IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 1525/MUM/2018
Assessment Year: 2013-14
&
ITA No. 1524/MUM/2018
Assessment Year: 2014-15

Shibani B. Bhojwani, Samir Complex, First Floor, St. Andrews Road, Bandra (West), Mumbai-400050.	Vs.	Deputy Commissioner of Income Tax Central Circle-3(4), 19th floor, Air India Building Nariman Point, Mumbai-400021.
PAN No. AABPB6649R		
Appellant		**Respondent**

Assessee by : Mr. Yogesh A. Thar, AR
Revenue by : Mr. Chaudhary Arun Kumar Singh, Sr. DR

Date of Hearing : 30/07/2019
Date of pronouncement: 31/07/2019

ORDER

PER N.K. PRADHAN, AM

The captioned appeals filed by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-51, Mumbai. [in short 'CIT(A)'] and arise out of the assessment completed u/s 143(3) of the Income-tax Act 1961, (the 'Act').

ITA No. 1525/MUM/2018
Assessment Year: 2013-14

2. Briefly stated, the facts are that the assessee filed her return of income for the assessment year (AY) 2013-14 on 29.09.2013 declaring a total income of Rs.41,70,081/-. During the course of assessment proceedings, the Assessing Officer (AO) noticed that the assessee has shown income earned from letting out of flats as business income under the narration "leave and license income". The AO followed the order of his predecessor-in-office for AYs 2011-12 and 2012-13 and brought to tax the rental income under the head "income from house property".

In appeal, the Ld. CIT(A) followed the order of his predecessor-in-office for AYs 2009-10 to 2012-13 and confirmed the order of the AO.

3. Before us, the Ld. counsel for the assessee relies on the order of the Tribunal in assessee's own case for AYs 2009-10, 2010-11 and 2011-12 and submits that facts being identical, the appeal be allowed.

On the other hand, the Ld. DR relies on the order of the Ld. CIT(A).

4. We have heard the rival submissions and perused the relevant materials on record. It is seen that the order passed by the Ld. CIT(A) for AYs 2009-10 to 2011-12 has been adjudicated by the ITAT 'J' Bench, Mumbai in assessee's own case in ITA No. 7573, 7574 & 7575/Mum/2014. The Tribunal *vide* order dated 26.07.2017 held :

> "9. We have deliberated on the issue under consideration, and are of the considered view that though it remains as matter of fact that for

adjudicating as to whether the income arising from the letting of a property is liable to be assessed as 'business income' or under the head 'income from house property', clear parameters had been laid down by the constitutional bench of the Hon'ble Supreme Court in the case of Sultan Brothers (P) Ltd. Vs. CIT (1964) 51 ITR 353, wherein the Hon'ble Apex Court had observed as under:-

> 12. We have earlier said that s. 12 can only apply if no other section is applicable, because it deals with the residuary head of income. Now sub-s. (4) of s. 12 only deals with certain allowances and it obviously proceeds on the basis that the income mentioned in it, namely, that from the building when inseparably let with plant, machinery or furniture, is not income falling under any of the specific heads dealt with by ss. 7 to 11 and is, therefore, income falling under the residuary head contained in s. 12. There a preliminary difficulty arises. In respect of buildings— and with them alone sub-s. (4) of s. 12 is concerned—as already seen, the owner is liable to tax under s. 9 not on the actual income received from it but on its annual value and in fact quite irrespective of whether he has let it out or not. How then can it be said that the rent received from a building could at all come under s. 12 ? In other words, why can it not be said that the specific section, that is, s. 9, covers the case and the income from the building cannot be assessed under s. 12 and no question of giving any allowances under s. 12 (4) arises ? It has sometimes been suggested as a solution for this difficulty that sub-s. (4) of s. 12 applies only when the building is let out by a person who is not the owner because such a case would not come under s. 9. Counsel for neither party however was prepared to accept that suggestion. Indeed that suggestion has its own difficulty. Under sub-s. (4) of s. 12 the assessee becomes entitled among others to an allowance in accordance with s. 10(2)(vi) which is on account of depreciation of the building "being the property of the assessee" from which it follows that sub-s. (4) of s. 12 contemplates the letting

> of the building by the owner. Sub-s. (4) of s. 12 must, therefore, be applicable when machinery, plant or furniture are inseparably let along with the building by the owner. If sub-s. (4) of s. 12 is to have any effect—and it is the duty of the Court so to construe every part of a statute that it has effect—it must be held that the income arising from the letting of a building in the circumstances mentioned in it is an income within the residuary head. If a person cannot be assessed under s. 12 in respect of the rent of a building owned by him, sub-s. (4) will become redundant; there will be no case in which the allowances mentioned by it can be granted in computing the actual income from a building. An interpretation producing such a result is not natural. We must, therefore, hold that when a building and plant, machinery or furniture are inseparably let, the Act contemplates the rent from the building as a residuary head of income".

The aforesaid judgment of the Hon'ble Apex Court was further deliberated upon by the court in the case of Shambhu Investment (P) Ltd. Vs. CIT (2003) 263 ITR 143 (SC), while upholding the order of the Hon'ble High Court of Calcutta in the case of CIT Vs. Shambhu Investment (P) Ltd. (2001) 249 ITR 47 (Cal), wherein laying down the parameters for adjudicating as to whether the income derived by an assessee from letting out of furnished premises was liable to be assessed under the head 'Income from house property' or as 'business income', it was held as under:-

> 7. Taking a sum total of the aforesaid decisions if clearly appears that merely because income is attached to any immovable property cannot be the sole factor for assessment of such income as income from property, what has to be seen is what was the primary object of the assessee while exploiting the property. If it is found applying such test that the main intention is for letting out the property or any portion thereof the same must be considered as rental income or income from property. In case it is found that the main intention is to

exploit the immovable property by way of complex commercial activities in that event it must be held as business income".

We find that the Hon'ble Apex Court had in unequivocal terms therein categorically held that where an assessee is into simpliciter letting out of property or any portion thereof, the same is liable to be assessed as 'Income from house property', but however, where it emerges that the main intention of the assessee is to exploit the immovable property by way of complex commercial activities, in that event the income is liable to be assessed as 'business income'. We find that as observed by us hereinabove, it remains as matter of fact that the assessee since inception, as conceded by the department, was engaged in the business activity of letting out furnished flats alongwith provision of certain services to the occupants. We further find that during the search and seizure proceedings conducted on the assessee on 30.11.2010, no such material was found which could go to dislodge and rather disprove the consistent view arrived at by the department for years at stretch in the course of regular assessments framed in the hands of the assessee, and thus could persuade the authorities to conclude that the receipts from the composite letting out of the furnished flats by the assessee had wrongly been brought to tax under the head 'business income', and was liable to be assessed as the latters 'Income from house property'. We find that the coordinate bench of the Tribunal in the case of the assessee for A.Y. 2008-09 after appreciating the aforesaid factual position, had therein concluded that in the absence of any new facts, a departure from the earlier consistent view of the department that the income from the composite letting out of the furnished flats was liable to be assessed as 'business income', as claimed by the assessee, would not be permissible in the eyes of law. We find ourselves to be in agreement with the aforesaid view taken by the coordinate bench of the Tribunal and are of the considered that though the principle of res judicata is not applicable to income tax proceedings, but then we cannot also be oblivious of the settled position law that in the absence of any new facts, the A.O cannot be permitted to take an inconsistent view on the basis of the same set of facts

which were there before him in the earlier years. We find that our aforesaid view stand fortified by the judgment of the Hon'ble Supreme Court in the case of Radhsoami Satsang Vs. CIT (1992) 193 ITR 321 (SC), wherein the Hon'ble Apex Court had observed as under:-

> "13. We are aware of the fact that strictly speaking resjudicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year hut where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

We further find that the Hon'ble High Court of Delhi relying on the aforesaid judgment of the Hon'ble Apex Court, had taken a similar view in the case of CIT Vs. A.R.J. Securities Printers (2003) 131 Taxmann 297 (Delhi) and therein held that where the fundamental aspect permeating through different assessment years had been found as a fact one way or the other, and the parties had allowed the position to sustain by not challenging the order, it would not be at all appropriate to allow the position to be changed in the subsequent years. That a similar view had also been taken by the Hon'ble High Court of Madhya Pradesh in the case of CIT Vs. Godavari Corporation Ltd. (1985) 21 taxmann 279 (M.P.), wherein it was held that though the principles of res judicata does not apply to income tax proceedings, but the rule of consistency does apply. We find that the Hon'ble High Court while arriving at the aforesaid view had relied on the judgment of the Hon'ble High Court of Bombay in the case of H.A. Shah and Co. Vs. CIT (1956) (30 ITR 618) (Bom) and Jivat lal Purtapshi Vs. CIT (1967) (65 ITR 261) (Bom), as well as the judgment of the Hon'ble High Court of Kerala in the case of Annamalai Reddiar Vs.CIT (1964) (53 ITR 601) (Ker). We further find that the aforesaid judgment of the Hon'ble Apex Court had also been followed by the Hon'ble High Court of Punjab and Haryana in the

case of CIT, Patiala Vs. Sood Harvester (2008) 304 ITR 279 (P&H), wherein the Hon'ble High court emphasized on the fact that the revenue was statutorily bound to maintain consistency, and a departure from an earlier decision on the same question would not be permissible, unless some new facts involving material difference were found in the subsequent years. We further are persuaded to be in agreement with the ld. A.R that the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Neo Poly Pack (p) Ltd. (2000) 112 Taxmann 363 (Delhi), which involved facts similar to the case of the present assessee, seized the issue under consideration. We find that the Hon'ble High Court in the aforementioned case, therein observing that now when the rental income in the hands of the assessee company was being assessed to tax as 'business income', therefore, for the sake of consistency, the same view should continue to prevail in the subsequent years, unless there was some material change in facts. The Hon'ble High Court on the basis of its aforesaid observations had thus set aside the assessing of the rental income by the A.O in the hands of the assessee under the head 'Income from house property'.

10. We have deliberated on the facts of the case and after giving a thoughtful consideration to the contentions of the authorized representatives for both the parties in the backdrop of the settled position of law, are unable to persuade ourselves to subscribe to the view arrived at by the lower authorities. We are of the considered view that now when it remains as a matter of fact that the income from the composite letting of the furnished flats by the assessee, had after thorough vetting and scrutinizing consistently accepted and assessed as 'business income' by the department in the earlier years while framing regular assessments, therefore, in the absence of any new facts emerging during the year under consideration, which could irrebuttably dislodge the aforesaid view and therein justify a view to the contrary, such an inconsistent approach on the part of the A.O would not be permissible. We find that the reliance placed by the department on the judgment of the Hon'ble High Court of Bombay in the case of H.A. Shah and Co. Vs. CIT(1956) 30 ITR 618 (Bom) is distinguishable

on facts. We find that in the aforesaid case the Hon'ble High Court had upheld the view arrived at by the A.O, for the reason that during the year under consideration certain documents justifying taking of such contrary view were made available on record. We are of the considered view that unlike the facts involved in the case before the Hon'ble High Court, now when in the case of the present assessee no such material had therein emerged which could go to justify taking of an inconsistent view by the A.O, therefore, the income received by the assessee from composite letting of furnished flats on the basis of same facts as were there before him in the preceding years, cannot be permitted to be assessed during the year under the head 'Income from house property'. That before culminating, we may herein observe that except for raising of oral averments, no material had been brought to our notice by the ld. D.R which could persuade us to subscribe to the claim of the department that certain new facts had emerged during the year under consideration, which clearly militated against the validity and legality of assessing of the composite rental receipts under the head 'business income' in the preceding years, and would thus justify a departure from the consistent approach that had been adopted by the department at stretch for years. We thus in the backdrop of our aforesaid observations, thus set aside the order of the CIT(A) and therein hold that the composite rental receipts were liable to be assessed, as claimed by the assessee in her return of income, as her 'business income'. The Ground of appeal No. I is allowed.

11. That as we have held that the composite rental receipts are liable to be assessed as the 'business income' of the assessee, therefore the assailing of the disallowance of depreciation by the assessee is rendered as consequential. We thus direct the A.O to allow the claim of the assessee towards claim of depreciation. The Ground of appeal No. II being consequential to our adjudication of the head of income under which the composite letting receipts were liable to be assessed, is thus allowed.

> 12. That as we have held that the income from the composite rental receipts are to be brought to tax as the 'business income' of the assessee, therefore the Ground of appeal No. III & Ground of appeal No. IV having being rendered as infructuous, are thus dismissed."

5. Facts being identical, we follow the above order of the Co-ordinate Bench, and allow the appeals filed by the assessee for AYs 2013-14 and 2014-15.

Order pronounced in the open Court on 31/07/2019.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 31/07/2019
Rahul Sharma, Sr. P.S.

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai