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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER & SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA No.1389/Mum/2015
(Assessment Year: 2011-12)

ITO(International Taxation)-2(1)(1), Room No.1724, 17th Floor, Air India Building, Nariman Point, Mumbai-400 021	Vs.	Administrator of the Estate of Late Mr. E. F. Dinshaw, 412,Churchgte Chambers, 5 Sir Vithaldas Thakersey Marg, Mumbai-400 020
		PAN No.AAEPD8394A
Appellant	..	**Respondent**

ITA No.334/Mum/2017
(**Assessment Year: 2012-13**)

ITO(International Taxation)-2(1)(1), Room No.1724, 17th Floor, Air India Building, Nariman Point, Mumbai-400 021	Vs.	Administrator of the Estate of Late Mr. E.F. Dinshaw, 412,Churchgte Chambers, 5 Sir Vithaldas Thakersey Marg, Mumbai-400 020
		PAN No.AAEPD8394A
Appellant	..	**Respondent**

Revenue by	Shri Parag Vyas, Sr. Counsel & Shri Sreekar, CIT-D.R.
Assessee by	Shri Dilip S. Damle, A.R.
Date of Hearing	**22/11/2019**
Date of Pronouncement	**19/02/2020**

O R D E R

PER G.MANJUNATHA (A.M):

These two appeals filed by the Revenue are directed against separate, but identical orders of the Commissioner of Income Tax (Appeals)–10, Mumbai, dated 28/10/2014 & 27.09.2016 and they pertain to Assessment Years 2011-12 & 2012-13 respectively. Since, the facts are common and issues are identical, for the sake of convenience, these appeals were heard together and are disposed of by this consolidated order.

ITA No.1389/Mum/2015

2. The Revenue has raised the following grounds of appeal:

> *"1. Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the advance of Rs 269.48cr, received by the assessee on transfer of asset, as income by the AO in the light of serious dispute between developer and the assessee regarding the validity of lease rent agreement as well as development right agreement.*
> *2. Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the advance income of Rs 269.48cr received by the transfer of asset without appreciating the fact that in the relatively new circumstances the AO analyzed and concluded that Revenue has arisen on account of transfer of asset and the tax on the Revenue generated cannot be postponed indefinitely.*
> *3. Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in holding that the advances received in different years, though credited in the account of the assessee in the previous year relevant to the AY-2011-12,is not taxable in that assessment year without appreciating the fact that these amounts had been shown as the contingent receipts by the assessee and were not offered to tax in year of receipt.*
> *4. Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in holding that the lease rent and 12% of sale proceeds pertaining to the AY 2009-10, 2010-11 and the instant assessment year 2011-12 deposited in the Bank A/c of the assessee on the Bombay High Court's directions, cannot be taxed in this year, without appreciating the fact that these amount had been shown as the contingent receipt by the assessee and were not offered to tax in year of receipt.*
> *5 The Appellant prays that the order of the Id. CIT(A)'s on the above grounds be set aside and that of the Assessing Officer restored.*

6 The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. The brief facts of the case are that the assessee, administrator of estate of late Mr. Edulji Framrize Dinshaw, is assessed as an individual and in the capacity of representative of the assessee filed its return of income for the AY. 2011-12 on 29.07.2011 declaring total income of Rs.1,33,34,503/-, comprising of income from short term capital gains and income from other sources. In addition, the assessee had also disclosed long term capital loss of Rs.18,99,26,806/- and carried forward said loss u/s 74 of the Income Tax Ac,1961. The case of the assessee was selected for scrutiny, and notices under section 143(2) and 142(1) of the Income Tax Ac,1961 were issued. In response to notice, the authorised representative of the assessee Shri Dilip S. Damle attended from time to time and filed various details as called for.

4. During the course of assessment proceedings, the AO noticed that the AIR information available in the departmental data base system shows the records of 19 number of registration details with respect to transfer of immovable properties worth Rs.85,52,30,000/- and CIB information of 43 transactions of Rs.36,31,00,000/- entered into by the assessee or on assessee behalf during the F.Y. 2010-11 relevant to A.Y. 2011-12, but no income from said transaction has been offered to tax under the head capital gains, therefore, he called upon the assessee representative to explain and reconcile AIR data base with return of income filed for the relevant year. In response, the authorised representative of the assessee filed a letter dated 18.12.2013 and explained information available in AIR data base and also contended that amount received towards agreement for sale of properties, i.e. flats

in the building owned by the assessee cannot be treated as transfer u/s 2(47)(v) read with section 53A of the transfer of properties Act, 1882. The relevant written submissions of the assessee have been reproduced by the AO in assessment order at para. 5.2 on pages 3 of assessment order.

5. The facts culled out from the records in respect of impugned dispute are that one Mr. Edulji Framrize Dinshaw a parsi American, resident of New York, USA had during his life time inherited vast tracks of land in northern suburbs of Mumbai which were acquired by his father Late F.E. Dinshaw (EFD). In February 1970, EFD executed his Will appointing his sister Ms. Bachoobai Woronzow ('BW') as the executrix of the Will for administering the Estate. The Bombay High Court vide its order dated 21st December 1972 appointed Mr. Nusli N Wadia ("NNW") as the Administrator of the Estate of EFD ("the assessee"). Mr. NNW, acting as the sole Administrator of the estate of the said E.F.Dinshaw, entered into agreements with developers of real estate (M/s Ivory Properties and Hotels Private Limited in relation to development of designated land admeasuring 205.69 acres and M/s Ferani Hotels Private Limited in relation to development of the designated land admeasuring 478.50 acres (hereinafter referred to as "developers"}. By the said agreements, the developers were appointed as Project Co-ordinators for the purpose of development and construction thereon on the immovable properties forming part of the estate of the said E.F.D. Mr. NNW as Administrator of the estate would grant a lease of the immovable properties of the estate of the said E.F.D for certain agreed period of 5 years and developers would clear the land of encroachers at their own cost and develop the properties by construction thereupon. It

was agreed between the parties that whenever the spaces in the constructions are sold, NNW, acting as the sole Administrator of the estate of the said Dinshaw would be entitled to receive from the customers 12% of the consideration. Clause 12 of the said Agreements with the developers reads as under:

> *"All gross realizations from the disposal/transfer, (by any and all different formats) as aforesaid, of the different developed segments, are to be divided between the Owner and the Company respectively towards the respective price of the land and sale-price of the building/s (segment-wise) as per the table set out hereunder:*
> *a) 12% (twelve percent) of all such gross receipts/realizations shall be receivable by the Owner (directly from the purchasers/prospective purchasers/ unitholders /flat holders by Payee's A/c cheques) and the same shall belong to and shall be the property of the Owner.*
> *b) 88% (eighty eight percent) of all such gross receipts/realizations shall be receivable by the Company (directly from the purchasers/prospective purchasers/unit holders/flat holders by Payee's A/c cheques) and the same shall belong to and shall be the property of the Company."*

Mr. NNW, acting as the Sole Administrator of the said estate, and the developers has entered into MOU's with the purchasers from 1997 onwards for sale of units in the building(s) to be constructed along with share of land. Mr. NNW in his capacity as the Administrator has received monies (representing instalments) which have been recorded in its books of accounts of the estate as "Advances" and reflected on the 'Liabilities' side of the Balance Sheet. However, where conveyances have been executed, the advances have been recorded as consideration accruing on sale of land and the profit arising there from has been offered to capital gains tax in the AY 2002-03 and AY 2003-04 in the hands of the Estate. The Department had considered these gains as Business Income in various years arising out of the business of real estate activity carried out by NNW the Administrator. The Tribunal has consistently held that the same is Capital Gains and not Business Income in the hands of the estate. The transaction which was involved in

AY 2003-04 related to sale of assessee's interest in land situated at Malad, Mumbai in respect of which the development rights were awarded to M/s Ivory Properties Pvt. Ltd. In AY 2003-04, the assessee had executed two conveyances in favour of M/s Blueberry & M/s Property Venture and 12% share in the sale consideration received from the transferee was offered to tax under the head "Capital Gains" in the year in which the conveyances were executed. As such, in respect of sale of land covered by the development agreement with Ivory Properties Pvt. Ltd, also; the appellate authorities up to the Hon'ble Supreme Court had upheld the assessee's contention that the profit made by the assessee would be assessable under the head "Long Term Capital Gains". Further, in the year 2008, Mr. NNW took legal steps for termination of his agreements with Ivory & Ferani respectively. The assessee not only terminated the Development Agreements but also revoked the Powers of Attorney given to each of the Developers. The assessee also filed suits against the Developers i.e. Ivory & Ferani in the High Court of Bombay which are currently pending as Suit no. 414 of 2008 and Suit No.1628 of 2008 respectively. Assessee notified the members of the public at large by publishing public notices in the newspaper about termination of the Development Agreements as also about the revocation of the Powers of Attorneys issued in their favour. Assessee filed criminal complaints against Ivory and Ferani and their Directors with the Economic Offences Wing (EOW) Mumbai; under Sections 406, 409, 420 read with 120(b) of the Indian Penal Code for perpetrating fraud by employing disingenuous modus operandi and thereby misappropriating the assessee's land by selling it to itself and not to genuine third party purchasers. Based on the complaints filed before the EOW an FIR was registered against the Ferani and its Directors in January 2011. As regards Ivory; in 2008 EOW registered

the FIR under Section 406, 409, 420 read with 120(b) against Mr. C.L. Raheja and his sons for cheating and criminal breach of trust. The EOW has completed investigation and have also collected the necessary details and documents corroborating the fraud perpetrated by them on the Appellant. Based on the statements recorded EOW was satisfied that fraud / cheating and misappropriation was committed and accordingly on 22nd October 2013 EOW has filed charge sheet against Mr. Chandru L. Raheja and his two sons Ravi and Neel u/s. 406, 409, 420 r/w 120 (b) of IPC. The case is now pending for trial before the Metropolitan Magistrate, 47th Court at Esplanade Court Mumbai. As regards to Ferani, an application seeking ad-interim and interim Injunctions was moved before Hon'ble Bombay High Court. The order thereon was pronounced by the Single Bench of the Bombay High Court on 19th July 2010. In its order dated 19.07.2010, the Hon'ble Bombay High Court found prima-facie case in favour of the Administrator of EFD. However the Court also accepted that the preliminary issue relating to limitation needs to be decided before proceeding in the matter. Against the order & judgment of the Single Judge, Ferani filed an appeal and the Division Bench of the High Court by its interim order dated 26.07.2010 stayed the judgment of the Single Judge. Administrator also filed an cross appeal against order of single judge on 3rd August 2010 which was admitted and directed to be heard along with the Appeal of Ferani. Later on, the Division Bench of the Bombay High Court by its common order and judgment dated 19.07.2012 allowed the appeal of Ferani since the Single Judge had disposed of the entire Notice of Motion contrary to Section 9-A of CPC. The judgment of the Single Judge was set aside to that extent. In its judgment dated 19.07.2012, the Division Bench of the High Court framed the preliminary issues under section 9A of CPC as

'Whether the claim of the Plaintiff in the suit is barred by limitation' and further directed as follows:

> *"(i) Pending the hearing and final disposal of the preliminary issue, (Ferani) is directed to maintain accounts and to continue depositing an amount equivalent to 12% of the gross sale consideration in a designated bank account. The amount upon deposit shall be invested in a fixed deposit to abide by further orders of the learned Trial Judge"; and*
>
> *(ii) Liberty is reserved to the Administrator to apply before the Learned Single Judge for appropriate interim reliefs after the final decision on the preliminary issue".*

6. During assessment proceedings, he AO, after considering relevant submissions of the assessee, agreement between the parties, subsequent dispute and cancellation of agreement and power of attorney and also orders of the Hon'ble Bombay High court in civil suits came to the conclusion that although the assessee had received 12% share in sale proceeds of developed area in building constructed on the leased land, but income from said transaction has not been recognised for want of conveyance of land title. The AO further observed that if you go through the contents of agreement between the parties coupled with power of attorney given to developers, it is very clear that the assessee had voluntarily entered into lease agreement in the year 1995 and also entered into a development agreement for development of a property for agreed revenue sharing. Further, the assessee had received his share of 12% revenue from sale proceeds of developed building upto financial year 2008 and shown under the head advances from customers. He further, observed that although, there was dispute cropped up between the parties in respect of share of revenue and matter went to the Hon'ble Bombay High Court, but on perusal of orders of the Hon'ble Bombay High Court in various civil suits, the Hon'ble Bombay High court did not granted injection to the assessee nor stopped development activities in

the impugned land, therefore it can be safely held that the agreement between the parties is in force subject to court verdict and the assessee is continued to receive his 12% share of revenue from sale of properties, which is evident from the fact that the developer M/s Ferani Hotels Private Limited had deposited assessee share in designated bank account. He, therefore, opined that the assessee had absolute right over the money received towards sale of property and hence amount received in the impugned assessment year, including amount received in earlier year is taxable for the impugned assessment year under the head income from business. Further, although the AO had taken a view that amount is assessable under the head business income, but subsequently changed his stand and held that the assessee's share of 12% income from sale of flats is assessable under the head income from other sources on the ground that amount shown under the head advances is a liability which ceased to exist as liability and therefore was assessable under the head income from other sources. The AO had also taken support from the provisions of Maharashtra Flat/Apartment Owners' Act, (MOA) Act, to come to the conclusion that there being deemed conveyance in favour of the flat purchasers, and hence income accrued in a financial year relevant to A.Y. 2011-12 becomes deemed conveyance of land. The AO further observed that the assessee is continued to receive money towards 12% share of income from sale of property and credited into advance account without offering any income, even though there is no obligation on the assessee to repay the same to the flat purchasers. The assessee was not able to prove that there existed any liability to the creditors shown in the books of accounts. As such the liability is a nonexistent and liable to be treated as income as there is cessation of liability. Even otherwise, the amendment in the Maharashtra Flat/Apartment Owners' Act mandates deemed

conveyance of title of land to the flat owners makes the condition imposed by the assessee of transfer of title of land to recognise revenue is illegal condition within Maharashtra and the accounting of receipts of sale proceeds as liability under the category of advance is also rendered illegitimate and illegal. Thus, the entire advance received up to 31.03.2011 is not an advance, but a liability which has ceased to exist or a liability which has been legally watered down by the due process of law. Therefore, he opined that entire advances received upto 31.03.2010 of Rs.269,48,90,886/- is treated as non existing liability and assessed under the head income from other sources. Similarly, the amount of advance received for the assessment year 2011-12 has been treated as non existing liability and assessed under the head income from other sources. Further, the AO had also assessed lease rental receivable from M/s. Ivory Properties and Hotels Pvt. Ltd., Mumbai and rent received from M/s. Ferani Hotels Pvt. Ltd. under the head income from other sources.

7. Aggrieved by the assessment order, the assessee preferred appeal before the Ld. CIT(A). Before the Ld. CIT(A), the assessee has filed elaborate written submissions on this issue which has been reproduced at para 5 on pages 47 to 127 of Ld. CIT(A) order. The sum and substance of arguments of the assessee before the Ld. CIT(A) are that the AO has completely ignored the judicial decisions/judgements given by the Jurisdictional ITAT as well as Hon’ble Bombay High Court, in assessee’s own case while assessing the income under the head income from other sources for which there was no reason for doing so. The assessee had also vehemently argued the issue in light of judgment of Hon’ble Bombay High Court in civil suits filed by the assessee in connection with cancellation of agreement entered with M/s. Ferani

Hotels Pvt. Ltd. and subsequent findings of Hon'ble Bombay High Court that the assessee is having a prima-facie grounds for cancellation of agreement and power of attorney as such it is very clear that the Hon'ble Bombay High Court has in principle accepted the contentions of the assessee. The assessee further contended that even though agreement and power of attorney was cancelled, the developer unilaterally opened an account in bank in their name and deposited 12% share of the assessee to said bank account, however, fact remains that the account opened by the developers is nowhere connected to the assessee and also the assessee is neither operating said bank account nor used the money lying in the said bank account because the amount deposited in the said account is kept in fixed deposits under the supervision of trial court and therefore it cannot be said that money deposited in designated account is belonged to the assessee, consequently income accrued for the year under consideration. The assessee had also relied upon plethora of judicial decisions in support of his argument and argued that interim amount received pursuant to order of Court is not liable to tax in the year of receipt but it is taxable in the year when final award is passed by the Court. Since, the matter is subjudiced before the court, unless the court decides the issue finally the disputed amount cannot be considered as income accrued to the assessee.

8. The Ld. CIT(A), after considering the relevant submissions of the assessee and also by relying upon various evidences including certain judicial precedents and also judgments of Hon'ble Bombay High Court in civil suits filed by the parties, held that amount received by the assessee towards 12% share from sale of flats is assessable under the head capital gains when the appellant has conveyed ownership rights in the land in favour of the purchasers, but not assessable under the head

income from business or profession. The Ld. CIT(A) further held that the assessee has right from the beginning considered amount received from sale of flats including for A.Y. 2001-02 and 2002-03 under the head long term capital gains, however, the AO while passing the assessment order for AY. 2003-04 assessed the income under the head income from business. Subsequently, on appeal the appellate authorities, including the ITAT and the jurisdictional Hon'ble Bombay High Court has held that profit/gain arising on transfer of ownership rights in the land was assessable under the head capital gains. Therefore, he opined that there is no merit in the finding of the AO in first part of the assessment order that income received towards sale of flat is assessable under the head income from business/profession.

9. In so far as, the findings of the AO in regard to addition towards advances received from customers from sale of flats under the head income from other sources, the Ld. CIT(A) observed that when income was chargeable to tax only under the head capital gains as the charge of tax is inextricably linked with the transfer of a capital asset and hence the question of taxing the advances shown under the head liabilities under any head of income including income from other sources as there is no transfer of capital assets in the given previous year. The Ld. CIT(A) further observed that the AO's action is also completely unjustified and incorrect in view of the accounting principles for recognition of income, because unless the income accrued during the relevant financial year the question of taxation of said receipts does not arise. He, further, opined that the AO has taxed entire receipts under the head income from other sources including amount received in earlier period without appreciating the fact that on one side he admits that advances received is towards sale of property and on the other hand he opined that

liabilities shown under the head advances is ceased to exist and consequently assessable under the head income from other sources without appreciating the fact that provisions of charging section 4 & 5 which empowers and Income Tax Authority to assess income to tax in a particular assessment year, but not income of a just preceding account year. Therefore, he opined that the AO has assessed advances received under the head income from other sources without adducing any cogent evidence and material to establish that the sums received by the assessee during the financial year 1995-96 to 2008-09 became income chargeable to tax in the assessment year 2011-12, which has been accepted as liabilities by the AO in all the preceding assessment years upto assessment year 2010-11. Accordingly, deleted additions made by the AO of Rs.2,69,48,90,886/- under the head income from other sources. Similarly, the Ld. CIT(A) had also deleted additions made by the AO towards advances received for the assessment year 2009-10 to 2011-12 on the ground that amount received towards 12% share of income from sale of flats is not liable to tax, because the assessee has not transferred right in immovable property during the relevant period due to cancellation of development agreement dated 02.01.1995 and also revocation of the power of attorney given to PHFL. The relevant findings of the Ld. CIT(A) are as under:

> *"7.1 Having taken note to the AO's order as well as appellant AR's submissions, I find that the appellant received the gross sums of Rs.278,51,85,876/- during the period 1995-96 to 2008-09 from various intending purchasers of the constructed spaces in terms of the Development Agreements dated 02.01.1995. Out of the aforesaid sum received by appellant in the form of 'Deposits', the appellant has already offered a sum of Rs.9,02,94,990/- as income of the appellant under the head 'Capital Gains' in F.Ys 2001-02 85 2002-03 in the year when the relevant conveyances were executed in respect of sale/transfer of land. However, the appellant did not recognize the income for the remaining 'Deposits'/ 'Advances' aggregating Rs.269,48,90,886/- in his books of accounts or in the income-tax returns on the ground that relevant conveyances were not executed. I find that while completing the assessment of the appellant u/s. 143(3) of the Act for*

A.Y.2003-04, the AO merely changed the head of income as "Business Income' instead of 'Capital Gains' as disclosed by the appellant but did not dispute the year of taxability of the income which accrued in the hands of the appellant on execution of conveyance in favour of the purchaser of the spaces constructed in terms of Development Agreement dated 02.01.1995. It is also a fact on record that the AO accepted the appellant's method of revenue recognition in all the preceding assessment years as disclosed by the appellant. Except changing the heads of income as recorded above in respect of assessability of income as a result of transfer/sale of land when the conveyance deed was executed by the appellant in none of the preceding assessment year, the AO did not make any whisper in relation to assessability of 'Deposits'/ 'Advances' received by the appellant pursuant to the agreements executed with the intending purchasers of the flats/constructed spaces. Thus, it is amply clear that the AO accepted the appellant's proposition that income arising from transfer of appellant's right in lands were chargeable to tax only in the year's in which the relevant conveyances were executed and not in any other year. The perusal of assessments completed under Section 143(3) of the Act in the case of the appellant in all the preceding assessment years establishes that the Assessing Officers consistently accepted that the 'Deposits' / 'Advances' received from the intending purchasers represented 'Liability' and hence, it did not represent income of the appellant for the years in which either the relevant Agreements were executed or the amounts received as per the Agreements dated 02.01.1995. In view of the above facts of the appellant's case, I do not find any merit in the AO's action of assessing the said sum of Rs.269,48,90,886/- as appellant's income chargeable in the A.Y.2011-12. Even in my considered view, the action of the AO is completely contrary to the provision of charging Section i.e. Section 4 and 5, which empowers an Income-tax Authority to assess income to tax in a particular assessment year for income of a just preceding accounting year. Even, I find that the AO could not adduce any cogent evidence and material to establish that the sums received by the appellant during the FYs 1995-96 to 2008-09 became Income' chargeable to tax in the AY 2011-12, which-has been accepted as 'Liabilities' by the Assessing Officers in the all the preceding assessment years upto A.Y. 2010-11.

7.2 In my considered view, the AO has wrongly assumed that the sum of Rs.269,48,90,886/- has become income due to cessation of the liability as the AO is of the view that the appellant can appropriate 12% share in the sale proceeds as his income and he had no liability whatsoever to refund it. This assumption of the AO is based on the judgment of the Division Bench of the Bombay High Court in the case of N.N. Wadia Vs Ferani Hotels Limited in Appeal No. 817 of 2010 in Suit No. 1628 of 2008 dated 19.07.2012. However, the AO's this assertion is completely incorrect and without having any basis for the same. The AO completely ignored this hard truth that the appellant's right of 12% share of sale proceeds of any sale agreement with the prospective purchaser of the flat/premises exists only in lieu of the .appellant's liability to execute the conveyance deed in favour of the intending purchasers of the constructed spaces with the specific intention of acquiring the ownership rights and interests in the land over which the Developers had

constructed the buildings. The payments were not intended for any other purpose but for the specific purpose of acquiring the rights in the land owned by the appellant. Besides this, the decision of Division Bench of Bombay High Court dated 19.07.2012 was merely interim directions which did not in any manner resolve the disputes between the parties as wrongly assumed by the AO. Hence, the AO was in error in concluding that the disputes between the parties stood resolved and 12% share received by the appellant or allegedly received by the Developer on behalf of the appellant became income of the appellant because it was the least minimum consideration receivable and for which Administrator had no liability to refund.

7.3. Even, I find that the Division Bench of Hon'ble Bombay High Court nowhere decided the the claims & counter claims of the parties to its finality but only required the Trial Court to first meet the preliminary objection of the Developer regarding maintainability of the suit on the • ground of limitation and only thereafter proceed with the trial. In view of the same, the said judgment nowhere crystallized the rights & obligations of the parties to the dispute. I, therefore, do not find any merit in the AO's conclusion that Rs.269,48,90,886/- or any part thereof being the 'Deposits' / 'Advances' received from intending purchasers during the FYs 1995-96 to 2008-09 became legally chargeable to tax in A.Y.2011-12. Even as per the methods of accounting prescribed in Section 145, the amounts/deposits received in the years prior to 2010-11 could not be brought to tax in AY 2011-12 under the provisions of the I.T. Act, 1961. Even I also find force in the appellant AR's this argument that the AO himself was not convinced by his own action that the amount received by the appellant in a period of 14 years i.e. From F.Y. 1995-96 to 2008-09 became chargeable to tax as income in A.Y.2011-12, which is evident from his subsequent action of re-opening of the assessment of the appellant u/s.148 of the Act for A.Y.2007-08 and 2009-10. To this effect, the appellant's AR filed copies of notices u/s.148 of the Act in the appellate proceedings. Besides this, specifically the appellant's AR also brought my attention to specific finding of the AO recorded in para 28 of the assessment order, which reads that ""Without prejudice to the above, proceedings are being separately initiated to examine the chargeability of income out of the 12% share in the sale proceeds and other receivables, arising in each earlier previous years in the assessment year relevant to the respective previous year of receipt or accrual." In view of these facts and also after taking noting to the fact that jurisdictional Bombay High Court in the appellant's case in A.Y.2003-04 has specifically held that the appellant holds the land by way of investment and hence, the gains/profit arised from the transfer of land was chargeable to tax in the year in which the transfer of such capital asset takes place. Hence, I have no hesitation to hold that the action of the AO in taxing the sum of Rs.269,48,90,886/- which was 'Deposits/Advances' shown by the appellant in its books of accounts pertaining to F.Y. 1995-96 to 2008-09 cannot be brought to tax in the year A.Y.2011-12 as 'Income from Other Sources' keeping reliance on the decision of jurisdictional Bombay High Court's judgment in the appellant's own case in A.Y. 1987-88 to 1989-90 and also A.Y.2003-04. Accordingly, I consider it proper and appropriate to hold that the AO's action of taxing the entire sum of Rs.269,48,90,886/- which was received by the appellant in a period of 14

years as "Income from Other Sources' in A.Y.2011-12 is completely incorrect and unjustined under the provisions of Income-tax Act as well as against the accounting principles. Therefore, the addition so made by the AO of Rs.269,48,90,886/- stands deleted. Therefore, the appellant's these grounds of appeal are allowed.

7.4 Even it is also very important fact to note that the judgment of the Division Bench, Bombay High Court, which the AO took note to hold that there was cessation of liability on the part of the appellant was adjudicated in July 2012 subsequent to accounting year closing of the assessment year 2011-12 i.e. 31.03.2011. Hence, the cognizance taken by the AO of this order in respect of Return of Income filed prior to this judgment of the Bombay High Court was completely wrong and. unjustified.

8. Through Ground Nos. 17 & 18, the appellant has agitated against the AO's action of making addition of Rs.6,35,29,260/- & Rs.2,62,55,640/- collected by M/s.FHL during F.Y.2008-09 and 2009-10 respectively on account of alleged 12% share in the hands of the appellant. The appellant contended that no opportunity was granted by the AO before making this addition, hence the AO has violated the principles of natural justice. Therefore, the appellant requested that the additions so made deserves to be deleted in full.

8.1 Having taken note to the AO's order as well as appellant AR's submissions and documents available on record, it is evident that the appellant instituted legal proceedings -Civil/Criminal in 2008 against the Developers who were party to the Development Agreement dated 02.01.1995. Subsequent to that, M/s.IPHPL neither entered into agreements with the intending purchasers nor collected & paid any sums to the appellant's 12% share in the sale proceeds. But M/s.FHPL continued with the development of the land and continued to enter into agreements with the intending purchasers for sale of the constructed spaces. Though the appellant had not only issued notice of termination of the Agreement but also revoked the Power of Attorney granted to FHPL under the Development Agreement dated 02.01.1995. Even the Administrator had also filed lis pendence notice with the office of the sub-registrar, Borivali. The Administrator also published public notices warning the members of general public cautioning them against entering into any agreements with the Developers in view of the pending litigation. Despite all such steps taken by the appellant, FHPL continued to develop the property and entered into registered Agreements for Sale. Consequent to that M/s.FHPL. collected 12% share in the sale proceeds on account of sale of constructed spaces by the intending purchaser on behalf of the appellant, but as the appellant/administrator of the estate initiated legal proceedings against M/s.FHPL as detailed above, hence, the appellant instructed his Banker, ICICI Bank not to accept payments from the intending purchasers or from the Developers. In this situation, I find that the Developer M/s.FHPL without the consent of the appellant opened an account with Indian Bank, Bandra under the name & style of "Ferani Hotels Pvt Ltd A/c N.N. Wadia Share" having A/c No.843184512 in which it has deposited various sums being 12% share of the sale proceeds received from the intending purchasers. I find that in the course of assessment proceedings, the AO gathered the information of deposits

made in this bank account of Rs.6,35,29,260/- & Rs.2,62,55,640/- in FYs 2008-09 & 2009-10 respectively from the Developers and the Bank by issuing notice u/s. 133(6) of the Act. I find that the AO having taken note to the decision of the Bombay High Court referred as above, held that the amounts so collected/deposited by M/s.FHPL was an act of the agent of the appellant and hence, the same represented minimum share in the sale proceeds for which the appellant had no liability to refund. In view of the same, the AO brought the total sum so received in F.Y.2008-09 and 2009-10 chargeable to tax under the head 'Income from Other Sources' in A.Y.2011-12.

8.2 However, I am completely not in agreement with the AO's action of taxing the aforesaid sum in the hands of the appellant in A.Y.2011-12 after taking note to the fact that the appellant had taken all legal steps preventing FHPL to proceed with the development and enter into agreements for sale of the constructed spaces with the intending purchasers. Not only this, the appellant had also instituted civil & criminal proceedings seeking cancellation of agreements and restoration of land. Besides this, I also note that the said deposits were made by M/ s. FHPL in the Indian Bank Account without having any permission/consent from the appellant. Therefore, the amount so deposited in the said account by no means can be said belonged to the Administrator nor such amount ever reached to the Administrator. Hence, by no stretch of imagination the same can be brought to the ambit of income in the hands of the appellant chargeable to tax in A.Y.2011-12. It is also evident from the appellant's submission that M/s. FHPL did not ever intimate or provide any details of such collection to the appellant. The appellant could gather this information of such deposit only after inspection of the assessment records of the AO subsequent to the assessment order passed by the AO for A.Y.2011-12. . Therefore, I find that no income accrued to the appellant on account of unauthorized sale of constructed spaces carried out by FHPL in the name & on behalf of the appellant. It is also a fact on record that the Hon'ble Bombay High Court directed M/s.FHPL for maintain a separate account of 12% share of the sale proceeds as an interim measure which will be liable to be governed by the order of the Trial Court. Thus, the rights & obligations of the parties in the amounts collected were subject to the outcome of the order to be passed by the High Court. Hence, the . rights of the appellant in the amounts so collected remained ' indeterminate and inchoate. Further to that, even I also find that the developer M/s.FHPL opened the bank account in July 2009 in Indian Bank for depositing 12% share suo moto once the appellant stopped through its banker to take any deposit from FHPL or by any prospective/intending purchasers of the premises. Thus, the appellant's this initiative of depositing 12% share suo moto in separate account was much prior to the order delivered in July, 2012 by the Hon'ble Bombay High Court. Hence, in my considered view, there is no sanctity in taxing the aforesaid sum in the hands of the appellant on the basis of High Court Judgment which was delivered in July 2012 after the closure of the accounting year. In view of the same, I consider it proper and appropriate to hold that the action of the AO of taxing the aforesaid sum of Rs.6,35,29,260/- and Rs.2,62,55,640/- received in F.Y.2008-09 and 2009-10 in A.Y.2011-12 is completely incorrect and unjustified under the provisions of Income-tax Act. Accordingly, the addition made by the AO stands deleted.

9. Through Ground NO. 14 to 16, the appellant has agitated against the AO's action of making addition of Rs. Rs.17,32,37,955/- on account of alleged 12% share of the sale realization with reference to M/s.FHPL. The appellant also contended that the said addition was made without giving opportunity of being heard and hence, the AO violated the principles of natural justice. Further to that, the appellant also contended that the AO ignored the fact that the appellant had already terminated his agreement with M/s.FHPL in 2008 and also revoked the Power of Attorney. Therefore, no part of the said sum was chargeable to tax as income since the matter was subjudice before the Hon'ble Court.

9.1 Further, the appellant. also submitted that the AO's action of taking note of judgment of Bombay High Court for taxing the aforesaid sum in the hands of the appellant was also contrary to the fact that the said judgment was given by the Court in July 2012. Therefore, by no stretch of imagination, FHPL could have deposited any sum in F.Y.2010-11 in compliance to said order. Hence, the AO's action of inferring base for taxing the aforesaid sum in the hands of the appellant in A.Y.2011-12 based on Bombay High Court's judgment was completely erroneous.

9.2 I find that the aforesaid sum of Rs. 17,32,37,955/- was deposited by the Developer M/s.FHPL, unilateral!/ and without the consent of the appellant, who had executed Agreements for Sale in favour of the intending purchasers after 2008 even though the appellant had instituted legal proceedings seeking cancellation of agreement dated 02.01.1995. I find that this act of the developer in executing the agreement for sale was without the consent of the appellant and also after revocation of Power of Attorney given by the appellant in favour of M/s.FHPL consequent to Development Agreement dated 02.01.1995. Even I find that the appellant had filed suit in the Court for cancellation of the agreement dated 02.01.1995 and restoration of land on account of fraud committed by the Developer while executing the agreement. Having taken note to the submission of the appellant and the documents on record, I am of the considered view that the AO was completely unjustified in his action in holding that the appellant by .executing agreements in 1995 and granting irrevocable development rights and executing power of attorney authorizing FHPL to undertake sale of the constructed spaces, the Administrator had also granted rights to the developer to conduct sale of his ownership rights in land.

9.3 Having taken note to the decision of Single Judge of Bombay High Court Interim Order delivered on 19.07.2010 wherein, the Hon'ble Judge has made adverse comments on the act of the Developer. Besides this, taking note of investigation conducted by EOW against the IPHPL and FHPL and also after admission of Suits filed by the appellant before the Bombay High Court for cancellation of the Development Agreement dated 02.01.1995, it is explicitly evident that the terms and conditions for the development which was stated in the Development Agreement dated 02.01.1995 was subjudice and therefore, in view of the fact that the aforesaid sum which was deposited by the Developer M/s.FHPL without having consent from the appellant in the Indian

Bank Account to which the appellant has no access nor the appellant has any right over such money to use in any manner. In my considered view, the act of the AO in bringing the said sum of Rs. 17,32,37,95s/- to tax was completely unjustified and incorrect when in the given facts of the appellant case, where the rights and obligations of the parties arising .from the interpretations and execution of the agreement dated 02.01.1995 are indeterminate and inchoate. Even, it is also observed from the submission of the appellant on record that the lis pendence notice were served by the appellant to the Sub-Registrar, Borivali, for restraining for registration of development and sale agreement by the Developer in relation to constructed spaces.

9.4 Even, I find that the action of the AO in treating the FHPL as agent of the appellant for taxing the aforesaid sum under the head 'Income from Other Sources' in A.Y.2011-12 was contrary to the term stated in Clause 15 of the Agreement dated 02.01.1995, which clearly manifest that the relationship between the Appellant and Developer was not one of Principal and Agent. Therefore, I have no hesitation to hold that the unilateral conduct and acts of FHPL in executing the agreement for sale of land on behalf of the Administrator, in a situation where the operation of the agreement dated 02.01.1995 itself is subjudice, and also the sum allegedly so collected and deposited by FHPL in its account with Indian Bank, cannot be brought to tax in the hands of the appellant as the same was not accessible to the appellant.

9.5 Even I find that the AO's reliance on judgment of the Apex Court in the cases of CIT Vs United Provinces Electric Supply Co [244 ITR 764] and CIT Vs K.C.P. Ltd [245 ITR 421] is not applicable in the appellant's case as the same, is clearly distinguishable on the facts of the appellant's case. In the case of the appellant, the amount collected by FHPL is assessable under the head 'Capital Gains' where as the decision relied upon by the AO is in respect of income assessable under the head 'Profits and Gains of Business'. Thus, in the circumstances where the appellant has filed Suit for cancellation of Development Agreement dated 02.01.1995 and also revoked the Power of Attorney given to FHPL. Any unilateral execution of agreement for sale by FHPL cannot be termed as income of the appellant. In view of the same, I consider it proper and appropriate to hold that the addition so made by the AO of Rs. 17,32,37,95s/- was completely unjustified and incorrect. Accordingly, the same is deleted.

10. In so far as, additions made by the AO towards lease rental income of Rs.39,60,000/-, the Ld. CIT(A) observed that the AO was incorrect in bringing to tax lease rental even though it was demonstrated that the assessee has cancelled development agreement dated 02.01.1995 and a civil and criminal proceedings have been filed against the developer in the courts. He further observed that the AO did not bring on record any documents or material except the agreement dated

02.01.1995 under which the leasehold rights were intended to be granted. Moreover, the agreement itself provided for grant of lease only for a period of five years and not beyond, therefore, he opined that the AO was not having sufficient and cogent material on the basis of which he could infer that assessee had subsisting and enforceable right to claim lease rent as the assessee never executed any registered document by which lease of property was granted in favour of the developers. Accordingly, he deleted additions towards lease rental amounting to Rs.39,60,000/- under the head income from other sources. The relevant findings of the Ld. CIT(A) are as under:

> *10. Through Ground No. 19 to 21, the appellant has agitated against the AO's action of taxing the lease rent income of Rs.39,60,000/- as income of the appellant assessable in A.Y. 2011-12. The appellant contended that the AO erred in assessing alleged lease rental of Rs.19,80,000/- each from the FHPL and IPHPL without bringing any document on record to suggest that the appellant had in fact granted lease of demised land and such lease was legally in force in terms of which the appellant could have received the lease rent in F.Y.2010-11. The appellant further submitted that the Administrator has terminated the tenancies through proper legal channel in 2008, hence, the AO could not assess any lease rent in the hands of the appellant in absence of any legal document to this effect.*
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> *10.1 I find that the AO has assessed the sum of Rs.39,60,000/- as lease rental income in the hands of the appellant in terms of the agreement dated 02.01.1995 by which the Administrator had agreed to grant lease of the demised lands in favour of the Developers for period of five years. He also noted that Clause (2) of the Agreements provided that the lease would be executed in the form agreed and annexed to the Agreement. It was also provided therein that the Administrator would execute the Lease in the agreed format as and when the Developers called upon the Administrator to execute. In consideration of grant of lease rights the Developers were required to pay monthly lease rents of Rs.55,OOO/- each. It is an admitted fact that although the Form of Lease agreement was agreed and was annexed to the Agreement dated 02.01.1995, yet no lease deeds were formally executed in favour of the Developers since they did not called upon the Administrator to formally execute the lease document. It is also an admitted fact that even though lease deed was not formally executed the developers paid monthly sums of Rs.55,000/- to the Administrator which he continued to accept. Thus, based on the appellant's act and also of the Developer, the AO held that there existed an arrangement between the parties in terms of which appellant was receiving Rs.55,000/- per month from each of the Developer. However, from the document and the appellant's submission, it is inferred that the appellant*

had specifically terminated the agreement in year 2008. Besides this, it is also a fact on record that the counsel of the Administrator issued legal notices in the year 2008 terminating the arrangements under which the Developers were paying monthly sums of Rs.55,000/-. In view of the same, the appellant claims that no lease rental income can be termed as income of the appellant as the Development Agreement dated 02.01.1995 itself was terminated by the appellant.

10.2 This was also brought to my notice by the appellant's AR that the Administrator stopped accepting the monthly payments. Subsequent to that the Developers had deposited monthly amounts in the accounts unilaterally opened by both the Developers in their own names. However, the appellant's AR claimed that such unilateral act did not result in accrual of any income in the hands of the appellant. Hence, it was requested that addition so made by the AO should be deleted.

10.3 Having perused the AO's order and appellant AR's submission, I find that the lease rental amount i.e. Rs.39,60,000/- which was assessed as income of the appellant for AY 2011-12 relates to the period F.Y.2008-09 to 2010-11 meaning thereby payment pertaining to A.Y.2009-10 and 2010-11 were also assessed as income of the appellant in A.Y.2011-12. After taking note of the submission and documents on record, I find that a sum of Rs.26,40,000/- which is forming part of Rs.39,60,000/- allegedly pertained to FYs 2008-09 & 2009-10 relevant to AYs 2009-10 & 2010-11 respectively. Therefore, I find that the action of the AO in charging such sum i.e. Rs.26,40,000/- in the hands of the appellant in A.Y.2011-12 is completely unjustified and incorrect. Further to that, the remaining sum of Rs.13,20,000/- pertained to F.Y.2010-11 though it is relevant to A.Y.2011-12 but as I find that the said sum was unilaterally deposited by the Developer in their account without any intimation to the appellant. Further to that, even I find that the appellant has no accessibility to the said sum which was deposited in the accounts maintained and operated by the Developer without having any consent from the appellant to this effect. Surprisingly, even it is also inferred from the appellant's submission that there was no intimation to the appellant about any such deposit in a separate account. In view of the same and also taking note of entire facts and submission available on record, I consider it proper and appropriate to hold that even this sum of Rs.13,20,000/- cannot be brought to tax in the hands of the appellant in view of dispute in relation to cancellation of Development Agreement dated 02.01.1995 and Civil and Criminal proceedings filed by the appellant against the Developer in the Courts. In view of the same, I consider it proper and appropriate to hold that the addition made by the AO of Rs.39,60,000/- in the hands of the appellant is against the provisions of law and hence, the same is deleted.

10.4 Under none of the charging provisions of the Income-tax Act, 1961, sum of Rs.26,40,000/- could be brought to tax in AY 2011-12. Even if one accepts the AO's presumption that appellant was legally entitled to receive lease rent on monthly basis, yet both under the mercantile system and the cash system of accounting, the income allegedly pertaining to FYs 2008-09 & 2009-10 could not be assessed to tax in AY 2011-12. Particularly AO has admittedly

that lease rent is assessable under the head 'Other Sources'. In the circumstances it was necessary for the AO to prove that the said sum of Rs.26,40,000/- was either received by the appellant during FY 2010-11 or legal right to receive such income accrued or crystallized during FY 2010-11. In absence of fulfillment of either of the two situations the AO could not assess Rs.26,40,OOO/- as appellant's income in AY 2011-12.

10.5 Even with regard to assessment of Rs.13,20,000/- allegedly pertaining to AY 2011-12 I find that the sum was not chargeable in the appellant's hands because the assessee did not have any subsisting legal right to claim or receive lease rentals from the Developers. It is true that the Agreements dated 02.01.1995 envisaged granting of lease of the demised lands in favour of the Developers. Save & except the clause (2) of the Agreements dated 02.01.1995 there was nothing more on record which established that the lease of land was in fact granted in favour of the Developers. The agreements of 02.01.1995 specifically provided that the lease would be granted in the form agreed between the parties. Format of the lease was annexed to the Agreements. However it is an admitted fact that such lease agreement was never formally executed by the Administrator in favour of either of the Developers. A lease creates an interest in an immovable property, such lease is required to be evidenced by a registered deed, duly stamped as per the provisions of the Indian Stamp Act. In the present case admittedly the Developers have claimed that lease rent payable was Rs.55,000/- per month. In other words the consideration payable for grant of lease was in excess of Rs. 100/- and therefore in - order to acquire any enforceable legal leasehold rights, it was necessary that the lease was granted by a formal written agreement which was properly stamped and registered. Nothing has been brought on record by the AO which in any manner suggests that any formal lease agreement creating perpetual lease in favour of the Developers was created by the appellant. This needs to be noted because Clause (2) of the Agreement of January 1995 had envisaged the lease only for a limited period of 5 years which stood expired in January 2000. In the circumstances for the AO to infer subsistence of lease in FY 2010-13^^'existence of a formal lease deed was necessary. I therefore find force in the submissions of the A/R that in absence of a properly executed lease deed there did not exist any legally enforceable agreement under which the assessee could demand payment of lease rent. At the same time it is also noted that the Developers made monthly payments and the appellant accepted such payments till 2006 and 2008 from IPHPL and FHPL respectively. However in absence of the registered lease agreement, such payment could only be inferred as a private agreement or arrangement between the parties which did not create enforceable lease rights in favour of the payers on perpetual basis. In my considered opinion the payments could at best be considered to be contractual payments not amounting to tenancy or lease because such an arrangement was not supported by any registered & stamped instrument of lease. Whatever private arrangement or understanding in terms of which monthly payments were made, was terminated by the assessee by issuing legal notices. Once the assessee took requisite steps for termination of agreement of his private understanding with the developer the assessee itself never acknowledged or

accepted that any lease hold rights subsisted with the Developers. The AO did not bring on record any documents or material except the agreement dated 02.01.1995 under which the leasehold rights were intended to be granted. Moreover the said agreement itself provided for grant of lease .only for a period of 5 years and not beyond. Viewed from any angle therefore I find that there was no sufficient & cogent material available with the AO on the basis of which he could infer that assessee had subsisting & enforceable right to claim lease rent as the assessee never executed any registered and duly stamped document by which lease of property was granted in favour of the Developers, In view of the foregoing therefore I hold that the AO was not justified in assessing lease rent of Rs.13,20,000/- allegedly pertaining to FY 2010-11. For the reasons set out in the aforesaid the AO is directed to delete the addition of Rs.39,60,000/-.

11. The Ld. Sr. Counsel, Shri Parag. A. Vyas, appearing for the Revenue submitted that the Ld. CIT(A) was erred on the facts and in the circumstances of the case and in law, deleting additions made by the AO towards advance of Rs.269.48 crores on transfer of assets in light of serious dispute between the developer and the assessee regarding the validity of lease agreement as well as development right agreement. The Ld. Sr. Counsel further submitted that the Ld. CIT(A) has failed to appreciate the facts in light of various reasons given by the AO to assess advances under the head income from other sources which is evident from the fact that the Hon'ble Bombay High Court has not granted any interim relief to the assessee for cancellation of agreement dated 02.01.1995 and power of attorney. The Ld. Sr. Counsel further submitted that the first and foremost question needs to be answered is whether income arising from development agreement is in the nature of capital gains or in the nature of business income. He further submitted that income arising to the assessee from the agreement dated 02.01.1995 is taxable as business income, since on entering into the development agreement the assessee has changed its holding from that of investment to that of stock in trade. He further submitted that the term stock in trade is not defined under the Income Tax Ac,1961 and

therefore a dictionary meaning may be adopted as per which the term stock in trade means, the inventory carried by a retail business for sale in the ordinary course of business. He further refers to the decision of Hon'ble Supreme Court in the case of Director General of Income Tax, Admin and others vs. GTC Industries Ltd. & ors reported in (2016) 240 taxman 209 has noted the fact that entering into a development agreement would convert land into stock in trade. The Ld. Sr. Counsel had also referred the decision of Hon'ble Supreme Court in the case of Raja J. Rameshwara Rao vs. CIT (42 ITR 179) and submitted that when land is sold in flats after development of the area to make it more attractive the same amounts to a business activity. The Ld. Sr. Counsel further submitted that the moment the assessee entered into a development agreement it becomes stock in trade of the assessee, consequently any income arising from said transaction is assessable under the head income from business. Since land was part of development agreement on entering into development agreement it becomes stock in trade based upon decisions of the Hon'ble Supreme Court of India cited above and the meaning of the term Stock in Trade. Since interim relief was refused by the Bombay High Court vide order dated 19th July 2010, the income relating to the transactions pertaining to the period from 1995-96 to 2010-11 relating to the development agreement treated as an advance by the assessee acquired the character of accrued income. The provisions of section 52 and 53A of the Transfer of Property Act enclosed marked Exhibit A may be considered in this regard. As per section 52, a third party acquires right in a property which is subject matter of a suit depending upon the result of the suit or as directed by the Court. In the instant case, the Hon'ble Bombay High Court in July 2010 rejected the motion for interim relief on the basis of equity. This is also confirmed by the Division Bench of the

Bombay High Court in 2012 hence the whole of the income of the assessee shown as advance pertaining to the period from 1995 to 2008-09 is income relating to the year 2011-12. The ld. Sr. Counsel further submitted that on taxability of income deposited in designated bank accounts for sale of flats during 2009-10 to 2011-12, it seems these deposits are under court order and as per court order dated 19th July 2010, ad interim stay has been rejected only a direction has been given that future sale of flats would be subject to concurrence of both parties. The income pertaining to sale of flats prior to the filing of the suit would be taxable for the A.Y.2011-12 as stated above while the one relating to the period after filing of the suit may be subject to the application of section 52 of the Transfer of Property Act and the order of the Bombay High Court dated 19th July 2010.

12. The. Ld. Sr. Counsel, further, submitted that as per the doctrine of Lis Pendens incorporated in section 52 of the Transfer of Property Act, 1882, the transfers of third parties although not illegal (as held by the Supreme Court of India in Thomson Press India Ltd vs Nanak Builders and Investors Private Limited) would depend upon the result in the pending proceedings. In the pending proceedings interim stay was refused in respect of the flats already sold by Ferani, but future sales were made effective subject to concurrence of all parties. This aspect was also overruled by the Bombay High Court Division bench in its judgment dated 19th July 2012. Since interim stay was refused by Bombay High Court one may argue that income in respect of these transactions also accrued on date of the decision in 2010. He, further, submitted that on the aspect of amount being not available to the Assessee one may see that the Assessee as per the decisions of the Bombay High Court in 2010/2012 cannot put the construction or sale of

flats on hold. Hence the only issue which would remain in the equity of things would be whether it would be entitled to further compensation in addition to the 12% deposited in a designated bank account. In any view of the matter the assessee would not be receiving any amount lesser than that of 12% already being credited to the designated bank account which it can always without prejudice to its contentions seek to withdraw. It may be noted the Assessee itself on its own account had stopped accepting the 12% amount on the ground that the agreement is in dispute. Under section 11 of the Maharashtra Ownership Flats Act 1970 even the land has to be transferred to the purchaser of the Flats (society). Hence, in any view of the matter the amounts received/deposited in bank accounts (including lease rentals) as stated above are rightly treated as income of the year 2011-12. In the decision of the Bombay High Court in the Assessee's own case for A. Y. 2003-04, the Hon'ble High Court was not apprised it is respectfully submitted about the decision of the Supreme Court of India holding sale of land (based upon development contract) to be business income and follows the earlier order for years not concerned with the development agreement without either side attempting to point out the difference.

13. The Ld. Sr. Counsel further referring to Maharashtra Flat/Apartment Owners' Act, 1970 submitted that section 11 of said Act, is very clear that the promoter shall take all necessary steps to complete his title and convey to the organisation of persons, who take flats, which is registered either as a co-operative society or as company or an association of flat owners, his right title and interest in the land and execute all relevant documents, therefore in accordance with the agreement executed under section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within

the prescribed period and also deliver all documents of title, relating to the property which may be in his possession or power. The Ld. Sr. Counsel further submitted that the plain reading of section 11 in conjunction with section 52A of transfer of property Act 1882, makes it very clear that once an agreement for sale is entered into between the parties, then the title and interest in the said property passed on to the buyer and consequently transfer take place within the meaning of section 2(47)(v) of the Income Tax Ac,1961. The Ld. Sr. Counsel further submitted that in this case although assessee continued to receive 12% share of income from transfer of property, but deferred recognition of revenue for indefinite period even though the developer has conveyed ownership to the flat buyers by citing a reason that he had cancelled development agreement and power of attorney. But, fact of the matter is that the Hon'ble Bombay High Court has not granted any interim relief or stay to the developer for construction work. Further, the Hon'ble Bombay High Court held that M/s. Ferani Hotels Pvt. Ltd. can continue construction activities, however further stated that no sales unless the consent of the owner. This clearly indicates that the developer is continued to develop the property and the assessee is receiving his share of income, therefore it cannot be said that amount received, towards sale of property is an advance in the nature of contingent liability. The Ld. Sr. Counsel had also extensively argued the issue in light of various clauses of agreement and findings of Hon'ble Bombay High Court in civil suit and submitted that the assessee is postponing tax liability on the income which is accrued for the year even though there is no injection or stay from the court. Therefore, the AO was right in assessed advances shown in the balance sheet under the head income from other sources and this order should be upheld.

14. The Ld. Sr. Counsel for the assessee submitted that the Ld. CIT(A) has rightly appreciated the facts in light of various evidences filed by the assessee to come to the conclusion that the AO was incorrect in holding that amount received towards 12% share of income from sale of flats is assessable under the head income from business. The Ld. Sr. Counsel further submitted that the issue of head of income under which receipt from sales is assessable is no longer an issue, because the matter has been finally settled by the Hon'ble Bombay High Court in assessee's own case for earlier period where the assessee had offered income under the head income from capital gains, whereas the AO had assessed under the head income from business or profession. On appeal, the appellate authorities including Ld. CIT(A) and ITAT held that income embedded in the advance received was chargeable only under the head income from capital gains and that too in the year of the transfer of the capital asset. The Ld. A.R. further submitted that the Ld. CIT(A) had recorded categorical finding in paras 6.9 to 6.21 that income received from transfer of capital asset is chargeable to tax under the head capital gains but not under the head income from other sources. These specific findings of the Ld. CIT(A) are not challenged by the Department in any of the grounds of appeal and once the findings of the Ld. CIT(A) goes unchallenged, then ground No.1 becomes only academic, because nowhere in any grounds it is claimed by the Revenue that transfers of the capital assets took effect in assessment year 2011-12 and some received represents consideration in respect of asset transfer.

15. The Ld. A.R. for the assessee further replying to argument of the Ld. Sr. Counsel for the Revenue submitted that when income from sale of flats has been consistently assessed under the head capital gains and

such treatment has been finally approved by the Hon'ble Bombay High Court, then there is no reason for the AO to hold that the land has been converted into stock in trade when development agreement is entered. In fact, it is not the case of the AO that the assessee has converted investments into stock in trade thereby provisions of section 45(2) of the Income Tax Act, 1961 and subsequent sale of flats is a sale of stock in trade and resultant income is assessable under the head income from business/ profession. The Ld. A.R. further submitted that no doubt the assessee had entered into a development agreement in the year 1995 and received sale consideration wherever conveyance has been entered into to transfer right and interest in land upto assessment year 2003-04. In fact, the assessee had executed 2 sale deeds and income there from has been offered under the head income from capital gains. The AO disputed and assessed income under the head income from business or profession, but ultimately the Hon'ble Bombay High Court has held that it is assessable under the head income from capital gains. Therefore, there is no merit in arguments of the Ld. Sr. Counsel for the Revenue.

16. The ld. Sr. Counsel for the assessee in reply to arguments of the Ld. Sr. Counsel for the Revenue that even if income is not assessable under the head capital gains, but the AO was very much right in assessing advances shown in the balance sheet under the head income from other sources as non existing liability because the assessee was deferring incidence of tax for unlimited period on the ground of dispute between the parties and cancellation of development agreement dated 02.01.1995 and power of attorney, but fact remains that the assessee has cancelled development agreement dated 02.01.1995 in the year 2008 and a suit has been filed before the court. The assessee had also filed criminal cases against Ivory hotels and Properties Pvt. Ltd., for

which the economic offence wing of Mumbai Police had filed charge sheet. In so far as agreement with M/s. Ferani Hotels Pvt. Ltd., agreement and power of attorney has been cancelled and also a civil suit has been filed in the court of law to restore the possession and the legal title of the disputed land with the assessee. The Hon'ble Bombay High Court single member judge had taken up the case for hearing, but at a time of hearing M/s. Ferani Hotels Pvt. Ltd. had challenged the application filed by the assessee on the ground of limitation. However, the Hon'ble Bombay High Court has passed an interim order and observed that the assessee had prima-facie grounds for cancellation of agreement and power of attorney. Although, the Division Bench of Hon'ble Bombay High Court has suspended the judgment of Hon'ble Single Judge, but has not given any finding in respect of dispute between the parties, however, only stated that the dependants M/s. Ferani Hotels Pvt. Ltd. can continue construction and sale of flats in concurrence with land owners, till the court decides the dispute between the parties. Therefore, it does not mean that the income in respect of amount deposited in designated bank account is accrued to the assessee for the year under consideration; consequently, it can be assessed under the head income from other sources. The Ld. A.R. for the assessee further submitted that the AO has assessed total advances received by the assessee upto assessment year 2011-12 under the head income from other sources as nonexistent liability, but provisions of section 56 does not permit the AO to assess income of earlier years in the year under consideration. The Ld. A.R. further submitted that assuming for a moment but not accepting, the liability is ceased to exist, but provisions of section 41(1) of the Income Tax Act, 1961 cannot be invoked, if income is assessed under the head income from other sources. In this regard, he relied upon various judicial

precedents including the decision of ITAT Kolkata Bench in the case of DCIT vs. M/s. Everyday Industries India Ltd. in ITA No.94/Kol/2004 dated 03.02.2016. The assessee had also relied upon the decision of ITAT Mumbai, in assessee's own case, in ITA No.1033/M/2018 dated 27.03.2019 and argued that under identical set of facts, the Tribunal held that amount lying in designated bank account opened by the developer in the name of the assessee and consequent interest is integral part of the funds under the custody of the court and said amount is not accessible to the administrator. The assessee had also relied upon the decision of Hon'ble Karnataka High Court in the case of CIT vs. L. Sambasiva Reddy (2015) 62 Taxmann.com 174 and the decision of ITAT, Mumbai in the case of Bombay Gowrakshak Mandali vs. ITO in ITA NO.5508/M/2014.

17. We have heard counsels of both parties, perused materials available on record along with orders of the revenue authorities. We have also carefully considered case laws cited by both sides. The fact which leads to impugned dispute are that the assessee entered into a development agreement and power of attorney infavour of M/s Ivory Hotels & Properties Limited and M/s Ferani Hotels Private Limited in the year 1995 for development of certain parcel of lands in Mumbai. The Administrator of the Estate of late EFD terminated the Development Agreement and filed Suit in Bombay High Court in 2008. Upon termination of the Development Agreement in May 2008, the Administrator had instructed ICICI Bank not to accept deposits being 12% share of the sale proceeds receivable under the Agreement dated 02.01.1995. Since Estate of EFD as well as its Banker i.e., ICICI Bank was not accepting the payment of 12% share of the sale proceeds, Ferani su-motto,

unilaterally opened a Current A/c bearing No.843184512 with Indian Bank, Bandra Branch, Mumbai under the nomenclature/cause title of "Ferani Hotels Pvt. Ltd-NN Wadia share" and utilized for depositing the 12% share of the proceeds arising from sale of flats/units by Ferani after the determination of the development agreement in 2008. Although such A/c was opened by Ferani: the Administrator was never informed about bank name, details of such an A/c nor had the Administrator authorized Ferani to open the said account and collect and deposit such sums in the said account. The Administrator moved an application bearing Notice of Motion No. 1863/2008 in Suit No. 1628 of 2008; seeking ad-interim and interim Injunctions against Ferani who alone was unilaterally carrying on development work in terms agreement dated 02.011995 even after the agreement was determinated and power of attorney given to both developers was withdrawn. The hearing of the motion was conducted on 24"'June 2010. The order thereon as pronounced by the Single Bench of the Bombay High Court on 19t1 July 2010. In its order dated 19.07.2010 the Hon'ble Bombay High Court found prima-facie case in favour of the Administrator of EFD and observed in Para-68 (Page-771-772) as follows:

"It may be mentioned that a defendant, who is on the wrong side of the law, upon having committed acts of fraud and deceit and put up construction after having committed such fraud cannot make bold to state to Court that no matter what his act is; he must be entitled to construct and develop the property. Once a prima-fade case is made out by the plaintiff for grant of interim relief in equity, the defendant cannot defeat the relief being granted upon his own convenience and to seek to balance it with the prima-fade case. It is only if the convenience of the defendant is such as can be balanced with plaintiffs case that the concept

and doctrine of the term 'balance of convenience', can weigh in favour of the defendant."

18. We further noted that During the hearing on the Notice of Motion before Single bench of the High Court, Ferani raised the plea of limitation in terms of Sec. 9A(1) of the Civil Procedure Code. The Court noted that since the plea regarding bar of limitation was a preliminary issue which went to the root of the jurisdiction of the Court it had to be decided in the first instance. Since the preliminary issue of limitation was required to be decided first, the Court ordered Ferani not to put any party either genuine third party or related parties in possession of the constructed premises except with the approval of the assessee pending the Suit. The Court also directed that the issue relating to limitation would be decided first being the jurisdictional issue. Since in the order dated 19.07.2010 the Bombay High Court had issued injunction against Ferani from handing over possession to the Flat purchasers; an appeal being Appeal No. 817 of 2010 was moved before the Division Bench of the Bombay High Court by Ferani. Similarly, since the injunction as sought by Estate EFD was not granted; counter appeal being Appeal No. 806 of 2010 was filed by Estate EFD before Division Bench of the Bombay High Court. The Division Bench of the Bombay High Court by its judgment dated 19.07.2012 (Page 787- 822) decided these Cross Appeals which arose from the judgment of the Bombay High Court order dated 19.07.2010 passed in relation to Notice of Motion No. 1863 of 2010 seeking ad interim relief. This is apparent from the opening para of the Judgment which reads:

"These appeals arise from a judgment dated 19.07.2010 of a Ld. Single Judge on a Motion for interim relief in his Suit. When an application for Ad interim

relief came up for hearing before the Ld. Single Judge; an objection to the maintainability of the Suit was raised on behalf of the first defendant on the ground that the claim was barred by limitation."

After considering the arguments on behalf of the rival parties; in Para-35 the High Court recorded the following findings:

(i) Appeal 817 of 2010 filed by Ferani Hotels Private Limited shall stand allowed and the impugned order of the Learned single Judge dated 19 July 2010 shall stand set aside:
(ii) The following issue is raised under Section 9A of the Code of Civil Procedure,1908 and shall be tried as a preliminary issue: "Whether the claim of the Plaintiff in the suit is barred by limitation."

(iii) ....

(iv) P.ending the hearing and final disposal of the preliminary issue, Ferani Hotels Private Limited is directed to maintain accounts and to continue depositing an amount equivalent to 12% of the gross sale consideration in a designated bank account. The amount upon deposit shall be invested in a fixed deposit to abide by further orders of the Learned Trial Judge:

(v) Liberty is reserved to the Plaintiff to apply before the Learned Single Judge for appropriate interim reliefs after the final decision on the preliminary issue;

(vi) We clarify that all the observations contained in this judgment are confined to the issues which have arisen before this Court at the present stage and the view expressed by the Court on the merits of the rival contentions shall not come in the way of the disposal of the Notice of Motion or the suit in terms of the directions issued.

19. We further noted that from bare perusal of the judgment dated 19.07.2012, it is very clear that the Division Bench of the High Court did not adjudicate the Suit filed by the appellant wherein the assessee had requested for granting relief in the form of cancellation Agreement dated 02.01.1995 and possession of the property. The Bombay High Court had granted liberty to the

assessee even to apply for interim relief once the preliminary issue was decided by the trial court. It is therefore factually and legally incorrect to canvass a proposition that in view of the judgments of the Bombay High Court dated 19.07.2010 and 19.07.2012 the assessee's plea for grant of injunction against Ferani was rejected forever and thereby the sale agreements executed by Ferani had become final and consequently therefore the income embedded in the entire advance received during the period 1996-97 to 2010-11 become chargeable to tax in AY 2011-12. Further, the contention raised to this effect by the Id. Counsel for the revenue is not supported by the specific liberty granted by division bench in its order dated 19.07.2012. It is also to be noted that the sum of Rs 269.48 crores assessed as income in AY 2011-12 includes only Rs. 156.48 Crores received under the agreement with Ferani and remaining sum of Rs 113 Crores was received under the agreement with Ivory. In respect of Ivory, there was no order of the court either on the Notice of Motion or in the suit filed. In that view of the matter, inference against the assessee could not be drawn in AY 2011-12 in relation to amounts received in total in Rs 269.48 Crores. As regards agreement with Ivory there was no development during the financial year 2010-11 so as to warrant drawing any inference that income to the assessee accrued during the relevant year in respect of sums received up to 2008-09 under the agreement with Ivory. It is also entirely incorrect on the part of the AO as also the Ld. Counsel for the Revenue to interpret & hold that the judgement of Bombay High Court dated 19.07.2012 finally adjudicated upon the rights and obligations of the parties arising from the Development Agreement dated 02.01 .1995. The AO while completing the income tax assessment order for A.Y. 2011-

12 interpreted the judgment of the Bombay High Court dated 19.07.2012 in the manner that the Court had finally decided on the assesses entitlement to receive the consideration on sale of the constructed spaces in his own right even though the Suit has remained pending even till today. In fact the Hon'ble High Court directed that pending hearing and final disposal of the preliminary issue; Ferani would maintain the accounts and to continue depositing an amount equivalent to 12% of the gross sale consideration in the designated Bank account. The Court further directed that the amount upon deposit would be invested in Fixed Deposits to abide by the further orders of the Ld. Trial Judge. From bare perusal of the order of the High Court's judgment: it was evident that nowhere the High Court had in any manner expressed any opinion or made any observation that the moneys deposited in the designated A/c by Ferani could be appropriated by Estate EFD or that the Estate EFD could exercise control or domain either over the amounts deposited in the designated A/c or over the fixed deposits made by Ferani out of the sums deposited in the designated A/c. Nowhere the Court had even indicated that in its opinion Estate EFD could have any access to the sums collected by Ferani. Keeping in mind the fact that Estate of EFD in the Suit filed had requested for cancellation of the Agreement dated 02.01.1995 and had sought restitution of the property in its original form, the Court had categorically directed that the amounts invested by Ferani in fixed deposit would abide by the further orders of the Trial Judge trying the Suit filed by Estate of EFD. In the circumstances, it is very clear that the Court was very categorical in its direction that the amount collected by Ferani

would remain under its exclusive control and over which Estate of EFD would neither have any control or access. Further this fact has been accepted by the ITAT "E" Bench Mumbai for AY 2013-14 in its order in ITA No. 1033/Mum/2018 Dt. 27.03.2019. The coordinate bench of the ITAT agreed with the assessee's contention that the amounts collected and kept in deposit by Ferani was under court custody and its disposal dependent upon the final order of the Court trying the suit. The relevant findings of the Tribunal are as under:

> *13. We have heard rival contentions and gone through facts and circumstances of the case. We have gone through the detailed arguments made by Ld Counsel for the assessee. We have also heard LD CIT-DR and gone through case records. We noted that the amount of Rs.4,06,41,567/- credited by Indian Bank on the FDs did not constitute income chargeable to tax for the A.Y. 2013-14 for the present assesse merely on the ground that the bank had deducted tax at source and the tax payment was reported against the PAN allotted in the name of Estate of EFD. We have notice from the judgment of Hon'ble Bombay High Court dated 19.07.2012 that the relevant directions of the High Court were pronounced while disposing the appeal filed by Ferani against the judgment of the Single Judge disposing Notice of Motion for Interim relief. We are of the view that CIT was unjustified in drawing inference against the assessee on the ground that it was the assessee who had approached the Court and therefore assessee could not deny the fact that the fixed deposits were made in its favour on the basis of Court directions & the FDs legally belonged to the assessee. We have noted the fact that the assessee had filed Suit before Hon'ble Bombay High Court in 2008 after terminating the Agreement dated 02-01-1995 and prayed for restitution of the property in its original form. The said Suit was pending and therefore the rights of the Parties flowing from the Agreement dated 02-01-1995 were inchoate and/or indeterminate. Even the CIT (A) in his appellate order for the A.Y. 2011-12 dated 28.10.2014 had held that no income arising from Agreements for Sale unilaterally executed by Ferani during F.Y.2010- 11 was legally chargeable to tax in assessee's hands because the entire matter was sub-judice and assessee was never a party to the Agreements for Sale executed by Ferani and for which the amounts were deposited in the Bank A/c opened by Ferani in its own name. But it is to be mentioned that these facts itself is enough to create the debate and this order of CIT(A) is pending adjudication before Tribunal. Moreover, we make it clear that this order of ours will in no way affect the hearing of that appeal. Copy of the appellate order for the A.Y. 2012-12 is enclosed at Pages 172 to 347 of the assessee's Paper Book. The same view was taken by the CIT (A) for A.Y. 2012-13 as well. The appeal against the order u/s 143(3) for A.Y. 2013-14 is pending*

before CIT (A). However, it is evident that on the same set of facts as prevailed in the prior years and the appellate authorities have held that since the assessee was not a party to any of the Sale Agreements after the Agreement dated 02-01-1995, which was terminated in May 2008, no income could be legally inferred with reference to amounts unilaterally collected by Ferani. However, until the Suit was decided one way or other no income in law could be inferred in the assessee's hands on substantive basis and in case revenue want to assessee the same here it can only be assessed on protective basis at the most. But that is not the case here because revenue has to give find where this has to be assessed on substantive basis.

14. Be the same as it may, in the present case the issue is not whether the part of the sale price deposited in the A/c No. 843184512 was assessable as income of the assessee. After the A/c No. 843184512 was unilaterally opened by Ferani in July 2009, the amounts collected & kept in said Current A/c did not yield any further income. In July 2012 the Division Bench of Hon'ble Bombay High court while disposing of the appeal of Ferani, however issued directions to Ferani to maintain the account of the amounts collected and deposited in the designated A/c. The Hon'ble High Court further directed Ferani (and not Estate of EFD) to make FDs out of the sums collected. The Hon'ble High Court's order further clarified that the amount invested in the Fixed Deposit would abide by further orders of the Trial Judge. As such the directions of Hon'ble Bombay High Court were express in their intent and language. Nowhere the order Court required Estate of EFD to take any steps with regard or with reference to amounts collected by Ferani. It was not for Administrator to keep account of the moneys collected. The directions of the Court expressly bound Ferani to deal with the amounts collected by it in a particular manner. Even though the Court permitted Ferani to proceed with collecting the sale proceeds from the Flat purchasers and the Court had required Ferani to maintain the accounts in respect of 12% share of the sale proceeds collected by it and further required Ferani to periodically keep such sale proceeds in fixed deposits so that Ferani did not have free and unfettered access to sums so collected. The Court also made it expressly clear that the amounts upon being invested in Fixed Deposits would ultimately be governed by the orders of the Trial Court. The directions of Hon'ble Bombay High Court made it clear that the deposits kept with the Bank under the orders of Hon'ble Bombay High Court essentially constituted funds in custodia legis. In other words, upon the amounts being kept in FDs the funds remained in the custody of the Court. In the circumstances therefore interest accruing on these fixed deposits also constituted integral part of the funds under the custody of the Court and not accessible to the Administrator.

20. We further noted that after the Agreement for development was terminated in May 2008 and the Suit was filed in Bombay High Court, only one of the Developer viz. Ferani unilaterally continued to execute Agreements for Sale in favour of the Flat

purchasers by using the Power of Attorney executed in its favour in January 1995, even though said Power of Attorney was legally revoked in 2008. Since Administrator was never party to any of the Agreements unilaterally executed by Ferani and no part of the consideration ever reached the Bank A/c of Estate EFD, the assessee rightly neither accounted the receipt of the part consideration in its books nor reported any gain or profit accrued on execution of Sale Agreements in the I T returns filed

21. In this factual back ground, the question that needs to be first answered is whether the AO was right in stating that income from sale of flats under agreement dated 2-1-1995 is assessable under the head income from business or profession. The issue of head of income under which amount received towards 12% share of income from sale of flats under agreement dated 2-1-1995 is assessable in attained finality, because the Hon'ble Supreme Court for the A.Y. 2003-04 had accepted the contention of the assessee that income is assessable under the head income from capital gain in SLP filed by the revenue. Therefore, in the first instance the ld. Counsel for the revenue should have restricted his arguments with reference to the grounds of appeal which arose from the orders of the authorities below. It is not permissible for the counsel of the revenue to make out a case which the revenue itself had never made out. In the present case, appellant before this tribunal is the Assessing Officer who had passed the assessment order. In the order passed under section 143(3), the A.O. had consciously and after due application of mind to various facts opted to assess the income under the head "Other Source"

and not profits and gains from business. In the circumstances, while representing the A.O., his counsel cannot be permitted to make out a case which was not the case of the A.O. at the assessment stage. It is further material to draw attention to the fact that CIT(A) in his order recorded a categorical finding that the amounts assessed as income were received as 'advance" from various persons to whom the assessee had agreed to transfer his right, title and interest in land. The income embedded in such advance could therefore be assessed only under the head "Capital Gains" and not under any other head of income. Further such income could only be assessed in the relevant previous year in which transfer of the capital asset took legal effect On scrutiny of memorandum of appeal, it was noted that, in four grounds of appeal the Revenue has not challenged the said specific finding and directions of CIT(A). In absence of any specific challenge to the CIT(A) finding in the grounds of appeal, the Revenue cannot be permitted to raise arguments in relations to head of income, more particularly when the matter was settled in earlier years.

22. We further noted that the CIT(A) had recorded categorical finding in his order, wherein he has first set out the historical background of assesses case inter alia giving details of past assessments in which profit on sale of inherited lands was assessed as business income, but held to be assessable under the head Capital gains by the appellate authorities including Hon'ble Bombay High Court. In respect of lands which were subject matter of development agreements dated 02.01.1995, the assessee had recognized income on execution of four conveyance in AY 2002-03 and AY 2003-04 respectively. The

income was offered under the head Capital gains. In the assessment under section 143(3) for the AY 2003-04, the A.O. assessed the same under the head profit and gains of business. It may be noted that in AY 2003-04 CIT(A) relying on the ITAT order for AY 1987-88 to 1989-90 and 1991-92 to 96-97 decided that the income from sale of land should be taxed as capital gains. The same was confirmed by ITAT. The High Court also decided the issue in favour of the assessee by relying on the courts order of AY 1997-98. The Hon'ble Supreme Court has dismissed SLIP filed by department for AY 2003-04 on 07.01 .2013. Therefore it is very clear that for AY 2003-04 the subject land which is covered by the development agreements dated 02.01.1995 was considered and held by the Hon'ble Bombay High Court to be capital asset" and not 'stock in trade". The CIT(A) has further held that as per the principle of consistency, it was necessary for the A.O. to bring on record new material or evidence to establish that position accepted or allowed to be persisted in the past by the parties was not legally and factually correct. Before, the AO departs from the view adopted earlier it is necessary for him to establish with sufficient evidence that position accepted by the parties in the earlier years was legally or factually no longer tenable.

23. It is pertinent to note that, no taxable event contemplated by section 2(47)(v) and section 45 of the I T Act., had taken place during the financial year FY 2010-11 so as to enable the AO to assess the amounts received during the FY 1996-97 to 2010-11 to be assessed as income of the AY 2011-12. It is further material to state that the AO himself has contradicted his conclusion because after completion of assessment for the AY

2011-12, he reopened the assessments of the AYs 2007-08 to 2010-11 u/s 147 of the Act for assessing the advances received from the flat purchasers in the relevant financial years on the plea that income was assessable in the respective years when agreements were executed and amounts were received The assessee never in the past changed holding of his land from "capital asset" to "stock in trade". The income tax assessment of the assessee for the AY 1995-96 i.e. the year in which development agreements were executed, was completed u/s 143(3), In that order, the AO did not record any finding to the effect that by entering into Development Agreement coupled with the receipt of Security Deposit of Rs 200 Lacs the land was converted into "stock in trade". Even in the assessment order for the AY 2003-04, when the assessee had offered the income on execution of two conveyances the AO assessed the said profit as business income by following the reasons discussed in the prior year which were disapproved by the Bombay High Court. In the assessment order for the AY 2003-04 no case was made out by the A.O. that the Land which was subject matter of the Development Agreement dated 02.01.1995 was converted into "stock in trade" because of the fact that transfer of land was under a development agreement. In absence any such finding in the prior year's assessments completed under section 143(3), the AO could not make out an altogether new case when factual matrix of the case did not change in the FY 2010-11. Further, virtue of signing of development agreement dt. 02.01.1995, land did not change the colour/character from investment/capital asset to stock in trade. We further noted that land was acquired way back in 1923 and since then it was held as capital asset/investment. The Administrator along with Bachoobal

Woronzow (BW) being the sole beneficiary of the Estate of late E.F.Dinshaw entered into the development agreement in 1995 even though the land was inherited as far back in 1936. In other words, the Administrator of the Estate and the sole beneficiary dealt with the land for the first time, almost after 60 years from the time land was inherited. All the above fact clearly demonstrates that holding of land cannot be construed as stock in trade thereby the resultant gain also cannot be taxed under the head business income. In any case, the AO in his order ultimately taxed the income under head "Income from other sources" while computing the total income of the assessee. This clearly proves that AO himself was not convinced that taxability of this income under the head "business Income". The department has also rightly not taken any ground of appeal to tax the same under the head business. We, therefore, are of the view that the Ld. Counsel is trying to open a concluded fact on taxability of income under the head "capital gain", though such grounds are not pleaded in present appeal filed by the department.

24. The Id. Counsel for the Revenue has relied on the case of DG of Income tax (admin) and Ors vs GTC industries Limited and Others reported in (2016) 240 taxmann 209 (SC) in support of his contention that wherever an assessee enters into a Development Agreement with a builder, then it necessarily leads to inference that the assessee has converted the capital asset into stock in trade. However it is to be noted that the facts of this case are totally different and cannot be relied on in the present matter. In this case, the assessee a sick industry was de-registered from Sick Industrial Companies Act as and when its net worth became positive after years

later, assessee put on sale one of its property. Further, the question for decision before the Supreme Court was not whether income arising from sale of land was assessable as business income or capital gain. The question was also not whether the immovable properties of GTC were its capital asset or stock in trade. In that case, GTC was a sick company under SICA and scheme for its revival was sanctioned by BIFR. During the period of revival scheme the said GTC entered into agreements with transfer of its immovable properties to two property developers by executing the development agreements. The IT department however sought to attach these properties for recovery of taxes. The recovery proceedings were opposed by GTC claiming that it was a sick company and during the period when revival scheme is in operation attachment of its properties by IT department was not permissible. Question for decision before the SC was therefore, whether the attachment of the properties was permissible and the attachment was legally valid. The relevant findings of the Supreme Court on the issue are as under.

> *"What follows from the above is that the High Court was convinced by the reason that the question as to whether the company had indulged in sale of assets unauthorisedly and in violation of para 9 (5) (b) which is yet to be taken by the Board. The High Court also proceeded on a palpably wrong presumption that the sanctioned scheme was still under operation and, therefore, bar under Section 22 of the S/CA applied. For this reason, it directed that the only remedy left for the Revenue was to approach the Board for lifting of bar under Section 22 of the 3/CA. From the facts and events noted above, this premise and assumptions are clearly erroneous and contrary to record. (19)"*
>
> *...........*
>
> *"The Income Tax Department shall be entitled to take steps for attachment of the properties of the Company, including Ville Pane Land as per the provisions of the Income Tax Act and shall be entitled to sell the same. If there are any secured creditors in respect of these properties, such attachment and sale shall be subject to rights of those creditors. Out of the proceeds, the principal amount of tax due to the income tax Department and even the admitted excise dues shall be paid to the Revenue. In so far as payment of interest and penalty is concerned, that would be dependent upon the decision which the Board*

would give. (33)'

25. From the plain reading of the findings of the Supreme Court in the case of GTC, it was evident that the court was never called upon to decide the nature and character of GTC's land holdings nor the court was deciding the question as to whether the income on sale of immovable properties was assessable as capital gains or business income. Therefore it is incorrect to say that Hon'ble SC had decided issue of conversion of capital asset into stock in trade. In this regards, it is relevant to make a reference to very important observation of supreme court in the case of CIT vs Sun Engineering works (198 ITR 297). The observations are as follows

> *"it is neither desirable nor permissible to pick out a word or a sentence from the judgment of this court, divorced from the context of the question under consideration and treat it to be complete "law" declared by the court. The judgment must be read as a whole and observations from the judgment have to be considered in the light of the questions which were before this court. A decision of this court takes its colour from the question involved in the case in which it is rendered and while applying the decision to later case, the court must carefully try the ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgment, divorced from the context of the question under consideration by this court, to support their reasoning. It is not proper to regard a word, clause or a sentence occurring in the judgment of the supreme court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment"*

Applying these observations to the assessee case, one needs to ascertain whether the judgment relied upon was at all applicable or relevant in deciding the assesses case. The lands were inherited by EFD on demise of his father in 1936 and after his demise in 1970 the lands were held by the Administrator for the benefit of his sister. In the context of the entire land holding of F.E.D admeasuring 2500 Acres approximately which was inherited by his two non-resident children i.e. EFD and BW, the Bombay High

Court had taken note of these material facts and also observed that no sale of land had taken place in the life time of EFD, but the sale of land first took place almost after 65 years after the land was purchased. The high court in the assesses own case therefore held that entire land holding in the hands of the Administrator was capital asset and therefore income on it's transfer was assessable as capital gains but not as business income. Even though the CIT(A) in his order has elaborately discussed this judgment of the jurisdictional High Court which has become final and therefore binding on the Revenue, the Ld. Counsel for the Revenue has not brought on record any material to distinguish the same. Therefore we are of the considered view that the in judgment relied upon by the ld Counsel, no principle of law per se was laid down nor the court was called upon to decide the question about characterization of income when the land admittedly was acquired as a business asset and it was given for development by a sick company to raise financial resources. In fact, it appears that it was sick company's assertion that land being business asset was converted by it as stock in trade. No such averment has ever been made in the present case by the assessee at any time before any authority. Further, no immovable property of the assessee was converted into stock in trade in any of the years and also not put the entire property on sale and hence the facts of the case quoted by ld. counsel are totally different from the present case and hence not applicable.

26. The ld. Counsel has further relied on the case of Raja J. Rameshwar Rao vs. CIT, reported in 42 ITR 179 (SC) in support of his contentions. The facts of this case are totally different and

cannot be relied on in the present matter. In this case, the person acquired the land with a view to selling it later after developing it. The person also went on dividing the land into plots, developed the area to make it more attractive and sold the land not as a single unit but in parcels. Based on these facts, the court has upheld that he is carrying on business and making a profit. Facts of this case were somewhat similar to the facts involved in the case of G. Venkatswomi Naidu and Co Vs CIT (35 ITR 594)(SC). The judgment of the Bombay High Court in the assesses case was rendered after due consideration of this SC judgment which has laid down several tests for deciding whether the income derived from dealings in land is to be assessed as business income or capital gains. After examining the facts and circumstances in which land was acquired by FED and the manner in which it was held by the successors and considering the changed circumstances in which the holding of the land itself became difficult, the Bombay High Court had categorically held that the dealings of the Administrator with the inherited land were with a view to protect the corpus of the estate as well as interest of the beneficiary and therefore, could not be regarded as business or adventure in the nature of trade and therefore the income was assessable only under the head Capital Gain' and not under the head business".

27. Further, in every case where land is given to a developer under Development Agreement there cannot be a presumption that the owner of the land has converted the land in to stock in trade. In this regard, the assessee relied upon the decision of the ITAT Kolkata in ITA No94IKolI2012 dated 03.02.2016, in the case of

Eveready Industries India Ltd. In this case, assessee had acquired an industrial plot of land at Madras in 1971 for setting up a factory. After the factory was operated for 23 years the company decided to consolidate its operations at one location. Pursuant to such decision, the factory land was found surplus. In December 2004 the assessee entered in a development agreement in respect of 7.1. Acres of land with a developer who agreed to pay part consideration in cash and part consideration in the form of 20% of the constructed area in the proposed new building which the developer was to construct. The AO held that the gain realized by the assessee on transfer of the development rights was assessable as business income. On appeal, the CIT(A) & ITAT concurrently held that the gain was assessable as Capital Gains and not as business profit. The ITAT held that under the agreement the assessee land owner was to receive a definite consideration and the assessee did not participate in any manner in the activity of development, construction and sale of the new building. All the cost and expenses associated with development and construction of the new buildings was to be borne by the developer and assessee had no obligation to perform. All risks associated with the venture of development of real estate were solely borne by the developer and no risk was shared by the land owner. The ITAT, therefore agreed with the assessee contention that the assessee itself never took part in trade and no risks associated with the adventure in the nature of trade was borne by the land owner. Therefore, in deciding true and correct nature and character of income it is necessary to examine facts and surrounding circumstances of each case. It is not correct or appropriate to pick up some facts or stray observations in the judgment of the court, divorced from the factual

context in which it is made by the court. In the assesses case, the land was acquired way back in 1923 and since then it was held as investment or capital asset and never as stock in trade. No activity was carried on in the said land. The administrator jointly with the sole beneficiary of the estate of EFD entered into the development agreement, and hence the facts of the case quoted by Id. Counsel, being totally distinguishable, and these judgments have no application.

28. The Id. Counsel has made statement that 'income pertaining to sale of flats prior to filing of suit would be taxable for AY 2011-12 as stated above while the one relating to period after filing of the suit may be subject to application of section 52 of the Transfer of property Act, 1882 and the order of the Bombay High Court dated 19th July 2010. In this regard, it is important to note that since the Agreement itself stands determinated, the question of declaring an income from the proceeds calculated on the alleged Agreement cannot be part of taxable income. Under such circumstances, the amounts received from the flat purchasers will be liable for tax subject to outcome of the decision in civil suit. Therefore, entire amount assessed by A.O. for A.Y. 2011-12 is incorrect. Further, it is noted that the bank account was opened by Ferani in the name of Ferani Hotels Pvt. Limited A/c - N N Wadia share", but the bank statement shows in the name of Ferani Hotels Pvt. Limited" only and not the Administrator of EFD. The said account was never opened by the Administrator nor had the Administrator consented for opening of such an account. The Administrator had never provided his PAN nor the Bank completed KYC formalities in respect of this account. The account title includes the name of

Shri. N.N. Wadia; nowhere it clarifies as to in what capacity name of Shri NN Wadia has been mentioned. It is material and pertinent to note that Shri N.N. Wadia is assessed to tax in his own name and in his own right in respect of income which he earns in his individual capacity as Administrator of the Estate of EFD in terms of Section 168 of the Act. As such, the mere reference to the name of N.N. Wadia in the account opened and operated by Ferani Hotels Pvt. Ltd., could not lead to conclusion that the amounts deposited by Ferani belonged to Estate of EFD. The Administrator Estate of E.F. Dinshaw does not have any control or domain over neither the said account nor such account can be operated by the assessee.

29. We further noted that the coordinate bench of this tribunal in its order 27 03.2019 in ITA No. 1033/Mum/2018 for AY 2013-14 had taken note of this factual and legal background. Taking into account specific directions contained in the High Court's order dated 19.07.2012, the tribunal agreed that the rights and obligation of the parties flowing or arising from or under the agreements dated 02.01.1995 where indeterminate. The ITAT also agreed that the fixed deposits made by Ferani under the order of the High Court did not belong to the Administrator as he neither had control or domain over the said amounts and these fixed deposits were to be governed by the order of the Trial Court before whom the suit was pending. Once the tribunal has held that the amounts collected by Ferani during the pendency of the suit and kept in FD's are amounts kept in custody of the court and not accessible to the Administrator till disposal of the suit and to be governed by the final order of the high court, then the amounts so

collected cannot be considered to be income of the assessee. Further, the AO has brought to tax advances which the assessee had received during the period 1996-97 to 2008-09 totally Rs 269,48,90,856/- under the head other source. We are surprised to note that the AO had made additions contrary to the provision of section 56 of the Income Tax Act which govern the assessment of income under the residuary head. Further, said provisions nowhere permit the A.O. to assess receipts of prior years in one lump sum in later year on the ground that in prior years the receipt was not taxed. The A.O., on one side has admitted that Rs 269.48 Crores was received for transfer of asset and there were serious disputes between the developer and the assessee and on the other hand an advance shown under liabilities in balance sheet is income of the assessee without assigning any reasons as to how a liability takes character of income for the AY year 2011-12. The 'asset in question is inherited land which was acquired in 1923 by FED and inherited in 1936 by E.F.D. The Bombay High Court in its judgment considered the circumstances in which the entire land was inherited by the children of F.E.D. and held that the Administrator was holding this land as capital asset and therefore income on its transfer can only be taxed under the head 'Capital Gains". In the circumstances, once the A.O. has admitted that Rs. 269.48 crores was received as Advance against transfer of asset, then he could not under the provisions of section 56 of the Act assess the same as income because none of the taxable events contemplated under section 56 took effect in FY 2010-11. Moreover as held by the High Court, the land in question is capital asset of the assessee, and hence, income embedded in advances against the transfer can only be assessed under the head capital

gains and that too in the year in which 'transfer" of the capital asset legally takes effect and not in any year. Since, in the suit the assessee has claimed for cancellation of development agreement in its entirety and has prayed for repossession of the entire land in its original form, the transfer of the capital asset if any can happen only when the suit of the assessee is finally decided by the Court and the decision of the court becomes final. In view of these facts, the amounts which the assessee received during the period 1995-96 to 2010-11 could not be charge to tax as income in AY 2011-12, under the head income from other source or any other head of income.

30. In so far as the observations of the AO in para. 26 of the assessment order, we find that although the A.O. considered the advances received in the prior years as income for AY 2011-12 on the ground that there was cessation of liability, but nothing more has been elaborated on this point. In this regard, it is pertinent note that in the assessment order, the A.O. assessed the income under the head income from other sources. We further note that section 56 of the Income tax Act, 1961 defines the scope of the income which is chargeable to tax under the head Other Source. The residuary head of income can be invoked only when the income is not found assessable under any other head of income. In the instant case, as admitted by the A.O., the advances were received against the transfer of land and therefore any consideration received for transfer of immovable properties could not be assessed under the head other sources. Further, the A.O has also accepted the fact that there were serious disputes between the developer and the assessee regarding the validity of the lease

agreement as well as development right agreement. The documents on records prove beyond doubt that such disputes were sub judice even till March 2011 being the end of previous year. Once it is evident that the disputes were sub judice then, it could not be argued that during the pendency of the legal proceedings there was cessation of liability. As such on the facts of the case, it could not be established that there was cessation of liability. It is further observed that section 41(1) has no application, because the liability contemplated by that section relates to trading liability for which deduction was allowed to the assessee the computation of income of any earlier year. In this case, the amount assessed was never allowed as a deduction in any earlier year.

31. In this regard, the assessee placed his reliance on the decision of the coordinate bench of this tribunal in I.T.A. no. 5508/Mum/2015 dated 06.02.2015 for AY 2010-11 in the case of Bombay Gowrakshak Mandali vs I T.O. In this case, the assessee trust owned a property in Mumbai. The trust had entered into a development agreement with M/s Lokhandwala Construction Industries Limited for which consideration of Rs 11 Crores or Rs 50 per square feet of available FSI whichever is higher was to be paid. The said trust received Rs 32.50 Crores from the developer. However, since there were disputes with the developer with regards to quantum of available FSI, advance of Rs 32.50 Crore received from the developer was shown as liability in its books. The manner in which the advance received was shown in the balance sheet and the disclosure in relation thereto by way of Notes in the audited accounts was consistently same in all the

past years and was accepted by the Revenue in past assessments. In AY 2010-11, the A.O assessed the said sum on the ground that it was income of that year because there was cessation of liability. On appeal by the assessee, the ITAT observed that development agreement was entered in 1984 and advance was received was never disputed. Till preceding year, advance received in 1984 was treated as advance and was never disputed. The fact that from 1984 till date there had being no change in the status of the transaction and there was neck deep litigation was also not disputed by the Revenue. Keeping in mind these facts, the ITAT held that for an amount to be added back under section 41(1) which should bear the charter of income. Nowhere from the orders of Revenue authorities it appeared that during the year, something new happened had which converted the advances into remission of liability to be treated as income. The Tribunal held that invocation of section 41 (1) was uncalled for. We find that facts of the present case are pari materia to the case considered by the Tribunal. Even in this case, the entire transaction with the developers is in neck deep in litigation and the assessee has filed suit requesting for cancellation and restitution of the lands. Even at the beginning and the close of the FY 2010-11, the disputes between parties was sub judice and bearing the order passed on Notice of Motion seeking interim relief and there was no process on the main suit which remained pending. As such, during the relevant year, there was no material change in the factual matrix in the assessee case. We therefore are of the opinion that the decision of the ITAT squarely applies to the facts of present case.

32. Further, in our considered view in order to tax any receipt as income, it is necessary for the Revenue to show that the receipt of the money is without any conditions attached and the recipient has complete domain, control and ownership over the money received. Wherever money is received in terms of agreement which by itself is disputed and pending for decision in court, then no income embedded in such receipts can be made exigible to tax as income for the simple reason that the recipient has inherent obligation to refund the same to the payer in the case in the event the court decides the other way. In this regard, reliance is placed on the decision of the Karnataka High Court in the case of CIT vs. L. Sambashiva Reddy (62 Taxmann.com 174). In this case, it is the case of the revenue that once the single judge in her order refused to grant injunction against Ferani to proceed with construction, then it automatically lead to conclusion that all agreements with flat purchasers become final and thereby income accrued. We are unable to agree with arguments of the ld. Sr. Counsel for the revenue for the simple reason that in the first place it is to be noted that in the order dated 19.07.2010 the Court restrained Ferani from handing over possession of flats to related as well as non-related third parties till the Notice of Motion was disposed. Once the court restrained Ferani from handing over possession, it implied that the agreements with flat purchasers could not have been given effect to and thereby there would not have been transfer of property in law. Even in the decision of the division bench of the High Court in July 2012, the Court directed the Trial Court to first decide the preliminary issue of limitation in terms of Section 9A of CPC and thereafter to proceed with the suit. It also granted liberty to the assessee at

that stage to seek interim relief by moving Notice of Motion. Therefore, it is factually and legally incorrect for the Id. Counsel to contend that upon disposal of assessee Notice of Motion seeking ad interim relief the agreements with the parties become final and income chargeable to tax accrued in AY 2011-12.

33. We further noted that when, the appeals were fixed for clarification on 22/11/2019, the Ld. AR for the assessee submitted that the Hon'ble Supreme Court, vide its order dated 04/10/2019 passed by the three judge Bench in Ivory SLP and Ferani review petition, decided the reference of question of law in favour of the administrator holding that the issue of limitation cannot be decided u/s 9A of Civil Procedure Code and all the issues, including limitation of petition filed by the parties and the merit of the matter to be decided by the trial court on the basis of contentions of both the parties and also, decide any applications seeking interim injunction/ relief if any. From the above, it is very clear that as of date, there is no material change in factual matrix, because after the administrator determinated the agreements dated 02/01/1995, revoked the power of attorney granted to Raheja and filed the suits in the Hon'ble Bombay High Court in 2008, there is practically no progress and the entire matter is sub-judice. Therefore, we are of the considered view that there is no merit in the contention of the Ld. AR for the revenue that the decision of Division Bench of Hon'ble Bombay High Court in review petition filed by Ferani Hotels Pvt.Ltd, has rest the matter of dispute between the parties regarding development agreement and sharing of sale consideration, and consequently, income accrues to the assessee for the impugned asst year.

34. In this view of the matter and considering facts and circumstances of this case, we are of the considered view that the Id. CIT(A) after

considering relevant facts has rightly held that the AO was incorrect in taxing advances received by the assessee up to the A.Y. 2011-12 as income chargeable to tax under the head income from other sources. Hence, we are inclined to uphold findings of the ld. CIT(A) and reject grounds taken by the revenue.

35. The next issue that came up for our consideration from revenue appeal is taxability of lease rental received by the administrator. The AO has made additions towards lease rental deposited by Ivory and Ferani in separate account under the head income from other sources on the same reasoning on which he had assessed advances under the head income from other sources. It is the contention of the assessee that lease rent allegedly deposited in the separate bank accounts by Ivory & Ferani of Rs. 39.60000/- was not legally chargeable to tax as income of the assessee as there was no privity of contract during the FYs 2008-09 to 2010-11 in terms of which the assessee could have claimed such rent from Ivory & Ferani.

36. We have heard counsels of both parties and perused materials on record along with orders of lower authorities. We find that in the agreements dated 02.01.1995 with Ferani & Ivory clause 2 envisaged that the assessee would grant a lease of the demised lands for a period of 5 years. In the circumstances, merely because grant of lease was provided in the Agreement dated 02.01.1995 but when in fact the lease deed was never executed in favour of the parties, then said Ferani & Ivory could not presume that lease rights were in fact awarded in their favour by the Administrator. In absence of any formal registered lease agreement, Ivory & Ferani could not legally infer that the lease of

land was granted by the Administrator in respect of the lands. The fact that the enforceable lease was not in operation was not disputed by the revenue. The Ivory had accepted contractual tenancy when it had executed conveyance in FY 2001-02 and 2002-03. The assessee had filed copy of lease deed dated 25-10-2001. We find that clause (iv)(b) of the deed of conveyance dated 25.10.2001 executed between the assessee and Ivory properties and hotels Pvt. ltd and Toyota Lakozy Auto Pvt. Ltd., which clearly talks about contractual monthly tenancy on the expiry of the lease. From the above, it is evident that even if one accepts the claim of the developers that lease for the period of five years was granted the same came to conclusion in January 2000 on expiry of five year period. Thereafter the relationship between the parties was that of landlord and contractual monthly tenant. Before the lower authorities, the assessee had filed requisite documentary evidence to prove that in 2008 the assessee had taken necessary legal steps to terminate the contractual tenancy of each developer. In the circumstances, once the assessee had taken legal steps to terminate the contractual monthly tenancy, the developers could not unilaterally claimed themselves to be having leasehold rights in the land in terms of covenants contained in the agreement dated 02.01.1995.

37. We further noted that the Assessing Officer before concluding that income by way of lease rent had accrued, failed to bring on record sufficient, adequate and cogent documentary evidence which proved that a legally valid & binding agreement subsisted between the Administrator and Ferani & Ivory in terms

of which the assessee had vested right of claiming monthly rent from them. The assessee had taken sufficient legal steps for termination of tenancies which could be inferred only from the conduct of the parties and consequent to the termination of tenancies, the assessee had stopped accepting the monthly payments tendered by Ivory & Ferani. Further, when the assessee stopped accepting the monthly payments, Ferani & Ivory unilaterally opened accounts with the Banks in their own names and continued depositing the monthly sums of Rs.55,000/-. But, fact remains that these accounts were opened by Ferani & Ivory entirely on their own volition and in their own names and the Administrator had never granted his consent either for opening of the Accounts or depositing the monthly sums of Rs.55,000/-. It is also material that there existed no privity of contract either written or implied in terms of which Ferani or Ivory had legal obligation to pay and the Administrator had vested right to demand payment of monthly lease rent. These accounts were opened by these companies by providing details & information about themselves. The Administrator of Estate of EFD had never authorized or permitted either of the companies to open the account nor had it provided any information enabling either of the companies to open these accounts. In the circumstances, on account of unilateral acts of the project coordinators, no income in law could be inferred particularly when no part of the income assessed was either legally due to the assessee or when the amounts were not actually received by the Administrator. The ld. CIT(A) after considering relevant facts has rightly held that the AO was incorrect in taxing lease rent as income chargeable to tax under the head income from other sources. Hence, we are inclined to uphold findings of the ld.

CIT(A) and reject grounds taken by the revenue.

38. In the result, appeal filed by the Revenue for Asst. Year 2011-12 is dismissed.

ITA.No. 334/Mum/2017-Asst Year 2012-13.

39. The facts and issues involved in this appeal filed by the revenue are identical to facts and issues, which we had considered in ITA.No. 1389/Mum/2015, for Asst Year 2011-12, but for figures. The reasons given by us in preceding paragraphs in ITA No. 1389/Mum/2015 for Asst Year 2011-12 shall mutatis mutandis apply to this appeal also. We, therefore for detailed reasons given in preceding paragraph in ITA No. 1389/Mum/2015 upheld the findings of the ld. CIT(A) and dismiss appeal filed by the revenue.

40. As a result, appeals filed by the Revenue for Asst. years 2011-12 and 2012-13 are dismissed.

Order pronounced in the open court on this 19 /02/2020

Sd/-	**Sd/-**
(SAKTIJIT DEY)	**(G. MANJUNATHA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 19/02/2020

Thirumalesh Sr.PS

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

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

BY ORDER,

//True Copy//

(Asstt. Registrar)
ITAT, Mumbai