आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.998/Mum/2016
(**निर्धारण वर्ष /** Assessment Year : 2012-13)

M/s. Sane & Doshi Enterprises, 12, Ali Chambers, Tamarind Lane, Fort, Mumbai-400023	**बनाम**/ v.	Jt. CIT 17(3) 1st floor, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai-400020
स्थायी लेखा सं./ PAN : AAAFS6687D		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri. S.C. Tiwari
Revenue by :	Shri V. Justin, DR

सुनवाई की तारीख **/Date of Hearing : 12.07.2018**
घोषणा की तारीख /**Date of Pronouncement : 08.08.2018**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 998/Mum/2016, is directed against appellate order dated 22.01.2016 passed by learned Commissioner of Income Tax (Appeals)-28, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2012-13, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 16.02.2015 passed by learned Assessing Officer (hereinafter called

"the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2012-13.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

> "*1. On the fads and circumstances of the case, the Learned CIT(A) erred in treating the profit arising from sale of commercial premises as Business Income instead of and in place of Long Term Capital Gain on the ground that the appellant has sold "Stock in Trade" without appreciating the fact that the appellant had held the said premises as "Investment" w.e.f. 1st April, 2005 and not as Stock in Trade and accordingly profit arising from sale thereof is Capital Gains and not Business Income.*
>
> *2. The appellant therefore prays that the profits arising from sale of commercial premises be treated as Long Term Capital Gain and the capital gain be computed in accordance with the provisions of section 48(i) and 48(ii) of the Income Tax Act, 1961.*
>
> *3. Each of the above grounds of appeal are independent and without prejudice to one another.*
>
> *4. The appellant craves leave to add, alter, amend, modify, delete and vary all or any grounds of appeal as and when provided."*

3. The brief facts of the case as were observed by the AO is that the assessee is engaged in the business of builders and developers. The assessee during the year under consideration has shown long term capital gains on the sale of commercial premises as under:-

> *" LTCG on sale of Premises no. 501 & 502, fifth floor, Mayfair Towers II lying and situated at Wakadewadi, Shivaji Nagar, Pune 411005."*

The assessee claimed cost inflation indexation to arrive at indexed cost of acquisition while computing long term capital gains. The said indexation was taken from the financial year 2005-06 which was the year in which the assessee had converted its 'Stock-in-trade' to

'Investments' . The AO wanted to assessee the said income as business income under the head 'Profits and Gain from business or Profession' . The AO asked assessee to explain why the said income be not assessed as business income. . The assessee submitted that it had completed the construction of Commercial Complex Mayfair Tower-II in AY 2002-03. These flats were built for the purposes of sale and unsold inventories of flats were shown as 'stock-in-trade'. But with effect from 01.04.2005 , the unsold flats in Mayfair Tower-II were shown as 'investments' and hence it was claimed that gains from sale of these commercial flats be treated as long term capital gains as these flats were treated and shown as 'investments' in the books of accounts . It is pertinent to mention here that these flats were let-out from time to time and rental income from letting out were earned by the assessee. The said rental income was offered for taxation as income from house property and interest expenses which were incurred towards the construction of said flats were claimed as deduction u/s. 24(b) of the 1961 Act. The Revenue wanted to assess the said rental income on commercial flats as business income and that is how matter travelled to Hon'ble Bombay High Court wherein vide judgement dated 09.04.2015 in CIT v. M/s. Sane & Doshi Enterprises in ITA no. 375 of 2015 & Ors. for AY 2000-01 to 2008-09 , the rental income from letting out was held in the case of the assessee to be income chargeable to tax under the head 'Income from house property' and deduction u/s. 24(b) of the 1961 Act towards interest expenses on construction was allowed by Hon'ble Bombay High Court . So far so good. The assessee is claiming that since the assessee has treated unsold inventory of flats in Mayfair Tower-II which was completed as a builder and developer by the assessee in AY 2002-03 should be treated as 'investment' as the assessee has converted the said inventory of unsold stock of flats as 'investments' in its books of accounts w.e.f. 01.04.2005. The AO did not agree with this contention of the assessee and brought to tax gains arising from the sale of said commercial flats in Mayfair Tower-II as business

income , vide assessment order dated 16.02.2015 passed by the AO u/s. 143(3) of the 1961 Act. The matter reached Ld. CIT(A) as the assessee filed first appeal being aggrieved by the aforesaid assessment order passed by the AO. The Ld. CIT(A) vide its appellate orders dated 22.01.2016 followed order of the tribunal in assessee's own case for AY 2009-10 and dismissed the appeal of the assessee by holding as under:-

> *" 5.2 Grounds 4 & 5 : These are against the action of the AO in treating the profit prising from sale of commercial premises in May Fair II as business income instead of and in place of long term capital gain offered by the appellant. I have carefully considered the matter and perused the order of the Hon'ble ITAT in the appellant's own case for A.Y. 2009-10. The ITAT has held as under:*
>
> *"We have considered the rival submissions. The Id.AR of the assessee has again reiterated its subm ssions that the property in question was converted from stock in trade to investment in the year 2005. However, we find that mere changing the head in the balance sheet is not sufficient to hold that the intention of the assessee to hold the property was as investment. From the record, we observe that since the assessee could not sell its property at appropriate time and therefore had exploited it for rental purposes. However, to get the benefit of indexation, the assessee made the accounting entry treating the same as investment, whereas, the real business intention and treatment of the property remained the same i.e. to sell it for the purpose of business of the assessee. The AO has discussed in detail, the nature, character and business of the assessee the clauses of the partnership deed as well as the terms and conditions of the agreement entered into by the assessee while selling the property in question as promoter of the property.*
>
> *The order of the AO as well as of the Ld. CIT(A) is well reasoned and we do not find any infirmity in the same. In our view, the lower authorities have rightly treated the income from sale of the premises in question as sale of the stock in trade and as such the income from the same has rightly been taxed under the head "Business Income". We therefore do not find any merit in the appeal of the assessee and the same is accordingly dismissed."*
>
> *I find that the facts are identical for this year also. In view of the above and respectfully following the decision of the Hon'ble ITAT in the appellant's own case for A.Y. 2009-10,I uphold the action of the AO in treating the profit arising from sale of commercial*

premises in May Fair II as business income. Grounds 4 & 5 are dismissed.

Thus, the learned CIT(A) dismissed the appeal of the assessee vide its appellate orders dated 22.01.2016 by holding that sale of flats in commercial premises in Mayfair Tower-II is to be assessed as business income by following the aforesaid order of the tribunal dated 28.10.2014 in ITA no. 6138/Mum/2012 and 5513/Mum/2015 for AY 2009-10 in the assessee's own case.

4. Aggrieved by the decision of ld. CIT(A) vide appellate orders dated 22.01.2016 , the assessee has come in an appeal before the tribunal. The Ld. Counsel for the assessee has strenuously and vehemently argued before the tribunal that the income from the sale of the commercial flats in Mayfair Tower-II be treated as long term capital gains because the assessee has shown and manifested its intention of treating the same as 'investments' by making appropriate entries in the books of accounts w.e.f. 01-04-2005 which is sufficient to treat the same as 'investments' as intention of the assessee is manifested by its action of treating and converting the 'stock-in-trade' as 'investments' wef 01-04-2005 and hence the income arising from sale of said commercial flats in Mayfair Tower-II be treated as long term capital gains. It was submitted that the construction of said commercial complex Mayfair Tower-II was completed in AY 2002-03. The construction of the said tower was undertaken for sale purposes as builder and developer. It was submitted that unsold flats were let out . It was submitted that the property being commercial flats was rented out for a long period of time which was in the form of unsold inventory of the flats. It was submitted that the revenue has wrongly brought to tax the said gains from sale of flats as business income while the same should be brought to tax as long term capital gains. The assessee has also reflected the unsold inventory of flats in its books of accounts as investments w.e.f. 01.04.2005 which had been ignored by the authorities below. It is also been submitted that the

income of letting out of this property has already held by the Hon'ble Bombay High Court as income from house property . It was pleaded that consequently income from sale of these commercial flats should be brought to tax as long term capital gains. Our attention was drawn to the decision of Hon'ble Bombay High Court in the case of CIT v. Sane & Doshi Enterprises (supra) from AY 2000-01 to 2008-09 reported in (2015) 377 ITR 165(Bom.), the said judgment dated 09-04-2015 of Hon'ble Bombay High Court is reproduced here under:-

> *" 20. We have, with the assistance of the learned counsel appearing on both sides, perused the Memo of Appeals and which are stated to be raising the above questions. They are common to all and, therefore, the Revenue as also the assessee's counsel pointed out that we need not separately refer to each and every Memo of Appeal and its annexures. Thus, we are not required to refer to all the Memos of Appeal and the individual facts therein or the view taken by the authorities under the I.T. Act simply because the points or questions raised are common to all of them. We have noted not only the rival stands as emerging from the oral arguments, but from the written submissions only because Mr. Chhotaray submits that the enormity of the Revenue and the impact of the view taken by the Tribunal on other matters requires us to give an in depth consideration. If this order has become rather bulky, then the reasons for the same are obvious.*
>
> *21. The Tribunal had before it, the appeal of the Revenue and which according to the Revenue challenges the order of the Commissioner and the Income Tax (Appeals) on various grounds. The three grounds which have been projected and emphasised pertain to treatment of total income as income from house property and allowing deduction under section 24 ignoring the fact that the income was received from the business asset (unsold flats) shown as closing stock. The other was the direction of the Commissioner to the Assessing Officer to allow the claim of expenses of Rs.45 lakhs on account of provision for incomplete work. The Tribunal noted the rival contentions. It found that there is no dispute that the assessee was engaged in construction business and has constructed a commercial property known as May Fair Tower. The unsold portion of the property was let out and assessee earned rental income therefrom. The Tribunal found that if rental income earned by the assessee could be treated as business income as claimed by the Revenue, or income from house property, is an issue which has been repeatedly raised and considered. An identical issue, according to the Tribunal, was raised before the Hon'ble Supreme Court in the case of East India*

Housing and Land Development Trust Ltd. vs. Commissioner of Income Tax (1961) 42 ITR 49. The Hon'ble Supreme Court held in that case that the assessee company was incorporated with the object of also developing landed properties. The construction of shops and stalls on purchased lands was made and these were let out to different tenants. The question arose as to whether rental income received by the assessee is an income from house property or a business income. The Hon'ble Supreme Court, according to the Tribunal, concluded that income received from tenants or shops and stalls by the assessee company is liable to be taxed as property income and not as a business income. In relation to that, the Hon'ble Supreme Court further held that income from tenants of shops and stalls is income from house property and the distinct head specified in the erstwhile Income Tax Act of 1922 could be pressed into service. These are mutually exclusive claims of deduction. The character of rental income is not altered just because it was received by a company formed with the object of developing and setting up markets or because occupants are not permanent.

22. Then the Hon'ble Supreme Court decisions and rendered later than this judgment in East India (supra) have been referred by the Tribunal including some of the High Court judgments and the parameters laid down therein. The Tribunal found that the Commissioner examined this issue in detail. Para 2.23 of the Commissioner's orde with specific references to the legal provisions have been reproduced in the Tribunal's order. The Commissioner held that the assessee has constructed a building of which it is owner and received income from letting out some portion of this house property. It continued to receive the same even till the date of passing of the order by the Commissioner. The Commissioner referred to some of the decisions and held that the ental income has been shown as income from house property by the assessee-company. The matter was viewed differently by the Assessing Officer. However, the Tribunal decisions and the judgments of the Hon'ble Supreme Court and some of the High Courts and referred by the Commissioner dealt with identical claim. If the assessee company is engaged in the business of construction and real estate development and it earned income in the form of rent from the tenants / lessees to whom the property was let out, then, whether the property is held as stock-in trade or otherwise is not what is material. The real and main issue is whether this income is earned in the capacity as a trader or in the capacity of the owner of the premises. If the property belongs to the assessee and part of it which was unsold has been let out, then, the income generated therefrom has been treated as income from house property. The Commissioner's order, therefore, was confirmed by the Tribunal. The Tribunal held that since correct tests and parameters have been applied and the facts and

circumstances in the assessee's case are identical to some of the decisions rendered by the Hon'ble Supreme Court, then, there is no legal infirmity in the findings of the Commissioner.

23. If the Tribunal also had before it the Profit & Loss account and it referred to the treatment given by the assessee therein, then, we do not find how the Revenue can complain otherwise.

24. We have before us a copy of the judgment of the Hon'ble Supreme Court in the case of East India Housing (supra). There, the appellant company which was incorporated with the object of buying and developing landed properties and promoting and developing markets, purchased 10 bighas of land in the town of Calcutta and set up a market therein. The question was whether the income realised from the tenants of the shops and stalls was liable to be taxed as business income under section 10 of the Income Tax Act, 1922, or as income from property under section 9. After the rival contentions were noted, this is what the Hon'ble Supreme Court has held :

> *" 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 tax d 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 l cence from the Corporation of Calcutta and to maintain sanitary and other services in conformity with the provis ons 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 section 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 : (I) 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 fat that it may indirectly be covered by another head will not make the income taxable under the latter head.

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. In United Commercial Bank Ltd. v. Commissioner of Income-tax, this court explained after an exhaustive review of the authorities that under the scheme of the Income-tax Act, 1922, the heads of income, profits and gains enumerated in the different clauses of section 6 are mutually exclusive, specific head covering items of income arising from a particular source.

In Fry v. Salisbury House Estates Co. Ltd. a company formed to acquire, manage and deal with a block of buildings, having let out the rooms as unfurnished offices to tenants, was held chargeable to tax under Schedule A to the Income Tax Act, 1918, and not Schedule D. The company provided a staff to operate the lifts and to act as porters and watch and protect the building; and also provided certain services such as heating and cleaning to the tenants at an additional charge. The taxing authorities sought o charge the income from letting out of the rooms as receipts of trade chargeable under Schedule D, but that claim was negatived by the House of Lords holding that the rents were profits arising from the ownership of land assessable under Schedule A and that the same could not be included in the assessment under Schedule D as trade receipts.

In Commercial Properties Ltd. v. Commissioner of Income-tax, income derived from rents by a company whose sole object was to acquire lands, build houses and let them to tenants and whose sole business was management and collection of rents from the said properties, was held assessable under section 9 and not under section 10 of the Income-tax Act. It was observed in that case that, merely because the owner of the property was a company incorporated with the object of owning property, the incidence of income derived from the property owned could not be regarded as altered; the income came more directly and specifically under the head "property" than income from business.

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 stall 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.
The appeal, therefore, fails and is dismissed with costs.

25. We do not find that the emphasis by Mr. Chhotaray and on certain aspects which allegedly missed and escaped the attention of the Tribunal would enable us to take any different view. Even if what has been emphasised by Mr. Chhotaray is taken into account, what the underlying test and as evolved throughout is whether the income has been derived from property. The treatment given in the books of account as stock-in-trade would not, therefore, alter the character or the nature of the income as held by the Hon'ble Supreme Court. If there is a test and which is in the field and emerging from repeated judgments rendered either by the Hon'ble Supreme Court or by other High Courts, then, even if Mr. Chhotaray's additional questions are taken into account, a different conclusion cannot be reached. Mr. Chhotaray was at pains o rely on certain judgments and wherein, according to him, the treatment given to the income would be decisive.

26. Let us now refer to some of the judgments. The main emphasis of Mr. Chhotaray was on the judgment of the Hon'ble Supreme Court in the case of Universal Plast Ltd. vs. Commissioner of Income-tax (1999) 237 ITR 454. There, the facts emerging from the judgment itself denote that the assessee set up a factory styled as "UPL Factory" for carrying on the business of manufacturing PVC sheets and allied products. The assessee suffered losses for two years. It then entered into an agreement styled as "leave and licence" agreement with M/s. Leatherite Industries Limited for a period of seven years commencing on 30th March, 1977. This was an agreement containing a renewal clause and further stipulations. They would denote that the licencee was to pay licence fee in the sum determined and twenty-five per cent of the net profit of the factory in question with effect from 1st April, 1977. For the first three months which fell in the accounting year relevant to the assessment year 1977-78, the assessee received only licence fee of Rs.6,00,000/- as no profit was earned by the licencee during this period. That amount was

shown by the assessee as part of the business income. The Income-tax Officer did not accept that it was business income and assessed the same as income from other sources. The Commissioner of Income-tax (Appeals), however, accepted the plea of the assessee that it was its business income and allowed the appeal on 27th April, 1985. The Revenue unsuccessfully appealed against the order of the appellate authority before the Income Tax Appellate Tribunal. However, the Tribunal drew up a statement of case and referred the questions of law which have been reproduced in the Supreme Court judgment. These two questions of law are whether the Tribunal was correct in holding that the income received by the assessee by leasing out the factory was business income. Similarly, in the Andhra Pradesh case, whether leasing out of godowns and the letting of the factory with machinery constituted business income of the assessee or not. It is in relation to these questions that the rival contentions have been noted and thereafter the judgments of the Supreme Court in the field. It is thereafter that the propositions have been summarised and which read as under :

> *"(1) no precise test can be laid down to ascertain whether income (referred to by whatever nomenclature, least,amount, rents, licence fee) received by an assessee from leasing or letting out of assets would fall under the head "Profits and gains of business or profession";*
>
> *(2) it is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and in the circumstances of each case, including true interpretation of the agreement under which the assets are let out.*
>
> *(3) where all the assets of the business are let out, the period for which the assets are let out is a relevant factor to find out whether the intention of the assessee is to go out of business or to come back and restart the same.*
>
> *(4) if only a few of the business assets are let out temporarily, while the assessee is carrying out his other business activities, then it is a case of exploiting the business assets otherwise than employing them for his own use for making profit for that business; but if the business never started or has started but ceased with no intention to be resumed, the assets also will cease to be business assets and the transaction will only be exploitation of property by an owner thereof, but not exploitation of business assets."*

27. We cannot ignore the fact that when the assessee was in business, set up factories and entire infrastructure for carrying

out certain manufacturing activities suffered losses and thereafter inducted a third party as licencees therein to continue the business. In that really it was found that the assessee generated the income as licence fees and a share in profits. Admittedly and undisputedly this was generated from the factory and from the godowns which have been given on leave and licence basis. It is in relation to that the Supreme Court held that it is important to lay down a precise test as to whether an income be given the nomenclature, lease amount, rents, licence fee received by an assessee from leasing or letting out of assets would fall under the head "Profits and gains of business or profession". Pertinently the Supreme Court held that it is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business, on the facts and in the circumstances of each case, including true interpretation of the agreement under which the assets are let out. Where all the assets of the business are let out, the period for which the assets are let out is a relevant factor to find out whether the intention of the assessee is to go out of business or to come back and restart the same.

28. We do not think that the reliance by Mr. Chhotaray on this decision is well placed. The tests which have been evolved by the Hon'ble Supreme Court and which are summarised and noted above themselves indicate that the matter has to be approached by referring and taking into account the facts and circumstances of each case. These are not general tests or rules which have been laid down. They have been evolved and that is how we do not think tha reliance by the Revenue on this decision would carry the matter any further. Equally, we do not think that any factual aspect and particularly on the conduct of the assessee and the treatment or non treatment in the books of account would carry the matter further. Eventually, the character and nature of the income is determinative and decisive and it is not the treatment that the assessee gives it in its books of account which would enable us to come to any conclusion. If the legal propositions which have been invoked and the deductions claimed are to be granted by applying the tests evolved and the parameters laid down, the governing conditions would be as to whether the deduction is permissible given the clear language of the section or provision and whether that is applicable to the facts and circumstances of a given case. Similarly, we do not think that the reliance on the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income-tax vs. Maheshwari Devi Jute Mills Ltd. would assist the Revenue. The Madras High Court case ought to be then noticed. There, the assessee was a company carrying on business as authorised dealers in Tata diesel vehicles in a building on Mount Road in Madras. The building consisted of three floors including the ground floor. While the ground floor and

the first floor were used for the assessee's business, the second floor was let out to a Government department. In the assessment years 1975-76 and 1976-77, the assessee claimed that the rental receipts in respect of the second floor should be considered under the head "business" as the entire property has been constructed with a view to use the same for the purpose of its business and that the surplus accommodation due to its shifting of branches outside Madras was let out. The Income-tax Officer rejected the contention and treated this income as income from property disallowing the deduction claimed under the head "business" towards repairs. The matter was carried by the assessee before the Tribunal and it allowed the claims. On a reference by the Tribunal, the Hon'ble High Court of Madras held that as the building in question was a commercial asset, the assessee could exploit it either by itself or by letting it to others. Therefore, in a matter like this, the fundamental position that had been asserted was whether a particular building or premises was a commercial asset or a house property. If the premises were a commercial asset, then, the income derived there from would amount to business income, otherwise it would be income derived from property assessable under the head "Property income". If on the facts, the Tribunal found that this was a commercial asset of the assessee used by it from the very beginning as such, then, the letting out of the second floor premises and the income derived by way of rent there from was rightly assessable under the head "business income". In holding and taking the above view, the Hon'ble Madras High Court distinguished the judgments and particularly in the case of East India Housing and Land Development Trust Ltd. We do not think that such a view and essentially confined to the facts of that assessee's case would enable the Court on the Revenue in this matter to interfere with the concurrent findings of the Commissioner and that of the Tribunal Eventually, as the Madras High Court held, the fundamental position had to be ascertained and that was whether a particular building or premises was a commercial asset or a house property.

29. We do not think that when the Tribunal relied upon the judgment of the Hon'ble Supreme Court in the case of East India Housing, it had committed any error of law or acted perversely. Therefore, assuming that we can allow any mixed questions to be raised for the first time, raising them does not enable the Revenue to urge and contrary to what is held by the Tribunal.

30. The position also appears to be identical in the case dealt with by the Hon'ble Supreme Court in Commissioner of Income-tax v. Vikram Cotton Mills Limited. There as well, the property came to be mortgaged and what was before the Supreme Court was the fact that the High Court, with the approval of the assessee and

the creditors evolved a scheme where under the business assets of the assessee were let out to M/s. General Fibres Dealers (P) Ltd. It is in that peculiar fact situation that the Supreme Court took the view and with regard to the nature of income. We are of the view that on the essential contentions raised before the Tribunal and as elaborated or additionally proposed before us a different view than the one taken by the Tribunal is not possible.

31. Similarly, with regard to the expenses claimed on account of incomplete work is concerned, the Tribunal found that the Assessing Officer observed that the assessee has shown the sale of 44,960 sq. feet and the remaining 76,106 sq. feet was shown as closing stock on which the assessee claims to have earned rental income. It disallowed Rs.45 lakhs as expenses incurred on that part of the stock and added the same to the income of the assessee.

32. The Commissioner found that in the Profit & Loss account, the assessee had offered the profit of the May Fair Tower I on the basis that construction work was substantially completed. The entire sale proceeds of the premises had been credited to the Profit & Loss Account. Further, proportionate cost of the premises lying unsold with the asssessee, including premises given on licence had already been taken to the Profit & Loss account. There was a proportionate cost carried forward as closing stock which also included p o rata provision for incomplete works. If the expenses which are required to be incurred and are allowable have been debited to the Profit & Loss account in accordance with the matching principle of accounting then the entire provision for incomplete work amount had been actually paid, the proportionate amount of provision of incomplete work of Rs.45 lakhs relating to unsold premises had been carried forward. This explanation which was given by the assessee was carefully examined and the Commissioner being convinced with it, allowed the claim. The Commissioner's factual findings have been reproduced in paragraph 15 of the order passed by the Tribunal and having considered them as also the rival contentions, eventually in paragraph 18, this is what the Tribunal held :

> *"18. Having carefully gone through the Order of the lower authorities in the light of rival submissions, we find that assessee has been following the project completion method and on account of completion of major part of the project, the assessee worked out its profit and offered it to tax. In the P & L account, he claimed a provision of incomplete work of Rs.45 lakhs relating to unsold premises. While calculating its closing stock, he has taken this figure of cost of provision of incomplete work of Rs.45 lakhs. It is an undisputed fact that in the case of project completion method the project is deemed to have been completed on its*

completion and sale of its 80%. The remaining portion of 20% is under either renovation or under sale. The common areas are generally renovated after the completion of the project. In this situation, making a provision for incomplete work, cannot be called to be incorrect system of accounting. More over, the claim made by the assessee were not doubted by the Assessing Officer. He has simply disallowed the claim of the assessee on the ground that the provision of incomplete work should not have been made in the impugned assessment year, without looking to the facts that same cost of incomplete work was taken in the closing stock.Keeping in view of the facts of the case, we are of the opinion that CIT (A) has properly adjudicated the issue in the light of given facts and circumstances of the case. We, therefore, find ourselves in agreement with the Order of the CIT (A). Accordingly, we confirm the same."

33. We do not think that the Assessing Officer's view having been interfered with in such a scenario that any substantial question of law arises for our determination and consideration. Thus, the appeals fail on these two grounds.

34. Then what remains for our consideration is the argument of Mr. Chhotaray that the Tribunal should not have granted the deduction under section 24(b) of the IT Act as interest on borrowed capital. In r lation to that what has been pointed out to us is that this question arises for the assessment years which are subject matter of Income Tax Appeal Nos.6234/2010, 1504/2012 and 418 of 2013. It is argued that these claims are huge and enormous. The Tribunal ought not to have granted them when the conduct of the assessee was mala fide. The assessee claimed this deduction by giving conflicting versions. The assessee could not hav argued in one matter while claiming deduction under section 24(a) and adopted a contrary position with regard to the claim under section 24(b). The argument is that the claim was made for the first time in the assessment year 2006-07. The explanation given is that this claim was not made in the initial years because in those years the stock-in-trade is completely unsatisfactory. If these were stock-in-trade, then, the income derived there from was definitely business income.

35. Section 24(b) of the IT Act on which reliance is placed reads thus :

"24. Income chargeable under the head "Income from house property" shall be computed after making the following deductions, namely :-
(a) … … … …

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

Provided that in respect of property referred to in subsection (2) of section 23, the amount of deduction shall not exceed thirty thousand rupees :

Provided further that where the property referred to in the first proviso is acquired or constructed with capital borrowed or after the 1st day of April, 1999 and such acquisition or construction is completed within three years from the end of the financial year in which capital was borrowed, the amount of deduction under this clause shall not exceed one lakh fifty thousand rupees."

36. A perusal thereof would indicate as to how deductions from income from house property are permissible Income chargeable under the head "Income from house property" shall be computed after making the deduction, namely, a sum equal to 30% to the annual value and (b) where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital. The proviso, and particularly the second proviso stipulates that where the property referred to in subsection (2) of section 23 is acquired or constructed with capital borrowed on or after 1st April, 1999 and such acquisition or construction is completed within three years from the end of the financial year in which the capital was borrowed, the amount under this claim shall not exceed Rs.1,40,000/ This proviso and the explanation thereafter has not been pressed into service.

37. The Tribunal in Income Tax Appeal No.3216/Mum/2009 for ass ssment year 2006-07 dealt with this ground of the Revenue in paragraph 8.1 and 9. However, what is material to note is that the Commissioner had rendered detailed findings and which came to be confirmed by the Tribunal. The Tribunal found that in ground No.4 of the appeal, the non-allowing of deduction of interest amounting to Rs.59,77,030/- on borrowed capital against the income from house property was the issue. The argument was that this deduction was already allowed by the Assessing Officer while assessing the rental income as business income. This ground was taken with a view that the rental income would be treated as income from house property and then as a natural corollary the interest paid on the amounts borrowed for the construction of the property should be allowed as a deduction against the rental income. Since ground Nos.1 and 2 pertained to the rental income and taxing the same as income from house property that the Commissioner held that in the light of his findings and conclusions on ground Nos.1 and 2, the Assessing

Officer should grant this claim of deduction of Rs.69,77,030/- as interest on borrowed capital. That is the conclusion which was before the Tribunal and the Tribunal found that the assessee had earned substantial rental income and, therefore, the interest on borrowed funds has to be allowed. The Tribunal also perused the Profit & Loss account and where the closing stock was shown as Nil. The Tribunal presumed that the entire income is related to the premises which were let out by the assessee. Therefore, there is no reason to interfere with the order of the Commissioner.

38. However, Mr. Chhotaray has invited our attention to the Memo of Appeal in Income Tax Appeal No.1504 of 2012. He highlighted the substituted question of law and submits that there the Commissioner had not granted such a claim.

39. In that regard, we have perused the order passed by the Commissioner on 30th July, 2010, copy of which is at Annexure C. The Commissioner in para 3.3. held that the claim was made for interest under section 24(a) which was allowed without examining the basis of the claim for nterest. The claim for interest falls under section 24(b) and which pertains to interest paid to the partners from their capital The Commissioner held that relationship of borrower and lender must come into existence before it can be said that any money is borrowed by one person from another. There must be a real transaction of borrowing and lending in order to amount to any borrowing. Where there is no relationship of borrower and lender, no deduction is permissible towards interest. In the instant case, the assessee's business was to construct flats or commercial units and sell them at profit. The partners of the firm had subscribed capital for the purpose of business and interest deduction to partner from business income has been allowed over the years. The partner's capital contribution has not been made for the purpose of acquiring property or construction of property for ownership and then for the purpose of letting it out and earning house property income on it. It is only because some flats remained unsold that these were let out and income from house property was earned. The Commissioner placed reliance on a judgment of the High Court of Allahabad in the case of Manse Ram & Sons vs. Commissioner of Income Tax (1991) 54 Taxman 308. He held that the assessee had borrowed amounts for business (banking business) and was utilised for construction of properties, interest was not allowable deduction under section 24(i)(vi). Where the assessee was a partner of a firm and on dissolution of the firm, it took over all assets and liabilities including a building, another judgment was relied upon and rendered by the High Court of Punjab & Harayana in the case of Commissioner of Income Tax vs. Four Fields (P) Ltd. (1998) 96 Taxman 143 which held that no relationship of borrower and lender had come into existence and

deduction of interest on acquisition of building claimed against rental was disallowed. Thus, the entire basis was that there must emerge a relationship of borrower and lender. The Partnership Act was referred to and it was held the firm's partners are indistinguishable from one another. It is only by a legal fiction that interest on capital is allowed as a deduction from "business income". No such legal fiction has been created under the head "Income from house property". Since the amount is held as not a borrowing for the purposes of section 24(b), the question of nexus between the capital contribution of the partners and its use for acquisition / construction of relevant properties is not relevant. He, therefore, confirmed the order of the Assessing Officer by such reasoning.

40. While carrying the matter to the Tribunal, the assessee specifically urged that the Commissioner e red in rejecting his claim without appreciating the fact that interest is paid to partners on the amount contributed by them and the said amounts in this case had been utilised for the purpose of construction of the property from which the appellant had earned the rental income (ground No.2). It is in relation to this ground that the Tribunal held in paragraph 4 as under:

> *"4. We have heard the arguments of both sides and also perused the relevant material on record. Although the learned DR ha strongly supported the impugned order of the learned CIT(Appeals) confirming the disallowance made by the AO on account of the assessee's claim for deduction u/s 24(b) for interest paid on partners' capital account by relying on the various reasons given in the impugned order, the learned counsel for the assessee has filed a written submission to meet satisfactorily each and every point raised by the learned CIT(Appeals) while confirming the disallowance made by the AO on account of assessee's claim for deduction u/s 24(b). Moreover, as rightly submitted by the learned counsel for the assessee, a similar issue involved in the immediately preceding year i.e. assessment year 2006-07 was decided by the learned CIT(Appeals) in favour of the assessee in the similar facts and circumstances and the said decision of learned CIT(Appeals) giving relief to the assessee has been upheld by the Tribunal vide its order dated 20th April, 2010 passed in ITA No.3216/Mum/2009. As held by the Tribunal in the said order, the entire interest paid on the partners' capital was related to the premises which were let out by the assessee and the same, therefore, was allowable as deduction u/s 24(b) while computing income of the assessee under the head "Income from house property". Respectfully following the said decision of the*

Tribunal in assessee's own case for assessment year 2006-07, we direct the AO to allow the claim of the assessee for deduction on account of interest paid on partners' capital u/s 24(b).”

41. The Tribunal held that if a similar issue was involved in the immediately preceding assessment year 2006-07 and there a finding was rendered in favour of the assessee by the Commissioner (Appeals), then, it was not possible to take a different view particularly because that finding of the Commissioner was upheld by the Tribunal by its order dated 20th April, 2010. If the facts and circumstances in which the claim arose were identical, then, the Tribunal concluded that a different view on facts was impossible.

42. We do not think that any larger question or wider controversy needs to be determined. If the matter was approached in this angle by the Commissioner and in the same factual backdrop, then, there is no justification for taking a contrary view. If two conflicting views of the Commissioner were placed before the Tribunal and the Tribunal found that it had concurred with one of those views and that the view with which it concurred prevails, then, we do not think how the Revenue can raise this issue. The issue has been considered bearing in mind the typical factual background. If the entire interest paid on the partners' capital was related to the pr mises which were let out by the assessee but the construction thereof came from the contributions of the partners, then, the interest was due and payable to them. That interest was payable not only in terms of the general principle of partnership and highlighted in the Indian Partnership Act, 1932, but also on the broad consideration under section 24(b) of the Income Tax Act, 1961. If the income is income from house property and that is a deduction which could be granted from the same we do not think that the Revenue should be permitted to raise this ground. Even otherwise, the finding being consistent with the factual position which is not disputed, then all the more even this ground cannot be considered as a substantial question of law. We do not think any reference is required to the detailed written submissions or the case laws in this regard.

43. As a result of the above discussion, each of these appeals by the Revenue fail. They are dismissed. There shall be no order as to costs.”

Our attention was drawn by learned counsel for the assessee to page no. 91 of the paper book , wherein details of inventory of unsold flats in Mayfair Tower I and II as available with the assessee along with

area sold/rented and area lying vacant since AY 2000-01 to 2017-18 is placed. It was submitted that commercial properties were build by the assessee and large area was sold while the balance vacant area was retained by the assessee which was treated as closing stock-in-trade of the assessee as business asset . It was submitted that the said unsold inventory of flats which were held as business asset as stock-in-trade were transferred to the head 'investment' w.e.f. 01.04.2005. Thus, w.e.f. 01.04.2005 the gains arising from the sale of these commercial flats should be brought to tax as long term capital gains and not as business income. These flats were let out from 01.04.2002 and finally sold on 24.12.2011 and these are commercial flats no. 501 and 502 in Mayfair Towers-II. It was submitted that income from letting of these flats was held by tribunal as income from house property which is finally upheld by Hon'ble Bombay High Court, the order of the tribunal for AY 2000 01 , 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09 are placed in paper book filed with the tribunal, which orders of the tribunal were finally upheld by Hon'ble Bombay High Court vide judgment dated 09-04-2015 which is also placed in file in the paper book filed with the tribunal. Our attention was also drawn to sale deed dated 22-12-2011 executed by the assessee w.r.t. sale of commercial flat no 501 and 502 in Mayfair Tower II which is also placed in file and it was submitted that merely showing these flats as being sold by promoters is not sufficient to hold that these flats are business asset. The learned counsel for the assessee submitted that it has changed the nomenclature of these unsold commercial flats in Mayfair Tower-II in its books of accounts wef 01-04-2005 which were earlier held as business assets for trading purposes and are now being held as investments w.e.f. 01-04-2005. The assessee's counsel relied upon decision of Hon'ble Supreme Court in the case of Rayala Corporation P. Ltd. v. ACIT in Civil Appeal No. 6437 of 2016 judgment dated 11.08.2016 and decision of Hon'ble Supreme Court dated 09-04-2015 in the case of Chennai Properties & Investments Ltd. v. CIT, in Civil

Appeal no. 4494 of 2004. It was submitted that there was no intention on the part of assessee to carry on business as builder and developers and hence the said unsold flats were rightly classified as investments. It was submitted by learned counsel for the assessee that Hon'ble Tribunal in cross appeals in ITA no. 6138/Mum/2012 and ITA no. 5513/Mum/2012 for AY 2009-10 has taken a view against assessee by holding that these unsold flats are business asset of the assessee and the assessee is engaged in the business of real estate development vide composite orders dated 18.10.2014 , by holding as under:-

> *" 10. We have considered the rival submissions. The ld. A.R. of the assessee has again reiterated its submissions that the property in question was converted from stock in trade to investment in the year 2005. However, we find that mere changing the head in the balance sheet is not sufficient to hold that the intention of the assessee to hold the property was as investment. From the record, we observe that since the assessee could not sell its property at appropriate time and therefore had exploited it for rental purposes. However, to get the benefit of indexation, the assessee made the accounting entry treating the same as investment, whereas, the real business intention and treatment of the property remained the same i.e. to sell it for the purpose of business of the assessee. The AO has discussed in detail, the nature, character and business of the assessee, the clauses of the partnership deed as well as the terms and conditions of the agreement entered into by the assessee while selling the property in question as promoter of the property.*
>
> *11. The order of the AO as well as of the ld. CIT(A) is well reasoned and we do not find any infirmity in the same. In our view, the lower authorities have rightly treated the income from the sale of the premises in question as sale of the stock in trade and as such the income from the same has rightly been taxed under the head "Business income." We therefore do not find any merit in the appeal of the assessee and the same is accordingly dismissed.*
>
> *12. In the result, appeal of the assessee as well as appeal of the revenue is hereby dismissed."*

It was submitted by learned counsel for the assessee that Hon'ble Bombay High Court had already admitted substantial question of law with respect to assessment year 2009-10 against the aforesaid order

passed by tribunal, and our attention was drawn to order passed by Hon'ble Bombay High Court dated 31.10.2017 in Sane & Doshi Enterprises vs. ACIT in ITA no. 250 of 2015 , wherein substantial questions of law raised by the assessee were admitted by Hon'ble Bombay High Court as under:-

" IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 250 OF 2015

M/s. Sane and Doshi Enterprises ... Appellant

vs.

Asst. Commissioner of Income Tax ... Respondent
Circle – 4, Pune

Mr. S. C. Tiwari a/w. Ms. Rutuja N. Pawar for the Appellant.

Mr. V. A. Bajpayee for the Respondent.

CORAM : A.S. OKA & A.K. MENON, JJ.

DATE : 31st OCTOBER, 2017

P. C.

1. Heard learned Counsel appearing for the parties. The appeal is admitted on the following substantial questions of law :

"a) Whether on the facts and in the circumstances of the case of the Appellant and in law the Tribunal is justified in holding that the premises sold by the appellant were as on the date of sale its stock-in-trade and not capital asset.

b) Whether on the facts and in the circumstances of the case of the Appellant and in law the Tribunal is justified in ignoring the orders of ITAT on the very issue in the case of the appellant from assessment years 2000-01 to 2009-10."

2. Place the appeal for final disposal high on board on 7th November, 2017.

(A.K. MENON, J) (A.S. OKA, J)"

The Ld. DR on the other hand submitted that assessee is engaged in the business of Real Estate Development and the assessee is Builder and Developer. It was submitted that ITAT has decided the issue against the assessee in cross appeals in ITA no. 6138/Mum/2012 and ITA no. 5513/Mum/2012 for AY 2009-10 by holding that these unsold flats are business assets and income from sale of these flats are to be brought to tax as income from business and the gains arising from sale of flats cannot be brought to tax as capital gains . It was submitted by learned DR that it is true that Hon'ble Bombay High Court has admitted substantial question of law for AY 2009-10, but merely because Hon'ble Bombay High Court admitted substantial question of law is not a ground for taking different view by tribunal for succeeding years as the factual matrix is similar and it could not be said that the view taken by the tribunal for AY 2009-10 was a perverse view and keeping in view principles of consistency , it was submitted that it is to be held that assessee is engaged in the business of real estate development and income from sale of flat is to be brought to tax as business income. It was also brought to our notice by learned DR that even Hon'ble Bombay High Court in its judgement dated 09-04-2015 in assessee's own case has held that the assessee is engaged in the business of real estate and constructed a commercial complex viz. May Fair Tower. It was submitted that the Revenue has rightly assessed the income from sale of commercial flats in Mayfair Towers-II as business income under head 'Profits and gains from Business or Profession'. The assessee has let out the property which was constructed for resale purposes and it was temporary letting out of the property which has not been sold but that will not change the character of the property being held as business asset.

The Ld. AR in rejoinder submitted that the assessee was not in the business of Real Estate Development during the year under consideration.

5. We have considered rival contentions and perused the material on record including case laws cited before us . It is undisputed fact that the assessee was in the business of real estate as builders & developer when the assessee developed and constructed these two commercial complexes namely Mayfair Tower- I and II and these commercial offices so constructed were meant for resale. The assessee completed construction of these two commercial complexes namely Mayfair Tower I and II in AY 2000-01 and 2002-03 respectively. The assessee sold certain inventories of offices flats in Mayfair Tower I and II while rest of the commercial flats which could not be sold were carried forward as closing stock-in-trade of flats from year to year as business assets until 01-04-2005 when the said unsold inventory of flats were classified as 'investments' by the assessee in its books of accounts. Some of the flats continued to remain unsold and these flats which remained unsold were rented out by the assessee from time to time and the income from rent from these unsold flats is now held by Hon'ble Bombay High court vide order dated 09.04.2015 in CIT v. Sane and Doshi Enterprises , reported in (2015) 377 ITR 165(Bom.) for AY 2000-0 to 2008-09 be an income which is assessable to tax as income chargeable to tax under the head 'Income from house property' despite the fact that the flats were earlier held as 'stock-in-trade' in asseseee's books of accounts also . So far as the chargeability of income from letting out of these unsold flats is concerned, the controversy is now settled by Hon'ble Bombay High Court vide its orders dated 09-04-2005 for AY 2000-01 to 2008-09 by holding that income is to be assessee as income from house property even if they are unsold inventory of stock-in-trade held as business assets .We have also noted that special leave has been granted by Hon'ble Supreme Court under Article 136 of the Constitution of India in SLP filed by Revenue in CIT v. Sane & Doshi Enterprises reported in (2017) 77 taxmann.com 288(SC). The appeal of the assessee for AY 2009-10 has been heard by the tribunal wherein the issue before the tribunal was identical as is now before us in this appeal and the

tribunal decided the issue against assessee by holding that the assessee is engaged in business of real estate and the income from sale of flats is to be brought to tax as business income under the head 'Profits and gains from business or profession' and not to be brought to tax as income from capital gains. The tribunal after detailed analysis of the facts and circumstances surrounding the case has come to the conclusion for AY 2009-10 that the assessee was engaged in the business of real estate and income from the sale of said flats were held to be taxable under the head income from business by tribunal and it was observed by the tribunal that the assessee has changed nomenclature to 'investments' wef 01-04 2005 in its books of accounts only to avail benefit of indexation and merely changing the said flats in books of accounts as 'investments is not sufficient . The assessee on its part had contended before the tribunal that gains arising from sale of these flats should be brought to tax as income from long term capital gains and the benefit of cost inflation index be also granted to the assessee which was repelled by the tribunal vide its orders for AY 2009-10. The assessee has filed an appeal before Hon'ble Bombay High Court for AY 2009-10 against order of the tribunal in appeal in ITA no. 250 of 2015, wherein the substantial question of law has been admitted by Hon'ble Bombay High Court vide orders dated 31.10.2017 against the aforesaid order of the tribunal for AY 2009 10 , which is reproduced here under:-

" IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 250 OF 2015

M/s. Sane and Doshi Enterprises ... Appellant

vs.

Asst. Commissioner of Income Tax ... Respondent
Circle – 4, Pune

Mr. S. C. Tiwari a/w. Ms. Rutuja N. Pawar for the Appellant.

Mr. V. A. Bajpayee for the Respondent.

CORAM : A.S. OKA & A.K. MENON, JJ.

DATE : 31st OCTOBER, 2017

P. C.

1. Heard learned Counsel appearing for the parties. The appeal is admitted on the following substantial questions of law :

> *"a) Whether on the facts and in the circumstances of the case of the Appellant and in law the Tribunal is justified in holding that the premises sold by the appellant were as on the date of sale its stock-in-trade and not capital asset.*
>
> *b) Whether on the facts and in the circumstances of the case of the Appellant and in law the Tribunal is justified in ignoring the orders of ITAT on the very issue in the case of the appellant from assessment years 2000-01 to 2009-10 "*

2. Place the appeal for final disposal high on board on 7th November, 2017.

(A.K. MENON, J) (A.S. OKA, J)"

The order of the tribunal for AY 2009-10 dated 28.10.2014(ITA no.6138/M/2012 and 5513/M/2012), wherein the tribunal held against the assessee by holding that income from sale of flats by the assessee shall be brought to tax as business income and not be chargeable to tax as long term capital gains , which order of the tribunal is reproduced hereunder:-

> " *10. We have considered the rival submissions. The ld. A.R. of the assessee has again reiterated its submissions that the property in question was converted from stock in trade to investment in the year 2005. However, we find that mere changing the head in the balance sheet is not sufficient to hold that the intention of the assessee to hold the property was as investment. From the record, we observe that since the assessee could not sell its property at appropriate time and therefore had exploited it for rental purposes. However, to get the benefit of indexation, the assessee made the accounting entry treating the same as investment, whereas, the real business intention and treatment of the property remained the same i.e. to sell it for the purpose of business of the assessee. The AO has discussed in*

detail, the nature, character and business of the assessee, the clauses of the partnership deed as well as the terms and conditions of the agreement entered into by the assessee while selling the property in question as promoter of the property.

11. The order of the AO as well as of the ld. CIT(A) is well reasoned and we do not find any infirmity in the same. In our view, the lower authorities have rightly treated the income from the sale of the premises in question as sale of the stock in trade and as such the income from the same has rightly been taxed under the head "Business income." We therefore do not find any merit in the appeal of the assessee and the same is accordingly dismissed.

12. In the result, appeal of the assessee as well as appeal of the revenue is hereby dismissed."

We have also observed that the asssessee has relied upon decision of Hon'ble Supreme Court in the case of Chennai Properties and Investment Limited (supra) and Rayala Corporation Private Limited(supra) wherein the Hon'ble Supreme Court held based on peculiar facts of those cases that income arising from letting out of property is chargeable to income-tax under the head 'Profits and Gains from Business or Profession' . But in later decision in the case of Raj Dadarkar & Associates v. ACIT reported in (2017) 394 ITR 592(SC) Hon'ble Supreme Court after considering the decision in the case of Chennai Properties and Investment Limited(Supra) and Rayala Corporation Private Limited(supra), has held income from letting out of properties as chargeable to income-tax under the head 'Income from House Proeprty', keeping in view peculiar factual matrix of the case. This is a question hich is to be decided after considering facts and circumstances of each case. The decision of Hon'ble Supreme Court in the case of Raj Dadarkar & Associates(supra) is reproduced hereunder:

***"10**. We have considered the aforesaid submissions of counsel for the parties in the light of legal provisions contained in the Act. We may remark at the outset that it is not in dispute that having regard to the terms and conditions on which the leasehold rights were*

taken by the appellant in auction, constructed the market area thereupon and gave the same to various persons on sub-licensing basis, the appellant would be treated as deemed owner of these premises in terms of Section 27(iiib) of the Act. We may point out that the High Court took note of the provisions of Section 27(iiib) as well as Section 269UA(f) of the Act which reads as under:

"Section 27(iiib) - a person who acquires any rights (excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in clause (f) of section 269UA, shall be deemed to be the owner of that building or part thereof;

Section 269UA(f) - "transfer",—

(i) in relation to any immovable property referred to in sub-clause (i) of clause (d), means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882).

Explanation.—For the purposes of this sub-clause, a lease which provides for the extension of the term thereof by a further term or terms shall be deemed to be a lease for a term of not less than twelve years, if the aggregate of the term for which such lease is to be granted and the further term or terms for which it can be so extended is not less than twelve years ;

(ii) in relation to any immovable property of the nature referred to in sub-clause (ii) of clause (d), means the doing of anything (whether by way of admitting as a member of or by way of transfer of shares in a co-operative society or company or other association of persons or by way of any agreement or arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, such property."

***11**. Thereafter, the High Court pointed out the circumstances under which the Market Department of MHAD had auctioned the market area wherein the appellant was the successful tenderor; the BMC permitted sub-letting of the shops and stalls in stilt portion; the appellant was permitted to carry out additions and alterations which he did; the manner in which the appellant after making necessary constructions sub-licensed to various types of traders etc. On that basis, the High Court concluded that reading of various clauses harmoniously as per the which the rights were given to the appellant in the said property, pointed out towards the appellant acquiring rights in or in respect of the building or part thereof, which rights were clearly traceable to Section 269UA(f) of the Act.*

***12**. As pointed out above, the aforesaid conclusion is not even disputed by the learned counsel for the appellant. The submission was, as noted above, even if the appellant is deemed owner of the premises in question, since the letting out the place and earning rents therefrom is the main business activity of the appellant, then the income generated from sub-licensing the market area and earned by the appellant should be treated as income from business and not income from the house property. His submission was that the dominant test has to be applied and once it is found that dominant intention behind the activity was that of a business, the rental income would be business income. In support, Mr. Agarwal referred to the following two judgments:*

(i) Chennai Properties and Investments Ltd. v. CIT [2015] 373 ITR 673/231 Taxman 336/56 taxmann.com 456 (SC).

(ii) Rayala Corporation (P.) Ltd. v. Asstt. CIT [2016] 386 ITR 500/243 Taxman 360/72 taxmann.com 149 (SC).

***13**. Before dealing with the respective contentions, we may state, in a summary form, scheme of the Act about the computation of the total income. Section 4 of the Act is the charging Section as per which the total income of an assessee, subject to statutory exemptions, is chargeable to tax. Section 14 of the Act enumerates five heads of income for the purpose of charge of income tax and computation of total income. These are: Salaries, Income fromhouse property, Profits and gains of business or profession, Capital gains and Income from other sources. A particular income, therefore, has to be classified in one of the aforesaid heads. It is on that basis rules for computing income and permissible deductions which are contained in different provisions of the Act for each of the aforesaid heads, are to be applied. For example, provisions for computing the income from house property are contained in Sections 22 to 27 of the Act and profits and gains of business or profession are to be computed as per the provisions contained in Sections 28 to 44DB of the Act. It is also to be borne in mind that income tax is only One Tax which is levied on the sum total of the income classified and chargeable under the various heads. It is not a collection of distinct taxes levied separately on each head of the income.*

***14**. There may be instances where a particular income may appear to fall in more than one head. These kind of cases of overlapping have frequently arisen under the two heads with which we are concerned in the instant case as well, namely, income from the house property on the one hand and profits and gains from business on the other hand. On the facts of a particular case, income has to be either treated*

as income from the house property or as the business income. Tests which are to be applied for determining the real nature of income are laid down in judicial decisions, on the interpretation of the provisions of these two heads. Wherever there is an income from leasing out of premises and collecting rent, normally such an income is to be treated as income from house property, in case provisions of Section 22 of the Act are satisfied with primary ingredient that the assessee is the owner of the said building or lands appurtenant thereto. Section 22 of the Act makes 'annual value' of such a property as income chargeable to tax under this head. How annual value is to be determined is provided in Section 23 of the Act. 'Owner of the house property' is defined in Section 27 of the Act which includes certain situations where a person not actually the owner shall be treated as deemed owner of a building or part thereof. In the present case, the appellant is held to be "deemed owner" of the property in question by virtue of Section 27(iiib) of the Act. On the other hand, under certain circumstances, where the income may have been derived from letting out of the premises, it can still be treated as business income if letting out of the premises itself is the business of the assessee.

***15**. What is the test which has to be applied to determine whether the income would be chargeable under the head "income from the house property" or it would be chargeable under the head "Profits and gains from business or profession", is the question. It may be mentioned, in the first instance, that merely because there is an entry in the object clause of the business showing a particular object, would not be the determinative factor to arrive at a conclusion that the income is to be treated as income from business. Such a question would depend upon the circumstances of each case. It is so held by the Constitution Bench of this Court in Sultan Bros. (P) Ltd. v. CIT [1964] 51 ITR 353 (SC) and we reproduce the relevant portion thereof:*

> *"7. ... 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."*

***16**. In view thereof, the object clause, as contained in the partnership deed, would not be the conclusive factor. Matter has to be examined on the facts of each case as held in Sultan Bros. (P) Ltd. case (supra)*

Even otherwise, the object clause which is contained in the partnership firm is to take the premises on rent and to sub-let. In the present case, reading of the object clause would bring out two discernible facts, which are as follows:

(a) *The appellant which is a partnership firm is to take the premises on rent and to sub-let those premises. Thus, the business activity is of taking the premises on rent and sub-letting them.*

In the instant case, by legal fiction contained in Section 27(iiib) of the Act, the appellant is treated as "deemed owner".

(b) *The aforesaid clause also mentions that partnership firm may take any other business as may be mutually agreed upon by the partners.*

***17**. In the instant case, therefore, it is to be seen as to whether the activity in question was in the nature of business by which it could be said that income received by the appellant was to be treated as income from the business. Before us, apart from relying upon the aforesaid clause in the partnership deed to show its objective, the learned counsel for the appellant has not produced or referred to any material. On the other hand, we find that ITAT had specifically adverted to this issue and recorded the findings on this aspect in the following manner:*

"26. …On this issue facts available on record are that the assessee let out shops/stalls to various occupants on a monthly rent. The assessee collected charges for minor repairs, maintenance, water and electricity. As per the terms of allotment by the BMC, the assessee was bound to incur all these expenses. The assessee, in turn, collected extra money from the allottees. The assessee collected 20% of monthly rent as service charges. Such service charges were also used for providing services like watch and ward, electricity, water etc. This in our opinion was inseparable from basic charges of rent. The assessee has made bifurcation of the receipt from the, occupiers of the shops/stalls as rent and service charges. As rightly held by the Assessing Officer, decision of Hon'ble Supreme Court in the case of Shambu Investment Pvt. Ltd., 263 ITR 143 will apply. The assessee has not established that he was engaged in any systematic or organized activity of providing service to the occupiers of the shops/stalls so as to constitute the receipts from them as business income. In our opinion, the assessee received income by letting out shops/stalls; and therefore, the same has to be held as income from house property."

***18**. The ITAT being the last forum insofar as factual determination is concerned, these findings have attained finality. In any case, as mentioned above, the learned counsel for the appellant did not argue on this aspect and did not make any efforts to show as to how the aforesaid findings were perverse. It was for the appellant to produce sufficient material on record to show that its entire income or*

substantial income was from letting out of the propertywhich was the principal business activity of the appellant. No such effort was made.

***19**. Reliance placed by the appellant on the judgments of this Court in Chennai Properties & Investments Ltd. (supra) and Rayala Corporation (P) Ltd.(supra) would be of no avail. In Chennai Properties & Investments Ltd. (supra) where one of us (Sikri, J.) was a part of the Bench found that the entire income of the appellant was through letting out of the two properties it owned and there was no other income of the assessee except the income fromletting out of the said properties, which was the business of the assessee. On those facts, this Court came to the conclusion that judgment of this Court inKaranpura Development Co. Ltd. v. CIT [1962] 44 ITR 362 (SC) was applicable and the judgment of this Court in East India Housing & Land Development Trust Ltd. v. CIT [1961] 42 ITR 49 (SC) was held to be distinguishable. In the present case, we find that situation is just the reverse. The judgment in East India Housing and Land Development Trust Ltd. (supra) which would be applicable which is discussed in para 8 of Chennai Properties& Investments Ltd. case (supra) and the reproduction thereof would bring home the point we are canvassing:*

> *"8. With this background, we first refer to the judgment of this Court in East India Housing and Land Development Trust Ltd. case [East India Housing and Land Development Trust Ltd. v. CIT, [1961] 42 ITR 49 (SC)] 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 which 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 Courtwhile 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."*

***20**. In Rayala Corporation (P) Ltd. (supra) fact situation was identical to the case of Chennai Properties & Investments Ltd. (supra) and for this reason, Rayala Corporation (P) Ltd. (supra)*

followed Chennai Properties & Investments Ltd. (supra) which is held to be inapplicable in the instant case.

***21**. For the aforesaid reasons, we are of the opinion that these appeals lack merit and are, accordingly, dismissed with cost."*

We have carefully gone through entire factual matrix surrounding the case and we have observed that finding of the tribunal vide orders dated 28.10.2014 for AY 2009-10 in assessee's own case that income from sale of flats keeping in view factual matrix of the case is to be brought to tax as business income and not as long term capital gains is not shaken by the judgment of Hon'ble Bombay High Court judgment dated 09-04-2015 for AY 2000-10 to 2008-09 in assessee's own case , which judgment of Hon'ble Bombay High Court is reproduced in preceding para's of this order. Further, we have observed that factual matrix in the instant case is similar to factual matrix prevailing for AY 2009-10 and admission of substantial question of law by Hon'ble Bombay High Court for AY 2009-10 against tribunal order in assessee's own case for AY 2009-10 is not sufficient for us to take different view than the view taken by tribunal for AY 2009-10 more so tha factual matrix are similar in both these years and it could not be shown by learned counsel for the assessee that the findings of the tribunal were perverse and consequently we do not find any reason to deviate from the well reasoned detailed order passed by the tribunal for AY 2009-10 holding that assessee is in the business of Real Estate and the said stock of flats are held by the assessee as stock-in-trade as business assets and their sale shall be brought to tax as business income and not income from long term capital gains.We are fully aware that principles of res judicata are not applicable to income tax proceedings but principles of consistency is to be followed. Reference is drawn to decision of Hon'ble Supreme Court in the case of Radhasoami Satsang V. CIT reported in (1992) 193 ITR 321(SC). Respectfully following the orders of the tribunal in cross appeals in ITA no. 6138/Mum/2012 and 5513/Mum/2015 for

AY 2009-10 vide composite orders dated 28.10.2014, we hold that the income from sale of flats as is made by the assessee in Mayfair Towers-II during relevant period under consideration shall be brought to tax as income chargeable to tax under the head 'Income from Profit and Gains from Business of Profession' and accordingly we dismiss the appeal of the assessee. We order accordingly.

6. In the result appeal of the assessee is dismissed.

order pronounced in the open court on 08.08.2018

आदेश की घोषणा खुले न्यायालय में दिनांकः 08.08.2018 को की गई ।

Sd/-	Sd/-
(SAKTIJIT DEY)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, dated: 08.08.2018

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI