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

BEFORE SHRI JASON P. BOAZ ACCOUNTANT MEMBER
AND SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No. 844/MUM/2014
(Assessment Year : 2005-06)

The Income Tax Officer 18(2)(1),
Room No.110, Piramal Chambers,
Lalbaug Parel,
Mumbai 400 012 ... Appellant

Vs.

Dr. Vasant J Rath Trust,
Top Floor, Manisha Bldg.,
S.H.Paralkar Marg, Shivaji Park,
Dadar (West)Mumbai 400 028
PAN: AAAAV 1500B .... Respondent

C.O. NO.76/MUM/2015
[Arising out of ITA No. 844/MUM/2014
(Assessment Year : 2005-06)]

Dr. Vasant J Rath Trust,
Top Floor, Manisha Bldg.,
S.H.Paralkar Marg, Shivaji Park,
Dadar (West)Mumbai 400 028. .... Cross Objector

Vs.

The Income Tax Officer 18(2)(1),
Room No.110, Piramal Chambers,
Lalbaug Parel,
Mumbai 400 012 ... Appellant in appeal

Revenue by : Shri Vikash Kumar Agarwal
Assessee by : Shri Madhur Agarwal &
Ms. Indira Anand

Date of hearing : 22/02/2016
Date of pronouncement : 29/02/2016

ORDER

PER JASON P. BOAZ, A.M:

This appeal by the Revenue is directed against the order of the CIT(Appeals)-29, Mumbai dated 22/11/2013 for assessment year 2005-06. The assessee has also preferred cross objection('C.O') in respect of the impugned order.

2. The facts of the case, briefly, are as under:-

2.1 The assessee trust filed its return of income for assessment year 2005-06 on 25/04/2012 in response to notice under section 148 of the Income Tax Act, 1961(in short 'the Act') declaring income of Rs.3,88,000/-. Proceedings under section 147 of the Act were initiated for assessment year 2005-06 in view of AIR information that the assessee had made investment for acquiring NABARD bonds/debentures amounting to Rs.25,00,000/- in the period under consideration. Notice under section 148 of the Act was issued on 27/3/2012. The assessee vide letter dated 26/7/2013 addressed to the Assessing Officer sought the reasons recorded for initiating proceedings under section 147 and issue of notice under section 148 of the Act , which were provided vide the Assessing Officer's letter dated

3/9/2013. The assessment was completed under section 143(3) of the Act vide order dated 15/1/2013 determining the income of the assessee at Rs.40,43,750/- as against the returned income of Rs.3,88,000/-. In the period under consideration, the assessee GRANTED tenancy rights of a property owned by it i.e. Vasant Niwas, Opp. Dadar Railway Station (W), Ranade Road, Dadar, Mumbai 400028, to six different parties/tenant for a premium aggregating to Rs.51,00,000/- alongwith monthly rents as under:-

S.No.	Date of transfer	Name of Tenant	Premium (Rs.)	Rent per month (Rs.)
1.	3/6/2004	Shubham Foods	6,00,000/-	1,450.00
2.	8/6/2004	Ramniklal Doongarshi Maru	4,50,000/-	383.00
3.	8/6/2004	Shantilal Doongarshi Maru	5,50,000/-	468.15
4.	8/6/2004	Suvidha Fashion P. Ltd.	10,00,000/-	634.95
5.	21/01/2005	Smt. Bhagyashree Omprakash Jaiswal & Shri Omprakash Jaiswal	8,00,000/-	1,401.00
6.	21/01/2005	Smt. Smt. Bhagyashree Omprakash Jaiswal	17,00,000	6,166.00
Total Premium received			51,00,000	

2.2 The assessee had offered the premium of Rs.51 lakhs received on transfer of tenancy rights to long term capital gains('LTCG') and claimed deduction under section. 54EC of the Act to the extent of investment of the capital gain i.e. 46.00 lakhs. The Assessing Officer did not accept the explanations of the assessee in this regard and proceeded to treat the premium of Rs.51.00 lakhs received on grant of tenancy rights not

as capital gains as returned by the assessee but as income from house property.

2.3 Aggrieved by the order of assessment for assessment year 2005-06 dated 15/01/2013, the assessee preferred an appeal before the CIT(Appeals) -29, Mumbai. The CIT(Appeals) disposed of the appeal vide the impugned order dated 22/11/2013 allowing the assessee partial relief. In so doing, the CIT(Appeals) (1) reversed the order of the Assessing Officer in holding the premium of Rs.51.00 lakhs received on transfer of tenancy rights as exigible to tax under the head 'income from house property' and held it to be assessable as capital gains as declared by the assessee, (2) the CIT(Appeals), however, dismissed the legal ground raised by the assessee challenging the validity of the order passed under section.147 r.w.s. 143(3) of the Act.

3.1 Aggrieved by the order of the CIT(Appeals) -29, Mumbai dated 22/11/2013 for assessment year 2005-06, Revenue has preferred an appeal raising the following grounds:-

> *"1. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made by the A.O. without appreciating the fact that the Tenancy right is a self-arising asset in the hands of tenant. This asset comes in to existences only when the tenant resides in the tenanted property for longer period i.e. at least more than 12 years and belongs to tenant only. This right is not acquired by the owner of property.*
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> *2. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made by the A.O. without appreciating the fact that the landlord cannot be a tenant in his own property as he is the owner of the property and has all the ownership rights pertaining to the said property.*
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> *3. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made by the A.O. by holding that /" in the case of Shri Vinod V. Chhapia (HUF) Vs. ITO, the tenancy y. rights were not with landlords of the property and such rights were vested with the old tenants and the*

same were transferred to a new tenant and in the instant case the landlords being the owner of the property entered into agreements directly with the new tenants and surrendered tenancy rights in the property without appreciating the fact that whether the rental agreement is tri-partite or bi-lateral is immaterial in so far as receipts in the hands of landlords are concerned. The CIT(A) did not consider the fact that the landlords had entered into separate agreements with old tenants and new tenants respectively effectively making a tripartite arrangement.

4. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made by the A.O. without appreciating the fact that the ITAT Mumbai, 'F' Bench in the case of Shri Vinod V. Chhapia (HUF) Vs. ITO (ITA No.3178/Mum/2010 dt. 21.11.2012) has upheld the stand of the Revenue by observing that the amount received by the landlords from the new tenant for accepting new party as his tenant in place of old tenants, is not a capital receipt. The facts of the case of Shri Vi nod V. Chhapia (HUF) are similar to the facts of the instant case i.e. Dr. Vasant J. Rath Trust. Thus the CIT(A) has erred by not following the decision of the jurisdictional ITAT, Mumbai.

5. On the facts and circumstances of the case and in law, the Ld.CIT (A) erred in deleting the addition made by the A.O. by drawing conclusion at para 55 of his appellate order that the facts of Shri Vinod V. Chhapia (HUF) are not identical to the facts of the instant case since in the case of Shri Vinod V. Chhapia (HUF), the landlords received the- amount as a confirming party to the agreement between the old tenant and the new tenant whereas in the instant case, the landlords being the owner of the property entered into agreements directly with the new tenants and surrendered the tenancy rights of the property in question without clarifying how the direct nature of agreements leads to the conclusion that there is a transfer of capital asset.

6. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made by the A.O. by holding at para 55 of his order that in the instant case, the tenancy agreement is a direct agreement between the landlords and the tenants without appreciating the fact that the landlords had entered into separate agreements with the old tenants as well with new tenants respectively. As per the agreements between the landlords and tenants, the landlords had received back the vacant possession of the premises from the old tenants who had surrendered the tenancy rights in favour of the landlords without getting any consideration for the same

whatsoever. By no stretch of imagination it can be presumed that the old tenant surrendered tenancy to the landlord without getting a single rupee.

7. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made by the A.O. without appreciating the fact that in both cases i.e. in the case of Shri Vinod V. Chhapia (HUF) and in the case of assessee i.e. Dr. Vasant J. Rath Trust, landlord had received a huge sum of money as advance rent from the new incoming tenant. Hence, this advance rent received has been correctly taxed by the A.O. under the head "Income from House Property". Also, the landlord had entered into separate agreements with new tenants and received a huge sum of money from them and had charged a nominal monthly rent from them which clearly falls under the head of 'Income from House Property' and cannot be taxed as 'Capital Gains'.

8. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made, by the A.O. without appreciating the fact that Clause-3 of the Agreements between the landlords and the new tenants indicate that the tenants agreed to take from the landlords the tenancy in respect of the tenanted premises on monthly tenancy basis at or for a stipulated "premium" and the stipulated monthly "rents". The question why the monthly rent is minimum and the "premium" is very high is further clarified by clause 4(1) which states that in consideration of the "premium" the landlords hereby agree to grant to the tenant and the tenant hereby agrees to accept from the landlords the monthly tenancy in respect of the tenanted premises. Similarly, Clause 4(2) states that as consideration for the grant of the monthly tenancy, the tenant paid to the landlords a lump sum premium.

9. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made by the A.O. without appreciating the fact that there is no transfer of capital asset in so far as the landlord is concerned as the landlord had given his property on rent. Also, the landlord is the owner of the property and his status remains unchanged before and after the property is given on rent.

10. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made by the A.O. by giving reference to Para-11 of the Agreement in Para-46 of the appellate order without giving any decision I comments on Clause 4(1) and Clause 4(2) of the Agreements between landlords and new tenants wherein it has been specified that in

consideration of the "premium" the landlords hereby agree to grant to the tenant and the tenant hereby agrees to accept from the landlords the monthly tenancy in respect of the tenanted premises. Similarly, Clause 4(2) states that as consideration for the grant of the monthly tenancy, the tenant paid to the landlords a lump sum premium."

The Ld. Departmental Representative for the Revenue was heard in support of the grounds raised. He vehemently supported the orders of the Assessing Officer in concluding that the premium received from the tenants by the assessee amounting to Rs.51lakhs in the relevant period pertaining to assessment year 2005-06 is not for grant of tenancy rights and is nothing but lumpsum rent received in advance and, therefore, exigible to tax under the head 'income from house property' and not LTCG as claimed by the assessee.

3.2.1 Per Contra, the Ld. Representative for the assessee supported the finding of the CIT(Appeals) in the impugned order in holding that the premium of Rs.51 lakhs received by the assessee from the six tenants is to be treated and assessed to tax as LTCG as declared by the assessee, and not under the head 'income from house property' as held by the Assessing Officer. The Ld. Representative for the assessee submitted that the facts of the matter are that the premium of Rs. 51 lakhs received by the assessee from six tenants, in lieu of tenancy rights given to them is a capital receipt on account of transfer of a capital asset on which it has offered LTCG of Rs. 46,00,000/- and that the said capital gain were invested in NABARD Capital Gain Bonds on which exemption under section 54EC of the Act was claimed.

3.2.2 According to the Ld. Representative for the assessee , the CIT(Appeals) had at para 40 to 56 extensively examined and decided the question of whether the premium charged by the assessee trust for grant of tenancy rights to the tenants are capital receipt chargeable to capital gains as declared by the assesee or is in the nature of advance rent and exigible to the tax under the head 'income from house property' as held by the Assessing Officer in the order of assessment It is submitted by the Ld. Representative for the assessee that after considering the provisions of sections 2(47) and 2 (14) of the Act , the CIT(Appeals) observed that it is an accepted principle that tenancy rights per-se is a capital asset by virtue of section 2(14) of the Act and, therefore, the 'transfer 'of any capital asset as per section 2(47) of the Act would result in the charging of Capital Gains thereon. The Ld. Representative for the assessee submitted that the CIT(Appeals) after considering the facts on record also observed that the premium of Rs.51.00 lakhs on grant of tenancy rights to the six tenants are all a onetime payment, non-refundable and is a capital receipt acquired by transfer of a capital asset i.e. grant of tenancy rights and accordingly was exigible for tax as capital gains. It was also pointed out by the Ld. Representative for the assessee that the CIT(Appeals) had came to the conclusion that the Assessing Officer had not brought on record any material evidence to establish that the premium received is advance rent. The Ld. Representative for the assessee contends that in view of the above finding of fact, the CIT(Appeals) following the ratio of the decisions of the Hon'ble Apex Court in the case of Parbari Tea Co. Ltd.

(1965) 57 ITR 422(SC) of the Hon'ble Bombay High Court in the case of Ratilal Tarachand Mehta(1977) 110 ITR 71(Bom); of the Co-ordinate Bench of the ITAT Mumbai in the case of Wadhwa Associates & Realtors Pvt. Ltd.(ITA No.695/Mum/2012) held that the premium of Rs.51.00 lakhs received by the assessee trust for grant of tenancy rights to the six tenants is transfer of capital asset and is exigible to capital gains and not as advance rent to be taxed under the head income from house property as held by the Assessing Officer. In this regard, the Ld. Representative for the assessee also placed reliance on the decision in the case of R.K.Palshikar (HUF) (1988) 172 ITR 0311 (SC) wherein it was held that the right to possession and enjoyment of properties leased for long periods on which a premium has been charged amounts to a transfer of capital asset.

3.2.3 Alternatively, the Ld. Representative for the assessee submitted that if at all the premium of Rs.51.00 lakhs was to be treated as 'income from house property' as alleged by the Assessing Officer, then the assessee ought to have been taxed only in respect of that portion of the premium/advance rent that pertains to the year under consideration.

3.2.4 The Ld. Representative for the assessee also submitted that the case relied upon by the Revenue i.e. Vinod v. Chhapia (Karta, v.v. Chappia HUF) is distinguishable on facts. In para 10 thereof, the transfer of tenancy rights was between the old tenant and new tenant and not between the landlord and tenants and therefore the amount of

Rs.7.26 lakhs paid to the landlord as 'consideration for consent' was held by the Co-ordinate Bench to be a windfall gain to the assessee and not transfer of any capital rights attached to the property.

3.3.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements cited. On an appreciation of the facts on record it is seen that in the year under consideration, the assessee trust granted tenancy rights of the property owned by it at Vasant Niwas, Opp. Dadar Railway Station (W), Ranade Road, Dadar, Mumbai 400028, to six tenants for total premium of Rs.51.00 lakhs and monthly rents. The assessee offered the premium received on grant of tenancy rights as LTCG and invested the capital gains of Rs.46.00 lacs thereon in NABARD Bonds and claimed exemption under section 54EC of the Act . The Assessing Officer however held that the grant of tenancy right was not a surrender of tenancy rights and consequently holding the premium to be advance rent held that the premium of Rs.51.00 lakhs is exigible to tax under the head ' income from house property'.

3.3.2 On appeal we find that the CIT(Appeals) after detailed examination had reversed the finding of the Assessing Officer that the premium of Rs.51.00 lakhs was exigible to the tax under the head income from house property as he was of the view that the grant of tenancy rights by the assessee trust to the tenants was in fact the transfer of capital asset within the meaning of sections 2(14) and 2 (47)

of the Act and also for the reason that the assessee had failed to bring on record any material evidence to establish that the premium of Rs.51.00 lakhs was in fact advance rent as alleged by the Assessing Officer. On the basis of material on record we agree with these views and findings recorded by the CIT(Appeals) . We also find that the judicial decision cited and placed reliance upon by Revenue in the grounds raised i.e. Vinod V. Chappia(Kartha HUF) (supra) has been correctly distinguished on facts and concur with the view of the CIT(Appeals) in this matter.

3.3.3 In this context the CIT(Appeals) 's elaborate examination and decision in the matter at paras 40 to 56 of the impugned order is extracted hereunder:-

> *40. The above arguments of the AR of the appellant have been considered and! intend to agree with the above arguments. The main issue under consideration here is to whether the premium charged by the appellant Trust for surrender of Tenancy rights is capital receipt chargeable to capital gains or is in the nature of advance rent as stated by the AO in the assessment order*
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> *41. The issue of premium/salami received on the transfer of a capital asset has been decided in various judicial pronouncements and overwhelmingly the courts including the Hon'ble Supreme Court have held that the premium/salami received on the transfer of a capital asset, in whatever form, is a one-time payment and non recurring in nature and therefore a capital receipt.*
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> *42. It is an accepted principle as of now that the tenancy right is a capital asset by virtue section 2(14) of the I.T. Act, where the capital asset is defined to mean, property of any kind held by an assessee whether or not connected with his business or profession. And it is further accepted principle that the 'transfer' of any capital asset would lead to charging of capital gains. In the*

context of section 45 of the Income-tax Act, 1961, capital gains would mean any profit or gain arising from the 'transfer' of a capital asset.

43. The term 'transfer' for this purpose, as defined in section 2(47) of the Income-tax Act, include the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law. Being an inclusive definition, the term 'transfer' for purposes of capital gains tax has been interpreted to be wide in scope and coverage.

44. In order to attract capital gains tax, therefore, there must be profit or gain arising from the transfer of a capital asset. Section 2(47) of the Act defines transfer as any transaction which has the effect of transferring or enabling enjoyment of any immovable property whether by way of any agreement or any arrangement or the transfer of tenancy rights or in any other manner whatsoever. All these will fall within the definition of transfer. A leasehold is also transfer of right to enjoy the property for a certain period with the lessee. In cases of lease cum license, the grant of a further lease was considered liable for capital gains tax [A.R. Krishnamurthy vs. CIT (1989) 76 CTR (SC) 18 : (1989) 176 ITR 417 (SC)].

45. In the instant case, the premiums paid by the six different tenants totaling to Rs. 51,00,000/- on the grant of tenancy rights by the appellant Trust, are all one time payments and are non refundable amount. Even in case of any trouble with the tenancy' agreement not being earned out in the letter and spirit, the premiums paid are not refundable to the tenants, which shows it is a payment which is once for all and therefore capital in nature. Thus the premium paid while giving the tenancy rights, is capital receipt acquired through the transfer of a capital asset i.e. the tenancy rights and accordingly would be liable for capital gains.

46. The AO has not brought any evidence on record to prove that the premium received is advance rent. To reach to this conclusion, the AO has to place some evidence on record to prove the same. In the absence of any evidence, to term it as advance rent would be only a presumption. Even if this presumption of the AO has to be believed, then the advance rent has to be for a certain period of time. As per the rent agreement, the tenancy would continue in operation unless the tenant did not pay the rent or other charges for a period of six months. This is as per para 11 of the agreement wherein it provided as under:-

"11. The Landlords hereby covenant with the Tenant that the Tenant" paying the rent hereby reserved the Tenant shall and may peaceable hold and enjoy the Tenanted Premises without any lawful interruption or disturbance from or by the Landlords or any person lawfully or equitably claiming by from through under or in trust for it. It is hereby expressly agreed and understood that the Landlords shall not be entitled to , terminate the tenancy of the Tenant in respect of the Tenanted ' Premises on any ground or for any reason whatsoever save on the ground of non--payment of rent or other amounts which the tenant is liable to pay to the Landlords hereunder for a period of six months from the same the same becomes due."

47. It is clear from the above that the tenancy is of a continuing nature in the instant case unless the tenant decided to terminate it by violating the conditions laid down in the tenancy agreement. In case of the termination of the agreement, again the premium paid will not be refundable. Looking into all these facts and circumstance, to call this premium received by the appellant Trust as advance rent would be totally incorrect appreciation of the facts of the issue under consideration.

48. The decision of the Apex Court in case of Commissioner of Income-tax v. Panbari Tea Co. Ltd. ([1965] 57 ITR 422 (SC) is on similar lines, wherein the Apex court has considered the provisions of Transfer of Property Act to distinguish the term 'premium' from the term 'rent':

"Under section 105 of the Transfer of Property Act, a lease of immovable property is a transfer of a right to enjoy the property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transferor on such terms.. The transferor is called the lessor, the transferee is called the (lessee, the price is called the premium and the money, share, - service or other thing to be so rendered is called the rent. The section, therefore, brings out the distinction between a' price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and the latter a revenue receipt. There may be , circumstances where the parties may

camouflage the real nature of the transaction by using clever phraseology In some cases, the so-called premium is in fact advance rent and in others rent is deferred price. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive but it helps the court, having regard to the other circumstances, to ascertain the intention of the parties."

49. Similar view was taken by the Hon'ble Bombay High Court in the case of Commissioner of Income-tax Vs. Ratilal Tarachand Mehta ([1977J 110 ITR 71 (BOM.)), wherein it was held that

"By its nature the salami being a non-recurring payment -made by a tenant to the landlord at the inception of the grant of the lease has a/ways been regarded as a receipt of a capital nature in the hands of the landlord. The finding that had been recorded by the Tribunal was that this payment was made to the assessee by the tenants for getting them accepted as tenants. In other words, it was by way of a premium or salami that these payments were received by the assessee as a consideration for granting monthly tenancies to the tenants. Obviously, it was a non-recurring payment made by the tenants to the assessee for the purpose of getting the monthly tenancy.

Every payment by way of a salami or a premium need not necessarily be held to be of a capital nature or on capital account, but since prima facie that is the nature of such payment it is for the department to establish facts which would go to show that such payment was in the - nature of income and not on capital account.

In the instant case no facts have been established or brought on record by the department to show that this payment which was by way of a premium or salami for obtaining monthly tenancies was in the nature of revenue or income. In the absence of any such material the Tribunal " was right in coming to the conclusion that the receipt by the assessee from the tenants was capital receipt.

50. In a recent decision rendered by Mumbai ITAT in case of ITO Vs. Wadhwa & Associates Realtors Pvt. Ltd. (I.T.A. No.695/Mum/2012), where the issue was under consideration was, as to whether the leasehold premium received by MMRDA was capital in nature or rent received.

51. Though the above decision has been rendered in the context of TDS provisions U/s. 1941, but issue decided is relevant to the facts of the instant case also.

52. In this case, the assessee executed a lease deed with MMRDA pursuant to which it obtained a plot of land at Bandra Kurla Complex on a long-term lease. The assessee paid MMRDA Rs.950 crore as lease premium. The Assessing Officer held that the said lease premium was in ihe nature of rent and that the assessee ought to have deducted TDS thereon u/s 1941. The AO held the assessee to be in default and demanded tax of Rs. 314 crore as per provisions of section 194-1. The order of the AO was reversed by the CIT(A) on the ground that lease premium could not be equated with rent. The revenue carried the matter in further appeal before the Tribunal who while dismissing the revenue's appeal held as under:

> *"5. After considering the facts and the submissions and the nature of transaction, the Ld. CIT(A) observed that the amount charged by MMRD as lease premium is equal to the rate prevalent as per Stamp Duty recovery for acquisition of the commercial premises. These rates are prescribed' for transfer of property and not for the use as let out tenanted property. The Ld. CIT(A) further observed that even the additional FSI given for additional charges as per Ready Reckoner rates only. It is the finding of the Ld. CIT(A) that the whole transaction towards grant of leasehold transaction rights to the assessee is nothing but a transaction of transfer of property and the lease premium is the consideration for the purchase of the said leasehold rights. The Id. CIT(A) went on to discuss the judicial decisions relied upon by the AO of Hon'ble Calcutta and Karnataka High Court and observed that both the decisions pertain to the same issue i.e. whether lease premium was a revenue or a capital expenditure. The Id. CIT(A) also discussed the decision in the case of Raja Benedur Kamakshya Narain Singh of Ramgarh v. Commissioner of Income-tax 11 ITR 513 PC wherein it has been held that the payment which' under ·the lease is exigible by the lesser may be classed under 3 categories (1) Premium or salary (2) the minimum royalty and (3) the royalty per ton. The salary have been rightly treated as capital receipt. It is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted both by the lease. The Ld. CIT(A) has also considered the decision of the Hon'ble Supreme Court in the case of Member for the Board of Agricultural Income Tax, Assam Vs Sindhurani Chaudhrani & Ors 321TR 169 wherein it has*

been held that Salami is in the form of a lump sum non recurring payment made by a prospective tenant to the landlord as a consideration and is paid anterior to the constitution of relationship of .landlord and tenant, it is not "rent" within the meaning of the word used in the definition of "agricultural income" in section 291)(a) of the I. T. Act It has ell the characteristics of a capital payment and it is not revenue. The Ld. CIT(A) further discussed certain other judicial decisions and in particular the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs :K:himline Pumps Lid., 2581TR 459 wherein the Hon'ble Jurisdictional High Court has held that an amount of Rs. 45 lakhs paid by the assessee to ·M/s. APVE Ltd., for acquisition of leasehold land was a capital expenditure and hence the same was not deductible. The Ld. CIT(A) has further considered the decision of the Special Bench of Mumbai Tribunal in the case of JClT Vs Mukund Ltd. 106 ITD 231 wherein the issue was whether the premium paid for acquiring leasehold right in land is revenue or capital. The Special Bench has held that the same is capital expenditure."

53. It is clear from the facts and circumstances as well as the judicial pronouncements cited above that the premium received by the appellant Trust for transfer of tenancy rights to the six tenants, is transfer of the capital asset and accordingly liable to capital gains. It cannot be termed as advance rent as the tenancy right is not for a particular period but in perpetuity. The amount of Rs.5,OO,OOO/- to the appellant is premium or balance which is a capital receipt.

54. During the course of. appellate proceedings, the AO vide letter dated 27/09/2013 has sent further submissions relying on the decision of the lTAT; Mumbai Bench 'F', Mumbai in the case of VV. Chhapia HUF Vs ITO, ITA no. 3178/Mum/2010 dated 21/11/2012. According to AO, in this case the assessee HUF had received an amount of Rs. 7,26,0001- and considering the same in lieu of the surrender of tenancy rights, claimed it exempt u/s 54EC as this amount was invested in the NABARD Bonds. On enquiry, it was found by the AO that the surrender of tenancy right was from the old tenant to the new tenant and the landlord was a confirming party to that agreement, for which he was paid Rs. 7,26,000/-. This amount was paid, not. for surrender of tenancy right but as a confirming party in the tripartite agreement between the old tenant, new tenant and the land lord. The ·AO treated the amount

received by the land lord as the income from the other sources and not the capital gains as claimed by the assessee HUF. The CIT(A) confirmed the order of the AO. On appeal before the ITAT, Mumbai, it was held that normally in the case of surrender of tenancy rights, it is the original tenant who receives the consideration from the landlord to surrender the tenancy rights. But the instant case is unique in nature and the land lord did not receive any consideration from the original tenant and it is the new tenant who paid the consideration to the original tenant. Under these factual matrix of the case, the principle relating to the surrender of tenancy rights is not applicable to the assessee and it is case of windfall . gain received by the assessee which was rightly taxed as "income from other sources".

55. The above contentions of the AO have been considered. But the facts of the above case of VV. Chhapia HUF Vs ITO (supra) are not identical to the facts of the instant case. In the above case, the tenancy rights were not with landlords of the property and the such rights were vested with the old tenant and the same were transferred to a new tenant by him vide agreement entered into between the two. The amount of RS.7,26,000/- which the landlord received in the above case was only as a confirming party to the agreement between the old tenant and the new tenant. The landlord neither surrendered any tenancy right to the new tenant nor received any payment from the new tenant in lieu of the surrender the tenancy right. The amount received by the land lord, therefore, was rightly stated to be the income from the other sources by the Hon'ble ITA T. In the instant case, the appellant landlord being the owner of the property entered into agreement directly with the new tenants and surrendered the tenancy rights in the property in question. The tenancy agreement is direct agreement between the land lord and the tenant. Thus the facts of the instant case are not identical to' the facts-of the case of VV. Chhapia HUF Vs ITO (supra) and cannot be relied upon. The reliance on this case by the AO is misplaced.

56. In view of the facts and circumstances and the judicial pronouncements cited above, in my considered opinion, the surrender of the tenancy rights by the appellant Trust and the premium/salami received. in lieu of that from the new tenant is a capital receipt on account of transfer of capital asset in the hands of the appellant and thus, liable for capital gains. The action of the AO treating the same. as advance rent is not in order and cannot be upheld and addition made, therefore, is deleted.

3.3.4 Taking into account the factual matrix and circumstances of the case on hand and the legal position on this issue espoused in section

2(14) and 2(47) of the Act and the ratio of the judicial pronouncements on the issue of grant of tenancy rights similar to the facts of the case on hand, inter-alia, laid down by the Hon'ble Apex Court in Parbani Tea Company (1965) 57 ITR 422 (SC), and R.K.Palshikar (HUF) (1988) 172 ITR 311(SC); of the Hon'ble Bombay High Court in the case of Ratilal Tarachand Mehta(1977) 110 ITR 71(Bom) of the Special Bench of the ITAT Mumbai in Mukund Ltd. (106 ITD 231), of ITAT Mumbai Bench in Wadhwa Associates & Realtors Pvt. Ltd. (ITA NO.695/Mum/2012), etc., we concur with and uphold the finding of the CIT(Appeals) that the grant of tenancy rights by the assessee trust and the premium of Rs.51.00 lakhs received in lieu thereof from the tenants is a capital asset in the hands of the assessee and is therefore liable for capital gains and is not advance rent exigible to tax under the head income from house property. Consequently, Revenue's grounds at S.No. 1 to 10, having been duly considered, are dismissed.

4. In the result, Revenue's appeal for assessment year 2005-06 is dismissed.

Assessee's Cross-Objection – C.O.No.76/Mum/2015:

5.1 In its cross objection the assessee has raised the following grounds:-

> *" 1.The order passed u/s. 143(3) r.w.s. 147 of the Act is void ab-initio and bad in law.*
> *2. The Appellant craves to add to and /or alter and/or modify and /or delete and/or amend the aforesaid ground of cross objection."*

5.2 The grounds raised in the cross objection (supra) pertain to the single issue of challenging the validity of the order of assessment issued

u/s. 143(3) r.w.s. 147 of the Act on 15/1/2013 for assessment year 2005-06. Before us, the Ld. Representative for the assessee submitted a copy of letter dated 3/9/2013 wherein the reasons recorded by the Assessing Officer for initiation of proceedings u/s. 147 of the Act in the case on hand have been reproduced and provided to the assessee. The Ld. Representative for the assessee contended that a perusal of the letter and the order of assessment would evidence that while the reasons recorded for initiation of proceedings u/s. 147 of the Act were in respect of AIR information related to investment in NABARD for acquiring Bonds/Debentures amounting to Rs.25 lakhs in the year under consideration, no addition on this count was made in the order of assessment passed u/s. 143(3) r.w.s. 147 of the Act dated 15/1/2013, but rather the premium of Rs.51.00 lakhs received on grant of tenancy rights and offered to tax under the head 'Capital Gains' was held to be exigible to tax under the head 'income from house property'. The Ld. Representative for the assessee contended that if after issuing notice u/s. 148 of the Act, the Assessing Officer accepts the contention of the assessee and does not hold that the income which he has initially formed a reason to believe had escaped assessment, it is not open to him to assess some other income. Therefore, the Assessing Officer has power to assess such other income, only if the income referred to in the reasons recorded for initiating proceedings u/s. 147 of the Act has been assessed. In support of this proposition, the Ld. Representative for the assessee placed reliance on the decision of the Hon'ble Bombay High Court in the case of Jet Airways (I) Ltd. reported in (2011) 331 ITR

236(Bom). In view of the above factual and judicial matrix of the case, it was prayed that the order of assessment for assessment year 2005-06 passed u/s. 143(3) r.w.s. 147 of the Act on 15/1/2013 is to be quashed as it is ab-initio void.

5.3 Per contra, Ld. Departmental Representative appearing for the Revenue supported the impugned order of the CIT(A) on this issue in upholding the validity of the aforesaid order of assessment for assessment year 2005-06.

5.4 We have heard the rival contention and perused and carefully considered the material on record; including the judicial pronouncement cited. The facts of the matter as emerge from the record and that the reasons recorded by the Assessing Officer for initiation of assessment proceedings u/s. 147 of the Act for assessment year 2005-06, as conveyed to the assessee vide letter dated 3/9/2013 are as under:-

> *"The AIR information in this case related to Investment in NABARD for acquiring bonds/ Debentures amounting to Rs.25,00,000/- during the F.Y. 2004-05. The period of four years but not more than 6 years have escaped from the end of the relevant assessment year. As the assessee had not filed any income tax return, I have reason to believe that the income which has escaped assessment amount to or likely to amount more than Rs.1 lakh.*
>
> *Hence, to issue notice under section. 148 of the I.T. Act, 1961 for the A.Y 2005-06 approval of Joint CIT Rg. 18(2), Mumbai is needed as per the provision of section 151(2) r.w.s. 149 (1)(b) of the I.T.Act, 1961.*
>
> *The proposal in prescribed proforma is put up for grant of approval to issue notice under section. 148 of the I.T. Act, 1961."*

5.4.2 A perusal of the impugned order of assessment passed u/s. 143(3) r.w.s. 147 of the Act vide order dated 15/1/2013 for assessment year 2005-06 clearly shows, as contended by the Ld. Representative for the assessee, that no addition has been made therein based on the reasons recorded in respect of the investment of Rs.25.00 lakhs by the assessee in NABARD for acquiring of Bonds/Debentures during the year under consideration. However, the Assessing Officer in the impugned order of assessment has proceeded to treat the premium of Rs.51.00 lakhs received for grant of tenancy rights and offered to tax by the assessee under the head ' capital gains', as advance rent and proceeded to bring the same to tax under the head 'income from house property'.

5.4.3 In the cited decision of the Hon'ble Bombay High Court in the case of Jet Airways (I) Ltd. reported in (2011) 331 ITR 236 (Bom), it has been held that the Assessing Officer has the power to assess other income only if the income referred to in the reasons recorded for initiation of proceedings u/s. 147 of the Act have been assessed. While interpreting the scope of power of the Assessing Officer in view of the effect of the amendment to Section 147 of the Act w.e.f. 1/4/1989, the Hon'ble Court noticed that effect of Explanation -3 to Section 147 of the Act was that even though the notice issued u/s. 148 containing the reasons for re-opening the assessment does not refer to a particular issue with reference to which income has escaped assessment, the Assessing Officer may assess or re-assess the income in respect of any issue which has escaped assessment, when such issue comes to his

notice subsequently in the course of assessment proceedings. The Hon'ble court observed that when Parliament used the words " assess or re-assess such income and also any other income chargeable to tax which had escaped assessment", the words " and also" cannot be read as being in the alternative. Rather, the correct interpretation would be to regard those words "and also" as being cumulative and conjunctive . The Hon'ble Court further observed that what the Parliament intended by use of the words "and also" is that the Assessing Officer upon the formation of reason to believe u/s.147 of the Act and issue of notice u/s. 148 of the Act must assess or re-assess (i) such income on which it has recorded reasons to believe that income of the assessee had escaped assessment; and also (ii) any other income chargeable to tax, which has escaped assessment and which comes to his notice subsequently, in the course of assessment/ reassessment proceedings. It was held that Explanation 3 to section 147 does not and cannot override the necessity of fulfilling the conditions set out in the substantive portion of the section. Section 147 of the Act empowers the Assessing Officer to assess or re-assess the income which escaped assessment, which was the basis for formation of belief and only if such income as brought to tax, can he also assess or reassess any other income which has escaped assessment and has come to his notice during the course of assessment proceedings.

5.4.4 The Hon'ble Court in the aforesaid decision held that if after initiation of proceedings u/s. 147/issue of notice u/s. 148 of the Act, the Assessing Officer accepts the contention of the assessee and does not

make any addition of such income on the basis of which he initially formed the reason to believe that income had escaped assessment, and as a matter of fact has not escaped assessment, he cannot independently assess some other income.

5.4.5 In the case on hand it is factually amply clear as per our observations at para 5.4.1 and 5.4.2 that the Assessing Officer did not make any addition to the assessee's income in respect of the investment of Rs.25.00 lakhs made by it in NABARD Bonds/Debentures; which formed the sole basis of the Assessing Officer's recorded reason to believe income had escaped assessment for initiation of proceedings u/s.147 of the Act (supra). In these circumstances, the Hon'ble Bombay High Court in the case of Jet Airways (I) Ltd. (supra) has held that when no addition is made in respect of such income which formed the basis for the recorded reasons for belief of income escaping assessment, the Assessing Officer cannot make any other addition to the assessee's income in respect of any other income which has escaped assessment. Since the Assessing Officer ostensibly accepted the assessee's claims regarding the investment of Rs.25.00 lakhs in investment in NABARD Bonds/Debentures and no addition has been made in this regard, the Assessing Officer ought to have dropped the re-assessment/ assessment proceedings initiated u/s. 147/148 of the Act for assessment year 2005-06. Taking into account the factual and legal matrix of the case as discussed from para 5.4.1 to 5.4.4 of this order, we are of the considered view that the decision of the Hon'ble Bombay

High Court in the case of the Jet Airways (I) Ltd. (331 ITR 236) is clearly applicable to the case on hand and respectfully following the same, we hold that the order of assessment for assessment year 2005-06 passed u/s. 143(3) r.w.s. 147 of the Act vide order dated 15/1/2013 for assessment year 2005-06 is void ab-initio and consequently quash the same. It is accordingly ordered.

6. The cross objection at S.No.2 being general in nature, no adjudication is called for thereon.

7. In the result, the Revenue's appeal for assessment year 2005-06 is dismissed and the assessee's cross objection is allowed.

Order pronounced in the open court on 29/02/2016

Sd/-	Sd/-
(SANDEEP GOSAIN)	(JASON P. BOAZ)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated 24/02/2016

Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai