**IN THE SUPREME COURT OF INDIA**
**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO(S).7379-7380 OF 2016**
**(Arising out of SLP(C) Nos.7857-7858 OF 2012)**

**M/S G.S.HOMES & HOTELS P.LTD. ...APPELLANT(S)**

**VERSUS**

**DY.COMMISSIONER OF INCOME TAX ...RESPONDENT(S)**

**O R D E R**

**1. Leave granted.**

**2. After hearing the leaned counsels for the parties and perusing the relevant material, we modify the order of the High Court by holding that the amount (Rs.45,84,000/-) on account of share capital received from the various share-holders ought not to have been treated as business income. The High Court, therefore, in our considered view, fell into error in reversing the order of the Tribunal on the aforesaid issue. Insofar as the issue of short term capital gains with respect to property T1 and T2 and maintenance deposit is concerned, we do not find any infirmity in the**

**order of the High Court so as to require any modification.**

**3. The appeals are disposed of as partly allowed as indicated above.**

**.....,J.**
**(RANJAN GOGOI)**

**.....,J.**
**(PRAFULLA C. PANT)**

**NEW DELHI**
**AUGUST 09, 2016**

**ITEM NO.3 COURT NO.6 SECTION IIIA**

**S U P R E M E C O U R T O F I N D I A**
**RECORD OF PROCEEDINGS**

**Petition(s) for Special Leave to Appeal (C) No(s). 7857-7858/2012**

**(Arising out of impugned final judgment and order dated 16/09/2011 in ITA No. 16/2003 and ITACR No. 1/2009 passed by the High Court of Karnataka at Bangalore)**

**M/S G.S.HOMES & HOTELS P.LTD. Petitioner(s)**

**VERSUS**

**DY.COMMISSIONER OF INCOME TAX Respondent(s)**

**(with interim relief and office report)**

**Date : 09/08/2016 These petitions were called on for hearing today.**

**CORAM :**
**HON'BLE MR. JUSTICE RANJAN GOGOI**
**HON'BLE MR. JUSTICE PRAFULLA C. PANT**

**For Petitioner(s) Mr. Preetesh Kapur, Adv.**
**Ms. Radha Rangaswamy,Adv.**

**For Respondent(s) Mr. Ranjit Kumar, Solicitor General**
**Ms. Anita Sahani, Adv.**
**Mr. S. Wasim A. Qadri, Adv.**
**Ms. Anita Sahni, Adv.**
**For Mrs. Anil Katiyar,Adv.**

**UPON hearing the counsel the Court made the following**
**O R D E R**

**Leave granted.**

**The appeals are disposed of in terms of the signed order.**

**(Neetu Khajuria) (Asha Soni)**
**Court Master Court Master**

**(Signed order is placed on the file.)**

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 16TH DAY OF SEPTEMBER, 2011

PRESENT

THE HON'BLE MR. JUSTICE V. G. SABHAHIT

AND

THE HON'BLE MR.JUSTICE RAVI MALIMATH

I.T.A. No. 16 OF 2003
C/W
I.T.A. CROB No. 1 OF 2009

ITA NO.16/2003

BETWEEN:

THE DY. COMMISSIONER OF
INCOME TAX, CO. CIRCLE-4 (3)
BANGALORE. ... APPELLANT

(BY SRI M.V SESHACHALA, ADV.)

AND:

M/S G.S HOMES & HOTELS
PVT LTD. NO. 148, INFANTRY ROAD,
BANGALORE. ... RESPONDENT

(BY SRI A SHANKAR & SRI M LAVA , ADVS.)

THIS ITA IS FILED UNDER SECTION 260-A OF I.T.ACT, 1961 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE, ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX

APPELLATE TRIBUNAL IN ITA NO. 504/Bang/02 DATED 20-08.2002 AND TO PASS SUCH OTHER SUITABLE ORDERS AS THIS HON'BLE COURT DEEMS FIT TO GRANT IN THE FACTS AND CIRCUMSTANCES OF THE CASE IN THE INTEREST OF JUSTICE AND EQUITY.

I.T.A. CROB No. 1 OF 2009

BETWEEN:

M/S G.S HOMES & HOTELS PVT LTD.
REP.BY ITS DIRECTOR SRI D. VIJAYAKUMAR,
NO. 148, INFANTRY ROAD,
BANGALORE. ...CROSS OBJECTOR

(BY SRI A SHANKAR & SRI M LAVA , ADVS. FOR CROSS OBJECTOR)

AND:

THE DY. COMMISSIONER OF INCOME TAX,
COMPANY CIRCLE-4 (3)
BANGALORE. ... RESPONDENT

(BY SRI M.V SESHACHALA, ADV. DIRECTED TO TAKE NOTICE FOR RESPONDENT. (V/O DT. 19/10/2010 IN ITA 16/2003)

THIS I.T.A CROB IS FILED UNDER ORDER XLII, RULE 1 R/W O. XLI, RULE 22 OF CPC, ARISING OUT OF ORDER DATED 20-08-2002 FOR THE BLOCK ASSESSMENT YEAR PERIOD 1996-97 IN ITA NO. 504/Bang/O2 PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN,

ALLOW THE CROSS-OBJECTION ARISING OUT OF THE TRIBUNAL BEARING, IN ITA NO. 504/Bang/02 DATED 20-08-2002, IN THE INTEREST OF JUSTICE AND EQUITY.

THESE I.T.A. & I.T.A CROB HAVING BEEN HEARD AND RESERVED FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, V.G.SABHAHIT J., DELIVERED THE FOLLOWING:-

**JUDGMENT**

This appeal and cross objection arise out of and are directed against the order passed by the Income Tax Appellate Tribunal, Bangalore Bench, Bangalore in ITA No.504/Bang/2002 for the assessment year 1996-97 wherein the Tribunal has upheld the finding of the first appellate authority and the Assessing Officer that the principle of mutuality is not applicable on the facts and in the circumstances of the case and law and has confirmed the finding in that behalf. However, has set aside the order passed by the first appellate authority confirming the order of Assistant Commissioner and allowed the appeal filed by the assssee by deleting Rs.22,92,000/- (maintenance deposit), Rs.45,84,000/- (share capital),

Rs.34,00,000/- (cost of T1 and T2 units with lawn areas as stock) and Rs.99,76,666/- (short term capital gains).

2. ITA No.16/2003 is filed by the revenue being aggrieved by the relief granted by the ITAT in favour of assessee and cross objection 1/2009 is filed by the assessee being aggrieved by the finding of the Tribunal that the principle of mutuality is not applicable to the present case.

3. The material facts leading up to this appeal and cross objection are as follows:

The assessee-Company was incorporated on 22.01.1976 with the object to run the business in real estate. The assessee filed return of income on 31.03.1998 for the assessment year 1996-97 with nil income. The assessee company followed Mercantile system of accounting. The return was processed u/s 143 (1) (a) on 26.10.1998. While going through the returns filed by the assessee it was noticed that the assessee company

although showing land as stock in trade in the balance sheet, the same has not been taken it to profit and loss account thereby reducing the taxable income to that extent. Further, the assessee company shows in the Balance Sheet nil fixed assets for the year 1995-96 whereas for the assessment year 1996-97 the fixed assets is shown as Rs.6.03 crores and the assessee company although constructed a huge commercial complex on the land owned by it the same was not duly reflected in the profit and loss account and hence the taxable income ascertainment is avoided. To examine these issues, the case was re-opened and notice u/s 148, 143 (2) and 142 (1) were issued to the assessee as it falls under compulsory scrutiny. In response to these notices, the assessee represented by its Directors appeared and offered clarification and filed details, for the queries raised in the course of hearing. Books of accounts and connected details were produced and have been checked by the Assessing Officer. The Assessing Officer held that

the assessee company was incorporated with the object of real estate agency and the assessee company developed a complex for the benefit of its shareholders for which it required the shareholders to deposit funds. The floor area in the complex were allotted to the share holders in proportion to the number of shares held by them in the assessee company and deposits were collected from them in proportion to the floor area allotted to each of them. The shareholder member on allotment of the floor area of the complex was entitled to have the right to use and enjoy the premises so allotted and was also entitled to enjoy the amenities including the common area. A maintenance deposit had to be made with the company for the so-called purpose of maintenance and upkeep of the building. The money/deposits so collected from the shareholders had been used for the construction of the complex. The Assessing Officer took a view that the above arrangement was adopted by the assessee to evade the tax and held that the assessee company being in the

business, the surplus out of the construction funds realised is business income of the assessee company. The Assessing Officer determined the taxable business income at Rs.6,11,704/- on the basis of the following findings:

> *"a) All the refundable deposits and other so-called deposits collected under the scheme is considered as income.*
>
> *b) All the direct and indirect expenses incurred for the building and the statutory deposits are paid are treated as expenditures.*
>
> *c) The cost of building put up in terrace which is not covered under the original scheme, Rs.34,00,000/- is treated as stock in trade and not included as cost for the item referred in (b) above.*
>
> *d) The surplus resulting on construction activity under the scheme is taxed as business income.*
>
> *e) The amount/consideration received from T1 to T2 right holders is treated as receipt in hands of the assessee company and is taxed as short term capital gains.*

*f) The surplus resulting on the maintenance activity is treated as business income.*

*g) Depreciation on the building is not allowed."*

and accordingly prepared the profit and loss account for the year ended 31.03.1996. Being aggrieved by the said order passed by the Assessing Officer, the assessee preferred an appeal before the office of the Commissioner of Income Tax, (Appeals)-II, Bangalore, in ITA No.458/CIT(A)-II/01-02 and the first appellate authority confirmed the order passed by the Assessing Officer. Being aggrieved by the same, the assessee preferred an appeal before the Income Tax Appellate Tribunal, Bangalore Bench, Bangalore, (for short 'the ITAT') in ITA NO.504/Bang/02. On 20.08.2002, the ITAT also confirmed the order passed by the first appellate authority and the Assessing Officer by holding that the principle of mutuality was not applicable and the income derived from the deposits which was used for construction of the

building from the shareholders be treated as the business income and they are entitled to admissible deduction towards the expenses of construction and other expenses. However, the Appellate Tribunal held that Rs.49,60,000/- incurred towards construction deposit and Rs.47,50,000/- towards lawn area and Rs.26,666/- towards lift are to be treated as business income as against the short term capital gains as ordered by the Assessing Officer as on the other allottees of shares and deposits were made under the same terms and conditions. Further, the Tribunal deleted the additions made by the Assessing Officer which was confirmed in appeal by the first appellate authority. Being aggrieved by the said finding of the Tribunal allowing the appeal in favour of the assessee by deleting the above said additions which were made by the Assessing Officer and which was confirmed by the first appellate authority, the revenue has preferred ITA No.16/2003 and being aggrieved by the finding that the

principle of mutuality is not applicable, the asessee has filed cross objection 1/2009.

4. Both the appeal and cross objections have been admitted for consideration of the following substantial question of law by order dated 07.01.2004.

> *"1. Whether the Tribunal was correct in holding that the maintenance deponent cannot be treated as the income of the assessee and charged to tax as the same was received towards future maintenance and upkeeping of building?*
>
> *2. Whether the Tribunal was correct in holding the share capital received by the assessee was in the nature of capital receipt and cannot be treated as a business income despite the same having received towards allotment of flats/units?*
>
> *3. Whether the Tribunal was correct in holding that the amount received towards transfer of T1 & T2 units with lawn rights does not amount to a transfer and therefore capital*

*gains tax cannot be levied as the entire receipt is treated as business income only?*

*4. Whether the Tribunal was correct in holding the stock of T1 & T2 units plus lawn area which was transferred, cannot be treated as stock in trade of the assessee, when the transferred amount is treated as business income of the assessee?*

*5. Whether on the facts and circumstances of the case, the Tribunal is justified in law in not holding that the income is also liable to be exempt on the principle of mutuality having regard to the ratio of the decisions of the Supreme Court in 243 ITR 89 and 226 ITR 97?*

5. We have heard learned counsel for the appellant/revenue and the learned counsel for the respondent/assessee.

6. Learned counsel for the appellant/revenue reiterated the grounds urged in the appeal memo and submitted that the Tribunal having found that the amount received by

way of deposit from the shareholders for allotment of construction portion was to be treated as income from business as the assessee was dealing in real estate, was not justified in holding that the lease made in favour of T1 and T2 along with lawn area was not in the earlier scheme and did not stand on the same footing as that of the shareholders depositing the amount proportion to the allotment of floor area made in their favour and a perpetual lease was executed in their favour in respect of both T1 and T2 area and lawn area and therefore the said amount was rightly treated as short term capital gain and the Tribunal only on the ground that the said two persons to whom T1 and T2 are allotted and the lawn area has been allotted on the same footing to other shareholders which is contrary to the material on record, was not justified in holding that the said income should not be converted as short term capital gain and should be treated as business income only as held in respect of other shareholders. Learned counsel further submitted that T1

and T2 was leased in favour of two Directors of the company and the said construction was not put up in accordance with law as per the original scheme. There was no provision for putting up construction as per T1 and T2 lawn area and therefore the order passed by the Tribunal cannot be sustained and the order passed by the Commissioner of Income Tax upholding the order of the Assessing Officer treating the said income towards deposit and allotment of T1 and T2 for lawn area as short term capital gain may be restored. Learned counsel further submitted that maintenance deposit of Rs.22,92,000/- had to be made with the company for the purpose of maintenance and upkeep of the building and that they were also obliging to pay the said amount for the amenities provided by the company. The Tribunal failed to note that the said amount of Rs.22,92,000/- also formed part of the consideration for allotment of the floor area though it was styled as deposit. Learned counsel further submitted that the order passed by the Tribunal

disallowing the additions made is erroneous and liable to be set aside. He also submitted that the Tribunal has rightly held that principle of mutuality is not applicable to the present case as the assessee is a company incorporated for doing real estate business and having regard to the rights that are transferred in favour of the allottees, the share holders as they can use the property and also alienate lease or deal with the property as they like and though the deposits were termed as refundable, the assessee would not have cancelled the allotment and refunded the deposit as there was no provision for it and therefore the finding of the Tribunal confirming the order passed by the Appellate Authority and the Assessing officer that principle of mutuality is not applicable and therefore the assessee is liable to be taxed on business income is justified.

7. Learned counsel for the assessee/respondent argued in support of the order passed by the Tribunal and

submitted that the Directors to whom T1 and T2 and the lawn area have been allotted stand on the same footing as other Directors and once it is held that the said amount should be treated as business income as treated in respect of other shareholders, question of treating the said income as short term capital gain would not arise and the Tribunal was justified in treating it as stock in trade of the assessee and further submitted that the maintenance deposit was for the future maintenance of the common area to provide to all the shareholders of the company. He further submitted that the Tribunal was not justified in holding that the principle of mutuality is not applicable to the facts of the present case having regard to the decisions relied upon by him which would be referred to at the time of consideration of the substantial questions of law and the Tribunal was not justified in negativing the contention of the assessee that business income is also liable to be exempted on the principle of mutuality having regard to

the ratio of the decisions of the Supreme Court referred to by him.

8. We have given careful consideration to the contentions of the learned counsel for the parties and scrutinised the material on record in the light of the principles laid down in the decisions relied upon by the counsel for the parties.

9. Points No.2 and 5 are taken up for consideration together since they are interconnected. It is clear from the scrutiny of the material on record that admittedly the respondent/assessee company was incorporated as per fresh certificate of incorporation on 17.01.1995. The Memorandum of Association of the respondent/company would clearly show that the main object of the company was real estate and it is maintaining mercantile system of accounting. It was contended by the assessee that the income derived from deposits from the shareholders towards the value of the floor area allotted to them

proportionately and other deposits should be treated as income from the property and not as business income. However, so far as the said contention of the assessee is concerned, the same has been rejected by the Assessing Officer and the appellate authority and the Tribunal also observed that the income received by deposits towards allotment of flats and units in the nature of capital receipt cannot be treated as a business income having regard to the objects of the respondent/assessee that is doing real estate business by putting up construction and selling the same. The concurrent findings arrived at by the Assessing Officer and the Appellate Authority are justified based upon the material on record having regard to the nature of the agreement entered into between the assessee and its shareholders. However, it was contended that in view of the principle of mutuality also it is not in dispute that having regard to the date of agreement, the deposits have been received for allotment of the floor area to the respective share holders. However, according to the

assessee in view of the principle of mutuality, the said income is not liable to tax. It is clear from the concurrent findings arrived at by the ITAT and the first Appellate Authority and the Assessing Officer on facts that the question of mutuality cannot be invoked in the present case so as to avoid payment of tax on the surplus income received by way of deposit from the shareholders for the allotment of rights in the built area and in the plots allotted to them. The authorities below have held that in view of the decision in the case of ***SHREE NIRMAL COMMERCIAL LTD., VS. COMMISSIONER OF INCOME TAX (193 ITR 694)*** wherein the division bench of Bombay High Court has held that where there is private motive and possibility of exploitation for commercial purposes, question of mutuality would not be there and has observed as follows:

> *"That having regard to the manner in which the non-refundable deposits were taken from the share-holders, the shareholders were allotted floor space area which they were not only*

*entitled to occupy but were also entitled to assign to others on payment of compensation and to transfer their occupancy rights by sale of shares and the purpose for which the compensation was charged, the whole transaction was, in reality, a sale of floor space by the assessee-company to its shareholders. The assessee-company had kept with itself only the right of the management of property as a whole, the compensation being charged by way of reimbursement of the expenses which were likely to be incurred. After parting with the right of occupancy of the floor area to every member, what remained with the assessee was merely ownership in the technical sense of the worl. The residuary rights of ownership which remained with the assessee-company were negligible and of dubious value. The residuary ownership rights were incapable of being let out. The charge under section 22 failed and the deposits had to be treated as trading receipts."*

10. The said decision has been reiterated by the Bombay High Court in the case of ***SHREE NIRMAL COMMERCIAL LTD. VS. COMMISSIONER OF INCOME***

***TAX (213 ITR 361).*** The ITAT, the first appellate authority and the Assessing Officer have rightly held that the decisions relied upon by the learned counsel appearing for the assessee in the cases of ***COMMISSIONER OF INCOME TAX VS. BANKIPUR CLUB LTD., (226 ITR 97)*** and ***CHELMSFORD CLUB VS. COMMISSIONER OF INCOME TAX (243 ITR 89)*** is not applicable to the present case as rightly held by the authorities below in view of the fact that the agreement would transfer ownership to the occupants, the shareholders for consideration of deposit made with the company and the right of ownership that is retained by the company is only dubious or negligible and having regard to the contents of the agreement, the authorities below have held that in order to constitute mutuality what is required to be proved is identity between contributor and the beneficiary, absence of private motive and the entire concept of mutuality is based upon the principle that when a property is held by the members, they cannot

be said to earn profit on their own property and whatever the income that is received by the Society or the Company would be shared by the members of the shareholders and therefore there is concept of mutuality among the company and the members. The other condition that is required to be proved is that there is no other beneficiary other than the contributors and treatment of company as an instrument obedient to the members mandate.

11. The Hon'ble Supreme Court in the case of ***COMMISSIONER OF INCOME TAX VS. PODDAR CEMENT PVT. LTD., (226 ITR 525)*** has observed as follows:

> *"Through under the common law "owner" means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, the Registration Act, etc., in the context of Sec.22 of the Income Tax Act, 1961, having regard to the ground realities and further having regard to the object of the Income Tax Act, namely, to tax the income, "owner" is a person who is entitled to receive income from the property in his own*

*right. The requirement of registration of the sale deed in the context of Section 22 is not warranted."*

12. Having regard to the terms of agreement in the present case, the authorities below have held that the occupants are given as per the agreement absolute right over the property, right to occupy the property, right to alienate or sell the property and the agreement would clearly show that in view of the consideration of deposit, the occupants would get allotted a specific commercial apartment together with a perpetual, uninterrupted, absolute and exclusive right to use and enjoy such apartment and the common area, along with the right to exploit, let out or otherwise enjoy the same and appropriate the income, usufruct and other benefits therefrom with such member also having the right to dispose of his share, deposit and interest vested in him in respect of the apartment allotted to him by a document intervivos or otherwise and in view of the above said rights

which are conferred upon the occupants, it is clear that the profit motive is involved in the scheme prepared by the respondent/assessee for conferring title under the agreement as referred to above and the income that is derived by the company is not shared among the shareholders but they are only entitled to dividend on the share.

13. Learned counsel for the assessee submitted that the principles laid down in Shree.Nirmal's case cited supra followed by the ITAT, first appellate authority and the Assessing Officer cannot be applied to the present case as in the said case, the deposit taken was not refundable and it was non-refundable and in the present case, the deposit is refundable on the principles of easing to the shareholders of the company or alienating the property. However, the agreement entered into by the assessee with the shareholders would clearly show that the assessee cannot voluntarily cancel right conferred upon the

shareholders under the agreement and after returning the deposit received by the company and therefore mere fact that the deposit is refundable in the present case would not in any way help the finding regarding the principle of mutuality and having regard to the concurrent finding arrived at by the ITAT, first appellate authority and the Assessing Officer that the principle of mutuality is not applicable in the facts and circumstances of the case is justified. We do not find any ground to interfere with the said finding arrived at by the lower authorities. Accordingly, we answer substantial question Nos.2 and 5.

14. Point Nos.3 and 4. These two substantial questions of law pertain to the validity of the order passed by the Tribunal in so far as it relates to the finding that the said transaction stands on the same footing as that of the other shareholders and therefore the income being the amount paid by the allottees of T1 and T2 and lawn area and should also be treated as business income of the

assessee by setting aside the order passed by the first appellate authority and the Assessing Officer that the income paid by the occupants of T1 and T2, the formal Directors of the assessee/company should be treated as short term capital gain is justified.

15. It is clear from the perusal of the order passed by the Tribunal that the only ground upon which the Tribunal has proceeded to hold that the income received from the allottees of T1 and T2 should also be treated as business income is that they also stand on the same footing as other allottees and therefore the amount paid by them could not have been treated as short term capital gain as it is clearly observed in paragraph 8.3.2 that they do not find any difference between the terms of allotment units between these two class of unit holders. The right acquired by both the class are also similar. Thus, it amounts to sale of property to T1 and T2 unit holders also. The nomenclature given to such deposits is nothing

but only for transfer by way of sale such units only and therefore they are to be treated as business income thereby setting aside the order passed by the Tribunal by the first appellate authority and the Assessing Officer holding that income as short term capital gain attracting tax u/s 45 of the Act. It is clear from the perusal of the material on record including the agreement entered into in respect of T1 and T2 unit holders and also the lawn area thereon do not stand on the same footing as the agreement entered into with the other shareholders, the persons in whose favour the said agreements were entered into and various amounts were received by the Directors of the assessee-company and the amounts received under the various agreements from the allottees of T1 and T2 and lawn area under different agreements entered into their favour. The finding of the first appellate authority and the assessing officer is to the effect that during the financial year 1995-96, the company had given the lease right of the floor area of 4000 sq. ft (T1 and T2) and

10,000 sq. ft of lawn area to its own Directors namely Jitendra Virwani and A.L.Sanghvi, by 6 identical agreements on 20.11.1995 15.03.1996 together with un-irrevocable, perpetual, uninterrupted, absolute and exclusive right to use and enjoy the same and appropriate the income, usufruct and other benefits therefrom as per the salient features in the agreements wherein a person on becoming a member of the company and holding a specified number of shares and the contents of the agreement are different. The details of the rent received pursuant to the lease are as follows:

"a) Mr. Jitendra Virwani

| | |
|---|---|
| i) For built up space of 2000 Sq ft. | Rs.24.80 lakhs |
| & ii) For lawn area of 4000 Sq.ft. | Rs.23.75 lakhs |

b) Mr. A.L.Sanghvi

| | |
|---|---|
| i) For built up space of 2000 Sq.ft. | Rs.24.80 lakhs |
| ii) For Lawn area of 4000 Sq.ft. | Rs.23.75 lakhs |
| | Rs.97.10 lakhs |

16. The details of rent received in respect of T1 and T2 are as follows:

**DETAILS OF RENT RECEIVED IN RESPECT OF T1 AND T2**

| Particulars | Deposits Received | Rent Received | | | | |
|---|---|---|---|---|---|---|
| | | 31/03/97 | 31/03/98 | 31/03/99 | 30/09/99 | Total |
| A.L. Sanghvi | 3,120,000 | 520,000 | 1,560,000 | 1,601,600 | 842,400 | 4,524,000 |
| Jitendra Virwani | 3,120,000 | 520,000 | 1,560,000 | 1,601,600 | 842,400 | 4,524,000 |
| | 6,240,000 | 1,040,000 | 3,120,000 | 3,203,200 | 1,684,800 | 9,048,000 |

17. The rights that vested in the said Directors by the agreement are heritable and transferable to any other persons by a document intervivos or otherwise and the transferee, assignee and successor also shall be entitled to enjoy such rights, subject to the restrictions and the liabilities set out under this agreement. There is no clause to refund the money by the Company to the Directors. The lease derived rental income of Rs.90.48 lakhs and an interest free deposits of Rs.62.40 lakhs as reflected in the table above during the period from 96-97 to 30.09.1999. Therefore, the company paying back the money to those

Directors does not arise. During the financial year 1999-2000, the floor area 4000 sq. ft. (T1 and T2) and 10,000 sq. ft. lawn space at 4th floor of the said commercial complex was given to Mr.Jitendra Majethia and his group on a perpetual lease for indefinite period from August 1999 for consideration of Rs.1.05 crores. The built up space of 4000 sq. ft. at T1 and T2 and lawn area of 10000 sq. ft was given on perpetual lease to Mr.Jitendra Majethia and his group of person and the deeds envisaged that the lessee being desirous of acquiring by way of lease, the constructed area on the 4th floor of the building standing on the schedule 'A' property along with the open garden space in front of the said constructed area, approached the confirming party and the lessor herein; and whereas the lessor and the confirming party informed the lessee that the said constructed area has still not been assessed to municipal tax in view of the same being constructed over and above the constructed area sanctioned and the perpetual lease was created. It is also clear that the lessee

accepts a lease of apportion of the premises bearing No.T1 on the 4th floor of the building standing on the property bearing No.148, Infantry Road, Bangalore and lessees have paid altogether one time premium of Rs.105.00 lakhs to the lessor (company) for the schedule premises.

18. The Assessing Officer held that the income received by the company as consideration for allotment of T1 and T2 which was not the construction approved under the original scheme and which was also without the permission of the competent authority and in view of the above said facts constituted short term capital income and accordingly the Assessing Officer held that the amount of Rs.99,76,666/- was to be treated as short term capital gain since no cost of the right is taken and the cost of right is taken as nil since the company retained the stock-in-trade and completed assessment accordingly by treating the income of Rs.99,76,666/- as the short term capital gain. However, the appellate authority confirmed

the finding that the income received by the assessee from the rights of T1 and T2 and lawn area would attract tax was rightly held to be short term capital gain. However, the appellate authority held that out of the amount of Rs.99,42,666/-, an estimated cost of leasehold right or right of exploit at Rs.34,000/- had to be deducted and the short term capital gain accordingly worked out to Rs.99,42,666/-. In arriving at the said conclusion, the Assessing Officer and the Appellate Authority have relied upon the decision in the case of ***A.R.KRISHNAMOORTHY VS. COMMISSIONER OF INCOME TAX (176 ITR 417)***. Therefore, the reasons assigned by the material on record would clearly show that rights of T1 and T2 and lawn area do not stand on the same footing as other shareholders in whose favour premises were allotted as construction T1 and T2 and lawn area was not included in the original scheme and it was in favour of the Directors initially as a lease deed and thereafter the same has been alienated as referred to above and therefore the order passed by the

Tribunal setting aside the order passed by the first appellate authority is liable to be set aside and order passed by the first appellate authority is entitled to be restored and accordingly we answer substantial questions of law 3 and 4 also in favour of the revenue and against the assessee as above.

19. Point No.1: The Tribunal has held that maintenance deposit cannot be treated as income of the assessee and charged to tax as the same was received towards future maintenance and upkeeping of buildings. However, the said finding of the Tribunal is not at all based upon the material on record as the material on record would clearly show that the maintenance costs collected at the rate of 2.75 per sq. ft. from the member allottees for future maintenance was admitted to be a business income notwithstanding the fact that it was taken as deposit for future maintenance and the assessee conceded that surplus of the amount can be treated as income from

business. The said observations in the order passed by the Assessing Officer and in view of the said admission that the said deposit of Rs.22,92,000/- are not in respect of transfer of property but for future maintenance of the common facility to be provided to the various occupants is clearly erroneous as the Assessing Officer and the appellate authority have referred to the submission made by the assesses before them to the effect that the surplus income from the said deposit shall also be shown as income from business and accordingly on the basis of the said submission, order has been passed by the Assessing Officer and the first appellate authority and therefore the Tribunal was not at all justified in deleting the income of Rs.22,92,000/- shown as income from business in respect of maintenance deposit and therefore the order of the Tribunal cannot be sustained and same is liable to be quashed by restoring the order of the first appellate authority and the Assessing Officer. Accordingly, we answer the substantial questions of law in favour of the

revenue and against the assessee and pass the follow order:

The order passed by the Income Tax Appellate Tribunal in ITA No.504/Bang/02 is set aside as per our answer to substantial questions of law and the order passed by the first appellate authority-Commissioner of Income Tax (Appeals)-II, Bangalore, dated 13.02.2002 confirming the order passed by the Assessing Officer except deduction of the amount taken as short term capital gain and reducing capital gain by Rs.34,000/- is restored. Cross objection filed by the assessee is dismissed.

Sd/-
JUDGE

Sd/-
JUDGE

Jm/-