

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

BEFORE SHRI RAJESH KUMAR, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.1124Mum/2017

(निर्धारण वर्ष / Assessment Year: 2012-13)

Dy. Commissioner of Income Tax, CC-3(4), Central Range-3 Room No.1915, 19 th Floor, Air India Bldg, Nariman Point, Mumbai-400021.	बनाम/ Vs.	Shri Samir Narain Bhojwani 1 st Floor, Samir Complex, St. Andres Road, Opp. Holy Family Hospital, Bandra (W), Mumbai-400050.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABPB9150H		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri Laxmi Vora Prasad Gude (DR)	
Assessee by:	Shri Yogesh A. Thar/ Chaitanya D. Joshi	

सुनवाई की तारीख / Date of Hearing: 17/07/2019

घोषणा की तारीख /Date of Pronouncement: 19/07/2019

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 22.11.2016 passed by the Commissioner of Income Tax (Appeals) -39, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2012-13.

2. The revenue has raised the following grounds: -

"1. On the facts and in the circumstances of the case and in law the Ld. CIT(A) was justified in assessing the license fees under the



*head profits and gains of business or profession” and not “
Income from House Property:.*

*The appellant craves to leave to add, to amend and/ or to
alter any of the ground of appeal, if need be.”*

3. The brief facts of the case are that the assessee filed his return of income on 28.09.2012 declaring total income to the tune of Rs.20,19,36,997/- for the A.Y. 2012-13. The return was processed u/s 143(1) of the I.T. Act, 1961. Thereafter, the case was selected for scrutiny under CASS and notices u/s 143(2) and 142(1) of the Act were issued and served upon the assessee. On verification, it was found that the assessee has shown the income earned from letting out flats as business income under the narration “License Fees”. The flats were not given on rent under the nomenclature “Leave and License Agreement” for rent i.e. the rent is charged for rent of the flats and furniture and fixtures and services and amenities. There was no bifurcation of rent charged for flats and rent charged for furniture and fixtures and services and amenities. The assessee claimed the income earned from letting of flats as income from ‘Business and claiming expenditure thereon. The notice was issued and after the reply of the assessee, the said income was treated as income from house property and the income of the assessee was assessed to the tune of Rs.15,4,89,190/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who allowed the claim of the assessee, therefore, the revenue has filed the present appeal before us.

4. We have heard the arguments advanced by the Ld. Representative of the parties and perused the record. The Ld. Representative of the revenue has argued that the CIT(A) has wrongly allowed the claim of the assessee because the income from lease out flats/shops is in nature of house rent but



the CIT(A) has wrongly treated the said income as business income, therefore, the finding of the CIT(A) is not justifiable, hence, the finding of the CIT(A) is not justifiable, hence, is liable to be set aside. However, on the other hand, the Ld. Representative of the assessee has refuted the said contention and argued that the claim of the assessee has rightly been allowed by CIT(A) and also argued that the case of the assessee has duly been covered by the decision of the Hon'ble ITAT in the assessee's own case for the A.Y. 2009-10 & 2010-11. On appraisal of the said finding, we find that the CIT(A) has allowed the claim of the assessee on the basis of the decision of Hon'ble Apex Court **Chennai Properties & Investments Ltd. (2015) 56 taxmann.com 456(SC)** and other law which has been mentioned in the order which is not required to be repeated further. It also came into notice that the matter of controversy came before the Hon'ble ITAT in the assessee's own case for the A.Y. 2009-10 & 2010-11 and in the said case the Hon'ble ITAT has decided the rental income from the "Leave and License Agreement" from property as business income. The copy of ITA. No.331/M/2015 is on the file in which the relevant finding has been given in para no. 5 and 6 which are hereby reproduced as under:-

"5. Under these issues the revenue has challenged the treatment of the income of the assessee as income from business and profession instead of income from house property. The AO has treated the income of the assessee as income from house property. The assessee gave the flats on rent under the nomenclature (leave and license agreement) for rent i.e. rent is charged for rent of the flats, furniture and fixture. After the detail discussion and relying upon the law mentioned in the order passed by the AO, the AO arrived at this conclusion that the rental income of the assessee on account of rent of flats is the income of house property. The assessee was not satisfied, therefore, filed an appeal before the CIT(A) who treated the rental income of the assessee as income from business and profession. The revenue has filed the present appeal before us. The assessee is a builder, developer, investor, financier and also engaged in letting out of flats for license fees. How the CIT(A) has arrived at this



conclusion that the rental income of the assessee is the income of business and profession is required to be seen. The relevant finding is hereby mentioned below.:-

“7.1. The appellant has raised various submissions/contentions in this regard. Accordingly, to the appellant such income is chargeable under the head “Profits and gains of Business or Profession” as has been returned by him and the same has been consistently assessed since several years, year after year, all the assessments being under 143(3) of the Act, since the commencement of the activity (under this head). The appellant constructs buildings which have residential flats. The residential flats in the buildings so constructed by him are let out on leave and licence basis to top executives of multinational companies / corporates. The flats so let, it is submitted, are furnished to the specifications of the licensee. Substantial expenditure is incurred on furnishing the basis to the specifications of the licensees. It is stated that flats are provided with wardrobe kitchen cabinets, beds, mattresses, bed sheets, curtains, air-conditioners, refrigerators, television sets, telephone connections, internet connections, washing machines, music systems, cooking ranges, dish washers, etc. The Hats are furnished and white goods provided as per the specifications of the licensee. Even Jacuzzi is provided, in the flats, wherever it is required by the licensee, it is submitted that the buildings in which the flats are situated have various facilities like swimming pool, fully equipped gymnasium, etc. It is submitted that the appellant also provides various services like services of a carpenter, plumber, mason, gardener, housekeeping, a swimming pool instructor, a gymnasium instructor, valet parking, errand boy, reading room with latest magazines in the lobby, liftmen round the clock, security personnel round the clock, etc. A composite license fee is charged for the letting of the flat as well as the furniture, fixtures and also for various services, facilities and amenities provided by the appellant,’

7.2. It is pointed out by the appellant that the business activity of the appellant was inherited by him 'Under the will of his father, late Shri Narain N. Bhojwani, who, during his life time, carried on the same activity. The appellant inherited activity under the will of his father and has not only continued the activity but expanded the activity quantitatively as well as qualitatively. It Is stated that during the previous year relevant to the assessment year under consideration the appellant has let out 59 flats. Of these, 55 flats were capital assets, whose license fees, the AO has charged to tax



under the head Income from House Property'. It is stated that as on 31.3.2009, the cost incurred on fully furnished flats which are let out amounts to Rs,121.05 crores. The amount of security deposits received from licensees to whom flats were let out amount to Rs,47.29 crores. It is also submitted that in all the earlier assessments, completed under s. 143(3) of the Act, the license fees in respect of the activity carried on by the appellant had been charged to tax under the head Profits and gains of business or profession' Each of the Assessing Officers have examined the issue and have assessed the license fee under the head "Profits and gains of business or profession'. It is submitted that the A.Q. had made the following observations in the assessment made for A.Y. 2008-09 under s. 143(3) of the Act.

"The assesses also carries on significant activities as a landlord. He gives on leave and licence basis which are fully furnished according to specifications of the licensee, it is not merely the Jims which are has out. The flats are provided with white-goods like refrigerator color televisions, washing machines, dish-washer, Jacuzzi, etc. At times, substantial changes are carried out at the request of the licensee. The flats are let out along with furniture, fixtures, facilities and amenities The buildings in which the premises lei on! are situated have a swimming pool, gymnasium, health-club, etc: These facilities are available to the licensees In addition to the above, various services are provided the licensees in the form of watch & yard, plumbing, electrical, carpenters for carrying out regular repair & maintenance work, valet parking, etc License fees m respect of this activity have regularly been assessed to tax under the head 'Income from Business'.

7.3 It is further submitted that in the assessments of total income of Narain N, Bhojwani, all completed under s. 143{3) of the Act; from whom the appellant had inherited the activity of leasing of the flats, the license fees received were consistently charged to tax under the head 'Profits and gains of Business or Profession', This was upon considering the nature of activity as also the volume and regularity thereof. It is brought to notice by the appellant that for assessment years 1996-97 to 1998-99, in connection with disallowance of interest under s, 36(1)(iii) of the Act, the question arose as to whether the activity carried on is business activity. The appellant states that the CIT(A}'s in Appeal No. C1T(A) XIX/IT/ROT-177/00-01 & 6/01-02 dtd. 03.04,2002 had decided the matter in favour of the appellant giving. elaborate reasons for holding that the activity of letting' out flats, on hire, constituted business. It is stated **by the** appellant that the Department has not



preferred an appeal to the Tribunal against the said "orders of the CIT(A) [placed at pages 1 to 4 of paper book No. 1],

7.4 It is contended by the appellant that during the course of search at the premises of the appellant no incriminating material was found to indicate that the factual position as narrated in the earlier assessment orders/appellate orders was incorrect. It is submitted that no material was found even to remotely suggest that the head of income under which the license fees were being regularly charged to tax needs to be altered/re considered. It is stated that the same activity of hiring out fully furnished/refurbished flats, which is a composite activity, has been continued. In all the earlier assessments carried under s. 143(3), the orders that have been passed by the respective A.Os., clearly indicate that the orders have been passed after examination of the factual position. According to the appellant, the present A.O. has not brought on record any material to indicate that during the relevant year under consideration, there is a change in the factual matrix of the activity carried, on by the appellant. It is also pointed out by the appellant that while it is agreed that *res judicata* is not applicable to Income Tax proceedings, the rule of consistency demands that a view taken, after examination of an issue, shall be followed in the subsequent years, unless there is a change in the factual position or in law. For- this proposition, the appellant has relied on several "judicial" pronouncements including the case of-'Radhasoami Satsang Vs. CIT 193 ITR 321 (SC), For the proposition that rental income should continue to be assessed under the head "Income from Business" unless there is, a material change in facts the appellant, relies upon -

(i) CIT Vs. Neo Poly Pack P. Ltd. 245 ITR 492 (Delhi) ;

(ii) Royal Business **Centre P. Ltd.** Vs. **ITO**
(ITA No. 3901/MUM/2004){BCAJ April, 2006)

(iii) Goel Builders 381 ITR 344 (Allahabad)

(iv) DCIT Vs. Goel Erectors and Pipe Manufacturers P. Ltd, 45 DTR 473 (Lucknow) (Trib). "

7.5 The appellant summed up his argument stating that the activity under consideration is carried on by him regularly, systematically, in an organized manner with a set purpose and with a view to earn profits. The flats have been constructed with the view to let them out and complex commercial activities are carried out. "The activities relate to acquisition of land/entering into development agreement, purchasing TDR, getting plans approved, engaging contractors, architects etc., constructing buildings thereon, then furnishing the fact so constructed, providing several facilities and



amenities which an ordinary landlord would not even think of. According to the appellant, the income from such a composite activity can never be taxed as Income from House Property', The appellant relies upon the decision of the Hon'ble Supreme Court in the case of Sultan Bros. P, Ltd. Vs. CIT 51 ITR 353 (SC). It is contended by the appellant that the decision of the Apex Court in the case of Shambhu Investments, which has been relied upon by the A.G. has not overruled the decision of the Apex Court in the case of Sultan Bros. P. Ltd.

7.6 Adverting to the assessment, order passed by the A.O., the appellant asserts that in the course of hearing of the case the appellant had, vide letter dated 24,07.2012, filed before the A.O. a detailed note explaining why the license fees need to be charged under the head "Income from Business" and why the ratio of the "decision" of the Apex Court in the case of Shambhu Investments P. Ltd. is not applicable to the facts of the appellant's case. The appellant points out that though the AO. has reproduced the said note in the assessment order (see pages 4, 5, 6 & 7 of the assessment order), the A.O- has only selectively reproduced the said note; important arguments and facts, in favour of the appellant contained in the said note a& per paragraphs 1,8, 1.9, 1.10, 2.1 to 2.3, 2.7 to 2,8, 3,6, 4.1 to 4-4, 5.1 to 5.2, 6 & 7 have not been reproduced in the assessment order. As regards the contention of the A.O. that no documentary evidence was seized during the course of search to substantiate the services rendered, the appellant submits that It is the discretion of the search party to the material and that the appellant has no say in the said matter, As regards the A.O's. finding that sec. applies only in primary letting out of land, machinery and furniture, the appellant submits that the very same argument was considered by the Constitution bench of the Apex Court in the case of Sultan Bros, and that the same did not find favour with the Apex Court. -

7.7 After considering the said contentions and submissions as made by the appellant, during the course of hearing of the appeal, as in the case of appellate proceedings for A.Ys, 2010-11 and 2011-12, the appellant was directed to produce the copies of agreements, documentary material, correspondence, if any, in order to substantiate his contention that complex commercial activities are being carried out. The appellant had in the course of appellate proceedings for A.Y. 2010-11 and 2011-12 produced material in order to substantiate its contention it was providing several facilities and amenities to the licensees which an ordinary



landlord would not normally provide. Identical material has been filed for the impugned assessment year also by way of paper book No. 4 which has been placed on record. The material contained in the said paper book No. 4 is similar to that filed in A.Y.2010-11 and A.Y. 2011-12 except that the complaint book wherein the complaints have been recorded is for the relevant year under consideration. It is relevant to mention here that while adjudicating on the said ground in A.Y. 2010-11 and A.Y. 2011-12, the said material, along with the ' complaint book has been remanded to the A.O. and the Remand Report of the A.O. had been obtained and had been considered. It would be pertinent to reproduce here the relevant paragraphs concerning the Remand Report of the A.O. as obtained while considering' the' identical ground of the appellate for A.Y. 2011-12 in 1TA No. CIT(A)-39/I.T. 124/13-14 dated 01.08.2014, as well as the Rejoinder of the appellant thereto.

7.8 It is also considered pertinent to reproduce here the findings/observations of the CIT(A) concerning the remand report and the rejoinder thereto, while deciding the appeal in respect of A.Y. 2011-12 which is quoted as under: -

“I have very carefully considered the facts of the case, the assessment order, the submissions of the appellant, the contention in the remand report and the rejoinder of the appellant thereto as well as the arguments raised during the appellate proceedings and the ratio of various decisions on the subjects. The appellant carries on the activity was inherited by the appellant from his father, Shri Narain N. Bhojwani. From the various details/documents as well as agreements, and copies of correspondence with the licenses placed on record. It is discernable that the flats are given on leave and license basis after furnishing them to the specifications of the license. Factually some of the sample complaints are as follows:-

- 1. Internet not working*
- 2. Water leaking in bathroom*
- 3. AC in Driver's room not working*
- 4. Still waiting for maid's mattress*
- 5. Need pest control*
- 6. Way took many ants in and around home*
- 7. Working table, mattress for maid, thirteen trees have long being delayed.*
- 8. Dishwasher needs service*
- 9. Fridge not working.”*



7.9. I have very carefully considered the facts in the case of the appellant, the assessment order and the submissions as made. From the facts gathered, it is evident that the appellant apart from giving on Leave and License basis flats which are fully furnished, also provides various facilities and amenities to the licensees in place., the Schedule to the Agreement illustrates that furniture, Fixtures and the white goods are being provided. It, therefore, follows that the appellant not only lets out flats, but furnishes the same to the specifications of the licensee, provides furniture, provides white goods, maintains the white goods, carries out repairs on the furniture, and provides various services as requested for and as required. In fact, these are not the services which would be provided by an ordinary Landlord. On a perusal of the complaint books as produced, of which a few sample complaints have been quoted above, *it* reveals that the licensees expect diverse nature of services from the appellant and the complaints range from security camera not working, air conditioner no working, ice dispenser in refrigerator not working, need a cage to catch a mouse, air conditioner in driver's room not working, slow internet speed, problem of ants, maid's , mattress required, switch loose contact, gas burner not working and so. A perusal of the P&L A/c, also indicates the expenditure incurred.' Undoubtedly, rendering these services involve maintaining a paraphernalia of architects, engineers, liftmen, gardener and so on. Moreover, the said activity has been expanding from year to year. Currently, the number of flats let out on Leave and License basis is 55. Funds have been borrowed for the said activity. In this context, the observations made by the CIT(A) in the appellate orders for A.Ys. 1996-97 to 1998-99 do merit consideration. The appellant has furnished a copy of the order of the CIT(A) XIX in-the case of Narain N, "Bhojwani for AT. 1996-97 dated 10.03.2000 in Appeal No. CIT(A) XXIX/JT. CIT.SR.9/IT.32 (placed in pages 110 to 121 of paper book no. 2. The observation of the CIT(A) in the said order is quoted below.: -

“there is no dispute about the fact that the flats given by the appellant on leave and license basis are fully furnished, appellant provides wardrobe, beds curtains decorative lights, jaccuzi, etc. Other amenities made available are telephone connections, cooking gadgets cooking range, refrigerators, color television etc. It is thus obvious that the aforesaid activity of the appellant is not an activity of an ordinary landlord. It is clearly intended to earn profit and



the activity of the appellant can by no stretch of imagination said flats.

7.10. While deciding the appeal for A.Ys. 1997-98 and 1998-99 vide order dated 03.04.2002 (placed at pages 1 to 4 paper book no.

1) the CIT(A) has decided the matter before him as quoted below: -

“I have carefully considered the matter. I find myself in agreement with the view taken by the CIT(A) XXIX that the assessee’s activity of letting out flats on hire constituted business. The facts clearly indicate that this activity is being carried out regularly, systematically and in an organized manner with a view to earn profit. As already mentioned above, during the previous year relevant to assessment year 1997-98 fourteen flats had been given out on rent. In the immediately succeeding year four more flats were given out on hire making the total 18. During the course of assessment proceedings it was informed that in financial year 1998-98 twelve more flats were given out on hire taking the total to 30. All these flats were given out on hire appellant specifically for giving them out on hire. From the scale of the activity, the magnitude of investment made, the amount of rent received, the construction of flats specifically for letting out, completion/finishing of Khoka flats on entering into a hiring agreement the elaborate furnishing of flats to the requirements of the licensee leave no doubt that the nature of activity carried on by the appellant pertaining to hiring of flats is in the nature of business. The AO has himself accepted that hiring of flats with furnishings yields business income to the assessee. On the facts of this case, I am one with CIT(A) XXIX that the activity of the assessee in hiring out flats constitutes business.”

7.11 It is also noteworthy that while completing the regular assessment under s. 143(3) for the A.Y. 2008-09, the AO had made the following observations: -

“The assessee also carries on significant activities as a landlord. He gives on leave and license basis flats which are fully furnished according to specifications of the licensee. It is not merely the flats which are let out. The flats are provided with while goods like refrigerators, color televisions, washing machines dis-washer, Jacuzzi, etc. At the licence



7.12. I have also perused the note which had been furnished before the AO as per letter dated 24.07.2012 in the course of assessment proceedings. The appellant had submitted that the AO has not reproduced para nos. 1.8, 1.9, 1.10, 2.1, 2.2, 2.3, 2.7, 2.8, 3.6, 4, 4.2, 4.3, 4.4, 5, 5.1, 6 & 7. I have perused the said note and it is found that those paragraphs which have not been reproduced by the AO contained the following arguments: -

2.1 Since inception the services we provided aid flats given on leave and license in the - manner narrated above. License fees have always been charged to tax under the head 'income from Business'.

2 Since Assessment Year 2000-2001, license fees of the activity under consideration have been offered for tax and assessed under the head 'income from Business'. The assessments for Assessment Year 2001-02 onwards have been completed under section 143{3} of She Act. A perusal of these assessment: orders (including (the block assessment order passed u/s158BC of the Act r.w.s. 143(3) of the Act) reveals that the activity under consideration is stated by the Assessing Officers under the 'Nature of Business' The activity under consideration has. also been stated in the body of the assessment order und the AO has assessed she income byway of license fees under the head 'income from Business' Therefore, ail along a conscious view has been token that the license fees under consideration need to be charged and rightly been charged under the head 'income from Business'.

2.3 In foci, while assessing my total income for assessment year 2002-03, 2003-04 and 2004-05, the Assessing Officer has in a particular casein/here I had entered into two separate agreements with the licensee - for letting of properly and she other for provision of 'various facilities and amenities, regarded she fees received by me under both the agreements as chargeable to fax under the Head 'Income from whereas in my of income I had computed and offered for taxation of property under the head 'Income from House Properly' and the fees under the facilities and amenities agreement under the head 'Income from Business'.

2.7 It is note humbly submitted that it is a well-established legal proposition that in absence of any change sis the factual 'aspects the decision taken in the earlier fears consistently be allowed in the following cases it has been dearly laid down ' trial the rule of consistency demands that if there is no change in the factual position and the law the view taken in earlier years needs to be followed –

2.7.1 H.A. Shah & Co. V. CIT (30 ITR 618) (BOM)

2.7.2 Burmah Shell V. Chand (61 ITR 493)(BOM)



2.7.3 Radhasoami Satsang V CIT (193 ITR 321) (SC)

2.7.4 CIT Vs. ARJ Securities Printes (264 ITR 276) (Del)

2.7.5 CIT V Godavari Corporation Ltd. (156 ITR 835)(MP)

2.7.6 CIT V Bhilai Engg. Corporation Pvt. Ltd. (133 ITR 687)(MP)

2.7.7 Sardar Kehar Singh V. CIT (195 ITR 769)

2.8 . You will appreciate that in the case of Shambhu Investment it was nobody's case that in the earlier years similar income was charged to tax 'Income from Business'. The factual position in my case is different from the case before the Court in Shambhu investment.

7.13. T have also considered the above notes which had been filed before the A.O. as per the letter of the appellant dated 24/07/2012. From an appreciation of the entire facts on record, it is clear that the appellant is giving on Leave and License basis flats which arc furnished to the specifications of the licensee. From the complaint books and the copies of the various letters/e-mails/tax messages produced, it is also clear that appellant is also rendering several services to the licensees. From a reading of the copies of the request letters made by the licensees, it is observed that various kinds of requests are made such as to permit friends of children to attend birthday parties, permit licensees to have a party at the swimming pool of the building, and according to the appellant these arc requests which are not acceded to by an ordinary landlord. Thus, the license fees are a composite amount for the flat and for the furniture and also for the services/facilities provided. The flats are being constructed utilizing borrowed' funds. It, therefore, follows that the appellant is carrying out complex commercial activities with a view to earn profits, It is also an agreed fact that the license fees have all along been assessed under the head "Income from Business". Even in the case of the appellant's father, from whom he inherited the activity, the license fees were assessed under the head "Income from Business". Moreover, it has been pointed out by the appellant that the license fees, in respect of the flats held as capital assets, in the F.Y.04-05 were Rs.4.77 crs that has increased to Rs.33.46 crs in F.Y, 2008-09 and Rs.38.57 crs. in F.Y. 2009-10. The corresponding no. of flats have increased from 17 to 55, It has also been pointed out that as on 31/03/2009 the borrowings of the



appellant were Rs, 306.79 crs and the Cost of the flats let out is Rs.121.05 crs and the security deposit does not cover the cost of the flat let out.

7.14. The A.O. has relied upon the decision of the Supreme Court in the case of Shambhu Investments. I have carefully perused the said decision and it is found that in the said case, the Hon'ble Supreme Court was dealing with letting out of table apace. However, in the case of the appellant, the appellant is carrying out the composite letting out activity with borrowed funds on & regular basis, with volumes increasing after year, coupled with provisions of various services Moreover, since the very beginning the license fees as received in the case of the appellant was always been assessed to tax as "Income from Business". Further, in Shambhu Investments, it is seen that the Apex Court has only approved the decision of the Calcutta High Court. Ongoing through the decision of the Calcutta High Court in the case of CIT vs. Shambhu Investments P. Ltd. 249. ITR 47, it is seen that the Hon'ble High Court has observed as under-

Taking a sum total of the aforesaid decisions it clearly appears that merely because income is attached to any property cannot be the Sole factor for income from property. What has to be seen is -what is the primary object of the assessee while exploiting the property. If it is found applying such test that the main intention is for letting the property or 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. " -

7.15 The Hon'ble Bombay High Court in the case of CIT Vs. National Storage P, Ltd, 1963 43 ITR 577 (Bom), while laying down the principles to be followed in determining a particular head under which the income is to be assessed observed as under:-

"In cases where the income received is not from the letting of the tenement or from the letting accompanied by incidental services or facilities, but the subject hired out is a complex one and the income obtained is not so much because of the mere letting of the tenement but because of the facilities and services rendered, (the operations involved, ' ' in such letting of the property may be of the nature of business or trading operations and the income derived be income not from exercise of property rights properly so-called so as to fall under s. 9 but income from operations of a trading nature of falling under 10 of the Act;"



7.16 The Calcutta Bench of the Tribunal in the case of PFH Mall and Retail Management LM, Vs. ITO 110 ITD 337 had held that if the main intention of letting out is found to be exploitation of the immovable property by way of commercial activities and not a simple letting out per se, then the resulting income must be held as business income. Further, the Bombay High Court in the case of Mohiddin Hotels P. Ltd. 284 ITR 229 had held as under :-

