned that “ NDMC could vary the percentage of revenue sharing based on gross receipts of the hotel, so as to get an amount equivalent to the fair market value.” **Unquote**

3.24 After receipt of the opinion of Shri Salve and Smt. Madhu Tewatia, SC, the Estate Department placed a brief for consideration of the Committee **Annexure-‘IX’ (See pages 187 – 192)**. The Committee submitted its report on 14.07.2011 and a copy of the same is at **Annexure-‘X’ (See pages 193 – 200)**. Among other things, the Committee recommended that the License may be extended further for a period of 30 years and License fee, with a minimum as well as percentage of gross income, whichever is higher, may be negotiated. License fee suggested was as under :-

|  |  |  |
| --- | --- | --- |
| **Duration** | **Minimum Fee** | **Fee as Percentage of turnover** |
| First ten years | 21 crore per annum | 17.25% of gross turnover |
| Second ten years | 25 crore per annum | 18.25% of gross turnover |
| Last ten years | 30 crore per annum | 19.25% of gross turnover |

3.25 A copy of letter dated 15.07.2011 from IHC on the subject is at **Annexure-‘XI**’ **(See pages 201 – 203)**.

3.26 On 1 August, 2011 in the Ministry of Urban Development, there was a meeting in regard to payment of certain dues in respect of certain hotels. An extract from minutes of this meeting dated 1 August 2011 is as under :- **Quote**

***“The issue of renewal of License of Hotel Taj Man Singh came up for discussion. Chairman, NDMC pointed out that as per the License, the existing operator has to first right of refusal. To maximize revenues, it was felt that NDMC should invite open bids and then ask the existing operator to match the highest bidder to exercise their right of first refusal. In case they are not willing to pay this amount, the bid of the highest bidder may be considered as per rules, after due diligence and following all procedural formalities”. Unquote***

3.27 Pursuant to these minutes, Chairperson, NDMC vide letter dated 14.09.2011 wrote to the Ministry clarifying that:-

* 1. The stand of NDMC was not correctly reflected in the minutes.
	2. The direction on ‘Fresh Auction and First right of refusal’ may not be implementable and may be reconsidered in view of the provisions of the existing agreement.

3.28 There was another meeting in the Ministry on 14 November 2011 and the relevant minutes of the meeting are as under :-.

**Quote** “The Minutes of the meeting held on 01.08.2011 and 26.08.2011 and the D.O. letter written by Chairperson NDMC in response to the minutes was mentioned. Additional Secretary (UD & DL) and JS (FA) stated that NDMC should strive to get as close to the market rent as possible, even if it has to negotiate with M/s IHC in relation to the said minutes. Secretary NDMC stated that in the Meeting of the Council held on 07.10.2011, the Council has resolved to accord sanction for extensions of existing collaboration agreement and licence deed with M/s IHC for a period of one year subject to the condition that M/s IHC shall pay licence fee as per mutually agreed term and condition. It was further stated by him that NDMC has also already initiated the process of appointing a Transaction Consultant.

Secretary (UD) noted NDMC’s above decision and advised that the Council may take further appropriate steps.” **Unquote**

A copy of these minutes is at **Annexure-XII (See pages 204 – 206)**

3.29 While the opinion of Shri Harish Salve, Sr. Advocate, Smt. Madhu Tewatia, Standing Counsel, report of the Committee and minutes of the Ministry of Urban Development were under consideration for being placed before the Council, it was felt that the department may examine other aspects such as recent transactions in DDA, DIAL, DMRC of similar nature and the practices followed in hotel projects in other states where revenue sharing has been the bidding criteria. It was also felt that NDMC may also assess NDMC’s and IHC investment in this venture. Accordingly, ITDC was approached to make available their consultancy services and give recommendations in this regard.

3.30 Since the License was up to the period ending 10 October 2011, a proposal was put up to the Council as Item No.2(L-03) in its meeting held on 07.10.2011for Council’s decision for the period after 11.10.2011. Copy of the Agenda Item is at **Annexure-‘A’ (See pages 109 – 116)**. Council’s decision was as under :- **Quote**

***“(i) To accord sanction for extension of existing collaboration project and lease deed for one year upto 10.10.2012, subject to the condition that the Indian Hotel Corporation[IHCL] shall agree to pay license fee as per mutually agreed terms and conditions retrospectively w.e.f.11.10.2011***

***(ii) To accord sanction for further review and actions in accordance with the decision of Ministry of Urban Development, the legal advice the Committee’s recommendations and Consultant’s Reports.***

***(iii) Council also directed that the Department should workout the timelines for completing the above exercise and the Council be informed of the progress.” Unquote***

3.31 After the receipt of intimation from the ITDC that they were not in a position to take up assignment, RFP was issued on 19 October 2011 and tenders were invited. IDFC was the successful bidder and the work was assigned to them on 3 December 2011. IDFC cited conflict of interest in not taking up this project as a reason and withdrew its proposal **[Annexure-XIII-A & XIII-B See pages 207 - 208 ]**. RFP was again invited and M/s. Ernst & Young were the successful bidder. They were assigned this work.

3.32 Since the report of Consultants was not available and IHC were paying License fee at the old rate of 10.5% of the gross income, an Agenda Item was placed before the Council in its meeting on 25 July 2012 **(Annexure-B, See pages 112 - 121)** and Council decided as under :- **Quote**

*“After considering the facts and circumstances of the case, it was resolved by the Council, by majority, that the Council may charge from the Licensee, M/s. IHC Ltd. License fee @ of 17.25% of the Gross turnover or Rs.21 crores a year for the period from 11.10.2011 to 10.10.2011, whichever is higher.*

*The Council further directed that the final report of the Consultant appointed to recommend further course of action be brought before the Council at the earliest.*

*It was also resolved by the Council that further action in the matter be taken by the department in anticipation of confirmation of the Minutes by the Council.”* ***Unquote***

3.33 Vide letter dated 17.08.2012, M/s IHC Ltd. have made payment of about Rs. 11.3 Cr for the period 11.10.2011 to 31.08.2012.

4. **Report of the Consultant**

4.1 Report from the Consultants has been received. The report is in two Volumes. Volume-I relates to the analysis and Volume-II, a report of Legacy Law Office giving an overview on the legal aspects concerning Contractual Arrangement between NDMC and IHC pertaining to the Taj Mahal Hotel. A copy of the Volume-I and Volume-II are at **Annexure-XIV- A** & **Annexure-XIV-B (In separate booklet)**. Letter dated 23.08.2012 received from the Consultant is placed at **Annexure – XIV- C (See pages 209 – 213).**

4.2 Chapter-5 of Volume-1 relates to comparable analysis. The conclusion arrived at in this chapter are available at Para-5.4 of report and are reproduced as under :- **Quote**

* IHC is one of the largest players in the Indian Hotel Industry, the next biggest player [by revenues], EIH has only 3,721 rooms compared to 13,606 rooms of IHC. Furthermore IHC also has the maximum number of hotels as against its comparables.
* Revenues parameters such as Occupancy ratio, RevPAR and ADR for Taj Mahal Hotel are all higher than the ratios of comparable hotels in the Delhi Lutyens area.
* EBITDA of Taj Mahal Hotel in FY12 [Unaudited] is 39.2%; EBITDA margin [excl Lease payments] for the Taj Mahal Hotel for the FY12 is 53.5%.
* Lease cost of the Taj Mahal Hotel has been – 10.5% of revenues over the last few years.
* IHC [Taj Mahal Hotel] has not defaulted in making lease payments to NDMC.
* Among the 7 Hotel properties leased by NDMC, it receives the largest consideration from Taj Mahal Hotel. **Unquote**

4.3 Chapter-6 of Report relates to “Financial Analysis”. While making the financial analysis the objectives was to consider return to NDMC under the following scenarios :-

* The hotel is operated by any Private Sector Partner (PSP)
* Hotel operated by IHC Group
* Hotel operated by NDMC

