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Court No. - 35
Case :- INCOME TAX APPEAL No. - 52 of 2014
Appellant :- M/S Meeraj Estate And Developers
Respondent :- Commmissioner Of Income Tax
Counsel for Appellant :- Rahul Agarwal
Counsel for Respondent :- C.S.C. It,Gaurav Mahajan
with
Case :- INCOME TAX APPEAL No. - 55 of 2014
Appellant :- M/S Meeraj Estate And Developers
Respondent :- Commmissioner Of Income Tax
Counsel for Appellant :- Rahul Agarwal
Counsel for Respondent :- C.S.C. It,Gaurav Mahajan

Hon'ble Bharati Sapru,J.
Hon'ble Rohit Ranjan Agarwal,J.

(Per Hon'ble Rohit Ranjan Agarwal,J.)

1. These two appeals filed under Section 260A of the Income Tax Act, 1961 arise out of judgment and order dated 14.08.2013 passed by Income Tax Appellate Tribunal, Agra Bench (hereinafter called as 'ITAT') in Income Tax Appeal No. 182 and 292/ Agra/ 2012 for assessment years 2006-07 and 2008-09.

2. As the issues in question are same in both the appeals, as such they are being heard and decided together by a common order.

3. These appeals were admitted on 25.10.2017 on the following question of law:-

> *"(a) Whether in view of the facts of the case particularly the source of funding for acquiring the property, the inter-relationship between the agreements entered into by the appellant and the*

Constitution Bench of the Hon'ble Supreme Court in Sultan Brothers Pvt. Ltd. Vs. C.I.T. (1964) 51 ITR 353 (S.C.) and the Division Bench judgment of this Hon'ble Court passed in CIT v. Goel Builders 331 ITR 344 (All.), the Tribunal below was justified in holding that the receipts of the appellant were income from house property/ other sources and not business income?

(b) Whether, in view of the decisions In Radhasaomi Satsang v. CIT 193 ITR 321 (SC) and in ACIT Vs. D.M. Brothers (2010) 44 DTR 13 (All.), the decision of the Tribunal below in discarding the treatment of the receipts of the appellant as business income for Assessment Year 2005-06 and in all subsequent assessment year's till A.Y. 2013-2014 (except assessment year's under appeals) is legally justified?"

4. The assessee is a partnership firm, which was constituted w.e.f. 01.07.2004, while the deed forming partnership is dated 01.11.2004. According to the deed, the object of the assessee firm is to venture into real estate business and allied activities such as leasing/ sub leasing, maintaining properties on maintenance contract etc. It was subsequent to formation of partnership firm, that assessee acquired leasehold rights over a commercial property measuring 6925 square feet at third floor of Block No. G10/ 8, Padam Deep Tower, Sanjay Place, Agra. The said rights were acquired by the assessee from one M/s Pee Cee Soap and Chemicals Pvt. Ltd. through a deed of assigning of lease executed on 17.11.2004. The money for acquiring the leasehold right by the assessee was arranged by taking loan of Rs.1,31,04,107/- from Indian Overseas Bank and also loans of Rs.16,94,107/- from M/s Meeraj Industries and Rs.5,03,385 from M/s Accurate Ferro Casting. Thereafter, the assessee entered into an agreement with Gas Authority of India Ltd. (hereinafter called as 'GAIL') on 30.11.2004 to lease the said property to GAIL for a period of 10 years. Second agreement

was executed by the assessee with GAIL on 14.12.2004 for furnishing of the leased area of 6925 square feet to ensure the furniture and fitting etc. and also to undertake major repairs. Thereafter, on 16.12.2004 third agreement was executed between the assessee and GAIL for maintaining the leased out area.

5. The assessee filed a return for assessment year 2005-06 at a loss of Rs.20,13.100/-. The said return was processed under Section 143(3) of the Income Tax Act (hereinafter called as 'Act') and reply filed by the assessee was accepted by assessing authority, which passed an order under Section 143(3) of the Act on 28.12.2007.

6. Return for the assessment year 2006-07 was filed by assessee on 12.06.2006 showing a loss of Rs.10,95,190/-. The case was picked under scrutiny, and notice under Section 143(2) of the Act was issued on 18.06.2007. As no compliance was made by the assessee, again notice under Section 143(2) along with notice under Section 142(1) with questionnaires dated 08.07.2008 was sent to the assessee. The assessee appeared and replied to the various queries. The AO after considering the three agreements as well as examining the statement of one of partners of the firm found that assessee was not involved in any kind of recurring activity to treat the receipt as business receipt and the income of the assessee was calculated at Rs.10,94,460/- as against loss of Rs.10,95,190/- and the setoff of brought forward loss of assessment year 2005-06 amounting to Rs.20,13,103/- was rejected on 14.11.2008. An appeal was filed before

Commissioner of Income Tax (Appeals) challenging the said order but the said appeal was rejected by order dated 23.01.2012 by CIT (A), aggrieved by the said order a Second Appeal was preferred before the ITAT which was also rejected by order dated 14.08.2013, which is impugned before this Court. Pursuant to the order of this Court, assessee filed copies of the partnership deed, as well as the three agreements executed between the assessee -appellant and GAIL.

7. Sri Rahul Agarwal, learned counsel appearing for the assessee submitted that the assessee firm is in the business of real estate and allied activities such as leasing and sub-letting, maintaining properties on contracts. He further submitted that the three agreements executed between the appellant and GAIL indicates that they were supplemental/ incidental to each other and were part of one composite transaction and should not be read in isolation as done by the taxing authorities. He further submitted that GAIL being a Government organisation does not enter into tenancy agreement with private parties without protracted negotiations and usually does not conclude a transaction within a space of a week or 10 days, as in the present case the property was obtained by assessee on 17.11.2004 and was let out on 30.11.2004, which indicates the fact that the property was acquired in view of the ongoing discussions with GAIL to fulfill their office requirements. It was also contended that the entire receipts received under the three contracts with GAIL was claimed under the head 'business income' and depreciation thereon was claimed and the assessee for assessment

year 2005-06 filed a return of loss of Rs.20,13,100/- which was accepted by the Additional Commissioner of Income Tax on 28.12.2007, as such there was no occasion for the assessing authority to treat the entire receipts of the appellant-assessee from the three agreements executed with GAIL as income from house property and from other sources and not as business income for assessment year 2006-07.

8. Sri Rahul Agarwal, learned counsel for the assessee also contended that even a solitary instance/ transaction could constitute business so long as it was established that intention of the assessee was to earn profit while undertaking the transaction and not with an object of making an investment for keeping the money safe or earning from that investment. He relied upon a Division Bench judgment of this Court in Case of ***CIT vs. Goel Builders 331 ITR 334 (All.)***, and which had considered the distinction between income from house property and income from business or profession.

9. It was also contended that assessee-appellant had acquired the asset out of borrowed funds, which normally would indicate an intention to carry on business and not profit from an investment. Counsel for the assessee relied upon the decision of the Constitution Bench of the Supreme Court in case of ***Sultan Brothers Pvt. Ltd. Vs. CIT [1964] 51 ITR 353 (SC)***, and also judgments of the Apex Court in ***Universal Plast Ltd. vs. Commissioner of Income Tax [1999] 237 ITR 454 (SC), Karnani Properties Ltd. vs. Commissioner of Income Tax [1971] 82 ITR 547 (SC), Karanpura Development Co. Ltd. vs. Commissioner of Income Tax***

[1962] 44 ITR 362 (SC).

10. Counsel for the assessee also relied upon the decision of the Supreme Court in ***Chennai Properties and Investment Ltd. Vs. CIT [2015] 373 ITR 673 (SC)***. Relevant Para 11 is extracted hereasunder:-

> ***"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."*

11. Reliance has also been placed on a judgment of the Division Bench of this Court in case of ***Hotel Arti Delux (Pvt.) Ltd. vs. Assistant Commissioner of Income Tax [2014] 227 Taxman 119 (All.)*** wherein this Court held as under:-

> *"**15.** From the recital of the lease deed it is evident that only the building was leased out along with a lift, tubewell and electrical fittings. These cannot be treated as plant and machinery but would be treated as amenities, which are necessary for the use of any building. We find that the appellant had not placed any material on record to show that the building had peculiar amenities with which the building could be treated as a "plant" and not a building simplicitor. No material has been brought on record to indicate that the building had peculiar amenities, which could be commercially exploited such as facilities of sterilization of surgical instruments and bandages or an operation theatre. The Tribunal has given a categorical finding of fact that the building which was leased out by the appellant was nothing else but a building simplicitor and was not a building, which was equipped with specialized plant and machinery. This being a finding*

of fact, we are not inclined to interfere in such findings, especially when nothing has been brought on record to indicate that the said finding was perverse.

16. *We also find that the appellant is not running the business of a hospital and has only let out the building. We are of the opinion that the income derived by the appellant was from the ownership of the building and not from the personal exertion, which is necessary to treat the income as a business income."*

12. Further, in case of ***Commissioner of Income Tax vs. Shambhu Investment (Pvt.) Ltd. [2001] 116 Taxman 795 (Calcutta)*** it was held as under:-

"7. *Let us approach the problem from another angle by applying the lest suggested by the five judges' Bench in the case of* ***Sultan Brothers Pvt. Ltd.*** *(supra). The three questions framed by the apex court are applied in the instant case as follows:*

(A) Was it the intention in making the lease-and it matters not whether there is one lease or two, i.e., separate leases in respect of the furniture and the building-that the two should be enjoyed together ?

In the instant case there is no separate agreement for furniture and fixtures or for providing security and other amenities. The only intention, in our view, was to let out the portion of the premises to the respective occupants. Hence, the intention in making such agreement is to allow the occupants to enjoy the table space together with the furniture and fixtures. Hence, this question should be answered in the affirmative.

(B) Was it the intention to make the letting of the two practically one letting?

From a plain reading of the agreement it appears that the intention of the parties to the said agreement is clear and unambiguous by which the first party has allowed the second party to enjoy the said table space upon payment of the comprehensive monthly rent. Hence, this question should be answered in the affirmative.

> *(C) Would one have been let alone, and a lease of it accepted, without the other ?*
>
> *As we have discussed hereinbefore that it is composite table space let out to various occupants, the amenities granted to those occupants including the user of the furniture and fixtures are attached to such letting out and the last question, in view of the same, must be answered in the negative.*
>
> *Applying the said test we hold that by the said agreement the parties have intended that such letting out would be an inseparable one.*
>
> ***8.** Hence, we hold that the prime object of the assessee under the said agreement was to let out the portion of the said property to various occupants by giving them additional right of using the furniture and fixtures and other common facilities for which rent was being paid month by month in addition to the security free advance covering the entire cost of the said immovable property.*
>
> *In view of the facts and law discussed above we hold that the income derived from the said property is an income from property and should be assessed as such."*

13. In case of ***Raj Dadarkar and Associates Vs. Assistant Commissioner of Income Tax, [2017] 81 Taxmann.com 193 (SC)***, the Supreme Court held that object clause contained in partnership deed would not be conclusive factor in determining whether the assessee carried on business activity, and liable to be assessed under the head 'income from business.

14. Per contra, Sri Gaurav Mahajan, learned counsel appearing for the Department submitted that assessee had let out vacant floor to GAIL and the receipts from the same cannot be treated as business income, as business is a continuous and systematic activity carried on by a person with a view to earn profit. As per the first agreement the assessee was not required to provide any day-to-day service or incur any day to

day expenses to receive the leased rent receipt, which establishes the fact that receipts are to be taxed income from 'house property' and not as income from business or profession. Second agreement was executed between the assessee and GAIL to furnish the third floor of the building as per requirement of GAIL, meaning thereby that vacant floor which was leased out was furnished and finished and converted into office by the assessee. This agreement was consequence of the first agreement and was executed 14 days later. The third agreement executed between assessee and GAIL was in regard to maintenance and upkeeping of building/ floor, furniture and fittings and other equipments installed and set up in said premises, and further, only one person was deputed to look after premises and the income from the said agreement should be treated as income under head 'income from other sources'.

15. He further submitted that in income tax, each year is independent year and in each year correct income is to be assessed under the correct head, and any mistake if committed cannot be allowed to continue. Sri Mahajan vehemently argued that mere statement of each of the deed would not be determinative factor to arrive at a conclusion that income is to be treated from business and in present case as there was no business activity being carried out by the assessee and having failed to produce any evidence, the assessing authority as well as the Tribunal rightly rejected the claim treating the income as income from house property and other sources and not from business or profession.

16. We have heard learned counsel for the parties and perused the material on record.

17. The question which arises for consideration is whether the property acquired by the assessee and subsequently entered into an agreement with GAIL and the receipts at the hand of assessee pursuant to the agreements is assessable under the head 'income from business or income from house property or income from other sources'.

18. The contention of the assessee hinges around two facts, firstly that AO has already taken a view while making assessment for the assessment year 2005-06 that income is assessable under the head 'income from business' and therefore maintaining consistency the Assessing Officer should have not taken a different view for the subsequent assessment year, and the second ground of attack being that the assessee firm is in the business of real estate and allied activities and the three agreements executed were supplemental and incidental to each other and are part of one composite transaction and should not be read in isolation, further the property acquired by the assessee was for letting, as such the same being income from business and cannot be assessed under the heading 'income from house property or income from other sources'.

19. The first question raised by the appellant-assessee regarding the maintenance of consistency by the assessing authority, the Tribunal had recorded categorical finding in view of the judgment of the Apex Court in case of ***Bhart Sanchar Nigam Nigam Ltd. and another vs. Union of India and***

others [2006] 3 SCC 1, wherein the Court held that *res-judicata* does not apply to tax matters for different assessment years, the relevant Paragraphs 20, 21, 22 are extracted hereasunder:-

> ***"20.*** *The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason whey the courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate Bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction.*
>
> ***21.*** *In our opinion, the preliminary objection raised by the State of U.P. therefore, rests on a faulty premise. The contention of the appellant-petitioners in these matters is not that the decision in* ***State of U.P. v. Union of India, (2003) 3 SCC 239*** *for that assessment year should be set aside, but that it should be overruled as an authority or precedent. Therefore, the decisions in* ***Devilal Modi v. STO, (1965) 1 SCR 686*** *and in* ***Hurra v. Hurra (2002) 4 SCC 388*** *are not germane.*
>
> ***22.*** *A decision can be set aside in the same lis on a prayer for review or an application for recall or under Article 32 in the peculiar circumstances mentioned in Hurra v. Hurra. As we have said, overruling of a decision takes place in a subsequent lis where the prcedential value of the decision is called in question.*

> *No one can dispute that in our judicial system it is open to a court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate. But in tax cases relating to a subsequent year involving the same issue as an earlier year, the court can differ from the view expressed if the case is distinguishable or per incuriam. The decision in State of U.P. v. Union of India related to the year 1988. Admittedly, the present dispute relates to a subsequent period. Here a coordinate Bench has referred the matter to a large Bench. This Bench being of superior strength, we can, if we so find, declare that that the earlier decision does not represent the law. None of the decisions cited by the State of U.P. are authorities for the proposition that we cannot, in the circumstances of this case, do so. This preliminary objection of the State of U.P. is therefore rejected."*

20. The said decision was followed by the Apex Court again in case of ***C.K. Gangadharan and another vs. Commissioner of Income Tax, Cochin [2008] SCC 739***, while the counsel for the appellant placed reliance upon the decision of the Apex Court in case of ***Radhasaomi Satsang vs. Commissioner of Income Tax [1992] 1 SCC 659***. Relevant Paras 13 and 16 are extracted hereasunder:-

> *"**13.** One of the contentions which the learned senior counsel for the assessee-appellant raised at the hearing was that in the absence of any change in the circumstances, the Revenue should have felt bound by the previous decisions and no attempt should have been made to reopen the question. He relied upon some authorities in support of his stand. A full Bench of the Madras High Court considered this question in T.M.M Sankaralinga Nadar & Bros. & Ors, v. CIT, 4 ITC 226 (Mad) (FB). After dealing with the contention the Full Bench expressed the following opinion:*
>
> > *"The principle to be deducted from these two cases is that where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other question on which the*

> *rights of the parties to be taxed are based, e.g., whether a certain property is trust property or not, it has nothing to do with the fluctuations in the income; such questions if decided by a Court on a reference made to it would be res judicata in that the same question cannot be subsequentiy agitated."*
>
> ***16.*** *We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."*

21. From the reading of the judgment of the Apex Court, it is clear that the judgment relied by the assessee in case of ***Radhasaomi Satsang*** (supra) was dealt by the Apex Court in the case of ***BSNL*** (supra) and Supreme Court held that principal of *res-judicata* does not apply in matter pertaining to tax for different assessment years, because res-judicata applies to debar courts from entertaining issues on the same cause of action, whereas cause of action for each assessment year is distinct. In the case in hand, the AO for assessment year 2005-06 had accepted claim of the assessee without examining relevant records, as well as without recording any finding on the issue in question. Thus, for subsequent year, the claim of assessee cannot be accepted without examining records and material, and AO after examining the records came to conclusion and took a view that receipts at the hand of assessee was to be assessed under income from house property and income from other sources and not business income. In ***Commissioner of Income Tax vs. British Paints***

India Ltd., Supreme Court while interpreting Section 145 of the Act held that even if the assessee had adopted a regular system of accounting, it was the duty of the Assessing Officer to consider whether correct profits and gains would be deduced from the account so maintained. Relevant portion are extracted hereasunder:-

> *"Section 145 of the Income Tax Act, 1961 confers sufficient power upon the officer-nay it imposes a duty upon him-to make such computation in such manner as he determines for deducing the correct profits and gains. This means that where accounts are prepared without disclosing the real cost of the stock-in-trade, albeit on sound expert advice in the interest of efficient administration of the company, it is the duty of the Income Tax Officer to determine the taxable income by making such computation as he thinks fit.*
>
> *Any system of accounting which excludes, for the valuation of the stock-in-trade, all costs other than the cost of raw materials for the goods-in-process and finished products, is likely to result in a distorted picture of the true state of the business for the purpose of computing the chargeable income. Such a system may produce a comparatively lower valuation of the opening stock and the closing stock, thus showing a comparatively low difference between the two. In a period of rising turnover and rising prices, the system adopted by the assessee, as found by the Tribunal, is apt to diminish the assessment of the taxable profit of a year. The profit of one year is likely to be shifted to another year which is an incorrect method of computing profits and gains for the purpose of assessment. Each year being a self-contained unit, and the taxes of a particular year being payable with reference to the income of that year, as computed in terms of the Act, the method adopted by the assessee has been found to be such that the income cannot properly be deduced therefrom. It is, therefore, not only the right but the duty of the Assessing Officer to act in exercise of his statutory power, as he has done in the instant case, for determining what, in his opinion, is the correct taxable income."*

22. Thus, a conspicuous glance of judgments of the Apex Court in case of ***Radhasaomi Satsang*** (supra), ***BSNL*** (supra)

as well as ***British Paints India Ltd.*** (supra) it has been constant view that question of *res-judicata* does not apply in tax proceedings, while each assessment year being a unit, what is decided in one year may not apply in following years, but where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other, and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in subsequent year, unless there was a material change justifying the revenue to take different view.

23. In the present case, the AO found sufficient materials and changes in the year under consideration, as he after examining the relevant clauses of agreements formed an opinion that the property was taken on lease for giving it on rent to GAIL. Further, Section 2(13) defines business, which includes any trade, commerce or manufacture or adventure or concerned in the nature of trade, commerce or manufacture. In the present case no business activity was being carried out by the assessee as business is a continuous and systematic activity carried on with a view to earn profit.

24. Further, the records of the assessee revealed that only one person was employed, which cannot go on to establish the fact that any business activity was being carried out by the appellant, and the premises was only let out to GAIL pursuant to the agreement and was thus rightly assessed by the Assessing Officer under the heading 'income from house property and income from other sources'.

25. Now adverting to the second question, whether the assessing authority was justified in treating the receipt of the appellant-assessee as income from house property and income from other sources other than income from business on the basis of partnership deed which defines object of the firm as to the business activity of real estate, letting and sub-letting of the properties and further, upon the agreement so entered by it with GAIL.

26. The constitution Bench of the Apex Court in case of ***Sultan Brothers Pvt. Ltd. vs. CIT, [1964] 51 ITR 353 (SC)*** had the occasion to consider whether the letting of a building fitted with furniture and fixtures and income derived from lease, would be income from business or income from property as well as income from other sources. The Apex Court held that merely by providing in the object clause that any activity was in regard to acquiring the land and building, as well as furnishing and maintaining it and also by leasing the same, would not be assumed as carrying on business activity. Relevant portion are extracted hereasunder:-

> *"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 India Housing and Land Development Trust Ltd. v. Commissioner of Income-tax 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."

Now the cases on which learned counsel for the appellant specially relied were cases of the letting out of plant and machinery, in some instances along with the factory buildings in which they had been housed. In all of them, except one, which we will presently mention, the assessee had previously been operating the factory or mill as a business and had only temporarily let it out as it was not convenient for him at the time to carry on the business of running the mill or factory. In these circumstances, it was held that by letting out the plant, machinery and building the assessee was still conducting a business though not the business of running the mill or factory.

Learned counsel for the appellant also relied on certain clauses in the lease and a clause in the memorandum of the appellant company to show that the lease amounted to the carrying on of a business. We shall now turn to these provisions. Clause 3(b) of the memorandum gave power to the appellant to manage land, buildings, and other property and to supply the tenants and occupiers thereof refreshment, attendants, messengers, light, waiting-room, reading room, meeting, room, libraries, laundry convenience, electric conveniences, lifts, stables and other advantages. The contention was that this cause in the memorandum gave the appellant a power to carry on a business of the nature of running a hotel. We do not think, it did. But in any case, by the lease none of the objects mentioned in this clause was sought to be achieved. We find nothing in the lessor's covenants to some of which we were referred to bring the matter within clause 3(b) of the memorandum. None of these clauses support the contention that by granting the

lease, the appellant did anything like carrying on the business of running a hotel. Thus clause (a) is a covenant for quiet enjoyment. Clause (b) provides for a renewal of the lease of the demised premises being granted to the lessee for a further term of six years at his request. Clause (c) deals with payment of municipal bills and similar charges and ground rent. Clause (d) provides that the lessor shall during the continuance of the lease and on its renewal provide various things which included furniture, pillows, mattresses, gas-stoves, bottle coolers, refrigerators, lift, electric fittings and the like and also paint the outside of the building with oil once in five years and keep the building insured. These are ordinary covenants in a lease of a furnished building. These do not at all show that the lessor was rendering any service in the hotel business carried on by the lessee or in fact doing any business at all. On the facts of this case we are unable to agree that the letting of the building amounted to the doing of a business. The income under the lease cannot, therefore be assessed under section 10 of the Act as the income of a business."

27. In case of ***Universal Plast Ltd. vs. Commissioner of Income Tax [1999] 237 ITR 454 (SC),*** the Apex Court considering the question of leasing out of asset of the business would be income from business or not, the Court held as under:-

"The question whether the amount earned by an assessee by leasing out the assets of the business would be income from business carried on by it, has been the subject-matter of consideration by this Court as well as by various High Courts and it would be useful to refer to the judgments of this Court bearing on the issue. In Commissioner of Excess Profits Tax v.. Shri Lakshmi Silk Mills Limited [1951] 20 ITR 451 (SC), the assessee-company was carrying on the business of manufacturing silk cloth and dyeing silk yarn. Due to lack of supply of silk yarn during the relevant period while keeping idle other plant and machinery, it let out dyeing plant for five months. The question which came up for consideration before this Court was whether the rent received from letting out the dyeing plant would fall under the head "Income

from business" or "Income from other sources". If it was "Income from business", it would have been chargeable to excess profits tax; if not, the liability would not arise. Mahajan,J., speaking for the Court, observed that no general principle could be laid down which was applicable to all cases and each case had to be decided on its own circumstances. It was held that it was part of the normal activities of the assessee's business to earn money by making use of its machinery by either employing it in its own manufacturing concern or temporarily letting it to others for making profit for that business when for the time being it could not itself run it and for that reason the dyeing plant had not ceased to be a commercial asset of the assessee, so the sum representing the rent for five months received from the lessee by the assessee was income from business and was chargeable to excess profits tax. In Narain Swadeshi Weaving Mills CEPT [1954] 26 ITR 765, a Constitution Bench of this Court considered a similar question which also arose under the Excess Profits Tax Act, 1940. In that case, the assessee-firm was carrying on manufacturing business. A Public Limited Company was incorporated to take over the business from the assessee-firm. The company purchased the building of the assessee-firm and took over from it the plant and machinery on lease at an annual rent. One of the questions that fell for consideration there was whether the lease money obtained by the assessee from the company could be legally treated as business profit liable to excess profit tax. Distinguishing Shri Lakshmi Silk Mills' case [1951] 20 ITR 451 (SC), it was pointed out that only a part of the business of the assessee therein, namely dyeing silk yarn, was temporarily stopped owing to difficulty in obtaining silk yarn on account of war so that part of the assets did not cease to be commercial asset of that business and accordingly, the income from the assets would be the profit of the business irrespective of the manner in which that asset was exploited by the company. Noticing the facts in the case before the Court that the assessee had already sold land and building to the Company; it was not having any manufacturing, trading or commercial activity; and let out the plant and machinery on an annual rent of Rupees forty thousand and applying the common sense principle to the facts, this Court found that the transaction of lease was quite apart from the ordinary business activity of the company, so it was impossible to hold that the letting out of the plant and machinery etc. was at all a

business operation when its normal business activity had come to a close.

In CIT v. Calcutta National Bank Limited [1959] 37 ITR 171 (SC), the case arose under the Excess Profits Tax Act. The assessee was a banking company. It owned a six-storeyed building of which only a part was under its occupation and the rest was let out to tenants. The question was whether the rent received from the tenants of the building was the business income of the company. The majority opinion was that realisation of rental income of the assessee was in the course of its business being in prosecution of one of its objects in its memorandum and was liable to be included in its business profits and was assessable to excess profits tax. That conclusion was reached on the premise that the term `business' as defined in that Act was wider than the definition of that term under the Income Tax Act. The minority, however, took a contrary view.

In Sultan Brothers Private Ltd. vs. CIT, [1964] 51 ITR 353 (SC), the assessee constructed a building, fitted it up with furniture and fixtures and let it out on lease fully equipped and furnished for the purpose of running a hotel. The lease amount provided separately for running of the building and hire charges for furniture and fixtures. The question that fell for consideration was whether the rent income was business income taxable under the Income Tax Act, 1922? It was held that as the assessee never carried on any business of a hotel in the premises let out or otherwise at all and there was nothing to show that it intended to carry on a hotel business itself in the same building, the letting of the building did not amount to the carrying on of a business, so the income under the lease could not be assessed as income from business.

The Constitution Bench formulated the principle thus (headnote) :

"Whether a particular letting is business, has to be decided in the circumstances of each case. Each case has to be looked at from the 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....".

In New Sevan Sugar and Gur Refining Co. Ltd. v. CIT [1969] 74 ITR 7 (SC), the appellant-company was carrying on business of crushing sugarcane and gur refining. The building, machinery and plant of the factory mill were leased out initially for a period of five years with three options to renew for similar periods on

the part of the lessee. The assessee had, however, the option to terminate the lease after first two years which option was not exercised. The question was whether the income which arose to the assessee for the Assessment Year 1955-56 from the lease was assessable as income from business or income from other sources? It was held, on interpretation of the terms of the lease deed, that the intention of the appellant-assessee was to part with the machinery of the factory and the premises with the obvious purpose of earning rental income and not to treat the factory and the machinery as commercial asset during the subsistence of the lease; the intention of the appellant was found to go out of business altogether, therefore the income was not assessable as business income.

CIT v. Vikram Cotton Mills Ltd. [1988] 169 ITR 597 (SC) is again a case arising under the Income Tax Act, 1922. One of the creditors filed a petition in the High Court for winding up. The Industrial Financial Corporation took possession of fixed assets under an English mortgage of those assets. The assessee company had gone into losses and had stopped its manufacturing activity. Under the scheme evolved by the High Court under the Companies Act, the business assets were let out for ten years with an option for renewal for another ten years. The management of the company was transferred to a Board of Trustees approved by the High Court. The question which fell for determination was whether the rental income was assessable in the relevant assessment years as business income? The findings of the Tribunal were that on account of financial crisis, the company found it advantageous to let out the machinery on hire for a temporary period and the company was able to liquidate its liability at the end of the lease period and regained possession of its assets; the company did not sell or otherwise dispose of its assets; there was nothing on record to show that the company was formed to let out plant and machinery on hire. The Tribunal came to the conclusion that the maintenance of the assets meant that the Company had an intention to re-start the business and that the intention of the Company in letting out its assets was to exploit the commercial assets for the purpose of its business and therefore the rental income was assessable as business income. On reference, that conclusion was upheld by the High Court. On appeal to this Court, while affirming the decision of the High Court, it was noted that all relevant facts were correctly considered from the standpoint of an ordinary prudent

businessman by the Tribunal and it was also pointed out that the stoppage of the business by the company was a temporary suspension of business for a temporary period with the object of tiding over the crisis condition and there was never any act indicating that the company intended to carry on the business in future.

In the light of the above discussion, the propositions may be summarised as follows:

(1) no precise test can be laid down to ascertain whether income (referred to by whatever 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';

(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 altogether or to come back and restart the same.

(4) if only or 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.

Now adverting to the facts of UPL case, the High Court referred to the findings of the Tribunal that the leasing out of the factory was not a sequel to the assesee's decision to go out of the business in respect of the subject factory and that it was just a make-shift transient alternative means of commercial exploitation of the commercial assets, so income from such letting could not be treated as the fruits of ownership simplicitor of the asset. The High Court also referred to various clauses in the Agreement, particularly Clauses 1, 2, 4, 7, 19, 20, 21 and 22 and concluded that "licensee exercising its vested right of option to purchase the licenced premises, the assessee stands

> *completely out in the cold". The High Court recorded the following findings (page 11):*
>
> *"Therefore, it can very well be presumed that at the time the licence agreement was entered into, the intention of the ultimate outright sell out was already there. The assessee was already committed to the licensee for such a sell-out at licensee's pleasure and there is no means of the assessee falling back from that commitment. Therefore, it can very reasonably be inferred that the assessee in the case decided to go out of business as far as this particular factory was concerned..*
>
> *The lease agreement is in fact a veiled agreement for lease-cum-sale....We are of the opinion that the licensing is not meant to be a temporary stop gap exploitation of commercial assets. It could not be in the contemplation of the assessee at the time it entered into the licence agreement, to retain the assets any more as a commercial asset."*

28. Thus, after having a close glance of the law laid down by the Apex Court in relation to the receipts at hands of assessee from letting out of any property pursuant to an agreement, whether amount to income from business or income from house property and income from other sources, in case of ***Sultan Brothers*** (supra), ***Universal Plast Ltd.*** (supra), ***Shambhu Investment Pvt. Ltd.*** (supra) and ***Hotel Arti Delux (Pvt.) Ltd.*** (supra) the Court was of the view that mere incorporation of the company or firm with an object of carrying on business of real estate, letting and sub-letting of property would not automatically mean that assessee was having business income from the property let out through agreement, but only upon qualifying certain test as laid down that any conclusion can be reached.

29. Business as defined in Section 2(13) of the Act postulates expenses of certain elements in the activity of an

assessee which would invest it with character of business. In each case the question whether or not the assessee carried on business must necessarily be approached in the light of intention of the assessee, having regard to the legal requirements which are associated with the concept of business. Word 'business' is used in the sense of an occupation, or profession which occupies time, attention and labour of a person, normally with the object of making profit. To record an activity as a business there must be course of dealing, which is continued or contemplated to be continued with profit motive and not for sport or pleasure. In the present case, the assessee had deposed and also from perusal of his records it is reflected that only one staff was engaged in the upkeeping and maintenance of the premises let out to GAIL, meaning thereby that no regular or continuous activity was carried out for deeming it to be a business activity for being assessed under the heading income from business.

30. In case of ***State of Gujarat v. Raipur Manufacturing Company Ltd. [1967] 19 HTC 1 (SC)*** the Apex Court observed that in taxing statutes, the word “business” is used in sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. Whether or not a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transaction, or purchase and sale in class of goods and transaction must necessarily be entered into with a profit motive. The said decision was rendered in the context of sales tax law, and was relied upon and referred in the context of Income Tax law in judgment of

Apex Court in case of ***Sole Trustee, Loka Shikshana Trust vs. Commissioner of Income Tax [1975] 101 ITR 234***.

31. As in case of hiring out of a property along with other articles, rights asserts etc. question which arises is whether the income derived is from house property, business or other sources. This was exclusively dealt by Bombay High Court in case of ***CIT vs. National Storage Pvt. Ltd. [1963] 48 ITR 577 (Bom.)***. This case was confirmed in 1967, ***66 ITR 596 (SC)***.

32. For the purpose of income to be revenue in nature it must arise from the various sources as envisaged under the Act. One of such sources is business income, but to be a business income, volume, frequency, continuity, regularity and the intention of the assessee to carry on has to be seen, and where business itself has not come into existence, it cannot be considered to be a business income and therefore, cannot be a revenue receipt, as in the present case the agreement executed between the assessee and the GAIL was for leasing out the premises, secondly for furnishing of the area leased out and thirdly for maintaining the leased out area.

33. Only one staff was kept for the said purpose by the assessee, meaning thereby that no business activity as mandated was carried out by the assessee so as to bring the said exercise within the ambit of business income, and the taxing authorities rightly assessing the assessee under the head 'income from house property and income from other sources'.

34. The guidelines laid down by the Apex Court in case of

Universal Plast Ltd. (supra) considering the Constitution Bench judgment in the case of ***Sultan Brothers Pvt. Ltd.*** (supra), the leasing out of the assets by assessee simplicitor would not constitute business income. Further, the partner of the assessee firm had admitted that the property was purchased to let out on rent to GAIL. The assessing authority had also come to the conclusion that no systematic set up was established for doing business activity and assessee having failed to point out the volume, frequency, continuity and regularity of the transactions.

35. In a similar set of fact, the Bombay High Court in case of ***Mangla Homes Pvt. Ltd. vs. Income Tax Officer, 325 ITR 281 (Bom.)*** following the decision of the Apex Court in case of ***East India Housing and Land Development Trust Ltd. v. CIT [1961] 42 ITR 49 (SC)*** held that income derived by the company from shops and stalls is income received from property and falls under the specific head described in Section 9 being income from property.

36. Thus, the finding recorded by the Assessing Officer after examining all the three agreements found that the assessee did not indulge in any kind of recurring, systematic and in organized manner, business activity and having only one employee rightly assessed the receipts under the heading 'income from house property and income from other sources'.

37. Having considered the case in depth and the findings recorded by the authorities below, we are of the considered opinion that as the appellant-assessee did not carry out any systematic, recurring and in organised manner, any business

activity nor there was any volume, frequency, continuity and regularity of transactions, and only one person was employed by him for the management and look after of the leased property, the taxing authorities had rightly held the receipts to be income from house property and income from other sources and not business income.

38. In our considered view the appeal lacks merit and is hereby **dismissed.**

39. The question of law as framed are hereby answered in favour of the Revenue and against the assessee.

Order Date :- 18.9.2019
V.S.Singh