"It needs no emphasis that when a specific head of charge provided for income from house property, rents or other income from the ownership of the house property has to be under his head and no other head. However, for an income from house property it should be covered by s. 22. By catena of decisions the Courts, time and again, have held where the subject-matter that is let out given on license is not bare tenement but a complex one like a well-furnished paying guest establishment or sheds with infrastructural facilities, the income derived therefrom which is not separable from income from letting out the building and the income letting out from the furniture, plant and machinery', -etc., such composite income shall not be covered by the income from house property. "

7. Thus, the legal position is that, as culled out from the various decisions as cited above; if the main intention is to use the property as a business asset, through commercial exploitation, thereof, the income therefrom shall be assessed as business income. However, on the other hand, if the primary intention is to let out property simpliciter, the income is assessable as Income from House Property'. Further, the A.O. has on page 20 of the assessment order stated that income can be considered under s. 56 only if primary letting is- of plant, machinery and furniture. The A.O. has stated 'that sec, 56(2)(iii) contemplates that the prominent object should be letting of machinery, plant or furniture. However, this has been considered-by the Apex Court in the-case of Sultan Bros, where it has been clarified that no consideration of binary or secondary letting arises in construing the section. The Apex Court had held that *the* provision contemplates the letting of machinery, and or furniture should be inseparable from, the letting of the buildings. In view of the said observations of the Apex Court, it has to be held that the section does not contemplate any primary or secondary letting but that the letting of plant, machinery and furniture must be inseparable from the letting of buildings. The A.O has also stated that the furniture etc., has not been let. However, from the reading of a sample of the License and License agreement, it is seen that as per the agreement the licensed



premises, being flat, are let out along with furniture, fixtures and fittings as stated in the Schedule. Also, it has been stated by the A.O. that no documentary evidence was view in the course of search nor was it produced before the A.O. to substantiate the factum of provision of various services. In the course of appellate proceedings, various documents/papers were produced before me to prove the provision of various services and it was the said documents that had been remanded to the A.O. In view of the facts as detailed above, in the present case, and also in view of the existing legal position on the subject, I am, of the considered that the income by way of. License fees in respect of the composite letting out activity-carried out by the appellant is chargeable to tax under the head "Income from Business".

6. On appraisal of the above said finding, we noticed that the CIT(A) has considered the each and every aspects of the income earned by assessee on account of lessee of flats. The assessee has offered the income of licence fees as business income which has been accepted by department continuously for the period of w.e.f. 2001-02 to 2008-09. At the time of argument, the Ld. Representative of the assessee has placed reliance upon the decision i.e. **H.A. Shah & Co. V. CIT (1955) (30 ITR 618)(Bom High Court), Burmah Shell Refineries Ltd. V. ITO (1966)(61 ITR 493)(Bom High Court), Radhasoami Satsang V. CIT (1991)(193 ITR 321) (SC), CIT Vs. ARJ Securities Printes (2003) 264 ITR 276 (Del High Court) & CIT V. Godavari Corporation Ltd. (1983)(156 ITR 835)(MP High Court) etc.** The case of the assessee clearly falls within the principal of consistency which is not required to be changed unless the facts are distinguishable from earlier years, the objects in the present year is the same as in the earlier year also. It is also brought into noticed that in the scrutiny assessment u/s 143(3) of the Act for the A.Y. 2014-15, the AO has assessed the income of the assessee as business income. It is also observed that in the case of wife of assessee who is in the same business, the Hon'ble ITAT 'J' Bench in the case of **Shibani S. Bhojwani V. DCIT (166 ITD 488)(TMum)** has held that the income of the assessee is the income from business. Taking into account, all the facts and circumstances, we are of the view that the CIT(A) has rightly adjudicated the issue in question, therefore, the finding of the CIT(A) is not required to be disturbed at this appellate stage. Accordingly, we decide this issue in favour of the assessee against the revenue."

5. Since the case of the assessee has squarely been covered by the decision of the Hon'ble ITAT in the assessee's own case for in **ITA.**



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No.331/M/2015 for the A.Y.2009-10 & 2010-11, therefore, in the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, we affirm the finding of the CIT(A) on this issue and decide this issue in favour of the assessee against the revenue

6. In the result, the appeal filed by the revenue is hereby ordered to be dismissed.

Order pronounced in the open court on 19/07/2019.

Sd/-

(RAJESH KUMAR)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated :19/07/2019

Vijay/ Sr. PS

Sd

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai