IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, MUMBAI

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. C.N. PRASAD, JUDICIAL MEMBER

I. T. A. No. 6496/Mum/2017
[Assessment Year: 2014-15]

Asst. CIT 4(3)(1) R.No. 649, 6th Floor, Aayakar Bhavan, Mumbai – 400020	vs.	The New Piece Goods Bazar Co. Ltd., 2nd Floor, Office Gally, M.J. Market, Kalbadevi Road, Mumbai [PAN: AAACT 1700F]
(Appellant)		**(Respondent)**

Appellant by : Ms. Kavita P. Kaushik (DR)
Respondent by: Sh. B.V. Jhaveri (Adv.)

Date of Hearing: 03.03.2020
Date of Pronouncement: 25.09.2020

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-9, Mumbai ('CIT(A)' for short) dated 17.08.2017, partly allowing the Assessee's appeal contesting its' assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter, the 'Act') dated 22.12.2016 for assessment year (AY) 2014-15.

The background facts

2. The brief facts of the case are that the assessee is an over 140 year old company, owning, among others, a shopping complex comprising, as stated, 4 buildings housing about 1200 shops. A wholesale/semi wholesale cloth and textile

market (by the name 'Mulji Jetha' Market) is operative therefrom. The assessee, as the owner of the said house property, has let out the shops on a monthly rental basis, which income is offered to tax, as in the past, under the head 'Income from house property', i.e., Chapter IV-C of the Act, comprising sections 22 to 27. The assessee is also charging tenants a sum called 'service charges', toward various services being provided by it to them. The same is, though, as again in the past, returned as business receipt, claiming the cost of those services as a deductible expenditure there-against, resulting in a business loss, denied by the Revenue, assessing the receipt as income from house property instead, entailing disallowance of business expenses. The third stream of income arising to the assessee is by way of 'premium on change of tenancies', being also the account head under which this income is credited/accounted for in accounts. The market being an established one, is a thriving market with good business potential. That apart, the rent, being controlled by legislation, i.e., Maharashtra Rent Control Act, is far below the prevailing market rent, resulting in the tenancy right (of the tenant) being a valuable right. The rent charged, as explained, is a fraction of the going rate, giving us an example for shop measuring 100 sq. ft. & 400 sq. ft. The issues arising in this appeal are as to the taxability of the various incomes arising to the assessee, including *qua* their computation. We shall proceed issue-wise. The order, made with due regard to the arguments advanced, is to be read as one whole as the issues are inter-related, and findings *qua* one have a bearing on the other.

The respective cases

3. The first issue arising in this appeal is the maintainability of the allowance of watchman salary, claimed at Rs.46,66,061, from the rental income (Rs. 91,07,102/PB pgs.1-2), assessed u/s. 22, i.e., prior to the claim of standard deduction u/s. 24(a) of the Act at the rate of 30% thereof, which is thus claimed on

the rent amount net of salary claimed, i.e., on Rs. 44,41,041 (PB pg. 1). The second issue is *qua* service charges, received at Rs. 52.80 lacs for the year, i.e., the head of income under which the same is assessable under the Act. The same assumes significance as the assessee has, as afore-stated, claimed huge expenses there-against (at Rs. 92.91 lacs/PB pg. 322), resulting in incurring, during the year, business loss, which issue is thus incidental, being essentially a computational issue, i.e., once the issue as to the head of income where-under the relevant receipt is assessable gets resolved. The assessee-company, as the owner, charges premium on the transfer of tenancy rights from one tenant to another, the taxability of which is the third issue. While the assessee regards it as a capital receipt, yielding long-term or, as the case may be, i.e., depending on the length of the time the tenancy has subsisted prior to its' transfer, short-term, capital gain, both in full inasmuch as there is no cost of acquisition, the Revenue regards it as 'Income from other sources'.

4.1 The assessee's case *qua* allowance of watchman salary is essentially with reference to its' past history, having been claimed and allowed since inception and, further, having received a favourble verdict whenever the matter travelled to the Tribunal, as for AYs. 1997-98 and 1998-99, the common order for which years (in ITA Nos. 4580 and 5201/Mum/2001, dated 17.09.2004), reproduced at pages 7 to 8 in the impugned order, bears reference to its' order for AY 1949-50 as well as for AYs. 1965-66 to 1967-68. The Revenue, on the other hand, relies on the change in the law by Finance Act, 2001, w.e.f. 01.04.2002, substituting sections 23 and 24, titled 'Annual value - how determined' and 'Deductions from income from house property' respectively. Section 22 brings to charge the 'annual value' of a property consisting of buildings or lands appurtenant thereto, of which the assessee is the owner, i.e., other than such portion of such property as he may occupy for the

purposes of any business or profession carried on by him, the profits of which are chargeable to income-tax. Section 23 (to the extent relevant) and sec.24 read as under:

23. (1) For the purposes of section 22, the annual value of any property shall be deemed to be—

(*a*) the sum for which the property might reasonably be expected to let from year to year; or

(*b*) where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (*a*), the amount so received or receivable; or

(*c*) where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (*a*), the amount so received or receivable :

Provided that the taxes levied by any local authority in respect of the property shall be deducted (irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him.

Explanation.—For the purposes of clause (*b*) or clause (*c*) of this sub-section, the amount of actual rent received or receivable by the owner shall not include, subject to such rules as may be made in this behalf, the amount of rent which the owner cannot realise.

(2) – (5)

24. Income chargeable under the head "Income from house property" shall be computed after making the following deductions, namely:—

(*a*) a sum equal to thirty per cent of the annual value;

(*b*) where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital:

Provided …

Section 25 bars the allowability of interest on which tax deductible under Chapter XVII-B of the Act has not been deducted. To that extent, it overrides section 24(b). Sections 25A, 25AA and 25B are special provisions to bring to tax the arrears of rent and unrealized rent on being received or, as the case may be, realized, i.e., subsequently, and even if the assesse is no longer the owner of the relevant property. Section 26 deals with a property owned by co-owners. Section 27 defines some of the terms used in the preceding sections.

4.2 The assessee claims watchman salary as a part of tenants' burden borne by it. We are completely at loss to understand any legal basis for the said claim. Taxing statutes, it is well-settled, are to be strictly construed; a statute being the edict of the Legislature, representing it's intent, even as reiterated recently once again by the Hon'ble jurisdictional High Court in *Humayun Suleman Merchant vs. CCIT* [2016] 242 Taxman 189 (Bom) (also refer: *CIT v. National Taj Traders* [1980] 121 ITR 535 (SC); *Orissa State Warehousing Corporation v. CIT* [1999] 237 ITR 589 (SC); *CIT v. Calcutta Knitwears* [2014] 362 ITR 673 (SC)). The law is in fact unambiguous and patent, so that it is the golden rule of interpretation, i.e., of literal interpretation, giving the words their natural, ordinary meaning, as also advocated in the afore-referred decisions, that would suffice. There is in fact no claim by the assessee to the contrary, i.e., as to any ambiguity in law, nor does it plead its' case with reference to a different interpretation thereof. Shri Jhaveri, the learned counsel for the assessee, on being queried in the matter, argued that there is no 'change' in law by Finance Act, 2001 (i.e., w.e.f. 01.04.2002, or AY 2002-03 onwards), as the several deductions allowed earlier u/s. 24 are replaced by a composite deduction at the rate of thirty per cent of the 'annual value'. The import of the change per the substituted section, even as explained during hearing, is that the assessee, irrespective of it having incurred, or not so, any expenditure in relation to earning the rental income, is entitled to a statutory deduction from the annual value at a fixed rate thereof, representing a cap on the said deduction. As apparent, the same precludes any loss arising to the assessee under this head of income, except on account of interest on borrowed capital u/s. 24(b), the provision in respect of which remains largely the same. *How could that, one wonders, be not regarded as a change in law*? Be that as it may, how, again, does the argument (of 'no change' in law) advance the assessee's case inasmuch as the deduction has to in any case be with reference to the provision/s of law. That, besides being the

mandate of law, is specifically provided for in s.24, while in the instant case the deduction is being claimed without reference to any provision of law!

We are conscious, and it may well be argued, that the claim toward watchman salary is being not made u/s.24, but in computing the annual value itself, which thus gets computed at Rs.44.41 lacs (as against the rent received at Rs.91.07 lacs). This is also in view of the manner in which the assessee has preferred the claim per its' return of income, and which could well be upon realizing the un-tenability of the claim toward salary, or any other specific expenditure for that matter, under 24(a). *That is, amounts to a tacit admission as to the change in law.* The impugned salary thus gets factored in the computation of the annual value, as required by sec. 23, which is an equally unambiguous and definitely worded provision (as sec. 24). The assessee, by own admission, receives rent at rates far lower than the prevailing market rate/s thereof on account of the same being regulated by law. *How could, then, it possibly argue of the annual value being lower than the rent received*? It is only where one could show that the rent received *includes* a compensation towards an obligation/s of the tenant undertaken by the landlord (owner), that a case for its deduction, so as to neutralize the inflation in rent to that extent, bringing it to a normative level, could be made out. No such case, which is principally factual, has been made out at any stage, including before us. On the contrary, as afore-observed, the rent received, on account of legislative control, is the standard rent, far lower than the fair market rent (i.e., the sum for which the property can reasonably be expected to be let from year to year), much less include any cost borne on behalf of the tenants. The watchman salary is even otherwise unrelated to the earning of rent *per se*. It does not represent a cost which could be said to determine the rental capacity of a house property. The assessee's case is without any factual or legal basis.

4.3 The reliance on the orders in the past is, in view of the change in law and non-substantiation of facts, misplaced. In *CIT v. British Paints (India) Ltd*. [1991] 188 ITR 44 (SC), the Apex Court discountenanced the plea by the assessee of following a method of valuation of stock consistently for the past several years, and accepted as such. The orders by the Tribunal, as for example in *Star Gold Pvt. Ltd. v. Dy. CIT* (ITA No. 349/Mum/2015, dated 22.06.2016) and *Asha Ashar v. ITO* [2016] 46 ITR (Trib) 492 (Mum), would be of little assistance to the assessee. All these cases are based on a finding by the Tribunal as to the relevant sum, as 'society maintenance charges' for example, being included in the rent received by the assessee, which formed the basis for allowance of its deduction u/s. 23. Similarly, in *Dy. CIT v. Sir Sobha Singh & Sons (P.) Ltd*. [2015] 153 ITD 157 (Del), the Tribunal upheld the deduction of watchman's salary from the composite rent received from the tenant per a separate agreement, covering, besides the same, house-tax, water and electricity charges, all of which were shown to be forming part of the gross rent received, and accordingly directed for exclusion in computing the annual value. *How could, one wonders, charges toward user of house property, separately reimbursed by the tenant, which fact was substantiated with reference to accounts, be regarded as part of rent*? There is no such factual edifice in the instant case, which formed the basis of the said decision. On the contrary, rent in the instant case is the standard rent, determined by law, and admittedly much below the fair market rent that the house property would otherwise fetch, much less being inclusive of the watchman salary! The said decisions are completely distinguishable on facts. In fact, in *Star Gold (P.) Ltd.* (supra), the Tribunal, likewise, clearly states of the security charges, which are similar to watchman salary, as being not connected with the rental income and, therefore, not deductible therefrom (paras 6 and 7).

4.4 The entire Rs.91.07 lacs shall be regarded as the annual value, and the assessee, accordingly, entitled to deduction u/s. 24(a) at the rate of 30% thereof. We are conscious that this may, rather, work to the assessee's 'advantage' in case the watchman salary, accepting the assessee's alternate claim, is allowed as deduction against business income. That, however, is besides the point. The law allowing the assessee standard deduction u/s. 24(a) being independent of it having incurred any expenditure in relation to the rental income, i.e., other than interest, for which a separate deduction is allowable u/s. 24(b), a lower gross total income, i.e., across different heads of income, on account of non-allowance of an expenditure unrelated to the occupancy or the rent agreement, cannot be construed as an 'advantage'; income being even otherwise liable to be computed in accordance with law. There is, it may be clarified, no estopple against law. Further, it is not the view that the parties may take of their rights in the matter, but the correct legal position, that is relevant (*CIT v. C. Parak & Co. (India) Ltd.* [1956] 29 ITR 661 (SC); *Kedernath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC)). We have in fact observed that the expenditure on watchman salary has no bearing on the rental income, or its earning, so that it cannot even otherwise be regarded as contemplated u/s. 23, or u/s. 24(a), *qua* which a gross (lumpsum) allowance is now provided at a fixed rate (sum). In other words, the notion of the assessee obtaining any 'benefit' or 'advantage' on account of the allowance of this sum, against another (business) income, where so, is misconceived, both in law and on facts.

4.5 The issue raised per Ground 1 is, thus, subject to the consideration of the assessee's claim *qua* watchman salary as business expenditure, decided in the affirmative, i.e., in favour of the Revenue-appellant. The assessee's income from house property shall stand, accordingly, increased by Rs.32,66,243, i.e., net of

standard deduction @ 30% on the claim of salary at Rs.46.66 lacs, disallowed in computing the annual value u/s. 22 r/w s. 23, or as deduction u/s. 24(a).

5. In respect of the second issue *qua* service charges income, the assessee's claim is that it charges 'service charges' @ Rs. 500 per month per shop, which income has been, as in the past, returned as 'income from business or profession' u/s. 28 at a loss of Rs. 21,89,336 for the year, i.e., after deducting the expenditure incurred toward providing those services, yielding a gross revenue of Rs. 52.80 lacs. The services provided are in pursuance of its' object of development and administration of the market. It has in fact been continuously allowed business loss *qua* the said activity in regular assessments for the past several years, toward which orders u/s. 143(3) of the Act for the preceding years have been placed on record, and were adverted to during hearing. The Revenues' stand, advanced with reference to the decision in *CIT v. J.K. Investors (Bombay) Ltd*. [2012] 211 Taxman 383 (Bom), is that the services are only toward enjoyment of the house property and, accordingly, income therefrom assessable u/s. 22 r/w s.23. The ld. CIT(A), in appeal, was of the view that the assessee's case is distinguishable from that in the case of *J.K. Investors (Bombay) Ltd*. (supra), in which case the services were toward providing stair case, common entrance, drainage facility, air conditioning, etc., which could not be said to be independent of the tenancy rights. Two, there was no reason to deviate from the past practice. He, accordingly, reversed the decision of the assessing authority, further directing inclusion of a sum of Rs. 2.49 lacs, being sanitation income, which had wrongly been returned by the assessee as income from house property.

6. We have heard the parties, and perused the material on record.

6.1 As apparent from the fore-going, the issue is primarily factual, with the law in the matter being well-settled. If and to the extent the services being provided are in relation to the occupancy of the house property or its proper enjoyment, even as observed by the Bench during hearing, the same assume the nature of the rent, assessable u/s. 22. Where, on the other hand, they are independent of the tenancy, or not related to the occupancy *per se*, but related, on the other hand, toward development of the market, with a view to facilitate the business of the tenants as business-men, the same would be in the nature of a business receipt of the assessee's business of administration and development of the market inasmuch as these services could be provided by the assessee even if it were not (to be) the owner of the house property. This, in fact, we observe to be the admitted position, being also the premise of the various decisions being relied upon by either side, with this being in fact the precise issue decided by the Hon'ble jurisdictional High Court in *J.K. Investors (Bombay) Ltd*. (supra), wherein it held as:

"6. We find that there are concurrent findings of fact by the Commissioner of Income Tax (Appeals) as well as the Tribunal that no services are being provided by the respondent to the occupants of its property and that the service charges have to be included as a part of its rental income. The aforesaid finding of the Tribunal is on the basis of the order of this Court in the matter of *CIT v. Bhaktavar Construction Pvt. Ltd*. (supra). The test to determine whether the service agreement was different from the rent agreement would be whether the service agreement could stand independently of the rent agreement. In this case the service agreement is dependent upon the rent agreement as in the absence of the rent agreement there could be no service agreement. It may also be pointed out that according to the respondent, the services being provided under the service agreement by the respondent assessee are in the nature of staircase of the building, lift, common entrance, main road leading to the building through the compound, drainage facilities, open space in/around the building, air condition facility etc. *These are services, which are not separately provided but go along with the occupation of the property. Therefore, the amounts received as service charges are to be considered as a part of the rent received and subjected to tax under the head 'Income from House Property'*."

(emphasis, by italics, ours)

6.2 Apart from the binding decision by the Hon'ble jurisdictional High Court in *J.K. Investors (Bombay) Ltd*. (supra), there is, as afore-stated, no estopple against law. *What, then, is the controversy about*? Why should not the assessee be allowed the deduction for watchman salary, claimed in the alternative; watch and ward (security) being one of the various services being provided? We have already held that it, being not relatable to the rental income, cannot be allowed by way of reduction from the gross rental income. Why, again, the assessee be not allowed its' claim of business loss; the same *ostensibly* arising as incidental to the carrying on of its' business? There is no charge of the expenditure being not relatable to the said business, or it being inflated or not genuine, et. al. In fact, it is stated (per the written submissions) that the directors of the company, drawn from its' shareholders, being the tenants in the main, do not draw any salary, but only claim sitting fees. The Assessing Officer (AO) ought to have therefore bifurcated the services being provided into two broad categories, i.e., in relation to the tenancy and/or occupancy, and those independent thereof, relating to the carrying of their business by the tenants. In fact, even the detail thereof, asked for during hearing, is not crystallized inasmuch as there are no service agreements, even as the assessee-company admittedly keeps adding newer services from time to time. The same, therefore, in case of doubt, would have to be cross verified with reference to the various expenses being incurred in respect thereof. In the absence of the AO having so done, the ld. CIT(A) ought to have directed him to do so or, alternatively, carried out the exercise himself, recording definite findings of fact. The issue arising being principally factual, with the scope of services being constantly subject to change, his allusion to the past history of the case is inapposite. Further, true, the assessee has been allowed its' claim of business loss in the past, but we observe no discussion in its respect in the assessment orders nor, consequently, any finding/s *qua* the same. The law in the matter being trite, it

becomes essentially a case of application thereof to the facts of the case, as found, and it is this that prompted us to observe that the assessee cannot be construed as having been, in appeal, allowed any 'benefit' or 'advantage'. The matter being factual, would have to be necessarily decided on clear findings of fact. Reference to the past history of the case is thus largely irrelevant. What are the different services provided for the current year? What are the direct and indirect costs relatable thereto? The latter, which may have to be allocated on some reasonable basis between the two broad categories afore-said, would not stand to be deducted, along with the direct costs, insofar as they relate to the provision of tenancy or occupancy rights, or the enjoyment of vacant possession by the tenants, for which the assessee gets a flat deduction of 30%. The expenses in relation to the assessee's business, on the other hand, warrant being allowed in full. In this regard, we observe that the expenditure on watchman salary is at Rs. 46.66 lacs, even as 'watch' is only one of the several services being provided, at an aggregate revenue of Rs. 52.80 lacs, which is short of the expenditure incurred, excluding on watchman salary, by Rs. 21.89 lacs. Though the same, despite constituting 88+% of the gross revenue, is allowable in principle, the admitted position is of the same being the tenants' liability, though borne by the assessee. *Why, one may ask, being not contractually bound, should the assessee yet incur the said expenditure*? This, perhaps, also explains the claim of the watchman salary against rental income, with which it has no relation, even as being a part of the watch and ward services and, thus, *apparently* within the scope of the services being provided toward administration and development of the market, is a business expense, to be claimed in computing business income u/s. 28. Further on, the assessee, despite incurring losses year after year, and in no insubstantial sum, does not increase the service charges, and, rather, has over time increased the scope of the services being provided, i.e., has evidently not charged proper or adequate service charges,

resulting in losses year after year. *Is it on account of commonality of interest inasmuch as the tenants are also the principal shareholders of the assessee-company*? It is only the loss, genuinely incurred, in carrying on its' business, that would stand to be allowed to an assessee. All these aspects remain unexamined in the past, on the basis of which the first appellate authority has, and despite the principle of *res judicata* being not applicable to the proceedings under the Act, allowed the assessee's claim/s without examining it for the current year. The question arising, it seems, would be if such services, and the monthly charge there-against, is taken into account, directly or indirectly, while computing the premium on the change of tenancy, to be paid for by each tenant on being admitted to the tenancy, or otherwise recouped in any manner? We state so as the rent income being governed by the statute, and the service charge deliberately suppressed, not representing the normative charge for the provision of the relevant services, this premium represents the only market driven receipt of the assessee. The two incidents, both admitted, i.e., the market being a well-established one – of which the heavy premium (at Rs. 9167 per sq. ft.) being paid by the incoming tenants is a clear indicator, and the continuing losses in huge sums (viz. at Rs. 68.55 lacs, including watchman salary, for the current year) in the business of administration and development of the market, are clearly inconsistent with each other.

6.3 The matter, accordingly, is restored to the file of the ld. CIT(A) to decide afresh in accordance with law, considering all the relevant aspects, *including* those stated hereinbefore, issuing definite findings of fact, and after hearing the assessee. He shall, further, do so in a reasonable time/time bound manner, even as he may seek a report from the AO. The assessee shall fully cooperate in the proceedings, providing all the necessary details, explanations, etc. We make it clear that while the onus to prove the incurring of an expenditure and its nexus with it's business,

i.e., the stated facts, including *qua* the business reason for the continuing losses, is on the assessee, the onus to establish any contravention of law, including its manner, or as to non-genuineness, is on the Revenue. It cannot disallow a loss without any sound, tenable reason i.e., in law; it being trite law that tax can only be charged on real, and not notional, income, subject of course to the provisions of law (*Poona Electric Supply Co. Ltd. v. CIT* [1965] 57 ITR 521 (SC)). It may appear that we, having been called upon to state if the impugned loss could be disallowed to any extent, have, in so deciding, travelled outside our mandate. It is not so; examining the assessee's alternate claim for allowance of the expenditure on watchman salary as a business expense, also emphasized before us, led us to state that the same, where covered within the scope of the several services being provided, cannot be denied in principle, even as the same was incongruent with the stated fact of it being the tenant's liability, which perhaps explains its claim against rental income. The matter would require a factual examination and finding. Two, the volume of the expenditure incurred, with the watchman salary alone accounting for nearly 90% of the gross revenue, pegged at, as stated, Rs. 500 p.m. per shop, even as the scope of the services gets continually enhanced, resulting in continued losses, even ignoring watchman salary (and which though cannot be), which therefore need to be explained from a business man's point of view, issuing clear finding/s of fact. This is as the same, inferably on account of commonality of interest, assumes thus the nature of a self-inflicted loss, which cannot be regarded as genuine? Business decisions are, after all, grounded in market realities and economic rationale, and must therefore be explainable in terms thereof. Rather, a non-explanation and, consequently, absence of any finding on this aspect, has led it to be a subsisting issue between the assessee and the Revenue. The law in the matter being clear, the matter stands accordingly set aside, for a decision as per law, delineating the onus cast on either side by law.

We may here also clarify that our order is, besides the orders by the Revenue authorities, also based on the arguments advanced during hearing. Further, though this may not appear to be the controversy arising, going by the Revenues' Gd. 2 before us, our adjudication is with reference to the issue discerned as arising; the AO at para 6.3 of his order clearly stating that the assessee is supposed to recover at least the cost of its' activities (the various services being provided), and the loss sustained cannot, thus, be accepted as a genuine business loss.

We decide accordingly.

7. The third and the final issue arising for our adjudication is as to the nature of the receipt (and, thus, income in its respect) by way of premium or, quite simply, transfer charges, on the transfer of tenancy by one tenant (of the assessee) to another. The same stands regarded by the assessee and Revenue as 'capital gains' and 'income from other sources' respectively. The Revenue's case, as clarified per the assessment order, is that inasmuch as the assessee continues to be the owner of the shop (relevant part of the house property), both before and after the transfer of the tenancy by the tenant, the said receipt is not relatable to the assessee's capital asset, which thus remains the same (i.e., unchanged) consequent to the said transfer. Like-wise, it is not relatable to the carrying on of the business of administration and development of the market by it, so as to be regarded as a business receipt, *but only arises to it in its' capacity as an owner of the house property*. The same, thus, is assessable under the residuary class of income, i.e., income from other sources, u/s. 56. The assessee was, accordingly, denied its' claim for deduction u/s. 54EC on investment of the realization in eligible bonds. The assessee's case, on the other hand, which also found favour with the ld. CIT(A), is that the matter has received consideration by the Tribunal, deciding it in its' favour; in fact, for several years.

8. We have heard the parties, and perused the material on record.

The Arguments

8.1 Before us, the matter was argued as covered by decisions by the Tribunal in the assessee's own case, in its' favour, a position conceded to by the Revenue, and also borne out by the record; the assessee's paper-book (PB) containing as many as four orders by the Tribunal in the assessee's case. No decision by the Tribunal or by any higher forum, taking a different (or even the same) view being brought to our notice, the matter was regarded as covered thus, and the hearing closed without any hearing on merits, except a reference to the lead order by the Tribunal, i.e., for AY 2009-10, since followed by it up to AY 2013-14, for the purpose of showing that the issue arising stands covered, an admitted position, even as the ld. DR would mention of there being a detailed discussion in the matter by the Revenue for AY 2013-14.

The precedents

8.2 A perusal of the record, however, reveals a decision by the Tribunal (Mumbai Benches) in the case of *Vinod V. Chhapia vs. ITO* (in ITA No. 3178/Mum/2010, reported at [2013] 56 SOT 465 (Mum)), relied upon by the Revenue before the Tribunal during the hearing of it's appeals for AYs. 2007-08 to 2011-12 (save AY 2009-10)(PB pgs. 66-72). The same, however, was not considered by the Tribunal, nor was it brought to our notice by either side during hearing; clearly, a misrepresentation. It therefore becomes incumbent on us to examine the position thus arising, i.e., on taking cognizance of the said decision by a coordinate bench of this Tribunal.

Toward this, we have perused the order by the Tribunal dated 25.5.2016 (for AY 2009-10), deciding the issue in the assessee's case for the first time (PB pgs.38-43), and that dated 17.2.2017, a common order for AYs. 2007-08 to 2011-

12 (save AY 2009-10), wherein it follows its' earlier order dated 25.5.2016 (PB pgs 66-72). The two other orders by the Tribunal are for AYs. 2012-13 & 2013-14, which, again, follow these orders. Per its' order dated 17/2/2017, the Tribunal notes (at para 4), on it being relied upon before it by the Revenue, a decision by the Tribunal in *Vinod V. Chhapia* (supra). The said order is dated 21.11.2012, so that it was in fact available even on 25.5.2016, the date of the first order by the Tribunal in the assessee's case. The Tribunal, however, does not consider the said decision at all in its' adjudication, basing the same on its' earlier decision in the assessee's case for AY 2009-10. In our view, it was incumbent on the Tribunal to have considered its' decision in *Vinod V. Chhapia* (supra), either distinguishing it or, where not distinguishable, refer the matter for a decision to its' larger Bench. This is what propriety and the rule of judicial precedence mandated as, faced with two views by it's coordinate benches, it could not follow one in preference to the other. It could not, in any case, do so without stating reasons for the same. It was in fact all the more incumbent on the Tribunal to do so as its' earlier order dated 25.5.2016 was also rendered without noticing an existing decision by its' coordinate Bench, which, if brought to its' notice, may have altered its' decision or, in the least, led to a reference to a larger Bench. It, as afore-stated, does not consider the earlier (dated 21.11.2012) decision by the Tribunal at all. The course adopted could, as is by now well-settled, rather, give rise to an application for rectification u/s. 254(2) (*Honda Siel Power Products Ltd. v. CIT* [2007] 295 ITR 466 (SC)).

Now it may well be argued that the Tribunal was persuaded by the fact that the AO had himself accepted the assessee's claim of the premium on transfer of tenancy rights as being taxable as capital gains, eligible for deduction u/s. 54-EC, in the assessments u/s. 143(3) for AYs. 2005-06 and 2006-07. That is, was moved on the ground of consistency, also argued before it. This, however, as a perusal of

the record shows, is without substance. There is firstly no rule of law that the assessing authority, whose powers in the matter of assessment are plenary, cannot take a view different from that by his predecessor, or even that taken by him for an earlier year; the principle of *res judicata*, it being trite law, is not applicable to the proceedings under the Act, for which reference, for the sake of completeness of this order, may be made to the decisions in *New Jehangir Vakil Mills Co. Ltd. v. CIT* [1963] 49 ITR 137 (SC); *M.M. Ipoh v. CIT* [1968] 67 ITR 106 (SC); and *Bharat Sanchar Nigam Ltd. v. UoI* [2006] 282 ITR 273 (SC), the facts of each of which are also telling. Tax proceedings are not in the nature of *lis*, and their premise, it may be appreciated, is the correct assessment of income as per law (*Ahmedabad Electricity Co. Ltd. v. CIT* [1993] 199 ITR 351 (Bom)(FB)). The decision in *Radha Soami Satsang v. CIT* [1992] 193 ITR 321 (SC), and the others following it, while accepting that the principle of *res judicata* is not applicable to tax proceedings, is, on the other hand, on the basis that where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other, and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. This, surely, represents a settled position of law, the premise of which is to, as public policy, set at rest judicial and quasi-judicial controversies, and that therefore there must be a point of finality, beyond which lapse of time must induce repose, and stale matters not allowed to be reactivated. Clearly, this is not the case in the instant case; the matter being agitated by the Revenue, at least before the Tribunal, continuously since AY 2007-08. The principle of consistency is, thus, on the face of it, not applicable. We shall, nevertheless, also examine the assessments for AYs. 2005-06 & AY 2006-07, stated to bind the Revenue. In the facts of the case, there is, on the contrary, no discussion, much less any finding *qua* this issue in the assessment order for AY 2005-06 by the AO, who merely states

that the assessee's representative explained that the premium on the transfer of tenancy rights is chargeable to tax as capital gains, and since it had not incurred any cost for the same, the entire receipt is offered as capital gain, liable to deduction u/s. 54EC, quoting the same verbatim (at pg.5/para 4 of the order/PB pgs. 193-198). There is, clearly, no application of mind by the AO. In the admitted facts of the case, there is no transfer of tenancy rights, surely a capital asset, by the assessee-owner, but by the tenant. There is, accordingly, no question of transfer of any rights therein by the assessee, the owner of the rented house property, to the incoming tenant and, resultantly, of any consideration arising to it therefrom, i.e., the incoming tenant. It is the existing tenant who transfers the rights vested in him, as the outgoing tenant, for a consideration. No wonder, the assessee reflects the sum received as 'premium on change of tenancies', both in its' accounts as well as the tax returns. The non-application of mind by the AO is also borne out by the fact that the subsequent allowance by the first appellate authority, which is for AY 2009-10 (PB pgs. 31-37), is, accordingly, on a different footing, and not the transfer of tenancy rights by the assessee-owner, which is clearly a misrepresentation in the facts and circumstances of the case. It, as a reading of his order, subsequently endorsed by the Tribunal, shows, is of the ownership being a bundle of rights, *of which some are transferred on the assessee agreeing for change of tenancy*. That is, the assessee's case, which found acceptance by the first appellate authority for AY 2009-10, the first instance of non-acceptance of the claim as to 'capital gains' by the Revenue, *was not of transfer of tenancy rights by the assessee*, as accepted by the AO for AY 2005-06, but of the right of consent, subject to which the tenancy rights stood transferred by the tenant, as being a separate capital asset, transferred, on giving consent, by the assessee-owner in favour of the incoming tenant. Merits of this finding aside, the purpose of referring thereto is to emphasize the complete absence of any delineation of the case by the

assessing authority, pleaded for acceptance on the ground of consistency. Continuing further, the assessment order for AY 2006-07 (PB pgs. 202-206) is *sub silentio* qua the said income; there being not a whisper of this receipt, much less its consideration, not to speak of any finding in its respect, therein. Further still, the assessment orders for AYs. 2005-06 and 2006-07, being dated 03.10.2007 and 29.8.2008 respectively, i.e., prior to the Tribunal's order in *Vinod V. Chhapia* (supra), *are therefore of no consequence for the assessment of the subsequent years*. Not only would the said order by the Tribunal prevail over that by the assessing authority, being by the jurisdictional Tribunal, it is a binding precedent for him (refer, inter alia, *CIT v. Ralson Industries Ltd*. [2007] 288 ITR 322 (SC); *Siapem S.P.A. v. Dy. CIT* [2003] 86 ITD 572 (Del)). Chronologically, the next assessment u/s.143(3) in the assessee's case is dated 12/12/2011, for AY 2009-10, where the AO independently takes a view in conformity with that expressed later by the Tribunal in *Vinod V. Chhapia* (supra), which is for AY 2006-07. *Where, then, is the scope for the plea of consistency in the facts and circumstances of the instant case*?