4.4 The conclusions are available in para-6.4 of the Report and are reproduced as under :- **Quote**

* Present value of cash flows from Taj Mahal Hotel is INR 3,543 million for scenario 1; property is operated by a private sector partner other than IHC.
* Present value of cash flows from Taj Mahal Hotel is INR 6,088 million for scenario 2; property is operated by IHC. The reason for the higher cash flow in scenario 2 is primarily attributed to two reasons :-
	+ High capital expenditure in scenario 1
	+ A construction period of 1.5 years is estimated for scenario 1 when the PSP looses revenue due to restoration activities. Whereas for scenario 2, it is expected that the hotel will continue operations without loss of any revenues.
* Present value of cash flows from Taj Mahal Hotel is Negative INR 2,581 million for scenario 3; property is operated by NDMC. The negative cash flow is attributed to lack of capacity to efficiently handle the property by NDMC. Thus NDMC may choose not to opt for scenario 3.
* Present value of cash flows Taj Mahal Hotel available to firm is highest for scenario 2. **Unquote**

4.5 Chapter 7 of Report relates to the “Commercial structuring options”. The purpose of this chapter was to illustrate various commercial structuring options and valuation of returns to NDMC under each option. The conclusions arrived at are available at para-7.5 of the Report and are reproduced as under: - **Quote**

* **Commercial structuring option** – A revenue share mechanism with guarantee of a minimum payment would ensure that NDMC can benefit from the future upside of the property whilst limiting the downside. The mechanism would also be favourable to a PSP, as unlike an upfront premium mechanism the PSP would not have to incur huge initial capital expenditure.
* Economic return to NDMC is expected to be maximum under scenario 2, where NDMC negotiates and extends the contract with IHC. **Unquote**

4.6 The conclusion of the report are Chapter-8. It has been divided into legal aspects, commercial aspects, qualitative aspects and conclusion. The chapter is reproduced as under :- **Quote**

 **Conclusion**

In order to reach to a conclusion, this report attempts to analyze all possible risks and return to NDMC in the current state of affairs.

The final conclusion is based on detailed analysis of legal, financial and qualitative aspects surrounding the situation.

 **Legal Aspects**

As per the legal opinion given by M/s. Legacy law offices [enclosed a Volume-II of this report], NDMC has the following legally tenable options :-

* NDMC to re-negotiate the financial and other terms and

conditions with IHC and thereby extend the lease period

* NDMC to conduct an open competitive bid for selection of

a private sector partner.

* NDMC to conduct an open competitive bid for selection of a private sector partner with rights of first refusal to IHC

The detailed legal opinion is presented as Volume-2 of this report

**Commercial aspects**

Volume-1 of this report discusses in detail the commercial aspects relating to the project. The commercial aspects evaluated have been further segregated under 3 broad topics namely (a) Comparable analysis; (b) financial analysis under various scenarios for NDMC (c) commercial structuring options alongwith risk analysis and impact or financial consideration to NDMC.

**Topic a [Comparable analysis] – Key findings**

**are as follows : Commercial Analysis**

 **Topic A**

* IHC is one of the largest players in the Indian Hotel Industry, the next biggest player [by revenues], EIH has only 3,721 rooms compared to 13,606 rooms of IHC. Furthermore IHC also has the maximum number of hotels as against its comparables ;
* Revenues parameters such as Occupancy ratio, RevPAR and ADR for Taj Mahal Hotel are all higher than the ratios of comparable hotels in the Delhi Lutyens area;
* IHC [Taj Mahal Hotel] has not defaulted in making lease payments to NDMC’
* Among the 7 hotel properties leased by NDMC, it receives the largest consideration from Taj Mahal.

**Topic b [Scenario analysis] - The three scenarios considered were**

* Scenario 1 – Taj Mahal hotel is operated by a Private Sector Partner (PSP) selected through an open competitive bid conducted by NDMC (Other than IHC)
* Scenario 2 – Taj Mahal hotel is operated by IHC Group through re-negotiated contract between NDMC and IHC
* Scenario 3 – Taj Mahal hotel is operated by NDMC

Key findings from topic b [financial analysis under various scenarios], are as follows :

* Present value of free cash flows to firm is higher for scenario 2

When compared to scenario 1. The detailed reasoning is explained in the key takeaways section of chapter 6

 **Topic B** ( Commercial Analysis)

* Present value of cash flows from Taj Mahal Hotel is Negative

INR 2,581 million for scenario 3. The negative cash flow is

attributed to lack of capacity to efficiently handle the property

By NDMC. Thus, NDMC may choose not to opt for scenario 3

 **Topic C [commercial structuring options]**

Covers risk analysis and impact of commercial structuring options on financial consideration. Key finds are as follows :

* A revenue share mechanism with guarantee of a minimum

payment would ensure that NDMC can benefit from the future upside of the property whilst limiting the downside. The mechanism would also be favourable to a PSP, as unlike an upfront premium mechanism the PSP would not have to incur huge initial capital expenditure.

* Economic return to NDMC is expected to be maximum under scenario 2, where NDMC negotiates and extends the contract with IHC.

**Qualitative Aspects**

The key qualitative aspects taken into consideration are as follows :

* The hotel is located within 2 kms of eminent structures such as the Indian Parliament and President’s House and security is one of the key concerns.
* The property has been a host to some of the country’s most prestigious events such as the BRICS Summit.
* IHC has enormously contributed in creating the brand name of Taj Mahal Hotel, The Tata Group of which IHC is a part of, has every strong corporate governance norms and is among the most trusted brands of India incorporate.
* For NDMC, one of the key decision parameters for selecting a PSP would be high returns from the property. However in our opinion, other factors such as risk of non performance and risk of non-payment by a PSP are equally important. These factors would significantly affect the returns to NDMC.

 **Conclusion**

Therefore, from the above we conclude that NDMC may choose any one of three legal options described above, however from a risk management and commercial consideration perspective NDMC stands to benefit most if the existing contract with IHC is renegotiated and extended. **Unquote** “

**5. Legal Opinions**

5.1 After the receipt of Report of the Consultant opinion of the Addl. Solicitor General was also sought. His opinion is at **Annexure-XV (See pages 214 – 235)**.

5.2 The legal opinion available in this case are from Shri Harish Salve, Sr Advocate who has given his opinion on request from IHC. A copy of which is at Annexure-VII. The opinion given by Ms. Madhu Tewatia, S.C. of the NDMC as sought by the Estate Department of NDMC and is available at Annexure-VIII. The Consultant has given a report on legal aspects from Shri Gagan Anand, Advocate. Sr. Partner-Corporate Practice Legacy Law Offices. His report is at Annexure-XIV B.

5.3 The opinions are summarized hereunder:-

(i) Legal opinion of Shri Harish Salve, Sr. Advocate is as under:- **Quote**

|  |  |
| --- | --- |
| **Query** | **Opinion** |
| Whether the provisions of Sections141(2) of NDMC Act, 1994 will be attracted/applicable when the renewal/extension of the License of the Taj Mahal Hotel comes up for consideration by NDMC | Considering the nature of the transaction, the renewal of the License may not be governed by section-141(2) of the Act. Even if it is, the renewal of the License, the consideration of which is a share of revenue for the hotel property, cannot be considered to be a violation of section-141(2) of the Act. |
| Whether the resolution dated 30th August, 2000 passed by NDMC apropos the provisions of Section-141(2) shall be applicable to the case of the Taj Mahal Hotel when the License granted by NDMC to IHCL is considered for extension/renewal by NDMC? | The resolution would apply to situations of License simplicitor where property [land and/or buildings] of the NDMC are made available to other agencies for use. It cannot apply to a joint venture in which there is a revenue share arrangements. |
| Whether the judgement of Delhi High court in the Chanakya case, the appeal against which was also dismissed by the Supreme Court shall be applicable to the case of renewal/extension of License in respect of the Taj Mahal Hotel and if not, the reasons therefore ? | In the negative. |

**Unquote**

(ii) Legal opinion of Smt. Madhu Tewatia, Standing Counsel is as under :- **Quote**

1. The Resolution of the Council may not therefore be applicable in terms Stricto Sensu as in the present case, the License term would require to be extended or renewed subject to mutually agreed terms which does not fall in the category of cessation of License and consequent of a fresh lease or License.

2. The decision of the Supreme Court of India interpreting the provisions of section-141(2) and Resolution dated 30.08.2000 would not prohibit the continuation of the license arrangement of the NDMC with IHCL, the vital and dominant consideration always being maximum consideration for immovable property even in cases governing contractual rights inter-se the parties where the NDMC is to offer state grant. “Further, the Standing Counsel has also mentioned that “ NDMC could vary the percentage of revenue sharing based on gross receipts of the hotel, so as to get an amount equivalent to the fair market value. **Unquote**

(iii) Legal opinion of Shri Gagan Anand as contained in para-4 of Volume-II of the Consultant Report are as under :- **Quote**

**“4 Legally tenable options for way forward** :

**a) NDMC to re-negotiate the financial and other terms and conditions with IHC**

 The New Delhi Municipal Council Act, 1994 [NDMC Act] came into force on the 25th day of May, 1994 for the establishment of the New Delhi Municipal Council and for matters connected therewith or incidental thereto. The License Deed was entered into by NDMC and IHC was on 8th December, 1976. Therefore, in the absence of a specific provision regarding the retrospective effect of the Act, a view can be taken that the conditions mentioned in the Act would not have any impact with respect to a Contract entered into by the parties prior to the date of coming into force of the Act

 Moreover, it would be pertinent to note that relevant negotiation enabling provision of the License Deed, which is as follows :-

 “On the expiry of the period of License of the said hotel building hereby granted, the licensor shall have the option to grant the License for a further period on such terms and conditions as may be actually agreed upon between the licensor and the licensee”

 Therefore, it is to be understood that there is a negotiation enabling provision in the License Deed so as to facilitate the extension of the License period, in case both the parties mutually agree to the same.

**b) Inviting bids without granting any special rights to IHC**

i. **Vashisht Kumar jaiswal Vs State of UP And Ors,** The court had opined that, once a public contract has been granted for a specific period then on the expiry of the period there is no question of renewal and there must be public auction/public tender after advertising in well known newspapers having wide circulation, otherwise Article 14 of the Constitution will be violated, and a monopoly may be created.

 If it is held that even if the period of the contract has expired there can be extension of the contract then logically it would mean that a contract can go on for term after term and can be extended for 100 years or even more. This would create a monopoly in favour of a party, which would be illegal. It would also be against the interest of the State because in a public auction the State naturally can get higher amount of royalty for grant of the mining lease. In fact granting such extension creates an impression that there is some collusion between the guarantee and the authorities.

ii. **Nex Tenders (India) Private Limited Vs. Ministry of Commerce and Industry & Ors.** - It was held that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognized by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law especially Article-14 of the Constitution.

iii. **In Nagar Nigam Vs. Al Faheem Meat Exports(P) Ltd.** - It was held that public auction or tender has to be allowed by Government or any public authority, instead of private negotiation, considering various aspects and also the public interest.

 In view of the above described case law, NDMC can exercise the option of inviting fresh bids for operating and maintaining the Hotel in future in public private partnership mode without granting any special rights to IHC.

**c) Inviting bids while granting special rights to IHC.**

 There is no legal right vested with IHC for seeking any special rights/privileges in any bidding process to be conducted by NDMC. However, keeping in view the peculiar facts of the case wherein IHC has invested in the fittings, fixtures etc., besides creating goodwill and has been regularly paying good revenue to NDMC, NDMC may consider granting the right of first refusal to IHC in case NDMC decides to invite bids for operating and maintaining the hotel in Public Private Partnership mode. The grant of the right of first refusal to IHC by NDMC due to such justifiable reasons shall be lawful. **Unquote**

(iv) Legal opinion of the Addl. Solicitor General on the queries made by Director(Estate-I) are as under :- **Quote**

Vide Para-13 of the Statement of facts in view of the above facts, NDMC has sought my opinion on the following issues :-

1. whether the decision of the Council taken through the resolution dt. 30th August 2000 that fresh licenses shall be as per provisions of section 141(2) of the N.D.M.C. Act 1994 is applicable to the facts of the case where IHCL has exercised option for grant of License for a further period as per Clause II(2) of the License deed;
2. whether the judgement of Delhi High Court in the case of M/s. Aggarwal & Modi of which appeal was dismissed by the Supreme Court shall be applicable to the case of grant of License for a further period as opted by IHCL;
3. whether the provisions of section 141(2) of the N.D.M.C. Act 1994 be attracted / applicable when notice exercising option for grant of License for a further period as per provisions of Clause II (2) of the License deed is under consideration of the Council.
4. whether the option exercised by IHCL as per Clause II(2) of the License deed has to be rejected on the ground that as per provisions of section 141(2) of the N.D.M.C. Act 1994 only option available with the Council is to put the property to auction/ tender to get the best price of License fee with a view to obtain normal and fair competition.

**Opinion of Add. Solicitor General**

**Query No.1** :-

**Reply** :- As is clear from the facts stated hereinabove the investment in land and building in this case was done by NDMC to the extent of Rs.475 lacs, however, by a Supplementary Lease Deed the said value was fixed at Rs.626 lacs. The additional cost was borne by IHCL. As per the terms of the license clause II (1), the License was for a period of 33 years commencing from the date of occupation by the first guest. This was an admitted case of the parties to the agreement now that the said period of 33 years was over on 11.10.2011. As per clause II(2) of the Terms of Agreement, the expiry of period of License, licensor shall have options to grant License for the further period of such terms and conditions as mutually agreed upon by the licenser and the Licenses. If the licensee shall be desires of obtaining a License for a further period after the expiry of the License, it was obligatory to give licensor notice in writing of not less than 60 days prior to the date of expiry of the present License for the consideration of licensor. Admittedly, the said notice for consideration of extension of license was given by licensee in the year 2011. Pending consideration of the request of the Licenses, licensor NDMC extended the period of license for one year.

Perusal of the terms of License Deed therefore clearly shows that there was no renewal clause in the license deed, giving right to the licensee to seek the renewal.

As is also clear from the facts narrated above the NDMC Act came into force in the year 1994 and Sec.141 (2) thereof (quoted above) specifically provides that the consideration for which any immovable property may be sold**, leased** or otherwise transferred shall not be less than the value at which such immovable property would be sold, leased or otherwise transferred in normal and fair competition. The language of Sec.141 (2) is clear, unambiguous and mandatory in nature. In view of the clear and ambiguous nature of Sec.141(2) which is a statutory provision , the NDMC has no option but to lease the property now by normal and fair completion process so as to fetch a market value for leasing out the property.

As quoted above in para 8 of the narration of facts, given by the NDMC in view of the provisions of Section 141(2) of the NDMC Act, 1994, NDMC in its meeting held on 30th August, 2000 resolved that on the expiry of the terms of the license of the hotels/cinemas and other similar commercial complexes, the licenses shall not be renewed. The fresh licenses shall be as per the provisions of section 141(2) of the NDMC Act, 1994.

The aforesaid resolution of NDMC dated 30th August, 2000 came up for consideration of the Delhi High Court and Supreme Court in the case of Aggarwal and Modi Ent. Pvt. Ltd., hereinafter referred to as Chanakya Cinema case. In Chanakya Cinema case, also like in the present case, tenders were invited by NIT for grant of license. M/s. Aggarwal and Modi Ent. Pvt. Ltd. was the successful bidder for cinema hall and this culminated into execution license agreement dated 30th October, 1967 with NDMC. The licensee was granted license to use the proposed building housing a cinema for a period of 10 years. The agreement provided renewal clause whether licensee was given an option to get the license renewed for another period of 10 years on the terms and conditions to be mutually agreed between the parties. There was no further extension contemplated in the License deed. Upon the expiry of the renewal period, NDMC refused to renew the license and instead sent cancellation notice dated 14th September, 1990 to the licensee. The licensee instituted a suit. However, an out of court settlement was arrived at whereby NDMC agreed for renewal of license for a further period of 10 years from 01.10.1990 to 30.09.2000 by enhancing the license fee over and above the license paid earlier. Clause 7 reads as under:

“7. Next renewal due in the year 2000 will be decided between the licensor and licensees on mutually settled terms and conditions at that time.”

However, the settlement failed to take off as the licensee failed to withdraw the pending case and instead filed a writ petition.

In the meantime, NDMC decided to redevelop the site as a multiplex. The licensee submitted a representation seeking right to develop the multiplex and seeking the renewal of the license of the cinema complex. The said representation was rejected on the ground that the request for redevelopment of multiplex and renewal of license is not in consonance of provision of Section 141(2) of NDMC Act. Another writ petition was filed challenging the said order. The writ petition was heard by the Ld. Single Judge of High Court. The Ld. Single Judge framed the following issue:

“The principal question involved in this writ petition is whether a party who has been issued a license/lease and has consequently enjoyed a long tenure in this complex can insist as a matter of law and legal right that the NDMC should not auction the same but must re-allot it to the petitioner as the petitioner was the original allottee inter alia on its plea that it was entitled to renewal in the year 2000.”

 The Ld. Single Judge came to the following conclusions:

“(i) Whether the grant was a license or lease had become academic because according to the appellants' own showing the period stipulated originally in the lease/license had come to an end. Even otherwise, the terms of acceptance of the tender in 1967 do not indicate any renewal beyond 2000.

(ii) As per the contractual terms, the appellants had no right to seek any renewal beyond 30th September, 2000 as there was no clause to this effect.

(iii) If a public authority were to allot an estate by inviting public tender then the very fact that more revenue was likely to be generated was clearly indicative of public interest as laid down by the Division Bench of this court in CWP No. 1066/1998 decided on 29th May, 1998.

(iv) Appellants were estopped from pleading discrimination qua hotels at this stage. Even otherwise hotels and cinema complexes, though figuring together in classification, could not be equated for the purpose of Article 14 as inherently the business of hotels and cinemas are different and, therefore, there was no discrimination, hostile or otherwise.

(v) The decision of the NDMC not to renew the lease of hotels/cinemas after present term coming to an end was a policy decision, adopting a uniform yardstick of the expiry of existing leases of hotels/cinemas and was, therefore, perfectly valid and reasonable. If the NDMC takes recourse to Section 141(2) of the Act for generating higher revenue from its resources such a policy decision cannot be questioned unless it is unconstitutional and it was not for the court to consider where a different policy should have been followed on the ground that other policy would have been fairer or wiser or more scientific or more logical.

(vi) Section 141 of the Act deals with the lease, let out on hire or transfer otherwise of any immovable property belonging to the Council. Section 141(2) clearly indicates that sale, lease or transfer of such property should not be less than the value at which such property could be sold, leased or otherwise transferred in normal and fair competition. Thus, it is evident that the transfers should be at the market rate when any property of the Council is sold, leased or otherwise transferred.

(vii) The impugned action could neither be treated as unreasonable, nor it was against public interest nor could it be termed as irrational, discriminatory or arbitrary to be affected by the judgment of the Supreme Court in Ramana Dayaram Shetty v. The International Airport Authority of India and Ors. (AIR 1979 SC 1628)

16. The Writ Court accordingly dismissed the writ petition and granted appellants time to vacate the cinema complex on or before 30th September, 2003 subject to filing of an undertaking to vacate the complex by this date.”

The decision of the Ld. Single Bench of the High Court was challenged before the Dn. Bench of the High Court of Delhi by way of a Letters Patent Appeal. The Hon’ble Division Bench framed the following questions for consideration:

“(i) Whether the appellants had any right of renewal or extension of lease under the lease agreement?

(ii) Whether, in the facts and circumstances of the case, Section 141(2) of the Act would apply and it is incumbent upon the NDMC to resort to the procedure laid down in this Section for grant of lease?

(iii) Whether the impugned decision dated 13th November, 2001 rejecting the offer of the appellants for extending the lease beyond 30th September, 2003 and to convert the cinema in a multiplex is arbitrary and/or discriminatory?”

The Hon’ble High Court in para 29 of the judgment summarized the position regarding the License Deed and its covenants as under:

(a) In the public auction held in the year 1965, bid of the appellants was accepted and 10 years' lease was granted i.e. from 1st October, 1970 to 30th September, 1980 (first block). This license deed contained renewal clause as per which one renewal could be allowed.

(b) On the appellants' exercising their option to renew the license/lease agreement dated 23rd September, 1980 was entered into for second block i.e. 1st October, 1980 to 30th September, 1990 by enhancing the license fee and mentioning the same in the said license deed. However, the appellants themselves challenged this license deed on the ground that it was executed under coercion and was not binding by filing Suit No.295/1981.

(c) Even if this license deed dated 23rd September, 1980 is to be treated as binding, fresh renewal could be, as per the license deed, only on both the parties agreeing for renewal and on terms on which renewal is to take place. No such thing happened. No further license deed was executed. Therefore, contract between the parties came to an end.

(d) Offer of further renewal beyond 1st October, 1990 (third block) was initiated vide NDMC's letter dated 2nd December, 1991. Although response dated 5th December, 1991 was given which was not an acceptance in the eyes of law; no further license deed/agreement was executed although offer dated 2nd December, 1991clearly stipulated that the same was subject to execution of fresh agreement. Moreover, the offer contained in the letter dated 2nd December, 1991 was challenged by the appellants themselves by filing CWP No. 3244/1992 meaning thereby it did not accept the said offer. However, they continued in possession because of stay orders granted in the writ petition. In this manner although without a contract, even the third block contained in the offer dated 2nd December, 1991 expired on 30th September, 2000. Therefore, this 'extension' did not flow from the lease executed in the beginning which had already expired, but was the result of the offer of the NDMC, an offer which did not fructify into a binding contract but the appellants enjoyed the occupation and term of 3rd block completed under the umbrella of court order.

(e) The Council extended the lease for another 3 years i.e. from 1st October, 2000 to 30th September, 2003. Again a unilateral act to validate the possession of the appellants for this period and to enable it to consider the proposal of the appellants. Otherwise there was no subsisting lease or agreement written or oral which gave any right to the appellants to seek further renewal under the lease.

The Hon’ble High Court in para 30 of its judgment held as under:

“30. It clearly follows from the aforesaid discussion that initial license/lease agreement dated 16th September, 1970 and thereafter second lease deed dated 23rd September, 1980 (even if it is to be treated as binding) came to an end and, therefore, there was no contract between the parties governing contractual relationship. Thus in so far as the appellants are concerned, they could not exercise any right for further extension under any contract/lease in the absence of any agreement in this behalf operating between the parties.” (Emphasis Supplied)

In para 32 of the judgement, the Hon’ble Division Bench culled out the law relating to the lease deeds and renewal and extension thereof as under:-

“32.

a) In India, a lease may be in perpetuity and the law, either the Transfer of Property Act or the general law abhors a lease in perpetuity. If there is a covenant for renewal in the lease agreement, lessee can exercise his right unilaterally for extension of lease, for which consent of Lesser is not necessary.

(b) Where the principal lease executed between the parties containing a covenant for renewal, is renewed in accordance with the said covenant, whether the renewed lease shall also contain similar clause for renewal depends on the facts and circumstances of each case, regard being had to the intention of the parties as displayed in the original covenant for renewal and the surrounding circumstances.

(c) There is difference between an extension of lease in accordance with the covenant in that regard contained in the principal lease and renewal of lease. In the case of extension it is not necessary to have a fresh deed of lease executed. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties.

(d) Failing the execution of fresh deed of lease, another lease for a fixed terms shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month, as the case may be.

(e) If the language in the lease deed is ambiguous, the court would opt for an interpretation negating the plea of the perpetual lease. Where there is a clause for renewal subject to the same terms and conditions, it would be construed as giving a right to renewal for the same period as the period of the original lease, but not a right to second or third renewal and so on unless, of course, the language is clear and unambiguous. While ascertaining the intention of the parties in this behalf, lease deed has to be read as a whole.”

The Hon’ble Division Bench in para 33 of its judgment came to the conclusion that there is no right to seek any renewal under the lease (License Deed).

While considering the applicability of section 141(2) of the NDMC Act, the Hon’ble High Court in para 40 of the judgment culled out the principles regarding disposal of the public property as under:

“40.

(a) The demarcated approach for disposal of public property, in contradiction to the disposal of private property is that it should be for public purpose and in public interest.

(b) Disposal of public property partakes the character of a trust.

(c) Public purpose would be served only by getting best price for such property so that larger revenue coming into the coffers of the State administration can be utilized for beneficent activities to sub-serve public purpose, namely, the welfare State.

(d) For getting the best price, the public property should be put to public auction or by inviting tender with open participation i.e. ensure maximum public participation and a reserve price. This also ensures transparency and such an auction would be free from bias or discrimination and thus beyond reproach.

(e) Private negotiations should always be avoided as it cannot withstand public gaze and cast reflection on the Government or its official and is also against social and public interest.

(f) In exceptional cases, the authorities may depart from public auction or tender process and even dispose of the property at lower price than the market price or even for a token price. However, resort to this process can be taken only to achieve some defined constitutionally recognized public purpose, one such being to achieve the goal set out under Part-IV of the Constitution of India.

(g) When the statute provides for several modes for disposal of the property as in the case of New India Public School (supra) where Section 15(3) provided for the disposal of the property by public auction, allotment, or otherwise, the court declared that the word ‘otherwise' would be construed to be consistent with the public purpose as public authority is discharging its public duty while disposing of the property when it is not resorting to public auction but ‘otherwise'. Therefore, the court mandated the necessity of unequal guidelines or rules so that it is not at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration. Again it would depend upon the nature of the scheme and object of public purpose sought to be achieved while resorting to this mode. The court thus held that it was necessary to make specific regulations or valid guidelines to exercise.”

On the basis of the above principles the Hon’ble High Court regarding applicability of Section 141(2) of the NDMC Act held as under:

“41. This clinching principle for the grant of government property, i.e. normally by public auction and in a given case if that is not possible then by inviting tenders and in no case by private negotiations, is statutorily recognized under Section 141(2) of the Act. In fact the appellants could not dispute this principle enshrined in Section 141(2) of the Act or even inbuilt in Article 14 of the Constitution of India and recognized by the courts dehors Section 141(2) of the Act.”

In para 43 of the judgment the Hon’ble Division Bench held that the lease deed having expired, there being no right to seek extension, there being no renewal clause, the requirement of consideration for renewal would be a case of fresh grant on lease. The conclusion in this regard under para 43 reads as under:

“We have already concluded that lease of the appellants had expired long ago. The appellants' right to seek extension of the lease, under the lease agreement, also stood extinguished. If after the lease period is over by efflux of time or otherwise, there is no renewal clause under which right can be exercised to get the lease extended and the lessee has no right to continue in occupation of the premises in question, any 'extension' would be a case of fresh grant only. Therefore, it would be a case of creating lease of an immovable property and once the immovable property is to be `leased', the NDMC has to resort to provisions of Section 141(2) of the Act. That is the only interpretation which can be given to the provisions of Section 141(2) of the Act, more so when the generally accepted principle of law for disposal of public property, as detailed above, is the public auction where most important consideration is the economics of getting maximum price.”

Further, in para 48, the Hon’ble Division Bench held as under:

“Obviously, when the appellants have no contractual right to continue and the complex is to be redeveloped into another project, the NDMC shall have to resort to Section 141(2) of the Act while dealing with disposal of the immovable property for another project/purpose. In that eventuality, it no more remains the case of `renewal' of the lease because it would be a fresh grant for altogether different purpose and obviously on different terms for which the authorities will apply different parameters. In such a scenario, grant of lease in favor of the appellants, ignoring the provisions of Section 141(2) of the Act, would be contrary to the statutory mandate. [See: MI Builders Pvt. Ltd. v.Radhey Shyam Sahu [(1999) 6 SCC 464]”

While considering the issue of arbitrariness and discrimination in para 60 of the judgment, the Hon’ble Division Bench noticed that in the case of Sun Air Hotel as well as Bharat Hotel, the allotment was after inviting tenders to a successful tenderer.

The judgment of D.B. and Single Judge were challenged by the Aggarwal & Modi in the Hon’ble Supreme Court.

Hon’ble Supreme Court while upholding the view taken by the Learned Single Judge as well as the Division Bench, in para 22 of the judgement held as under:

“22. The mandate of Sec.141(2) is that any immovable property belonging to NDMC is to be sold, leased, licensed or transferred on consideration which is not to be less than the value at which such immovable property could be sold, leased, or transferred in fair competition. The crucial expression is “normal and fair competition”. In other words, NDMC is obligated to adopt the procedure by which it can get maximum possible return/consideration for such immovable property. The methodology which can be adopted for receiving maximum consideration in a normal and fair competition would be the public auction which is expected to be fair and transparent. Public auction not only ensures fair price and maximum return it also militates against any allegation of favouritism on the part of the Government authorities while giving grant for disposing of public property. The courts have accepted public auction as a transparent means of disposal of public property. (See State of U.P. v. Shiv Charan Sharma, Ram & Shyam Co. V. State of Haryana , Sterloing Computers Ltd.v.M&N Publications Ltd., Mahesh Chandra v.Regional Manager, U.P. Financial Corporation, Pachaiyappa’s Trust v.Official Trustee of Madras, Chariman and MD, Sipcot v.Contromix(P) Ltd., New India Public School v.HUDA, State of Kerala v. M.Bhaskaran Pillai and Haryana Financial Corpn.v.Jagdamba Oil Mills.” (Emphasis Supplied)

Further the Hon’ble Supreme Court in para 23 of the said judgement held that invitation for participation in public auction ensures transparency and it would be free from bias or discrimination beyond reproach. Para 23 reads as –

“23. Disposal of public property partakes the character of trust and there is distinct demarcated approach for disposal of public property in contradiction to the disposal of private property i.e. it should be for public purpose and in public interest. Invitation for participation in public auction ensures transparency and it would be free from bias or discrimination and beyond reproach. (Emphasis Supplied)

Under the terms of the License deed clause II (2), the period of the License was 33 years. Licensor could request for consideration for extension for a further period which is to be considered by the licensor on such terms and conditions as may be mutually agreed upon between the licensor and the licensee. A perusal of the said clauses of the license clearly shows that upon expiry of the term of License, licensor does not have any right to have any further extension, there is no renewal clause under which right can be exercised to get the license extended and the licensor has no right to continue in occupation of premises, any ‘extension’ would be a case of fresh grant only. There is no compulsion on NDMC as a licensor to renew the License deed. That being the case the provision of Sec. 141(2) as interpreted by Hon’ble Supreme Court in Chanakya Cinema case (supra) will be attracted.

In view of the above, in my opinion, the Council will be bound to lease out property now by invitation by participation in public auction so as to fetch the market value of the property to be licensed/ leased. The query No.1 is answered accordingly.

**Query No.2**

**Reply:-** The judgement of the Hon’ble Single Judge as well as the Division Bench of the Delhi High Court in Aggarwal & Modi case was upheld by the Hon’ble Supreme Court. The judgments have been quoted in extensor in response to query no 1 above. The view taken in that case was that the lease/license period having expired, there being no Clause contemplating extension, there being no renewal clause under which right can be exercised to get the lease extended and the lessee has no right to continue in occupation of the premises in question, any “extension” would be a case of fresh grant only. Therefore, in such a case, for creating a lease/license of an immovable property NDMC has to resort to the provisions of Section 141 (2) of the Act. The Hon’ble Supreme Court in the said case has held that immovable property of the NDMC has to be sold, leased, licensed or transferred on a consideration which shall not be the value at which the immovable property could be sold, leased or transferred in fair competition, is fully applicable to the present case. NDMC is bound to follow the law laid down by the Hon’ble Supreme Court and High Court. It may not be out of place to mention here that in the said judgement the Hon’ble Supreme Court has laid down that NDMC is obligated to adopt the procedure by which it can get maximum possible return/consideration for such immovable property and that the methodology which could be adopted in reaching maximum consideration in a normal and fair competition can be public auction which is expected to be fair and transparent. Hon’ble Court has further laid down that the public auction not only ensured fair price and maximum return it also militates against any allegation of favoritism on the part of the Government authorities while giving grant for disposing of public property.

In my opinion, NDMC is bound to follow the judgement of the Hon’ble Supreme Court in M/s Aggarwal & Modi’s case. The query No.2 is answered accordingly.

**Query No.3**

**Reply** :- The query No.3 is partially answered by answering query No.1 but for the sake of clarity, I may say that the issue was considered by the Hon’ble Supreme Court in para 10 of its judgement in Aggarwal & Modi’s case. Para 10 of the judgement reads as follows:

10. In essence, it means that the lease amounts should not be less than the market value. The expression in the renewal clause on which great emphasis is led speaks of “terms and conditions to be mutually agreed upon”. According to the appellants it cannot mean that one of the parties can stipulate unreasonable terms and conditions. In essence, the terms and conditions have to be fair. While determining the fair value the amount is what the existing tenant is required to pay. NDMC itself had required payment of rupees two crores per year. The requirements of Section 141(2) cannot apply to a case of renewal. It is submitted that the appellants have spent more than rupees three crores after 2000. Though there has been no renewal the High Court noted that discriminatory treatment is being meted out to the appellants and, therefore, it had directed the respondent NDMC to give instances where public auction had been resorted to.

While dealing with the aforesaid contention the Hon’ble Supreme Court came to the conclusion in para 22 and 23 reproduced above while answering query No.1 and held that even in such case, the NDMC will have to follow the methodology of Section 141(2).

In my opinion, the provision of Section 141(2) as interpreted by the Hon’ble Division Bench of the High Court and upheld by the Hon’ble Supreme Court in para 22 and 23 of Aggarwal & Modi’s judgement will be attracted/applicable in the present case. The NDMC, therefore, has to follow the procedure laid down by the Hon’ble Supreme Court in para 22 and 23 of Agarwal & Modi’s judgement and grant License by public auction. The query No.3 is answered accordingly.

**Query No.4**

**Reply** :- A detailed discussion in response to query No.1 & 3 hereinabove may also be read as my response to the query No.4. The clause II (2) of the license deed provides that the NDMC has an option to grant a License for a further period on such terms and conditions as may be mutually agreed upon. The licensee can only request the licensor to consider its request for license for a further period. As such the licensee after the lease period is over by efflux of time, there being no renewable clause to seek extension has no right to continue in occupation of premises and any extension would be a case of fresh grant only. In view of the law laid down by the High Court, upheld by the Hon’ble Supreme Court in para 22 and 23 of Aggarwal & Modi’s case, the NDMC has no option but to grant lease/license to the Hotel building by invitation for participation in public auction so as to fetch fair market price and maximum returns as contemplated in Section141 (2) of the NDMC Act. Query No.4 is answered accordingly. **Unquote**

**6. Views of the Law Department**

**6.1** In view of the opinions tendered by various legal luminaries as stated above, Law Department has nothing more to add.

**7. Views of Finance Department**

**7.1**  Finance Department is of the view that while taking a decision in this matter, the criteria should be to obtain the maximum revenue with minimum risk involved in the process.

8. **Final Submission**

8.1 In Resolution dated 07.10.2011, the Council had decided to accord sanction for further review and actions in accordance with the following parameters.

1. Decision of Ministry of Urban Development
2. The legal advise
3. The Committee’s recommendations and
4. Consultant’s Reports.

8.2 Directions of Council have been complied with as hereinafter.

8.3 Minutes of Ministry of Urban Development are at para 3.26 and 3.28.

8.4 Legal advise from Shri Harish Salve, Senior Advocate; Smt. Madhu Tewatia, Standing Counsel (NDMC), Consultant’s Advocate Shri Gagan Anand, and Shri Rakesh Khanna, Additional Solicitor General are available at para 5 above and Annexures-VII, VIII, XIV B and XV.

8.5 The Committee’s Report at Annexure-X.

8.6 Relevant extracts from Consultant’s report is at para 4 and full Report is at Annexure-XIV A.

**9. Decision Required**

9.1 In view of what has been stated above and in the Report of Committee of officers, advice of Ministry of Urban Development, GOI and the Consultant as also the legal opinion tendered by various advocates, standing counsel and the Additional Solicitor General summarized above, the Council may now consider any of the options given below :

(i) The Council may grant extension for a further period on the terms and conditions as may be mutually agreed upon with IHC, **or**

(ii) The Council may decide to go for public auction with first right of refusal to IHC.

**COUNCIL’S DECISION**

The Council carefully considered all the facts placed before it in the Agenda Item, including the Annexures, and noted that IHC not only has a clean record in its dealing with the Council, but has also made regular payments of license fee to it till date and that there are no disputes between the Council and the Licensee (IHC Ltd).

After discussing at length the pros and cons of the two options proposed in the Item the Council resolved by majority, to opt for public auction, in a fair and transparent manner, of the NDMC property at 1, Man Singh Road, with first right of refusal to Indian Hotel Company. The recourse to public auction would serve to determine the market price of the license fee, that IHC would have to match if they wish to run a hotel at this property. This option, the Council noted would also safeguard its revenue interests.

The Council further resolved by majority to extend the period of license of IHC, on existing terms and conditions, for a further period of one year or till such time a new licensee is chosen through the bidding process, whichever is earlier.

That further action may be taken by the Department in anticipation of confirmation of the Minutes by the Council.

**ANNEXURE -A**

**ITEM NO. 02 (L- 03)/07.10.2011**

**1. Name of the Subject:**

Extension of Collaboration Agreement between NDMC & M/s IHC in respect of Hotel Taj Man Singh beyond 10.10.2011.

**2. Name of the Department:**

Estate-I Department

**3. Brief History of the Subject:**

3.1 NDMC, in 1976, with the objective of developing tourism in the capital city before the PATA Conference of 1978 and to boost its own revenues decided to develop a 5 star hotel as per the standards laid down by Government of India. NDMC made a request to the Ministry of Works & Housing, Govt. of India for the plot of land measuring 3.78 acre at 1, Man Singh Road, New Delhi. Around the same time, the Ministry was also approached by Indian Hotels Co. Ltd. (IHC) for this plot. Finally L&DO, Govt. of India initiated the allotment of this plot at 1, Man Singh Road, New Delhi to NDMC.

3.2 NDMC, being an urban local body (*Nagar Palika*), did not and does not have the expertise of setting up or running 5 star hotel. Indian Hotels Co. Ltd. (IHC) approached NDMC in 1976 for developing the 5 star hotel as joint venture project. Considering the lack of expertise with Council and paucity of time (in view of PATA Conference in 1978), it was decided by NDMC to have a collaboration with Indian Hotels Co. Ltd. (IHC). The approval for this joint venture / collaboration was granted by the New Delhi Municipal Committee, vide Resolution No. 35 dt.02.4.1976 **(Annexure – I)**. The plot was allotted to NDMC vide the allotment letter No.L-II-A-16 (436)/76 dated 13.07.1976.

3.3 In this joint venture, NDMC provided the allotted land and financed the construction of building and IHC was to provide technical services such as planning, designing, supervision and quality control for construction of the hotel building by deploying qualified architects, consultants, engineers and quality surveyors. IHC was also to provide, at its own cost, necessary equipments, furniture, furnishings and assets such as kitchen equipment, laundry equipment, furniture and furnishings. IHC was also to undertake, at its own cost and responsibility, regular running of this 5 star hotel as per laid down standards laid down by the D.G. (Tourism) Department of Tourism, Government of India by employing qualified and skilled staffs. This unique joint venture arrangement followed in case of hotel Taj Man Singh is fully captured by 3 agreements :-

* + 1. License deed (18.12.1976) for land area of 3.78 acre (161706 sqft) and building covered area of 323438 sqft providing that NDMC owns the land and the constructed building with its assets; while IHC owns the movable assets such as laundry equipments, furniture, office equipments, etc. As per the License Deed, IHC was liable to pay the license fee at the rate of 10.5% of gross receipts or 15% of NDMC investments in the hotel building i.e. Rs.6.26 cr, whichever is higher, along with Rs.12 lacs per annum towards House Tax and ground rent of Rs.2.29 lacs per annum.
		2. Collaboration agreement (18.12.1976), detailing the investments by NDMC in Schedule-II and those by IHC in Schedule-III. It captures total investments by NDMC and IHC as Rs.626 lacs and Rs.550 lacs respectively.
		3. Supplementary agreement (25.9.1979), capturing final investments of NDMC of Rs.626 lacs including construction of the hotel building with fixtures and fittings, cost of land & construction supervision.

**4. Detailed proposal on the subject**:

4.1 The Hotel Taj Man Singh represents an unique Joint Venture/ Collaboration project between the NDMC & IHC where land and construction funding were provided by NDMC and IHC had undertaken construction though this funding and then provided for equipments, regular operations & maintenance. IHC has been fairly regular in clearing their dues of license fees. There have been no major legal disputes or proceedings between NDMC and IHC.

4.2 IHC have strived to increase their consumer base and created a strong brand name for the property. IHC and NDMC have long term interest in the property. After taking over hotel building from NDMC in 1976, IHC have invested about Rs. 129 cr by March 2011 in substantive renovation and refurbishments of the hotel. This can be verified from the audited statements of IHC.

4.3 As per the Agreement and license deed, the term given to IHC was for 33 years i.e. upto 10.10.2011. This was calculated from the date on which the first paying guest occupied the hotel room. The clause – II of the License Deed provides that:-

 *“the licensor shall have the option to grant the licence for a further period on such terms and conditions as may be mutually agreed upon between the licensor and the licensee… if the licensee shall be desirable of obtaining the licence for a further period after the expiry of the present licence it shall give to the licensor a notice in writing of not less than 60 days prior to the date of expiry of the present licence for consideration of the licensor*”.

4.4 Thus the license deed of 18.12.1976 itself provides for extension of the license period on mutually agreed terms and conditions. IHC, the collaboration partner and the present operator has applied for extension of term in February 15, 2010. As the original agreement/deed provided option to grant further term to IHC, the case was processed for appropriate decision.

 4.5 Chairperson, NDMC constituted a Committee on 27.07.2010 to examine the legal, contractual and financial aspects of the proposal and suggest course of actions on the request received from IHC. The Committee consisted of the following officers:

 1. Financial Advisor In Chair

 2. Legal Advisor Member

 3. Director (Estate-I) Member

4.6 The Committee held a number of meetings/discussions, including those with IHC. It also considered legal advice of Counsel forwarded by IHC and Standing Counsel of NDMC **(Annexure – II)**. She advised that this project is a Joint Venture Collaboration Agreement and it can’t be equated with normal license shops/units. She has concluded that ‘The decision of the Supreme Court of India interpreting the provisions of section 141(2) and Resolution dt. 30.08.2000 would not prohibit the continuation of the license arrangement of NDMC with IHC, the vital and dominant consideration always being maximum consideration for immoveable property even in cases governing contractual rights inter-se the parties where the NDMC is to offer state grant’. Further the Standing Counsel has also noted that “NDMC could vary the percentage of revenue sharing based on gross receipts of the hotel, so as to get an amount equivalent to the fair market value”. Based on this input and detailed examination and discussion, the Committee submitted its detailed report in July, 2011.

4.7 In Brief, the Committee’s recommendation regarding license fee as share of gross turnover are summed up as follows :-

|  |  |  |
| --- | --- | --- |
| **Duration** | **Minimum License Fee** | **License fee as share in gross turnover** |
| First ten years | 21 crores per annum | 17.25% of gross turnover |
| Second ten years | 25 crores per annum | 18.25% of gross turnover |
| Last ten years | 30 crores per annum | 19.25% of gross turnover |

4.8 While the findings and recommendations of the Committee were under consideration, the Ministry of Urban Development, in a meeting with NDMC in August 2011, suggested that fresh bids should be invited for the property while giving first right of refusal to IHC (**Annexure – III**)**.** NDMC has written to the Ministry clarifying that this was not in accordance with the agreement between NDMC and IHC, which are legally binding documents (**Annexure – IV**). The reply from MOUD is still awaited.

4.9 While the committee has given its recommendations based on internal inputs and records, it was felt necessary that the department may also examine other aspects such as recent transactions of DDA, DIAL, DMRC of similar nature and also the practices followed in hotel projects in other states where revenue sharing has been the bidding criteria. The Department should also assess NDMC’s and IHC’s investments in this joint venture. While NDMC has invested in land and building, IHC has invested in refurbishment, regular operations, brand building and creating a loyal customer base.

4.10 Keeping all above factors in mind, NDMC has decided to take some expert opinion through a Consultant to give us the best possible evaluation for considering the extension on mutually agreed terms and conditions. In this regard, the Department is exploring various options for engaging a Consultant. However, the consultant would need some time to come up with detailed recommendations. Further the reply from MOUD is also still awaited. Therefore it is sought to extend the term of license for one year from 11.10.2011 to 10.10.2012 on the terms and conditions to be mutually agreed to. The matter will be reviewed and further taken up for negotiation, after the decision of the Ministry of Urban Development, based on the Committee’s recommendations and Consultant’s report.

**5. Financial implication of the proposed Subject:**

This is a joint venture agreement between IHC and NDMC and one year extension is sought on the existing arrangement while reserving the right to implement the final decision about terms of extension from 11.10.11. Hence no financial implication is involved.

**6. Implementation schedule with timelines for each stage including internal processing:**

N.A.

**7. Comments of the Finance Department on the subject with diary number and date:**

 Financial Advisor was a member of the Committee. Further the Finance Department vide their note No. 2038/Fin./R-Secy. Dated 3.10.2011 that as the proposal of the deptt. in the draft agenda for extension of the existing Collaboration Agreement with M/s Indian Hotels Co. Ltd. (Hotel Taj Man Singh) for a period of one year on the existing terms and conditions, beyond 10.10.2011 i.e. the date on which the existing agreement & licence deed for 33 years is expiring, is based upon the facts that Ministry of Urban Development has suggested to invite bids for the property while giving first right of refusal to IHC, and also that NDMC has decided to take some expert opinion before considering the extension on mutually agreed term, it would be advisable if the proposed extension is termed as Provisional while reserving the right to implement the final decision from 11.10.2011 itself about terms of extension, after the finality of the discussion/correspondence with MOUD and on the basis of the expert opinion at a late date. Accordingly the draft agenda may be amended accordingly. However, the legal advice may also be taken on this proposal to safeguard the interest of NDMC.

**8. Comments of the Department on comments of Finance Department:**

 Comments of Finance Department have been incorporated in the draft resolution.

**9. Legal implication of the subject:**

The Agenda is proposed as per the provisions of Collaboration Agreement, License Deed and Supplementary Agreement between IHC and NDMC for this joint venture project.

**10. Details of previous Council Resolutions on the subject:**

 As mentioned in para 3.2 above.

**11. Comments of the Law Deptt on the Subject:**

The opinion of Standing Counsel of NDMC has been incorporated in the draft resolution and also annexed. Legal Advisor has, inter-alia, observed that when licensee has exercised option, there is not much left, except to decide further period of license and terms and conditions to be mutually agreed upon. He has opined that under section 141, the power for disposal of immovable property is with sanction of the Council. He has noted that the license was issued under Punjab Municipal Act, 1911 and now is deemed to be license under the NDMC Act, 1994 as per s.416(2)(a) and that we may formally inform IHC about the Ministry’s stand.

**12. Comments of the Department on the comments of the Law Deptt:**

 Comments of Finance Department has been incorporated in the draft resolution.

**13. Certification by the Department that all Central Vigilance Commission (CVC) guidelines have been followed while processing the case.**

Not application at this stage.

**14 Recommendations:**

 Considering the facts as brought out above, the case is put up before the Council for sanction for extension of the existing Collaboration Agreement with M/s Indian Hotels Co. Ltd. For Hotel Taj Man Singh and extension of license deed for a period of one year on the terms and conditions to be mutually agreed to as also for reviewing and taking up for negotiations,after the decision of the Ministry of Urban Development, based on the Committee’s recommendations and Consultant’s report.

**15. Draft Resolution**

 The proposal contained in the agenda presented before the Council was considered in detail and proposal as contained in para 14 of the agenda is approved. Further action may be taken by the department in anticipation of confirmation of minutes.

**COUNCIL’S DECISION**

The Council expressed its’ displeasure regarding delay in processing the case. Considering the urgency of the matter, the council resolved, by majority, as follows:

1. to accord sanction for extension of existing collaboration project and lease deed for one year upto 10.10.2012, subject to the condition that the Indian Hotel Corporation (IHC) shall agree to pay license fee as per mutually agreed terms and conditions retrospectively w.e.f. 11.10.2011.
2. to accord sanction for further review and actions in accordance with the decision of Ministry of Urban Development, the legal advice, the Committee’s recommendations & Consultant’s reports.

The Council also directed that the Deptt. should workout the timelines for completing the above exercise and the Council be informed of the progress.

It was also resolved by the Council that further action may be taken by the department in anticipation of confirmation of the minutes by the Council.

**ANNEXURE –B**

**ITEM NO. 08 (L-01)/25.07.2012**

1. **Name of the Subject** :-

Determination of licence fee for the period 11.10.2011 to 10.10.2012 on mutually agreed terms on One year extension of Collaboration Agreement and license of Taj Man Singh Hotel with the Indian Hotels Co. Ltd. from 11.10.2011 to 10.10.2012.

2. **Name of the Department** :-

 Estate-I Department.

3. **Brief History of the Subject** :-

3.1.A proposal to consider extension of the Collaboration Agreement between NDMC and M/s. Indian Hotels Co. Ltd. in respect of Hotel Taj Mansingh from 11.10.2011 was considered by the Council as an Item No.02 [L-03] in its meeting held on 7.10.2011. [**Annexue-‘A’** ]. The Council resolved as under :-

(i*) to accord sanction for extension of existing collaboration project and lease deed for one year upto 10.10.2012, subject to the condition that the Indian Hotel Corporation [IHC] shall agree to pay license fee as per mutually agreed terms and conditions retrospectively w.e.f. 11.10.2011 ;*

*(ii) to accord sanction for further review and actions in accordance with the decision of Ministry of Urban Development, the legal advice the Committee’s recommendations and Consultant’s reports.*

 *The Council also directed that the Department should workout the timelines for completing the above exercise and the Council be informed of the progress.*

 *It was also resolved by the Council that further action may be taken by the department in anticipation of confirmation of the minutes by the Council.* **[Annexure-‘B’**]

3.2. The Council Resolution was in two parts :-

(i) the Council accorded sanction for extension of existing collaboration project and lease deed for one year upto 10.10.2012, subject to the condition that the Indian Hotel Corporation shall agree to pay license fee as per mutually agreed terms and conditions retrospectively from 11.10.2011 ; and

(ii) accorded sanction for further review and actions in accordance with the decision of the Ministry of Urban Development, the legal advice, the Committee’s recommendations and Consultant’s reports ;

3.3. Initially, ITDC was asked to carry out the consultancy assignment but after they conveyed their inability, RFP document was floated amongst the empanelled PPP consultants of Govt. of India. IDFC was the successful bidder but the company soon backed out citing conflict of interests. The RFP was then floated again among the remaining ten empanelled PPP Consultants and this time the work was awarded to M/s. Ernst and Young Private Ltd. The prefeasibility report has been submitted and approved by Competent Authority. The final report is awaited.

3.4. Meanwhile, Ministry of Urban Development, in a meeting dated 14th November, 2011 has stated that NDMC should strive to get as close to the market rent as possible even if it has to negotiate with M/s. IHC Ltd. MoUD has already noted the steps taken by the Council towards granting one year extension to IHC and appointing a Transaction Consultant and have given the final direction that the Council may take further appropriate steps.

3.5. It is clear from the above that as the recommendation of the Consultant have not been received so far the only option available to the NDMC is to implement the 1st part of the Resolution to collect to licence fee for a period of one year on mutually agreed terms and conditions from 11.10.2011. There are two options - to continue with the present structure of licence fee or to increase it on mutually agreed terms. In pursuance of these directions from the Council, representatives of M/s. IHC were invited to discuss the mutually agreed licence fee for a term of one year from 11.10.2011 to 10.10.2012. M/s. IHC has made an offer of 17.25% of the gross turnover with a minimum of Rs.21 crore, whichever is higher. The representatives of M/s. IHC were asked to confirm their offer and they have confirmed the offer vide letter dated 16.07.2012, a copy of which is annexed at [**Annexure-‘C’**].

3.6. To arrive at the mutually agreed terms for one year, the only information available to the NDMC is the report of the Committee (Comprising Financial Advisor, Legal Advisor and Director (Estate-I) constituted by the Chairperson, NDMC in 2010 to examine IHC’s request for extension. The Committee had also recommended a licence fee of 17.25% of the gross turnover with a minimum of Rs.21 crore for a period of ten years but no further action was taken on this report. **(Para 4.5, 4.6 and 4.7 of Annexure A).**

3.7. The report of the Consultant is still awaited. MoUD has also indicated its view as per Para-3.4 above. Since the Collaboration Agreement has been extended only for one year, the only information available with the NDMC at present is the recommendation of the aforesaid report wherein the LF was proposed at 17.25% of the gross turnover or Rs.21 crore as the minimum licence fee, whichever is higher.

3.8. Prior to 11.10.2011, M/s. IHC as per the Collaboration Agreement M/s IHC were required to pay 10.5% of the gross turnover or Rs.96 lac as the minimum LF, whichever is higher. The proposal, if approved by the Council would increase the percentage of LF from 10.5% to 17.25%, which is an increase of 6.75% of turnover or 64% as compared to the LF being paid by M/s. IHC upto 11.10.2011.

3.9. The gross turnover of the LF being paid in the last 12 years from 2000 to 2012 is at **Annexure-“D”.**

3.10. There has been a substantial increase in the gross turnover and corresponding increase in the LF. The turnover and the LF have gone up in the last 12 years by about 2.7 times i.e. 270%. For the current financial year 2012-13, M/s. IHC has estimated their turnover provisionally at Rs.205.61 crores. With the increase in percentage of LF from 10.5% to 17.25% and increase in turnover the LF would be above Rs.35 crores i.e. an increase in LF by about Rs.15 crores as compared to the LF being paid for the year 2011-12 on the basis of 10.5% of the turnover. This increase takes into consideration, the increase in the turnover and increase in the percentage from 10.5% to 17.25%.

**4. Detailed proposal on the subject**

4.1 IHC have continued to make regular payments since 11.10.2011@ 10.5% of GTO (**Annexure E**) and undertake to make the balance payments within a week of getting Council’s approval.

4.2 As per audited accounts for the year 2011-12, the gross turn over is Rs.200.17 Cr. IHC has provisionally estimated gross turn over for 2012-13 at Rs.205.61 Cr. Licence fee for the period 11.10.2011 to 31.3.2012 will be based on the audited accounts of 2011-12 and that for 1.4.2012 to 10.10.2012 on estimated gross turn over of Rs.205.61 Cr. Difference if any for the period 1.4.2012 to 10.10.2012 will be collected after the accounts for 2012-13 get audited. The rate of licence fee is proposed at 17.25% of GTO for the above period of 11.10.11 to 10.10.12.

4.3 The consultant would need some time to come up with a detailed report after conducting market study and analysis. Therefore, IHC’s offer as stated in their letter dated 16.7.2012 is placed before the Council for consideration and decision.

**5. Financial implication of the proposed Subject:**

5.1 The proposed increase in licence fee will result in revenue of around Rs. 34.5 crores (based on 2011-12 GTO) from this unit during the one year extension from 11.10.11 to 10.10.12. This amount is likely to increase further to Rs. 35 Cr. (approx.) because projected GTO for 2012-13 is Rs. 205.61 Cr.

**6. Implementation schedule with timeliness for each stage including internal processing:**

 NIL

**7. Comments of the Finance Department on the subject with diary number and date:**

Financial Advisor has seen and concurred vide diary No. 1092/PS/FA/12 dt. 18.7.2012

**8. Comments of the Department on comments of Finance Department:**

 NIL

**9. Legal implication of the subject:**

NIL

**10. Details of previous Council Resolutions on the subject:**

As mentioned in para 3 above.

**11. Comments of the Law Deptt on the Subject:**

 Vide Diary No. 44/PS/LA/12 dt. 19.7.2012 Legal Advisor has commented that “It has no legal issue. This is to comply with the directions of the Council.”

1. **Comments of the Department on the comments of the Law Deptt:**

 NIL

**13. Certification by the Department that all Central Vigilance Commission (CVC) guidelines have been followed while processing the case.**

Not applicable as extension has been granted for a limited period of 1 year and is in accordance with provisions of the licence deed and collaboration agreement signed in 1976.

14. **Council Resolution** :-

Considering the fact that at present only the Committee’s Report, which formed part of the Resolution dated 07.10.2011 is available, it is recommended that additional revenue may be collected on the basis of the recommendation of the Committee’s Report. The matter shall be further placed before the Council for consideration, after receipt of report of Consultant.

**COUNCIL’S DECISION**

After considering the facts and circumstances of the case, it was resolved by the Council, by majority, that the Council may charge from the Licensee, M/S IHC Ltd License Fee @ of 17.25% of the Gross Turnover or `.21 Crores a year for the period from 11.10.2011 to 10.10.2012., whichever is higher.

The Council further directed that the final report of the Consultant appointed to recommend further course of action be brought before the Council at the earliest.

It was also resolved by the Council that further action in the matter be taken by the department in anticipation of confirmation of the Minutes by the Council.