

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

(CONDUCTED THROUGH VIRTUAL COURT)

**BEFORE Ms. MADHUMITA ROY, JUDICIAL MEMBER &
SHRI BHAGIRATH MAL BIYANI, ACCOUNTANT MEMBER**

I.T.A. Nos.117,118 & 344/Ind/2017 & 203/Ind/2018
(Assessment Years: 2011-12to2014-15)

DCIT-3(1), Room No. 306, Aayakar Bhawan Annexe, Indore	Vs.	M/s. M.P. Entertainment & Developers Pvt. Ltd., 4 th Floor, C-21, Mall, Plot No. 94-104 & 300-303, Sch. No. 54, PU-4, A.B. Road, Indore
PAN No.AAECM8668D		
(Appellant)	..	(Respondent)

Appellant by :	Shri Anil Kamal Garg & Arpit Gaur, A.Rs.
Respondent by :	Shri P.K. Mitra, CIT-DR

Date of Hearing	01 .09.2022
Date of Pronouncement	21.11.2022

ORDER

PER Ms. MADHUMITA ROY - JM:

The bunch of appeals preferred by the Revenue are directed against the separate orders dated 15.12.2016, 16.12.2016, 28.02.2017 & 28.12.2017 passed by the Ld. CIT(A)-III & CIT(A)-I, Indore arising out of the orders passed by the JCIT, Range-4, Indore & ACIT, Circle-3(1), Indore & ACIT-3(1), Indore dated 29.03.2014, 31.03.2015, 30.03.2016 & 30.12.2016 under Section 143(3) of the Income Tax Act, 1961(hereinafter referred to as “the Act”) for A.Ys. 2011-12 to 2014-15 respectively. All the appeals are

related to the same assessee and the issues involved therein are identical. Thus, all are heard analogously and are being disposed of by a common order for the sake of convenience.

ITA No. 117/Ind/2017 (A.Y. 2011-12) is taken as a lead case.

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

“1. *Whether on the facts and circumstances of the case Ld. CIT(A) erred in law in holding that income derived by the company from leasing out properties in the mall falls under the head income from business and not under the head from income from house property, relying on Hon’ble Apex Court’s decision in the cases of M/s. Rayala Corporation Pvt. Ltd. vs. ACIT (2016) 386 ITR 500 (SC) and M/s. Chennai Properties & Investments Ltd. vs. CIT (2015) 373 ITR 673 (SC) which are in respect of the assessee company involved in earning of rental income from letting out of properties only and are distinguishable on facts & circumstances of the present case and the decision of Shambhau Investment relied on by the AO is neither discussed nor over ruled.*

2. *Whether on the facts and circumstances of the case Ld. CIT(A) erred in law in deleting the addition made under head income from house property of Rs. 4,69,34,191/- after considering that the provisions of section 22 of the I.T. Act, 1961 and held that the income from leasing out of profession u/s. 28 without appreciating the fact that the present case is running a mall and deriving income letting out of shopping mall as well as business income from common are maintenance of shopping mall and the decision of Apex Court in the case of Shambhau Investment relied on by the AO is neither discussed nor over ruled.*

3. *Whether on the facts and circumstances of the case Ld. CIT(A) erred in deleting the addition made by AO by determining gross rent of Rs. 7,92,90,780/- and disregarding the rental basis adopted by the AO without contradicting the findings of the AO while making above addition.*

4. *Whether on the facts and circumstances of the case Ld. CIT(A) erred in law in allowing depreciation of Rs. 1,55,95,905/- as claimed by the assessee company which was restricted by AO to Rs. 74,63,469/- by treating the rental income of mall from house property u/s. 23 of the I.T. Act and no depreciation is allowable in respect of such income and after considering relevant facts of the case.*

5. *The appellant reserves the right to add, amend or alter the ground of appeal on or before the date the appeal is finally heard for disposal”*

3. The brief facts leading to the case is this that the assessee is a Private Limited Company duly incorporated under the Companies Act, 1956 on 28.03.2006 and carrying out activities of running and managing a Shopping-cum-Entertainment mall and named & styled as 'Malhar Mega Mall' situated at Indore. The assessee company has derived its income mainly from carrying out the operation and maintenance of that particular mall in the relevant Assessment Year. The assessee has furnished its return of income under Section 139(4) of the Act on 31.03.2012 declaring business loss of Rs. 1,02,098/- book loss of Rs.1,81,15,601/- and claiming carry forward of unabsorbed depreciation at Rs. 1,55,95,905/-. In the P&L account of the assessee total receipts showed at Rs.67,06,781/- consisting of rental receipts of Rs.7,95,526/- common area maintenance of Rs. 32,53,311/-, HVAC charges of Rs.13,04,535/- and interest income of Rs.13,53,409/-. After deducting expenses of Rs.2,48,22,382/-, book loss was computed at Rs.1,81,15,601/-.

4. During the course of assessment proceeding the assessee duly filed the Tax Audit Report and the copy of the Audited Financial Statements for the year under consideration and also complied with all the notices issued under Section 143(2) and 142(1) of the Act by filing written submission and relevant documentary evidences from time to time. The assessment was finalized under Section 143(3) of the Act on 29.03.2014 by determining the total income of the assessee at Rs. 4,71,42,454/-. Further that the Ld. AO re-characterised the income from operation of the mall as shown by the assessee in its computation of income under the head "Income from Business Profession" to the head "Income From House Properties" and

estimated rental income as against the same shown by the assessee in its books of account.

5. The Ld. CIT(A) in appeal held that running and operating of the shopping mall is predominant object of the assessee company in terms of the Memorandum & Articles of Association and the entire income derived by the assessee company from leasing out properties in the malls falls under the head "Income from Business". The other two additions were also deleted by the Ld. CIT(A). Hence, the instant appeal before us.

6. We have heard the rival submissions made by the respective parties, and we have also perused the relevant materials available on record. The assessee also filed a written notes of submissions on 30.05.2022.

7. Ground Nos. 1 & 2 are interconnected and are dealt with accordingly.

8. The assessee company purchased a piece of land admeasuring about 7735.65 sq. meter lying and situated at Plot Nos. 299, 299A and 304, Scheme No. 54, PU-4, A. B. Road, Indore on leasehold basis for initial period of 15 years from Shri Gurjeet Singh Chabra and others by and under a registered lease deed for construction of one Multiplex-cum-Shopping Mall. During the relevant previous year, construction of part of the Mall got completed and the assessee commenced operation of the mall by leasing small operation of units situated at the basement and the ground floor, therein.

9. It is the case of the assessee that the said mall has been constructed exclusively and necessarily for the purpose of carrying out its business for achievement of its predominant object for which it has come into existence. In support of such the assessee relied upon the Memorandum of Association (in short “MOA”) a copy whereof has been annexed to the Paper Book filed before us. The main objects of the company as per Clause A-1 of the said Memorandum of Association is to construct, own, acquire, develop, provide, arrange or deal in or manage, run, hire or let out, sale or lease family entertainment centre or centers for offering all types of comprehensive entertainment facilities and/or multiplex, cineplex, cinema halls, theatres, shops, shopping mall, shopping junctions, circus or centers for offering sports facilities, pool and billiards tables, or centers offering entertainment etc. Needless to mention, that carrying out of business of shopping Mall has been included in the main object of the Memorandum of Association as above.

10. In this respect the assessee filed a written note of submission on 30.05.2022 the relevant portion whereof is as follows:

“1.05 **SHOPPING MALL CONSTRUCTED BY ASSESSEE FOR CARRYING OUT BUSINESS - INTENT & PURPOSE**

It is reiterated that the subject Mall has been constructed by the assessee company, exclusively and necessarily, during the course of and for the purpose of carrying out its business, for the achievement of its predominant main object for which it has come into existence.

2.00 **ASSESSEE DERIVED LEASE INCOME FROM UNITS IN MALL - PB 48 & 24**

Since the appellant company had derived lease income from leasing out a part of the, Mall and further since, the deriving of lease income was a result of carrying out systematic, organized, synchronized and recurring activities of the nature of trade and venture, the assessee company, while furnishing its

return of income, regarded the lease income as its income from carrying out the business [kindly refer Computation of total income and Profit & Loss Account respectively at PB Page No. 48 & 74].

3.01 **ASSESSEE CARRIED OUT COMPLEX SERIES OF ACTIVITIES**

In the instant case, the assessee company has not merely constructed a super structure and leased it out. In contrast, the assessee company envisaged construction of a huge Multiplex-cum-commercial Complex and made the construction by observing all the rules and regulations prescribed specifically by the local authorities for a commercial shopping mall. The assessee equipped its Mall with all the facilities such as provisions of parking, elevators, escalators, fire fighting systems, common toilets, electromechanical maintenance, etc. The assessee had also deputed man power for housekeeping, cleaning, securing the entire Mall premises and ensuring systematic parking. The provision of all such basic amenities and facilities are interlinked and are integral part of the assessee's business of letting out the various units in the Mall either on fixed rental basis or on revenue sharing basis. It will be appreciated that in the present case, complex fit-outs were required to be installed as per the strict requirements of the occupants as also as per the regulatory requirements. Letting out of the premises is not possible without the relevant services, amenities and facilities and letting out of premises and utilities and fit-outs are inseparable.

3.02 **ASSESSEE'S RESPONSIBILITY FOR SUFFICIENT FOOT FALL IN MALL**

It is the sole responsibility of the assessee company to ensure that there is sufficient foot fall in its Mall and there is a good response to the products and merchandise offered by various occupants of the Mall. For ensuring such foot fall, the assessee company has to organize various events from time to time in the Mall premises so as to attract the youth. Many a times, the assessee company has to coordinate with the celebrities for ensuring their visit to the Mall which in its turn, bring popularity to the entire Mall and promote the sale of products in the Mall.

3.03 *What has to be seen is what was the primary object of the assessee while exploiting the property.*

3.04 **ASSESSEE TO PROVIDE SPECIFIC AMENITIES & FACILITIES - RENT AGREEMENTS AT PB 238 TO 295**

The assessee company has to necessarily provide certain amenities and facilities to occupants of the Mall under contractual agreement. Specimen copies of agreements entered into by the appellant company with the lessees of the Mall are placed at 238 to 295 of our Paper Book for A. Y. 2011-12.

3.05 **VARIOUS SERVICES PROVIDED BY THE ASSESSEE**

The assessee has to provide various services to the lessees in the Mall. Some of the essential services are enlisted as under :

- i) *Electricity, water charges for common area;*
- ii) *HVAC for Common Area;*
- iii) *AMC's for all plant and machinery facilities and amenities provided in the Mall;*
- iv) *Lifts, escalators and other utilities;*
- v) *Civil, plumbing, structural and all other repairs replacements and maintenance;*
- vi) *Maintenance and upkeep of building;*
- vii) *Mall Management Charges;*
- viii) *Insurance of entire building;*
- ix) *Housekeeping/ Sanitation Services;*
- x) *General Security Services in the Mall;*
- xi) *All other costs and expenses attributable to the Mall*

4.00 **ASSESSEE CARRIED OUT SYSTEMATIC BUSINESS ACTIVITY**

The assessee company has been carrying out a systematic business activity with an intent to earn profit by providing host of services to the lessees of the Mall and by employing large number of permanent staff to carry out such activities on day to day basis. In such a situation, it has to be necessarily held that the activities of the assessee company fall in the category of carrying out the business of running the Mall and consequently, income is to be assessed only under the head 'Income from Business or Profession', under s.28 of the Income-Tax Act, 1961. For such proposition, we wish to place reliance on the judicial pronouncement of the Hon'ble Apex Court in the case of Karnani Properties Ltd. vs. CIT (1971) 82 ITR 0547 (SC) [kindly refer Judgments Compilation Book (JCB) Page No. 26 to 30].

5.00 **CASE OF CHENNAI PROPERTIES - HON'BLE SUPREME COURT**

The Hon'ble Apex Court in the case of Chennai Properties and Investments Ltd. vs. CIT (2015) 373 ITR 673 (SC) [kindly refer JCB Page No. 1 to 4] has held that where an income has been derived by an assessee from the commercial exploitation of the properties and in lieu of its professed objects, then the same has to be regarded as business income and not income from house property.

6.00 **CASE OF RAYALA CORPORATION - HON'BLE SUPREME COURT**

The Hon'ble Supreme Court again in the case of Rayala Corporation Pvt. Ltd, Versus Assistant Commissioner of Income Tax [2016] 386 ITR 500 (SC) [kindly refer JCB Page No. 5 to 8] has held the same view.

7.00 **DISTINGUISHING FACTORS IN THE CASE OF ASSESSEE FROM THAT OF SHAMBHU INVESTMENT & RAJ DADARKAR**

The facts of the case of the assessee company are distinguishable from those in the decision of Hon'ble Apex Court in the case of Shambhu Investment Pvt. Ltd. vs. CIT (2003) 263 ITR 143 (SC) and its recent decision in the case of Raj Dadarkar & Associates vs. ACIT2017 (5) TMI586 (SC).

<i>Point of Difference</i>	<i>Shambrju Investment/Raj Dadarkar & Associates</i>	<i>Chennai Properties / Rayala Corporation</i>	<i>Assessee Company</i>
<i>Facts</i>	<p><i>In <u>Shambhu Investment</u>, the assessee owned a building and after getting it furnished, the same was let out to various persons with all furniture, fixtures, light, air conditioners for being used as 'table space'.</i></p> <p><i>In Raj Dadarkar the assessee firm obtained a land on leasehold basis and constructed shopping centre thereon and given the same to various persons on sub-licensing basis.</i></p>	<p><i>In Chennai Properties, the assessee acquired two properties known as "Chennai House" & "Firhavin Estate" and has let out those properties.</i></p> <p><i>In Rayala Corporation the assessee was having house property which has been let out on rent.</i></p>	<p><i>The assessee company obtained a land on leasehold basis and constructed a multiplex-cum- shopping mall. Units in the Mall have been leased out by the assessee.</i></p>
<i>Relevant Para of the Order</i>	<p><i>Para 7 of Calcutta HC Order in the case of Shambhu Investment.</i></p> <p><i>Para 17 & 18 in the case of Raj Dadarkar.</i></p>	<p><i>Para 5 in the case of Chennai Properties.</i></p> <p><i>Para 10 in the case of Rayala Corporation.</i></p>	-
<i>Findings of the Court</i>	<p><i>In Shambhu Investment, the Hon'ble High Court of Calcutta, at para 7, has held that merely because income is attached to any immovable property cannot be the sole factor for assessment of such income as income from property, what has to be seen is what was the primary object of the assessee while exploiting the property.</i></p> <p><i>In Raj Dadarkar, the Hon'ble Court, at para 18, held that the assessee failed to produce sufficient material on record to show that its entire income was from letting out of property which</i></p>	<p><i>In Chennai Properties, the Hon'ble Court, at para 5, held that the main object of the assessee in its MOA : was to acquire & hold such properties. Further, at para 11, it has been held that since the letting of properties is the business of the assessee, the income will be classified under the head 'Income from business'.</i></p> <p><i>In Rayala Corporation, at para 10, the Court held that the rent should be the main source of income or the purpose for which the</i></p>	<p><i>The facts of the case of assessee company are identical to that of Chennai Properties & Rayala Corporation. The assessee company has been incorporated with the main object to construct, run, hire-out shopping mall and the main source of income of the assessee is also from leasing out of the units in shopping mall.</i></p>

	<i>was principal business activity of the assessee.</i>	<i>company is incorporated should be to earn income from rent so as to make the rental income to be taxable under the head 'Income / from business'.</i>	
<i>Important Points to be considered</i>	<p>Shambhu Investment: i) Mere letting out of the immovable property ii) Primary object/ Intention of exploiting the property is to be seen. iii) Composite table space along with furniture has been given on rent to the occupants, iv) The user of the furnitures is attached to the letting out. v) The rent agreements show the intent of the parties as that of letting one.</p>	<i>Letting of properties is the main object & business of the assessee.</i>	<p><i>Constructing, running and hiring of the shopping mall is the main object as well as the main business of the assessee company.</i> <i>The cases of the Chennai Properties and Rrayala Corporation squarely apply to the case of the assessee company.</i></p>
	<p><u>Raj Dadarkar:</u> i) Merely an entry in the object clause of partnership deed is not determinative factor. Such question would depend on the circumstances of each case. ii) Letting out of property was not objective of the assessee. iii) Assessee failed to produce sufficient material on record to prove that its entire income or substantial income was from letting out of property which was the principal business activity, iv) Decisions of Chennai Properties & Rayala Corporation would not apply, v) Case of East India Housing and Land Development Trust Ltd. vs. CIT (1961) 42 ITR 49 applies.</p>		

8.01 *Your Honours, the Hon'ble Kerala High Court in the case of CIT vs. Oberon Edifices and Estates Pvt. Ltd. 2019 (3) TMI 1468 (Ker.) has also held that income derived by the assessee by letting out the shops in the mall has to be assessed as income from business and not from income from House property. The Hon'ble Court, while holding so, has also dealt with and distinguished the Order of the Hon'ble Supreme Court in the cases of Shambhu Investment and Raj Dadarkar supra. A copy of the decision of the Hon'ble Kerala High Court is being enclosed herewith, as Exhibit -P/1.*

8.02 *Your Honours, the Hon'ble Bombay High Court in the case of Pr. CIT vs. Shreeji Exhibitors 2018 (12) TML 656 (Bom.) has also held the same view. A copy of the decision of the Hon'ble Bombay High Court is being enclosed herewith, as Exhibit -P/2.*

8.03 *Your Honours, the Hon'ble Madras High Court in the case of Ms. PSTS Heavy Lift and Shift Ltd. & Anr. Vs. DCIT & Anr. 2020 (2) TMI 213 (Mad) has also decided the issue in favour of the assessee by discussing the judgment of Raj Dadarkar supra. A copy of the decision of the Hon'ble Madras High Court is being enclosed herewith, as Exhibit -P/3.*

8.04 *Your Honours, the Hon'ble ITAT Ahmedabad, constituting the then Hon'ble President Justice P P Bhatt, as the Judicial Member and the Hon'ble Vice President Shri Pramod Kumar, as the Accountant Member, in the case of Gulmohar P Mall Pvt. Ltd. vs. ITO 2019 (8) TM 1431 (ITAT Ahd) has held that the income of the assessee engaged in the development and maintenance of immovable properties and mall management, is to be treated under the head profits and gains from business or profession. A copy of the decision of the Hon'ble ITAT is being" enclosed herewith, as Exhibit -P/4.*

9.00 *In view of the facts and circumstances and as also, on view of the judicial pronouncements, the income of the assessee company would be classified only under the head 'income from business' and not under the head 'income from house property'."*

11. Thus, it appears that the Mall is also equipped with other facilities like provisions of parking, elevators, escalators, fire fighting systems, common toilets, electromechanical maintenance in rendering the smooth activities of the Mall and had deputed man power for housekeeping, cleaning, securing the entire Mall premises and ensuring systematic parking. The provision of all basic amenities and facilities are interlinked and are the

integral part of the assessee's business of letting out the various either on fixed rental basis or on revenue sharing basis. It is the sole responsibility of the assessee company to ensure that there is sufficient foot fall in its mall and there is good response to the products and merchandise offered by various occupants of the Mall as the case made out by the assessee. In order to ensure that the assessee has organized various events from time to time in the mall premises itself to attract the youth. As the appellant has derived income from leasing out a part of the mall upon carrying out systematic, organized, synchronized and recurring activities in the nature of trade and venture, the assessee considered the lease income as its income from carrying out the business while furnishing the return of income. As such the assessee company is carrying out a systematic business activities with an intent to earn profit by providing host of services to the lessees of the Mall and by employing large number of permanent staff to carry out such activity on day to day basis. According to the assessee, such activities of the assessee company fall in the category of carrying out the business of running the Mall and the income derived therefrom can be assessed only under the head "Income from Business or Profession" under the provision of Section 28 of the Act.

12. During the course of assessment proceeding the assessee was asked to explain as to why the income derived from letting out of Shopping Mall may not be assessed as "Income from House Property" partly and "Income from Business or Profession" instead of entire income from business only as shown by the assessee. Upon considering the reply in the same line as discussed in the forgoing paragraph filed by the assessee, the Ld. AO held

that the rental receipts from letting out the area of Shopping Mall are in the nature of “Income from House Property” and not in the nature of business receipts. The income from common maintenance charges, HVAC Charges etc. were held to be the ‘income from business’. The main contention of the Ld. AO is as follows:

- “i) Generally, in any type of business activity uncertainty of receipts is a basic feature, but in the instant case the assessee was in receipt of constant amount of rent through rent agreements. Even accretion to the rate of rent at regular intervals was found embedded in the agreements. Thus, no element of risk or uncertainty was involved.*
- ii) As per settled position of law, the Memorandum of Association of a company, by itself is not a conclusive factor for determining the nature of income derived by a company.*
- iii) All the infrastructure and amenities provided by the assessee in the mall are for sole purpose of making its lettable value more and more attractive so that it can fetch maximum rent. Thus, providing of these facilities cannot alter the rental income character of the property.*
- iv) The rent agreements themselves are calling the receipts as 'Rent'. Further, various clauses of the rent agreements makes it undoubtedly clear that the assessee lets out the spaces in the mall and there was no business activity involved in it.*
- v) The main object of the assessee company was to earn rental income from leasing out different units of the mall to various tenants who in turn were free either to do business activity there from or to sublet to any other person. Further, providing of other common facilities were ancillary objects of the assessee.*
- vi) As per rent agreements, contractual obligation of the assessee was very limited and the assessee was allowed to enter the premises of the tenants at reasonable intervals for inspection and to carry out repairs only.*
- vii) The assessee was not under any contractual obligation to ensure that the customers who visited the mall keep on buying and/or availing various entertainment and other facilities available in the mall so that the occupation in the mall remains commercially viable for those from whom it derives income from month to month.”*

13. While categorizing the income derived from the activities of the Shopping Mall under the head “Income from House Properties” the Ld. CIT(A) mainly relied upon the judgment passed by the Hon’ble Supreme

Court in the matter of Shambhu Investment Pvt. Ltd. vs. CIT, reported in (2003) 263 ITR 143 (SC), wherein the income derived from the property which is not exploited as business asset has been held to be the 'income from property' and not 'income from business'. He further relied upon the judgment passed in the matter of Karnani Properties Ltd. vs. CIT, reported in (1971) 82 ITR 0547 (SC), wherein carrying out business of running the Mall and consequential income derive from such activities has been assessed only under the head "Income from Business and Profession" under Section 28 of the Act. The assessee further relied upon by the judgment passed by the Hon'ble Apex Court in the case of Chennai Properties and Investments Ltd. vs. CIT, reported in 373 ITR 673 (SC) including the judgment passed by the Hon'ble Kerala High Court in the case of CIT vs. Oberon Edifices and Estates Pvt. Ltd., reported in 2019 (3) TMI 1468 (Ker.), the judgment passed by the Hon'ble ITAT Ahmedabad Bench in the matter of Gulmohar Park Mall Pvt. Ltd. vs. ITO, reported in 2019 (8) TMI 1431 (ITAT Ahd.).

14. Upon perusal of the entire details submitted by the appellant and the supporting documents it appears that main object of carrying out of business of the assessee is of constructing, owning, acquiring, developing, managing, running, hiring, letting out, selling or leasing multiplex, cineplex, cinema halls, theatres, shops, shopping malls, etc. as per the Memorandum of Articles and Associations. The above facilities and amenities provided by the assessee is for carrying out the business of Shopping Mall in a systematic and organized way for earning profit and not particularly letting out the property on rental basis. Considering that particular aspect of the

matter the First Appellate Authority accepted the categorization of the income derived from such Shopping Mall of the assessee under head income from “Income from Business” under Section 28 of the Act.

15. In fact, accepting the claim of the assessee in regard to the head of ‘income under business or profession’, Ld. CIT(A) deleted the addition with the following observation:

“4.3 The appellant company has been incorporated, as a private limited company, under the Companies Act, 1956, with the main object of carrying out the business of constructing, owning, acquiring, developing, managing, running, hiring, letting out, selling or leasing, multiplex, cineplex, cinema halls, theatres, shops, shopping malls, etc. Such objects have been found stated as predominant objectives of the appellant company in its Memorandum 65 Articles of Association, a copy whereof was filed at Page no. 84 of the Paper Book During :he previous year relevant to the assessment ear under consideration, construction of a portion of the Mall was completed and the appellant entered into lease agreements with various" parties for leasing out units in such constructed portion. However, during the relevant previous year, the appellant could derive rental income from only our parties and in respect of the remaining parties, the appellant has not received any rent. During the relevant previous year, the appellant has shown rental receipts of Rs.7,95,526/- only in it\$ audited Profit & Loss Account placed on record.

4.3.1 From the perusal of the lease agreements it is seen that the appellant company was required to provide various facilities and amenities such as central air conditioning, maintenance of common passage, lobbies, security services, parking services, lifts, escalators and other facilities. Thus, there is substance in the appellant's contention that it was running and operating the Mall as a systematic and organized activity for earning profit and it was not a case of merely letting out the property on rental basis. For operating and running a shopping mall various activities are required to be undertaken in an organized and recurring mariner. First of all, a mall has to be constructed in such a manner that it may attract various retailers and other entrepreneurs for setting up their outlets and establishments in such mall. Further, the mall should be located at a convenient place and should be designed in such a manner so as to attract optimum number of customers so that the occupants of the mall are commercially benefitted to the maximum. After setting up the mall, the company running the Mall has to attract MNCs and brands of repute so as to capture the maximum footfall in the mall, A mall entrepreneur has to enter into negotiations and agreements with such customers. The mall operator has to ensure that there is adequate and convenient parking and management of parking. The security of the mall is also the responsibility of the mall operating company. The mall

operating company has to manage cleanliness and housekeeping of the mall at all times. It is also required to operate and look after the maintenance of lifts, escalators, elevators etc. Further, a mall running company has to maintain its own staff and establishment and is also required to keep necessary records, to comply with various laws like service tax, PF etc. Thus, in my considered opinion, running a mall involves a series of activities and it is not mere letting out of the properties. This being so, any income from leasing/letting out properties in such mall are essentially required- to be computed only as 'Income from-Business' under section 28 of the Act and cannot be treated as income from house property.

4.4 *The Hon'ble Supreme Court in the case of Karnani Properties Ltd, vs. CIT (1971) 82 ITR 0547 (SC) has held that income derived by an assessee, the owner of flats and shops, from services rendered in an organized and systematic manner, with the help of large staff has to be computed as business income. Recently, the Hon'ble Supreme Court in the case of & Investments Ltd. vs. CIT (2015) 373 ITR 673 (SC) has the letting out of the property is the main object of a company, its income is to be computed under the head income from business it cannot be treated as the income from house property. The Hon'ble Supreme Court has observed as under:*

Before we refer to the Constitution Bench judgment in the case of Sultan Brothers (P) Ltd., we would be well advised to discuss the law laid down authoritatively and; succinctly by this Court in 'Karanpura Development Co. Ltd. v. Commissioner of Income Tax, West Bengal' (44 ITR 362 (SC)]. That was also a case where the company, which was the assessee, was formed with the object, inter alia, of acquiring and disposing of the underground coal mining rights in certain coal fields and it had restricted its activities to acquiring coal mining leads over large areas developing them as coalfields and then sub-letting them to collieries and other companies was the business of the assessee. The income which was received from letting out of those mining leases was shown as business income. Department took the position that it is to be treated as income from the house property. It would be thus, clear that in similar circumstances, identical issue arose before the Court. This Court first discussed the scheme of the Income Tax Act and particularly six heads under which income can be categorized / classified. It was pointed out that before income, profits or gains can be brought to computation, they have to be assigned to one or the other head. These heads are in a sense exclusive of one another and income which falls within one head cannot be assigned to, or taxed under, another head. Thereafter, the Court pointed out that the deciding factor is not the ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them. It was highlighted and stressed that the objects of the company must also be kept in view to interpret the activities. In support of the aforesaid proposition, number of judgments of other jurisdictions, i.e. Privy Council House of Lords in England and US Courts were taken note of. The position in law, ultimately, is summed up in the following words:

"As has been already pointed out in connection with the other two cases where ,, there is a letting out of premises and collection of rents the assessment on property basis may be correct but not so, where the letting or sub-letting is part of a trading

operation. The diving line is difficult to find- but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings with its property, it is possible to say on which side the operations fall and to what head the income is to be assigned."

After applying the aforesaid principle to the facts, which were there before the Court, it came to the conclusion that income had to be treated as income from business and not as income from house property. We are of the opinion that the aforesaid judgment in Karanpura Development Co. Ltd.'s case squarely applies to the facts of the present case.

No doubt in Sultan Brothers (P) Ltd.'s case, Constitution Bench judgment of this Court has clarified that merely an entry in the object clause showing a particular object would not be the determinative factor to arrive at an conclusion whether the income is to be treated as income from business and such a question would depend upon the circumstances of each case, viz., whether a particular business is letting or not. This is so stated in the following words: -

"We think each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. We find nothing in the cases referred, to support the proposition that certain assets are commercial assets in. their very nature."

We are conscious of the aforesaid dicta laid down in the Constitution Bench judgment. It is for this reason, we have, at the beginning of this judgment, stated the circumstances of the present case from which we arrive at irresistible conclusion that in this case, letting of the properties is in fact is the business of the assessee. The assessee therefore, rightly disclosed the income under the Head Income from Business. It cannot be treated as 'income from the house property'. We, accordingly, allow this appeal and set aside the judgment of the High Court and restore that of the income Tax Appellate Tribunal. No orders as to costs."

4.4.1 Further, the Hon'ble Supreme Court in its pronouncement dated 11/08/2016 in the case of Rayala Corporation Pvt. Ltd. vs. ACIT (2016) 386 ITR 500 (SC), has affirmed its decision in the case of Chennai Properties supra.

4.5 The various case laws relied upon by the Assessing Officer in the impugned order are distinguishable. The Assessing Officer has relied upon the decision of Hon'ble Supreme Court in the case of Karanpura Development Company Ltd. vs. CIT (1962j 44 ITR 362 (SC), I find that the acts of the case of Karanpura Development Company are quite distinguishable and support the stand of the appellant. In this case the question before the Hon'ble Apex Court was whether a company, formed with the specific object of acquiring coal fields for selling them can

be said to be deriving business income or not. The Hon'ble Apex Court held that a company formed with the specific object of acquiring properties, developing them and subleasing them without working the same, the sums received as salami by the assessee for granting such subleases are trading receipts and the amount of profit therein is assessable to tax.

4.5.1 The Assessing Officer has also relied upon the decisions of Hon'ble Supreme Court in the case of CIT vs. Panipat Woollen & General Mills Company Ltd. (1976) 103 ITR 66 (SC) and in the case of Sulej Cotton Mills Ltd. vs. CIT (SC) 116 ITR 1 for the purpose that the entries made by an assessee in his books are not determinative and what is necessary to be considered is the true nature of the transaction. However, I find that in the instant case, the determination of income of the appellant is not based upon the entries made by it in its books of account.

4.5.2 The Assessing Officer has also relied upon the decision of Hon'ble Allahabad High Court in the case of CIT vs. Goel Builders (2011) 331 ITR 344 (All) where the Assessing Officer has distinguished the case of the appellant from that of the decision of Goel Builders supra. I find that the facts of the case of Goel Builders are in fact supportive of the stand of the appellant. In this case the Hon'ble High Court has held that the purpose of assessment under the head "Profit and gains of business or profession", it shall be necessary that the property acquired and used is for commercial purpose under business activity and the owner must have acquired the property with the intention to earn profit under commercial activity. The Assessing Officer has placed reliance on an initial Memorandum of Understanding between the appellant and M/s. M2K Infrastructure Pvt. Ltd. for leasing out the entire Mall to the aforesaid company against receipt of lease rent. However, as the said agreement did not materialize the appellant itself undertook the operations and management of the Mall with its own staff/and resources. In such situation, it cannot be said that the appellant has an intention of deriving rental income.

4.5.3 The Assessing Officer has further relied upon the decision of Shambhu Investment Pvt. Ltd. in which the prime object of the assessee was to let out portion of property to various occupants by giving them additional using furniture and fixtures and other common facilities and the property was not exploited as business asset. However, in the case of the "appellant, the property has been exploited for commercial purposes to run and operate a shopping mall which cannot be said to be a mere letting out of the property.

4.5. The Assessing Officer has relied upon the decision of Hon'ble Kerala High Court in the case of Attukal Shoppin Complex Pvt. Ltd. (2003) 259 ITR 567 (Ker.) wherein it was held that income from chopping complex would be separately assessable as income from house property from letting out shops and income from business for the amenities provided.

4.5.5 The Assessing Officer has also relied upon the case laws of various Courts in the context of determination of income under section 22 of the Act. Since, in the ensuing paragraphs I have held that the income of the /appellant is to be treated as

business income and not as income from house / property, these case laws are not relevant.

4.6 *Though the decision of Hon'ble Kerala High Court in the case of Attukal Shopping Complex Pvt. Ltd (Supra) supports the view of the Assessing Officer but the issue has to be dealt with keeping in view the recent decisions of Hon'ble Supreme Court in Chennai Properties and Investments Private Limited and Rayala Corporation Private Limited (Supra). The Hon''ble Supreme Court has relied upon its own judgment in Karanpura Development Co. Ltd. where in it is held that the diving line is difficult to find but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings with its property, it is possible to say on which side the operations fall and to what head the income is to be assigned. The Constitution Bench judgment in the case of Sultan Brothers (P) Ltd. has also been discussed clarifying that merely an entry in the object clause showing a particular object would not be the determinative factor to arrive at a conclusion whether the income is to be treated as income from business. The Hon'ble Court being conscious of the aforesaid dicta laid down in the Constitution Bench judgment arrived at the conclusion that the letting out of the properties is business of the assessee as holding the aforesaid properties arid earning income by letting out those properties is the main objective of the company.*

4.6.1 *The appellant is running and operating the mall in a systematic and Organized manner by carrying out series of activities by maintaining staff and establishment. The appellant is also engaged in organizing various events and shows for maximizing the footfalls in the Mall. The various units in the Mall have been let out to big MNC brands for setting up their outlets and not to any person for establishing its office and in such a case, it is clear that the appellant was carrying out a systematic series of activities to maximize the popularity of the Mall and getting the best tariffs for its units in the Mall. In view of the facts of the case and the recent decisions of Hon'ble Supreme Court in Chennai Properties and Investments Private Limited and Rayala Corporation Private Limited (Supra) the rental income of the appellant from operating and running the Mall has to be assessed under, business income and not under income from house property.*

4.6.2 *In view of the above discussions, judicial pronouncements and Considering the fact that running and operating shopping mall is predominant object of the appellant company as per its Memorandum & Articles of Association, I am of the view that the entire income derived by the appellant company from leasing out properties in the mall falls under the head 'Income from Business' and not under the head 'Income from house property'. Thus, the Ground Nos. 2(a) & 2(b) of the appellant are allowed."*

16. The Ld. DR relied upon the order passed by the Shambhu Investment Pvt. Ltd. (supra). However, the Ld. DR failed to controvert the factual aspect of the matter in regard to the facilities/activities provided by the

assessee in running the business of Shopping Mall of the assessee. In the case of Shambhu Investment Pvt. Ltd. the assessee owned a building and after getting it furnished the same was letting out to various persons with all furniture, fixtures, light or air conditioners for being used as “table space”. Moreso, the assessee only let out the immovable property to various parties as per the rent agreement with those parties. In fact, the composite table space alongwith furniture were given on rent to the occupiers in that particular case.

The main consideration in this case should be primary object of the assessee while exploiting the property which has been duly taken care of by the Hon’ble Apex Court in the judgment in the case of Karnani Properties Ltd., Chennai Properties & Rayala Corporation as relied upon by the Ld. AR.

17. We have considered the judgment passed in the matter of Karnani Properties Ltd. vs. CIT, reported in (1971) 82 ITR 0547 (SC), which is in favour of assessee. The Hon’ble Apex Court in the judgment passed in the matter of Chennai Properties & Investment Ltd. vs. CIT, reported in (2015) 373 ITR 673 (SC) categorically held that where an income has been derived by the assessee for the commercial exploitation of the properties and in lieu of its professed objects then the same is required to be recorded as business income and not income from house property. The same view has been reiterated in the case of Rayala Corporation Pvt. Ltd. vs. ACIT, reported in (2016) 386 ITR 500 (SC) by the Apex Court. The Hon’ble Kerala High Court in the case of CIT vs. Oberon Edifices and Estates Pvt. Ltd., reported in (2019) (3) TMI 1468 (Ker) on an identical facts and circumstances of the

case has been pleased to hold that income derived by the assessee by letting out of the shops in the Mall has to be assessed as income from business and not income from house property. It is relevant to mention that the judgment passed by the Hon'ble Apex Court in the case of Shambhu Investment Pvt. Ltd. (supra) as relied upon by the Ld. DR has been distinguished by the Hon'ble Court on the basis of the facts available therein as already discussed above.

18. Considering the object of constructing, running and hiring of the Shopping Mall as the main object and the business of the assessee company the income derived from the Shopping Mall as has been categorized as income from business or profession is clearly applicable to the case in hand. We would also like to mention that upon considering this particular aspect of the matter the Hon'ble ITAT Ahmedabad Bench in the case of Gulmohar Park Mall Pvt. Ltd. has been pleased to hold that the income of the assessee engaged in the development and maintenance of immovable properties and mall management is to be treated under the head profit and gains from business and profession. Thus, taking into consideration the entire aspect of the matter we do not find any irregularities and/or ambiguity in the order passed by the Ld. CIT(A) considering the income derived by the appellant company from leasing out properties in the mall falls under the head income from business and not under the head income from house property so as to warrant interference.

19. **Ground No.3:-** Deletion of addition on determining gross rent of Rs. 7,92,90,7780/- is under challenged before us.

20. We have heard the rival submissions made by the respective parties, and we have also perused the relevant materials available on record.

21. During the relevant previous year the assessee company derived lease rent only from leasing out Mobile Tower, Kiosk and space for storage facilities for temporary period and no lease rental from the encompassed commercial spaces had been derived. The question before the Ld. AO was as to whether the income from letting out mall is chargeable to tax in terms of the provisions of Section 22 of the Act under the head “Income from Business or Profession” or the same is chargeable in terms of the provisions of Section 28 of the Act.

The assessee has shown rental receipts of Rs. 7,95,526/- from the four parties. The AO came to a finding that the rental income would come under the head “Income from House Property”.

22. The assessee was issued show cause as why floor wise per sq. feet rate of rent may not be determined and adopted as under:

<i>Floor</i>	<i>Per sq. ft. rent as per rent agreements</i>		<i>Average rate of rent</i>	<i>Rate of rent adopted</i>	<i>Reason for the same</i>
	<i>Minimum Rs.</i>	<i>Maximum Rs.</i>			
<i>(a)</i>	<i>(b)</i>	<i>(c)</i>	<i>(d)</i>	<i>(e)</i>	<i>(f)</i>
<i>UG</i>	<i>15.00</i>	<i>546.88</i>	<i>280.94</i>	<i>280.00</i>	<i>Average Rate.</i>
<i>FF</i>	<i>30.00</i>	<i>69.28</i>	<i>49.64</i>	<i>200.00</i>	<i>Rate of first floor can be slightly below than that of UG Floor</i>
<i>LG</i>	<i>26.00</i>	<i>26.00</i>	<i>26.00</i>	<i>150.00</i>	<i>Rate of LG floor can be this much below than that of UG floor</i>

23. The Ld. AO was of the opinion that rental receipt from Mobile Tower has been suppressed to a large extent by the assessee. While coming into such conclusion the Ld. AO observed as follows:

“4.6 Further, the assessee has shown rent from Bharti Airtel Mobile Tower installed in the mall at only Rs. 1,32,000/-, and from Idea Cellular Mobile Tower at only Rs. 36,000/- during the year under consideration. This minuscule amount of rent shown was not found acceptable. It was observed from the agreement for equipments dated 26/04/2010 between the Assessee Company and Bharti Airtel Ltd. that (i) One time lump sum rental amount of Rs. 96,000/- for the month of April 2008 to Nov. 2010 was agreed to be paid by Bharti Airtel Ltd. (ii) Monthly consideration of Rs. 9,000/- per month from Dec. 2010 was agreed to be paid by Bharti Airtel Ltd. (iii) Electricity charges on the temporary basis of unit count of sub meter attached to the electricity connection @ 6.5 per unit was agreed to be paid by Bharti Airtel Ltd. (iv) The assessee company agreed to ensure safety and security of the equipments and to maintain surrounding area sufficiently clean, lighted and in good condition to ensure the smooth operation of the equipments. However, amount received on account of electricity charges and common area maintenance charges were not found accounted for in the books of account of the assessee. Further, it was observed from the lease agreement dated 16/05/2008 between the Assessee Company and Idea Cellular Ltd. that the assessee company provided its premise on lease for installation of antennae pole and machine room to Idea Cellular Ltd. for 15 years and in turn, Idea Cellular Ltd. agreed to pay Rs. 6,000/- by way of lease rental fees and extra cost on account of electricity supply. However, amount received on account of electricity charges were not found accounted for in the books of account of the assessee. In such circumstances, it is clear that rental receipt from mobile tower has been suppressed to a large extent.”

24. The assessee was further asked to explain as to why the provision of Section 23(1)(a) of the Act may not be invoked in order to determine the annual taxable value of the assessee property and determine the same at Rs.50,000/- per month in each case of Mobile Tower.

25. However, the Ld. AO was ultimately formed an opinion that :

- (i) The assessee's rental income will come under the head 'income from house property', and not under the head 'income from business and profession',
- (ii) The rental income will be determined from the date of rent agreement, and not from the date when certain percentage of mall was occupied.
- (iii) The floor-wise rate of rent per square feet will be as per the table mentioned below the para-
- (iv) The estimated rent in the case of mobile towers will be @ Rs. 50,000/- per month per tenant.”

26. Finally the rent receivable/accrued in the assessee hand was calculated at Rs. 7,92,90,780/- which has been determined as the assessee's income from house property for A.Y. 2011-12 as against the rental income of Rs. 7,95,526/- as shown by the assessee. The income from house property was ultimately determined at Rs. 4,69,34,191/- with the following observation:

5.1 Against the aforesaid amount of Rs. 7,92,90,780/-, the assessee would be entitled for deduction u/s 24(a). Further, in the P&L A/c, the assessee has claimed interest expenses to the tune of Rs. 85,69,355/- [interest on bank loans Rs. 37,96,088/- + interest on unsecured loans Rs. 47,73,267/-]. It has been claimed that all the loans were utilized in construction of the mall. Hence, the aforesaid interest expense of Rs. 85,69,355/- would be deductible u/s 24(b) as interest paid on borrowed capital. (Even if certain loans are found to be not utilized for construction of the mall, and instead utilized for purchase of machineries etc.; in that case also, no difference would be there; since then, that portion of interest would be admissible as business expense.) However, depreciation claimed on building at Rs. 76,46,466/- would be inadmissible, since there is no provision in the Income Tax Act to claim depreciation under the head 'income from house property'. As such, the assessee's income from house property is hereby determined as under –

Particulars	Amount Rs.	Amount Rs.
Total rental income		7,92,90,780/-
Less:		
(i) Deduction u/s 24(a) @ 30%	2,37,87,234/-	
(ii) Deduction u/s 24(b)	85,69,355/-	3,23,56,589/-
Income from house property		4,69,34,191/-

5.2 Since, the assessee has furnished inaccurate particulars of its income and concealed income, penalty proceedings u/s 271(l)(c) of the Income Tax Act, 1961 are initiated in the matter.”

27. Before the Ld. CIT(A) the main contention of the assessee was as under:

“5.01 Without prejudice to the above, it is submitted that even if the rental income of the appellant is computed under Chapter IV-C of the Act being under the head 'Income from House Property', then it has to be computed in accordance with the provisions of ss. 22 & 23 of the Act. Under the provisions of sub-section (I) of section 23, the annual value of a property shall be deemed to be (a) the sum for which 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.

5.02 Your Honour, in the instant case, the case of the appellant falls under clause (b) read with clause (c) of section 23(1) of the Act. It is submitted that during the relevant previous year, the appellant had let out a very small portion of its property and the actual rent received from letting out such property was undisputedly higher than the rent determined by the Municipal Authority. Thus, it can safely be concluded that in the instant case, the actual rent received/ receivable from the property actually let out was higher than the corresponding rent at which the property might reasonably be expected to let from year to year. It is submitted that in the case of the appellant, the clause (c) of subsection (1) of section 23 squarely applies as the property was constructed for letting out and during the relevant previous year, a major portion remained vacant. It is submitted that in the instant case, the deemed rent of the entire lettable property under clause (a) of sub-section (1) of section 23 of the Act might have been higher than the meager rent of Rs.7,95,526/- actually received by the appellant company but since the sole reason for receiving the lesser rent was that a major portion of the lettable property remained vacant during the

relevant previous year the clause (c) of sub-section (1) of section 23 would come in to operation and accordingly, the actual rent received shown by the appellant company in its books of account would alone have to be taken as the Annual Value of the house property under the provisions of section 23 of the Act. For our above assertion, we place reliance on the following judicial pronouncements :

- i) ACIT vs. Dr. Prabha Sanghi (2013) 35 CCH 0002 (DelTrib)
- ii) Preamsudha Exports (P) Ltd. vs. ACIT (2008) UOITD0158

Copies of the above referred decisions are being submitted herewith for kind perusal and ready reference of Your Honour, as Annexure A-17.01 & A-17.02 IPB Page No. 272 to 2901

5.01 Your Honour, it is a settled law that the annual value of any house property should be governed by the standard rent or fair rent. The Hon'ble Apex Court in the case of *Dewan Daulat Rai Kapoor vs. New Delhi Municipal Committee & Anr.* (1980) 122 ITR 700 (SC) has held that 4Le actual rent, in normal circumstances, afford a reliable evidence of when and how much a landlord might reasonably expect to get from a hypothetical tenant. The Hon'ble Supreme Court further held that the annual value of a building whether let out or self-occupied must be limited by measure of standard rent determinable under the relevant Act.

5.02 Your Honour the Hon'ble High Court of Madras in the case of *CIT vs. Parasmai Chordia* (3998) 233 ITR 147 (Mad.) has held that where in case of a let out property, if the actual rent received is more than the standard rent, the annual value of the property should be determined on the basis of actual rent received. In the instant case, the standard rent has not been fixed by the Rent for any property of Indore. However, the Municipal Valuation of the Mail Building has been computed by the Municipal Corporation at Rs. 1,27,86,134/- kindly refer Para 3.02.8 supra} and the municipal rent per sq. ft. works out at Rs.5.55/-. In such circumstances, the rental income should be adopted only on the basis of actual rent received by the appellant.

5.03 Your Honour, the Hon'ble High Court of Delhi in the case of *CIT vs. Anil Arora* (2015) 93 CCH 0093 (Del HC) has held that where no evidence was placed on record by the AO to refute the claim of the assessee to such effect or to show that rent over and above what was declared was realized, then no addition is warranted.

5.04 Reliance is also placed on the following judicial pronouncements:

- i) CIT & Anr. vs. Dr. M.J. Mohan (2010) 320 ITR 0368 (Kar.)
- ii) CIT vs. Indra Co. Ltd. (2004) 268 ITR 240 (Cal)
- iii) John Tinson & Co. (P) Ltd. & Ors. Vs. CIT & Ors. (2008) 298 ITR 407 (Del.)
- iv) Vimal R. Ambani vs. DCIT(2015) 375 ITR 66 (Bom.)

In view of the above facts and circumstances of the case, it is submitted that the action of the learned AO in estimating the lease rental of the appellant company being exorbitantly high, hypothetical, unjustified and unwarranted, deserves to be set aside.”

28. The Ld. CIT(A) ultimately deleted the addition with the following observations:

“5.1 I have gone through the assessment order, submissions made by the appellant as reproduced above and various documentary evidences placed by the appellant in its paper book.

5.2 I find that in the instant case, the Assessing Officer has made the estimation of rent on ALV by invoking the provisions of section 23 of the Act. The provisions of section 23 can be invoked only if the income is computed under section 22 of the I.T. Act, 1961. As it has been held above that in the case of the appellant, income from leasing out of properties in the mall is chargeable to tax under the head from ‘Income from Business Profession’, under section 28 of the Act, the rental income cannot be estimated under the provisions of section 23 of the Act. Thus, as ground nos. 2(a) and 2(b) are allowed, the income of the appellant cannot be estimated u/s 23 and therefore ground no. 3 and ground nos. 4(a) to 4(f) of the appellant are allowed.”

29. Admittedly, the AO has made estimation of rent on ALV upon invocation of provisions of Section 23 of the Act which can only be invoked if the income is computed under Section 22 of the Act. As we have already seen in the earlier ground that the income from leasing out of properties in the mall has been held to be chargeable to tax under the head “Income from Business or Profession” under Section 28 of the Act which has also been confirmed by us, the rental income estimated under the provision of Section 23 of the Act by the Ld. AO is bad in law and thus liable to be quashed in the present facts and circumstances of the case. Hence, the order passed by the Ld. CIT(A) as above is according to us is just and proper so as to warrant interference. With the above observations, we conclude that the Grounds Nos. 1 to 3 filed by the Revenue are found to be devoid of any merit and thus, dismissed.

30. **Ground No.4:-** Restricting depreciation on fixed assets at Rs.74,63,469/- as against Rs.1,55,95,905/- claimed by the assessee is under challenge before us.

31. The assessee has shown the entire income under the head “Income from Business” and claimed depreciation of Rs.1,55,95,905/- on its fixed asset in the return of income. The Ld. AO held that rental income from leasing out the areas in the Mall was assessable as “Income from House Property” and therefore, the depreciation in respect of those areas was disallowed. In respect of the other common areas the income whereof was assessed under the head “Income from Business”, the Ld. AO observed that the assessee claimed depreciation for fixed assets for both occupied and unoccupied areas. As the assessee was showing business income only in respect of the occupied portion of the Mall, the depreciation expenses should have been claimed by the assessee pertaining to the only occupied portion and not to the common areas as of the opinion of the Ld. AO. As the total usable floor area is of 1,88,832.35 sq. ft. whereas the occupied area was only 65,585 sq. ft. i.e. 35% of the usable floor area, the Ld. AO was of the opinion that the appellant is, therefore, entitled to the claim in respect of 35% of the depreciation expenses on proportionate basis and therefore, restricted the claim of depreciation of the appellant at Rs. 74,63,469/- in respect of income derived from business from common area charges.

32. Before the First Appellate Authority the assessee submitted as follows:

“1.00 That, while computing the income of the appellant company under the head 'Income from business', the learned AO restricted the claim of the appellant company as regard to depreciation on fixed assets at Rs.74,63,469/- only as against the same claimed by the appellant in its return of income at Rs.1,55,95,905/-. A comparative chart of the depreciation claimed by the appellant and that allowed by the learned AO is given as under:

<i>S. No.</i>	<i>Particulars</i>	<i>Depreciation Claimed by the appellant</i>	<i>Depreciation allowed by the AO</i>	<i>Short-allowance by the AO</i>	<i>Reason assigned for short-allowance</i>
<i>1</i>	<i>Building</i>	<i>76,46,466</i>	<i>6,88,182</i>	<i>69,58,284</i>	<p><i>i) Assessee is not eligible for depreciation on that portion of building, income wherefrom is assessable under the head 'Income from property'.</i></p> <p><i>ii) The depreciation cannot be allowed on the entire constructed building but it has to be restricted to the occupancy level. Accordingly, based upon occupancy level of 35%, depreciation has been restricted.</i></p> <p><i>iii) The AO presumed</i></p>

					<i>the ratio of common area to the rentable area as 6615 : 65585 only.</i>
2.	<i>Right of Leasing</i>	<i>17,81,250</i>	<i>6,23,437</i>	<i>11,57,813</i>	<i>The depreciation cannot be allowed on the entire constructed building but it has to be restricted to the occupancy level. Accordingly, based upon occupancy level of 35% depreciation has been restricted.</i>
3	<i>Other Assets (Furniture & Fixtures Plant & Machineries and Computers)</i>	<i>61,68,189</i>	<i>61,51,850</i>	<i>16,339</i>	<i>No reason assigned</i>
	<i>Total</i>	<i>1,55,95,905</i>	<i>74,63,469</i>	<i>81,32,436</i>	

2.00 *As regard to the short-allowance of depreciation on building, it is submitted as under:*

- i) First of all, the appellant claims that its entire building was used by it for the purpose of business of leasing out and therefore, its entire income is liable to be computed under the head 'Income from business or profession' only. Accordingly, it was eligible for claim of depreciation on the entire portion of the constructed building.*
- ii) Even if the stand of the learned AO to the effect that the rental income and common area maintenance charges received by the appellant are respectively assessed under the head 'Income from house property' and 'Income from business' is accepted, then the depreciation allowance against the common area maintenance charges ought to have been computed qua the actually constructed and completed area of building of the Mall instead of the actual occupancy level of the Mall.*

iii) *It is submitted that the appellant has constructed its Shopping Mall in various phases and in its audited balance sheet, the appellant has shown only the completed portion of the building as it is tangible depreciable asset and on such completed portion only, it has claimed the appreciation at the prescribed rate as per the Companies Act, 1956. The remaining part of the building which was under construction, has been under Capital Work in Progress in the Balance Sheet. The appellant has not claimed any depreciation on such portion. Since the entire completed portion of the building was put to use for the purpose of business, the appellant rightly claimed depreciation at the rate of 5% (being 50% of the prescribed rate of 10% as the building was put to use for a period of less than 180 days) on the entire actual cost of building i.e. of Rs. 15,29,29,322/-. Accordingly, the appellant company had rightly computed and claimed the depreciation on building at Rs.76,46,466/-."*

33. At the time of hearing of the matter the Ld. DR relied upon the order passed by the Ld. AO.

34. On the other hand, the Ld. A.R. relied upon the order passed by the Ld. CIT(A).

35. The income from leasing out properties in the Mall has been held to be chargeable to tax under the head "Income from Business". In that view of the matter the appellant is eligible for claim of depreciation of all the business assets which were either actually put to use or were ready to be put to use by the appellant for the purpose of its business of leasing out the properties. The assessee has shown the value of building Phase-1 at Rs. 15,29,29,322/- and the amount of Rs. 18,79,15,890/- has been shown under the head "Capital Work in Progress", as it is evident from the Schedule-5 of the fixed asset of the Audited Financial Statement. It is also a fact that the assessee has claimed depreciation only in respect of building which was already constructed and put to use and in respect of the fixed asset under the

head “Capital Work in Progress”, the appellant has not claimed any depreciation. Further fact, as has been considered by us, is this that the entire property including the right of leasing were owned by the appellant and the same were put to use for business purposes or ready to put use. The assessee has restricted the claim of depreciation at 50% of the prescribed rate of depreciation as the assets were put to use for a period of less than 180 days.

Though, some portions of the constructed building was let out by the appellant and was occupied by the appellant the lease rent did not commence in all cases due to occupancy level stipulation. Even the vacant portion of the constructed building was ready to use.

For the purpose of allowance of depreciation under Section 32 of the Act actual user of the property is not the precondition and depreciation can be allowed even for a passive user of the property if it is ready for use for the intended purpose the claim of depreciation of such assets, since has been made at the rates and on the prescribed manner, the claim of the appellant of depreciation of 50% of the building Phase-1 has been rightly allowed by the Ld. CIT(A) which is found to be just and proper, without any ambiguity so as to warrant interference. Hence, the order passed by the Ld. CIT(A) is hereby upheld. This ground of appeal preferred by the Revenue is found to be devoid of any merit and thus dismissed.

ITA Nos. 118 & 344/Ind/2017 & 203/Ind/2018 (A.Y. 2012-13 to 2013-14):-

36. The identical issues involved in the case have already been dealt with by us in ITA No. 117/Ind/2017 for A.Y. 2011-12 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, the appeals preferred by the Revenue are dismissed.

37. In the combined result, all the appeals filed by the Revenue are dismissed.

Order **pronounced on 21/11/2022** by placing the result on the Notice Board as per Rule 34(4) of the Income Tax (Appellate Tribunal) Rule, 1963.

Sd/-

(BHAGIRATH MAL BIYANI)
ACCOUNTANT MEMBER
Ahmedabad; Dated 21 /11/2022
TANMAY, Sr. PS

Sd/-

(MADHUMITA ROY)
JUDICIAL MEMBER

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

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

आदेशानुसार/ BY ORDER,

(Sr. PS)
ITAT, Indore

*ITA Nos.117,118&344/Ind/2017 & 203/Ind/2018
DCIT vs. M. P. Entertainment & Developers Pvt. Ltd.
Asst. Years–2011-12 to 2014-15*

- 33 -

1. Date of dictation 10.08.2022
2. Date on which the typed draft is placed before the Dictating Member 11.08.2022
3. Other Member.....
4. Date on which the approved draft comes to the Sr.P.S./P.S .08.2022
5. Date on which the fair order is placed before the Dictating Member for pronouncement .08.2022
6. Date on which the fair order comes back to the Sr.P.S./P.S .08.2022
7. Date on which the file goes to the Bench Clerk .08.2022
8. Date on which the file goes to the Head Clerk.....
9. The date on which the file goes to the Assistant Registrar for signature on the order.....
10. Date of Despatch of the Order.....