Applicability of the decision in Vinod V. Chhapia's case

8.3 The decision by the Tribunal in *Vinod V. Chhapia* (supra) was not brought to our notice by either party during hearing, and which is, we are afraid to say, unfortunate. The same came to our notice only while perusing the record for finalizing this order. Fair hearing implies not only a fair opportunity of hearing to the parties, but, equally, they bringing forth honestly the facts and circumstances of the case as well as the obtaining legal position – the premise being to assist the court to arrive at a correct decision, i.e., as per law, the end to which the entire judicial process is geared. This is more so in tax proceedings which, as also afore-stated, are not adversarial proceedings. Be that as it may, we next proceed to

consider the decision by the Tribunal in *Vinod V. Chhapia* (supra), applicability of which in the facts of the instant case cannot be a matter of presumption, i.e., merely because the Revenue had relied on it, and is to be tested. The assessee HUF rented its' house property, a residential flat, to one, 'B', in 1962. The tenancy rights were, on her demise in 1986, inherited by her daughter 'D', who sold the same during the relevant year to another 'AB', receiving Rs.14.74 lacs. Another Rs.7.26 lacs was paid by AB (the new tenant) to the assessee-owner pursuant to a tripartite agreement, admitting the new tenant at a monthly rent of a measly sum of Rs.129.34. The amount of Rs.7.26 lacs was received as a consideration for granting monthly tenancy and accepting Rs. 390 only as the interest on security deposit. The question arose as to the nature, capital or revenue, of the said receipt by the assessee and, consequently, of the head of income under which it is assessable under the Act. The Tribunal, after a detailed discussion, examining the arguments, opined that Rs.7.26 lacs received by the assessee was a 'consideration for consent'; the assessee agreeing to let the property at a minimal rent of Rs.129.34 per month and only Rs.390 toward interest on security deposit. The same, it held (paras 10,11), was neither a capital nor a rental receipt, *and did not involve transfer of any capital rights attached to his property*, and was accordingly rightly assessed as 'income from other sources'. The same argument as made before the Tribunal in the assessee's case (for AY 2009-10), and which found its acceptance, i.e., that some of the capital rights, out of the bundle of rights attached to the house property, stand transferred to the new tenant by the landlord, was negatived by the Tribunal (para 11). *The transfer of tenancy rights, a capital asset no doubt, it explained, was by the old tenant in favour of the new, incoming tenant*. In the instant case, monthly rent, due to the application of the rent control legislation, is again very low, viz. at Rs. 1948 p.m. for a shop admeasuring 231.81 sq. ft., which fact is admitted, making the tenancy in the said house property a very valuable

asset in the hands of the tenant. The same is transferred for a consideration of Rs. 18 lacs, even as a premium of Rs. 21.25 lacs is payable to the assessee-owner, only subject to which it grants a no-objection certificate (NOC) for the transfer of the tenancy per a tripartite agreement dated 19/9/2013 (PB pgs. 125-161). The decision by the Tribunal in *Vinod V. Chhapia* (supra) is thus squarely applicable to the facts of the present case. The tenancy being in force since long, and the monthly rent being abysmally low, the tenancy rights become a valuable property in the hands of the tenant, who accordingly transfers the same to another, the incoming tenant, for a consideration. The assessee-landlord agrees thereto, partaking a part of the consideration, chargeability to income tax, including the head of income under which it is assessable, was the issue arising for determination. The Tribunal considered all the contentions put forth, including the grant of consent by the assessee-landlord, stated to be a condition precedent for the transfer of tenancy rights by the tenant (in favour of the incoming tenant), which was argued to be the capital asset transferred. The grant of consent, it opined, did not result in the transfer of any capital asset by the assessee; he being the owner *sans* the tenancy rights, or the rights already divested in favour of the existing tenant. The two fact-situations are clearly at par, entailing even same/similar arguments.

It is said (refer order by the first appellate authority for AY 2013-14/PB pgs. 96-122) that as per the Rent Control Act, the tenant does not acquire tenancy rights, but only possessory rights. The two, in commercial parlance, connote the same; the specimen agreement dated 19/9/2013 being itself titled 'Agreement of transfer of tenancy'. *Two, the incoming tenant steps into the shoes of the outgoing tenant, acquiring all his rights/interest, whatever be it, in the property, and no more*. And, therefore, it would matter little if the rights transferred by the outgoing tenant to the incoming tenant are tenancy or only possessory rights. *The relevant issue here is whether the transaction involves the transfer of any capital asset by*

the assesse-landlord, the owner of the rented property, in favour of the incoming tenant, decided by the Tribunal in *Vinod V. Chhapia* (supra). Again, section 26 of the Maharashtra Rent Control Act, 1999 is cited to contend that the tenant cannot transfer the tenancy rights in favour of any person without the consent of the landlord. The statement is *ex facie* in contradiction of the earlier statement as to the tenant not enjoying any tenancy rights, but only possessory rights. Besides, the transfer of rights by the outgoing tenant in the instant case, as indeed in the case of *Vinod V. Chhapia* (supra), has been only with the consent of the assessee-owner. *To what significance, then, the said statement*? The only import of the said statement, in the context of the instant case, to our mind, is that the tenancy agreement, or that entered into on its transfer, reserving the right of consent to a change in tenancy with the owner, has the sanction of law, i.e., is a legally valid arrangement. Further, the special bench of the Tribunal in *J.C. Chandiok v. Dy. CIT* [1999] 238 ITR (AT) 89 (Del), to which decision there is reference in the appellate order for AY 2013-14, has held that that there is no difference between the rights of a statutory tenant and contractual tenant.

Adjudication by the Tribunal in the assessee's case

8.4 We, next, discuss the adjudication by the Tribunal in the assessee's case. The only decision by it on merits, i.e., for AY 2009-10, is imbued with a legal infirmity. Being rendered without considering the earlier decision by its coordinate bench, i.e., *Vinod V. Chhapia* (supra), holding otherwise, it cannot hold in law, and is to be regarded as *per incuriam*. Reference in this context be made to the decisions by the Apex Court in *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Others* [1999] 3 SCC 722 [(2) SCR 728]; *Sir Chunilal V. Mehta & Sons Ltd. v. Century Spng. & Mfg. Co. Ltd.* [1962] AIR 1962 (SC) 1314 [(1962) SCR 549]. To almost the same effect is the order by the Tribunal in *Addl. DIT v. TII Team*

Telecom International (P.) Ltd. [2011] 12 ITR (Trib) 688 (Mum), whereby, an order by the Tribunal contrary to the earlier decision/s by the coordinate bench/es, looses its binding effect.

Further, the order, the relevant part of which is reproduced below, does not specify the capital asset transferred by the assessee-owner, and how, inasmuch as clearly capital gains envisages a capital asset and its transfer, both defined in law:

'6. We have gone through the findings of ld. CIT(A). We agree with the observations of the ld. CIT(A) that during the course of time the assessee acquired bundle of rights with respect to the impugned shops. These rights include inter alia, rights of possession in tenancy. As per section 2(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business of profession. A perusal of this definition shows that the legislature has intended to define the term "capital asset" in the widest possible manner. This definition has been curtailed to the extent of exclusions given in section 2(14) itself, which include stock-in-trade and personal effects. The impugned asset does not clearly fall in the aforesaid exclusions given in section 2(14). The bundle of rights acquired by the assessee are undoubtedly valuable in terms of money. In our view, the said tenancy rights shall from part of a capital asset in the hands of the assessee and, therefore, any gain arising therefrom would be assessable under the head "Income from capital gains eligible for deduction u/s. 54 EC of the Act. Under these circumstances we find that the findings of the ld. CIT(A) are well reasoned and in accordance with law and facts and do not require any interference. Accordingly, the order of ld. CIT(A) is upheld.' (pgs.5-6)

There is no statement of the case of the Revenue, which has been almost uniform throughout, or as to why the Tribunal considers it as not valid, preferring to uphold the view of the first appellate authority instead. It does not address the question as to whether, and if so, how, there is any accretion to the rights of the incoming tenant, i.e., over and above those being enjoyed by the outgoing tenant, so as to contend of transfer of any capital asset to him by the assessee-owner. In other words, there is no delineation or formulation of the issue at hand, much less its examination. It is this order that has been followed by the Tribunal in the assessee's case for the other years, with some orders following the order/s following the order for AY 2009-10. There being, again, no discussion or deliberation in these orders, except a finding as to the issue arising for adjudication

being the same, makes the order for AY 2009-10 as the only relevant order by the Tribunal in the assessee's case, which, for the reasons afore-stated, cannot be regarded as a valid judicial precedent. Even so, clearly, if the right of consent, to which there is though no reference in the lead, or for that matter, any order by the Tribunal in the assessee's case, is the asset transferred, as held in the appellate order for AY 2009-10, there would be no need to seek its' consent on a subsequent change in tenancy, which is not the case. In fact, such a course is stated as impermissible in law (refer para 8.3).

The said order/s, in light of the foregoing, is not liable to be followed (*Sri Agasthyar Trust v. CIT* [1999] 236 ITR 23 (SC); *Raghubir Singh (Decd) v. Union of India* [1989] 178 ITR 548 (SC); *Distributors (Baroda) (P.) Ltd. v. UoI* [1985] 155 ITR 120 (SC); *CIT v. Hi-Tech Arai Ltd*. [2010] 321 ITR 477.

Discussion

8.5 We have already clarified of the detailed arguments and deliberations by the Tribunal in *Vinod V. Chhapia* (supra), also noting its' findings (para 8.3). That being the case, the only course available to us is to decide the issue, regarding the said decision as the only judicial precedent; no other decision by the Tribunal – other than those in the assessee's case, discussed hereinbefore, or any higher forum, having been brought to our notice. The 'right of consent' is without doubt a valuable right, a capital asset u/s. 2(14). *However, this right has not been parted with by the assessee*. It is this right it exercises each time there is a change in tenancy; being in fact the right exercised by any owner while giving his house property on rent. *Does an owner, one may ask, thereby, or for that reason, transfer any capital asset to the tenant*? Surely, not; letting *per se* does not involve transfer of any capital asset; the right of possession given thus being only to enable enjoyment of the property. While letting its' house property, the assessee, whether

legally or contractually, reserves the right of consent to any future change in tenancy. But for this right, there is no question of any reference to it, or it being paid any sum. The issue, therefore, is not, as perceived by the assessee and considered by the first appellate authority (for AY 2009-10), i.e., while considering the assessee's case on merits for the first time, as to whether the assessee has the right of consent or not, or whether the same, forming part of the bundle of rights which the ownership entails, is a capital asset or not, *but whether the grant of consent (to a change in tenancy) involves any transfer of a capital asset or is an exercise of the right being enjoyed by the assessee-owner*? This is the issue decided in *Vinod V. Chhapia* (supra). It is only by virtue of the exercise of this right that the assessee lets it's property, yielding income from house property. This, in fact, obtains commonly, i.e., whenever the landlords give their house property on rent, *earning rental income*. The assessee is in fact exercising this right, right from the very first letting, for which it may or not have received any lump sum consideration/amount. It is this right that stands retained by the assessee, or secured by law, warranting reference thereto whenever there is to be a change in tenancy. A transfer of this right, on the other hand, would imply that the tenant could transfer the tenancy to another without recourse to the owner or seeking his consent therefor, or any payment thereto. *Rather, given the position of law as explained, it may not be possible to do so, i.e., transfer the right of consent*. That is, the assessee, despite changes in tenancy, continues to hold this right, exercising it on each change upon receiving what it calls 'premium' or 'transfer fees'. It thereby thus partakes a part of the transfer consideration arising to the outgoing tenant, even though it gets paid direct by the incoming tenant. There is, thus, no transfer of any rights or capital asset by the assessee in favour of the incoming tenant. The incoming tenant substitutes the outgoing tenant, getting all the rights being hitherto enjoyed by the latter, i.e., possessory rights, subject to the payment of a

premium/transfer fee to the owner on transfer of tenancy, which is uncertain both in time and frequency and, perhaps, even the premium sum. In other words, the tenancy or other rights being enjoyed by a tenant are not complete, but are subject to certain restriction on their transferability. The payment, though made to the assessee-owner by the incoming tenant, is for and on behalf of outgoing tenant, even as clarified per clause-E of the specimen agreement of transfer of tenancy (dated 19.9.2013). This is perhaps for the reason that the assessee could not legally charge any sum from the incoming tenant, who could be admitted to the tenancy only on the existing tenant relinquishing the same in his favour. The need and, therefore, the stipulation for approval of the owner would also operate to prevent admission of any undesirable person as a tenant and, thus, assuming an unacceptable level of risk in letting the property. Besides, the old tenant could have arrears of rent or other unpaid bills to settle.

In sum

8.6 Implicit in the letting of property is the consent therefor, i.e., the grant of consent is incidental to, and forms an integral part of, letting. In fact, a property cannot be let without the exercise of this right of consent by its' owner, even as in the instant case it is being continually let, even to different tenants, from time to time. That by itself does not result in any (capital) rights being transferred to the incoming tenant by the owner. The right of alienation is an important constituent of any right, i.e., along with the right of possession and of enjoyment. This right has not been granted by the assessee while letting its property on rent. The outgoing tenant is thus constrained to seek the consent of the assessee-owner whenever he wishes to relinquish/transfer his rights in the assessee's property, and which it grants for a price, facilitating the said alienation. And even as he so does, the incoming tenant does not acquire the right of alienation, i.e., contractually, being

stated to be barred by law. The legal validity of this arrangement aside inasmuch as, as stated, the applicable rent control legislation does not recognize transfer of tenancy rights on giving a property on rent, the outgoing tenant is made to part with a part of the consideration arising to him on the transfer of possessory rights, even as he transfers all the rights he has, being the tenancy/possessory rights subject to a charge on their transfer, and thus the incoming tenant acquires no more. There is no accretion to the rights of the incoming tenant, i.e., over and above those being enjoyed by the erstwhile tenant, despite payment of a sum to the owner; the payment in fact being for and on behalf of the outgoing tenant. We have thus sought to explain, in some detail, what stands held by the Tribunal in *Vinod V. Chhapia* (supra), with which we find ourselves in respectful agreement. Though we could proceed to close this matter, deciding thus, we, in the interest of propriety, refrain from doing so, as it would, in strict sense, amount to deciding an issue at the assessee's back. Though a decision may bind a court of coordinate jurisdiction, a litigant must get an opportunity to defend its' case. Though the assessee has not acted honestly, and the Revenue's been plainly negligent, we cannot but be alive to the need to eschew any prejudice being caused to either side.

There is, then, also the issue of head of income under which the income arising is taxable. The rent control legislation is toward regulating tenancies, i.e., protecting them, as well as exercising control over rentals. It is therefore open for the assessee to contend that it is, by partaking a part of the transfer consideration on the transfer of their (tenancy) rights by its' tenants, i.e., by way of premium or transfer fee, only compensating itself for the low rent being received by it. It must be borne in mind that it is on account of low rent, coupled with the protection of tenancy, which makes it a valuable asset in the hands of the tenant for the time being, which he realizes on its transfer for a consideration. The assessee, by providing for a share therein for acquiescing to the said transfer, is thus also

realizing, albeit indirectly, a consideration for the low rent. *This as the tenants are being thus required to pay a lumpsum consideration for acquiring tenancy/possessory rights.* Its legal validity apart, this constitutes the economic logic or justification for the charge of premium, which is thus in substance a consideration for the user of the assessee's house property by another, which the Act provides for being liable to tax as income from house property, i.e., irrespective of the mode and manner of its realization. Ownership of house property, howsoever profitable, it was clarified in *CIT vs. National Storage (P.) Ltd.* [1963] 48 ITR 577, 594 (Bom) (since affirmed in [1967] 66 ITR 596 (SC)), cannot be business or trade under the Act. The amount realized by the assessee-owner is only in his capacity as the owner of the property. There is thus scope for arguing of the premium as liable for assessment as income from house property u/s. 25AA, brought on statute-book by Finance Act, 2001 w.e.f. 01.4.2002. We are conscious that this is nobody's case – the assessee or the Revenue. However, as afore-stated, the premise of tax proceedings is the correct assessment of income, and these are not adversarial proceedings. Further, as afore-referred, with reference to the decisions by the Apex Court, it is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter. Surely, the Tribunal in *Vinod V. Chhapia vs. ITO* (supra) has held this income to the chargeable as income from other sources u/s. 56. However, as its' order shows, no such argument was advanced before the Tribunal. Moreover, in that case the agreement specifically rules out the same being toward rent or advance rent (para 10). We are here not concerned with the legality of this stipulation, or of such an arrangement in general; the same being not relevant for deciding the taxability of an income, for which, it is the nature of the income, howsoever derived, that alone is relevant (*CIT v. Bazpur Cooperative Sugar Factory Ltd*. [1988] 172 ITR 321 (SC). We are, in

any case, placing forth an argument for its consideration. It also fortifies the view that the receipt is not on capital, but revenue, account.

There is then also the issue of the categorization of the capital gains as short-term or long-term on the basis of the length of time the tenancy or possessory rights were prior to their transfer held by the outgoing tenant, the transferor thereof. There does not seem to any factual or legal basis for the same; the holding period is of the capital asset transferred. The same is to be reckoned with reference to the capital asset transferred by the assessee, i.e., since the date of its' acquisition by it.

Decision

8.7 With these observations, we, for the reasons afore-stated, set aside the matter for fresh adjudication in accordance with law to the file of the ld. CIT(A), after affording the parties before him a reasonable opportunity of hearing, within the time frame, if any, stipulated by law. Inasmuch as we are setting aside the matter, the first appellate authority shall not be bound by our observations, except have regard to them to the extent they are consistent with or otherwise explain the order by the Tribunal in *Vinod V. Chhapia* (supra), a valid judicial precedent, and relied upon in the assessee's own case. And decide the matter per a speaking order, issuing definite findings of fact and of law, answering the various aspects of the issue as delineated by us. The twin elements of 'capital gain' are 'capital asset' and 'transfer'; *the transfer making the capital asset the property of the transferee*. The capital asset acquired by the incoming tenant from the assessee is to be specified. The gain arising is to be categorized on the basis of the holding period of the capital asset by the transferor – and not another, prior to its transfer. Then there is the aspect of the head of income under which it is taxable, i.e., where the same is held as not assessable as capital gains. We decide accordingly.

9. Before parting with this order, we wish to make it clear, that we have, in rendering our decision, kept uppermost the need to eschew any prejudice being caused to either side, while at the same time discharging the duty cast on the Tribunal as the final fact finding body, i.e., to deal with and determine questions which arise out of the subject-matter of the appeal in the light of the evidence, and consistently with the justice of the case, as explained by the Apex Court in many a case (*CIT v. Walchand & Co. (P.) Ltd*. [1967] 65 ITR 0381 (SC)).

10. This appeal was heard on 03/03/2020. As per Rule 34(5) of the Income Tax (Appellate Tribunal) Rules, 1963 (ITAT Rules), the order is required to be "ordinarily" pronounced within a period of 90 days from the date of conclusion of the hearing of appeal. The instant appeal was heard prior to the lockdown declared by the Hon'ble Prime Minister on 24-03-2020 in view of COVID-19 pandemic. The lockdown was forced due to extra ordinary circumstances caused by world wide spread of COVID-19. Thereafter, the lockdown is being extended from time to time, continuing, with some relaxations, in most part of the country to date. Therefore, the pronouncement of order beyond a period of 90 days from the date of hearing is in the instant case not under "ordinary" circumstances. The co-ordinate Bench of the Tribunal in the case of *DCIT v. JSW Ltd*. (in ITA No.6264/Mum/2018 for A.Y 2013-14), decided on 14/05/2020, under identical circumstances, after considering the provision of Rule 34(5) of the ITAT Rules, 1963, judgements rendered by the Hon'ble Apex Court and the Hon'ble Bombay High Court on the issue of time limit for pronouncement of orders by the Tribunal, as well the factual circumstances leading to lockdown, held as under:-

> "10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at

> least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5), but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of *Otters Club v. DIT* [2017] 392 ITR 244 (Bom), Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that "*while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly*". The extraordinary steps taken *suo motu* by the Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of the considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case."

Hearing in the instant case was concluded on 03/3/2020 and the notes, after study of the file, made soon thereafter, followed by dictation for most part. It is only due to lack of proper support services due to lockdown, that the final order could not be released. This is accordingly, in view of the given factual and legal position, a fit case for pronouncement of order beyond 90 days of hearing.

11. In the result, the Revenues's appeal is partly allowed for statistical purposes.

Order pronounced under Rule 34(4) of the ITAT Rules on September 25, 2020 by placing the details on the notice board

Sd/-	Sd/-
(C.N. Prasad)	(Sanjay Arora)
Judicial Member	Accountant Member

Mumbai, Dated 25.9.2020