

**IN THE INCOME TAX APPELLATE TRIBUNAL
"E" BENCH, MUMBAI**

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 556/MUM/2023
(Assessment Year: 2012-13)**

Tulsidas V. Patel,

Kanchanjunga, 72, Peddar Road,

Mumbai - 400026

[PAN: AA ACT1639H]

.....

Appellant

**Deputy Commissioner of Income Tax,
5(3)(2), Mumbai,**

Vs

Aaykar Bhavan, M.K. Road,

Mumbai - 400020

.....

Respondent

Appearance

For the Appellant/Assessee

: Shri Prakash K. Jotwani

For the Respondent/Department

: Ms. Richa Gulati

Date

: 16.05.2023

Conclusion of hearing

: 11.08.2023

Pronouncement of order

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 30/11/2016, passed by the Ld. Commissioner of Income Tax (Appeals)-21, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2012-13, whereby the Ld. CIT(A) had dismissed the appeal of the Appellant against the Assessment Order, dated 23/03/2015, passed under Section 143(3)(ii) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
2. The Appellant has raised following grounds of appeal:
 - "1. *Ground No. 1 : Denial of the claim of Appellant to compute income under the head "Profits & Gains of Business or*

Profession":

The learned Commissioner of Income Tax (Appeals)-10, Mumbai [hereafter referred as the 'CIT(A)'] erred in upholding the action of the Deputy Commissioner of Income Tax, Circle 5(3)(2), Mumbai [hereafter referred as the 'A.O] computing income from licensing of residential flats of the appellant, held as stock-in-trade, under the head "Income from House Property" instead of computing the said income under the head "Profits & Gains of Business or Profession".

2. *Ground No. 2: Compute loss under the head "Profits & Gains of Business or Profession" and allow set off against income under the head "Income from House Property":*

Without prejudice to Ground No. 1 above and in the alternative, if it is held that the income from licensing is to be taxed under the head "Income from House Property", the learned A.O. be directed to compute the loss arising from incidental business activities of the assessee and allow the same to be set off against income under the head 'Income from House Property'.

3. *Ground No. 3: Recalculation of Interest w/s 234B:*

Without prejudice, the learned A.O. be directed to re-compute the interest chargeable u/s 234B of the Act consequent to revision in the taxable income.

4. *The above grounds are independent and without prejudice to each other.*
5. *The Appellant craves leave to add, amend or alter the grounds of appeal either before or at the time of hearing of the appeal."*

3. In order to adjudicate the grounds raised in the present appeal it would be pertinent to appreciate the following facts of the case as emerging on perusal of the material on record and from the submissions made by both the sides during the course of hearing.

3.1. The Appellant was incorporated as a private limited company in 1962. On account of dispute between shareholders, the management and

affairs of the Appellant-Company were taken over by the court receiver/administrator appointed by the Hon'ble Bombay High Court vide, order dated 17/04/2009, passed in Suit No. 2435 of 2005 titled Indu Permanand Patel Vs. Sudha Chowgule & Ors., the relevant extract of which reads as under:

"Pursuant to the judgment and order dated 6th March 2009 passed by the Hon'ble Supreme Court of India in Special Leave Petition Nos.17162 of 2006 and 17396 of 2006, the following further orders and directions are passed:

(1) By an order dated 6th April 2009, Mr. J. Solomon, a practicing Solicitor of this Court has been appointed Administrator/Receiver of the assets of the defendant no.4 Company viz Tulsidas V. Patel Pvt. Ltd. ("the Company") in place of the Court Receiver, High Court, Bombay, appointed by order dated 7th September 2006. The formal possession of the assets, presently with the Court Receiver, High Court, Bombay, and mentioned/included in the inventory dated 20th April 2007 prepared by M/s.N.B. Shah & Associates, Chartered Accountants appointed by the Court Receiver dated 20th April 2007 shall continue to be in possession of the Administrator/Receiver. The Administrator/Receiver shall also take formal possession of any other assets of the Company

(2) The Administrator/Receiver shall be empowered to issue cheques, pass receipts, receive monies, give discharge, oversee litigations, appoint/retain advocates, institute suits, legal proceedings, prosecute parties, defend proceedings, sign vakalatnama(s), authorizations, affidavits, written statements, etc. and protect the properties, evict illegal occupants, make composition and do everything which is required to be done in administering and managing the assets.

(3) For the aforesaid purpose, the Administrator/Receiver shall operate, direct deposit of all monies received/receivable by the Company including monies received from its assets and disburse there from or salaries, outgoings including property taxes, maintenance, security and other payments and liabilities as he may deem fit into/from bank account no.30047 with Union Bank of India, Peddar Road Branch of the Company. The Administrator/Receiver may himself operate the aforesaid bank account.

(4) The Administrator shall, at the cost of the Company, have power and authority to enter into leave and license or other arrangements in

regard to the Company's flats (without transferring or creating third party interest therein) on such terms, conditions and agreements as he may determine including dealing with licensee, arrangements with parties presently using the said flats. However, the licence fee fixed by the Administrator/Receiver will be approved by Mr.Elavia, Partner of Kalyaniwala & Mistry, Chartered Accountants.

5.-10. xx xx

11.All the properties and assets of the Company will continue to remain in the name of the Company and all agreements concerning them will continue to be entered into only in the name of the Company.

12.-14. xx xx "

- 3.2. Thus, in terms of the above order, dated 17/04/2009, passed by the Hon'ble Bombay High Court the business operations of the Appellant were curtailed and the Administrator was given power/authority to act within the bounds of the directions issued by the Hon'ble Bombay High Court. The administrator was permitted to enter into leave and license or similar arrangement in the name of the Company.
- 3.3. During the previous year relevant to the Assessment Year 2012-13, the control and management of affairs of the Appellant-Company continued to be with the receiver/administrator appointed by the Hon'ble Bombay High Court who also filed the return of income for the Assessment Year 2012-13 on 14/12/2013, in his capacity as administrator/receiver, declaring total income of INR 2,09,82,760/-. The Appellant only earned income by way of Leave & License Fee which was offered to tax as business income.
- 3.4. During the course of assessment proceedings, the Assessing Officer noted that the Appellant is the owner of the flats in building 'K' at Peddar Road, Mumbai. The Appellant received Leave & License Fee of INR 3,95,02,950/- from various persons who were occupying the flats on leave & license basis. The Appellant also provided lift

services, electricity, cleaning and maintenance services on composite basis to the occupants. The Appellant offered the aforesaid Leave & License Fee as business profits taxable under the head 'Profits & Gains of Business' after claiming deduction for business expenses and setting off the losses arising from incidental business activities. The Assessing Officer was of the view that Lease & License Fee was liable to tax under the head 'Income from House Property' and therefore, show cause notice was issued to the Appellant asking the Appellant to explain why Leave & License Fee should not be assessed under the head 'Income from House Property'. In response, the Appellant filed reply letter, dated 12/03/2015, in support of the claim that Leave & License Fee was assessable as business income. However, the Assessing Officer was not convinced and following the judgment of the Hon'ble Bombay High Court in the case of Mangla Homes Pvt. Ltd. Vs. ITO: (2010) 321 ITR 281 (Bom.) and placing reliance on the judgment of the Hon'ble Supreme Court in the case of East India Housing & Land Development Trust Ltd. Vs. Commissioner of Income Tax: (1961) 42 ITR 49 (SC), the Assessing Officer concluded that Leave & License Fee received by the Appellant from the occupants was assessable under the head 'Income from House Property'. The Assessing Officer further concluded that since the Appellant had not carried out any business activities during the relevant previous year, the loss under the head 'Profits & Gains of Business' arising on exclusion of Leave & License Fee as aforesaid, could not be allowed to be set off against income from House Property. After allowing reducing the annual Leave & License Fee receipts by the amount of municipal taxes paid and after allowing deduction at the rate of 30% under Section 24(a) of the Act, the Assessing Officer computed income taxable under the head 'Income from House Property' at INR 2,61,29,264/- vide order, dated

23/03/2015, passed under Section 143(3) of the Act.

- 3.5. Being aggrieved, the Appellant preferred appeal before CIT(A) against the Assessment Order. The CIT(A) agreed that the Assessing Officer and dismissed the appeal vide, order dated 30/11/2016.
- 3.6. Being aggrieved by the order passed by the CIT(A), the Appellant has preferred the present appeal on the grounds reproduced in paragraph 2 above which are taken up hereinafter in seriatim.

Ground No.1

4. By way of Ground No. 1 the issue that has been raised for consideration is whether the Leave & License Fee is assessable under the head 'Profits & Gains of Business and Profession' or under the head 'Income from House Property'.
5. We have heard the rival contention and perused the material on record. During the course of hearing, both the sides had relied upon judicial precedents which are discussed hereinafter to the extent, the same are relevant to the facts of the present case.
6. We note that the Hon'ble Supreme Court has dealt with this issue in the judgments cited before us by both the sides during the course of hearing. The Hon'ble Supreme Court has, while deciding each case on its own facts, taken into consideration various factors or parameters.
 - 6.1. In the case of **East India Housing and Land Development Trust Ltd. Vs. Commissioner of Income Tax: [1961] 42 ITR 49 (SC)** the contention of the assessee was that assessee-company was formed with the object of promoting and developing markets, and therefore, its income derived from the shops and stalls was liable to be taxed under Section 10 of the Income Tax Act, 1922 as 'profits or gains of

business' and not as 'Income from Property' under Section 9 of the Income Tax Act, 1922. The Hon'ble Supreme Court rejected the contention of the assessee in that case holding as under:

"The appellant contends that because it is a company formed with the object of promoting and developing markets, its income derived from the shops and stalls is liable to be taxed under section 10 of the Income-tax Act as "profits or gains of business" and that the income is not liable to be taxed as "income from property" under section 9 of the Act. The appellant is undoubtedly, under the provisions of the Calcutta Municipal Act, 1951, required to obtain a licence from the Corporation of Calcutta and to maintain sanitary and other services in conformity with the provisions of that Act and for that purpose has to maintain a staff and to incur expenditure. But, on that account, the income derived from letting out property belonging to the appellant does not become "profits or gains" from business within the meaning of sections 6 and 10 of the Income-tax Act. By section 6 of the Income-tax Act the following six different heads of income are made chargeable: (1) salaries, (2) interest on securities, (3) income from property, (4) profits and gains of business, profession or vocation, (5) income from other sources and (6) capital gains. This classification under distinct heads of income, profits and gains is made having regard to the sources from which income is derived. Income-tax is undoubtedly levied on the total taxable income of the taxpayer and the tax levied is a single tax on the aggregate taxable receipts from all the sources; it is not a collection of taxes separately levied on distinct heads of income. But the distinct heads specified in section 6 indicating the sources are mutually exclusive and income derived from different sources falling under specific heads has to be computed for the purpose of taxation in the manner provided by the appropriate section. If the income from a source falls within a specific head set out in section 6, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head.

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The income received by the appellant from shops is indisputably income from property; so is the income from stalls from occupants. The character of the income is not altered merely because some stalls remain occupied by the same occupants and the remaining stalls are occupied by a shifting class of occupants. The primary source of income from the stalls is occupation of the stalls, and it is a matter of little moment that the occupation which is the source of the income is temporary. The income-tax authorities were, in our judgment, right in holding that the income received by the appellant was assessable under section 9 of the Income-tax Act." (Emphasis Supplied)

6.2. In the case of **Sultan Brothers Private Ltd. Vs. Commissioner of Income-tax: [1964] 51 ITR 353 (SC)** the assessee, a private limited company, owned building constructed fitted up with furniture & fixtures which was given on lease for running a hotel and for certain other ancillary purposes. The assessee contended that the entire income should be assessed under Section 10 of the Income Tax Act 1922 as the income of a business. However, the Hon'ble Supreme Court held that rental income was to be assessed as Income from Property as the assessee was not carrying out the business of letting. The relevant observations of the Hon'ble Supreme Court read as under:

"The first contention of the appellant, as already seen, is that the assessment should be made under section 10 as of income from a business. The reason for this preference is that under that section it would be entitled to much larger allowances as deductions in the computation of the income than it would be under either section 9 or section 12. The appellant put the matter in this way. Letting out of a commercial asset is a business and what it did was to let out a commercial asset, namely, a fully equipped hotel building. It also said that the lessor's covenants in the lease showed that in making the lease, the appellant was carrying on a business and not letting out property. This is somewhat different from the way in which it was put before the Tribunal. The argument advanced before the Tribunal was not advanced in this court and need not, therefore, be considered. It is indeed not very clear.

A very large number of cases was referred to in support of this contention but it does not seem to us that much assistance can be derived from them. Whether a particular letting is business has to be decided in the circumstances of each case. We do not think that the cases cited lay down a test for deciding when a letting amounts to a business. 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.

The object of the appellant company no doubt was to acquire land and buildings and to turn the same into account by construction and reconstruction, decoration, furnishing and maintenance of them and by leasing and selling the same. The activity contemplated in the aforesaid object of the company, assuming it to be a business activity, would not by itself turn the lease in the present case into a business deal. That would follow from the decision of this court in East Indian Housing and Land Development Trust Ltd. v. Commissioner of Income-tax [1961] 42 ITR 49 (SC), where it was observed that "the income derived by the company from shops and stalls is income received from property and falls under the specific head described in section 9. The character of that income is not altered because it is received by a company formed with the object of developing and setting up markets." (Emphasis Supplied)

- 6.3. In the case of **Karanpura Development Co. Ltd. Vs. Commissioner of Income Tax: [1962] 44 ITR 362 (SC)** the issue before the Hon'ble Supreme Court was whether on the facts and in the circumstances of the case, the sums received as salami by the assessee for granting sub-leases were trading receipts in its hands. The contention of the assessee was that the assessee-company was holding its capital asset, namely, the mining leases, through its sub-lessees, and that its activities were the management of the leasehold right, selection of sub-lessees, collection of rents or royalties which did not amount to the carrying on of a business. Whereas, the contention of the Revenue was that in acquiring the leases and in granting the sub-leases, the assessee-company was carrying on a business within its memorandum of association and the increased salami received from the sub-lessees represented profits of that business liable to be included in the assessable income for income tax purposes and in the profits, for purposes of the business profits tax. Deciding the issue in favour of the Revenue the Hon'ble Supreme Court concluded that the receipts were taxable as business income holding as under:

"Ownership of property and leasing it out may be done as a part of business, or it may be done as land owner. Whether it is the one or the other must necessarily depend upon the object with which the act is done. It is not that no company can own property and enjoy it as property, whether by itself or by giving the use of it to another on rent. Where this happens, the appropriate head to apply is "income from property" (section 9), even though the company may be doing extensive business otherwise. But a company formed with the specific object of acquiring properties not with the view to leasing them as property but to selling them or turning them to account even by way of leasing them out as an integral part of its business, cannot be said to treat them as landowner but as trader. The cases which have been cited in this case both for and against the assessee company must be applied with this distinction properly borne in mind. In deciding whether a company dealt with its properties as owner, one must see not to the form which it gave to the transaction but to the substance of the matter. The Californian Copper Syndicate case (supra) illustrates vividly dealings with mineral rights and concessions by a company as part of the objects of its business, or, in other words, in the holding of the business. The Calcutta cases and the case of Fry v. Salisbury House Estates Ltd. [1930] AC 432; 15 Tax Cas. 266 (HL) illustrate the contrary proposition. There, the property, though dealt with by a company intending to do business, was dealt with as landowner. The intention in those cases was not to derive profit by business done with those properties but to derive income by renting them out. Where a company acquires properties which it sells or leases out with a view to acquiring other properties to be dealt with in the same manner, the company is not treating them as properties to be enjoyed in the shape of rents which they yield but as a kind of circulating capital leading to profits of business, which profits may be either enjoyed or put back into the business to acquire more properties for further profitable exploitation.

We shall now turn to the present case, because it remains to consider what the assessee company was doing with the head leases. The relevant clauses of the memorandum of association of the assessee company have already been quoted. They show the various objects for which the assessee company was incorporated. Though power was taken under clauses (2), (3), (6) and (34) to do business of coal-raising, etc., the assessee company did not do the sort of business authorised there. It restricted its business to clauses (1) and (52). Under clause (1), power was taken to purchase and acquire underground coal mining and relative rights. Under clause (52), power was taken to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the company. Business was done extensively within these two clauses. Annexure "F" shows the areas which were sub-leased. A glance at the chart shows the large number of sub-leases and the different companies to which the sub-leases were granted. The sub-leases were granted, because the assessee

company wanted, as a matter of business, to turn its rights to account. The assessee company opened out, and developed the areas, and then granted these sub-leases with an eye to profit. It is clear from these operations that the assessee company having secured a large tract of coal-bearing land parcelled and developed it into a kind of stock-in-trade to be profitably dealt with. The assessee company extended its business along these lines acquiring fresh fields. In the circumstances, the nature of the business was trading within the objects of the company and not enjoyment of property as landowner. There was also no sale of its fixed capital at a profit. In our opinion, the High Court rightly answered the question against the assessee company.

- 6.4. All the above three judgments were taken into consideration by the Hon'ble Supreme Court in a subsequent judgment in the case of **Chennai Properties & Investment Limited Vs. CIT, Central – III, Tamil Nadu: [2015] 373 ITR 673 (SC)**. In that case the main objective of the assessee-company, as stated in the memorandum of association, was to acquire the properties and to let out those properties. The rental income received from the aforesaid properties was shown as income from business in the return filed by the assessee-company. The assessing officer, however, refused to tax the same as business income. The Hon'ble Supreme Court accepted the contention of the Assessee and held as under:

"6. It transpires that the return of a total income of Rs.244030 was filed for the assessment year in question that is assessment year 1983-1984 and the entire income was through letting out of the aforesaid two properties namely, "Chennai House" and "Firhavin Estate". Thus, there is no other income of the assessee except the income from letting out of these two properties. We have to decide the issue keeping in mind the aforesaid aspects.

7. With this background, we first refer to the judgment of this Court in *East India Housing & Land Development Trust Ltd.'s case (supra)* which has been relied upon by the High Court. That was a case where the company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Thus, the main objective of the company was to develop the landed properties into markets. It so happened that some shops and stalls, which were developed by it, had been rented out and income was derived from the renting of the said shops and stalls. In those facts,

the question arose for consideration was whether the rental income that is received was to be treated as income from the house property or the income from the business. This court while holding that the income shall be treated as income from the house property, rested its decision in the context of the main objective of the company and took note of the fact that letting out of the property was not the object of the company at all. The court was therefore, of the opinion that the character of that income which was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties.

8. Before we refer to the Constitution Bench judgment in the case of Sultan Brothers (P.) Ltd. (supra), we would be well advised to discuss the law laid down authoritatively and succinctly by this Court in 'Karanpura Development Co. Ltd. v. CIT [1962] 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 leases over large areas, developing them as coal fields and then sub-letting them to collieries and other companies. Thus, in the said case, the leasing out of the coal fields to the 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 categorised / 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 Counsel, 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."

9. 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 (supra)* squarely applies to the facts of the present case.

10. No doubt in *Sultan Brothers (P.) Ltd.'s case (supra)*, 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 a 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."

11. 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."

7. On perusal of the above judgments, we find that the relevant aspects requiring consideration while arriving at a conclusion that a particular receipt is assessable under the head 'Income from House Property' or under the head 'Profit & Gains of Business and Profession' are as under:

- (a) The source of receipt - Is it the house property or the business carried on by the assessee
 - (b) Whether letting amounts to doing business or exploitation of property as an owner - This is to be examined from the perspective of a businessman keeping in view the facts and circumstances of each case.
 - (c) Intention of the assessee - while the objects stated in the memorandum of association of company are indicative of the intention, the activity contemplated therein would not, by itself, turn a lease transaction into a business deal. The deciding factor would be the actual nature of the activity of the assessee and the nature of operations, and not be the ownership of the property.
8. In our view the above aspects are interconnected as the answer to the query as to what is the source of receipt would require determination of the issue whether the letting amounts to carrying business, which would in-turn would require examination of the intention of the assessee as gathered from the actual nature of activity and operations of the assessee, with the objects stated in the memorandum of association of a company and factum of ownership of the property being the relevant factors but not the sole determining criterion.
9. Coming to the facts of the present case, we find that the Appellant-company has, inter alia, the following objects:

"(1) To acquire by purchase, lease, exchange, hire or otherwise any lands, tenements and premises of any tenure, or interest in the same, whether subject or not to any charge or incumbrances and to hold or to sell, let alienate, mortgage, charge or otherwise deal with all or any such lands, tenements or premises

(2) To construct, erect and maintain either by the company or other parties, sewers, roads, streets, brick-kilns and works,

buildings, house, flats, show-rooms and shops and all other works, erections and things of any description whatsoever either upon the lands acquired by the company or upon other lands and generally to alter and to improve the lands and other property of the company

(3) To let on lease any such premises or parts thereof and to provide such facilities for the accupiers whether members or tenants thereof as are commonly provided in residential flats, business offices or hotels.

(4) To grant easements, profits, a prendre or other rights in over or under the said lands and to acquire such rights in over or under any adjoining lands.

(5)"

10. Pursuant to the above objects the assessee-company constructed the building 'K' at Peddar Road, Mumbai 400026. The assessee-company treated the flats in the said building as its 'stock-in-trade' and did not claim any depreciation. However, the business of the Appellant was curtailed on account of appointment of the receiver/administrator. While as per the objects clause the Appellant was permitted to construct flats for sale or for giving on lease along with related services, the only income earned by the Appellant during the relevant previous year was by way of Leave & License Fee. During the assessment proceedings, it was claimed on behalf of the Appellant that the Appellant had provided maintenance service, electricity etc. on composite basis. All the aforesaid facts when examined from the perspective of a businessman, leads us to a conclusion that while the Appellant was owner of the flats, the intention of the Appellant was to undertake business of leasing by providing maintenance services, lift, electricity etc on composite basis. We note that in the case of East India Housing and Land Development Trust Ltd. (supra) the object of the assessee did not include lease/letting and the assessee was under statutory obligation to

provide the maintenance, and sanitary services/amenities as per the provisions of Calcutta Municipal Act, 1951. Whereas, in the present case the Appellant was not under statutory obligation to do so. Though the flats were shown as stock-in-trade the same were no longer tradable on account of the order, dated 17/04/2009, passed by the Hon'ble Bombay High Court. The flats were in the nature of commercial assets exploited by the Appellant to make profits. Thus, in our view, the source of the receipt was the business activity carried out by the assessee through the administrator as per the directions issued by the Hon'ble Bombay High Court vide order dated 17/04/2009.

11. We note that the Assessing Officer had placed reliance on the judgment of the Hon'ble Bombay High Court in the case of Mangla Homes Private Limited Vs. ITO: [2010] 325 ITR 281 (Bombay). However, in our view, the facts in that case were different to the extent that the renting/leasing was part of ancillary objects of the assessee-company whereas the main objects included purchase and sale of flats. Further, in that case the assessee was free to and did undertake the business of purchase and sale of flats during the relevant previous year. However, on account of recessionary market conditions the assessee chose to rent some of the flats for temporary period for earning rental income. Whereas in the present case renting/leasing was part of the main objects and income way of Leave & License Fee was the only source of income earned during the relevant previous year as the Appellant was not permitted to create third party interest in the flats. Also in the present case, the appellant provided services of electricity, lift, cleaning and maintenance on a composite basis, whereas in the case of Mangla Homes Private Limited (supra), the assessee did not provide any services and gave flats on leave and license to earn rental income.

12. In our view, the facts of the present case are closer to the judgment of the Hon'ble Supreme Court in the case of Karanpura Development Co. Ltd. (supra). Therefore, we hold that the Leave & License Fee received by the Appellant was assessable under the head "Profits & Gains of Business".
13. In view of the above, the Assessing Officer is directed to re-compute the income of the Appellant by treating the Leave & License Fee as income assessable under the head 'Profit & Gains of Business'. Ground No. 1 raised by the Appellant is allowed. Ground No. 2 raised by the Appellant, on without prejudice basis, is dismissed as being infructuous in view of the fact that Ground No. 1 raised by the Appellant has been allowed. Ground No. 3 pertaining to levy/computation of interest under Section 234B of the Act is disposed off as being consequential in nature, whereas Ground No. 4 and 5 are disposed off as being general grounds not requiring adjudication.
14. In result, the present appeal preferred by the Assessee is allowed.

Order pronounced on 11.08.2023.

Sd/-
(Prashant Maharishi)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 11.08.2023
Alindra, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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