Narang Overseas Pvt. Ltd. vs The Acit on 28 February, 2007

ORDER

K.C. Singhal, Judicial Member

1. The Hon'ble President, ITAT, vide order dated 7.8.2006 has constituted this Bench to adjudicate the following issue:

> Whether in the light of the decision in 232 ITR 2 it must be held that mesnc profit received by the assessee is revenue income chargeable to tax.
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> as well as to dispose off the appeal of the assessee containing the following grounds:
>
> (1) The learned Commissioner of Income Tax. (Appeals (CIT(A)[erred in holding that the mesnc profit of Rs. 34,57,01,137/- received by the Appellant pursuant to the consent decree dated 08.01.2002 constitutes revenue receipt assessable to tax and consequently, in confirming the AO's order bringing the same to tax.
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> (2) The CIT erred in holding that as-per the decisions in P. Mariappa Gounder v. CIT and DCIT v. Sardar Exhibitors Pvt. Ltd. (2005) 1 SOT 918 (Del) mesne profits constitute taxable revenue receipts.
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> (3) He further erred in this connection in holding that paragraphs 28 to 31 of the Tribunal's order dated 16.12.2004 pertaining to block assessment were not the operative parts of the Tribunal's order and therefore, can only be construed as obiter dicta and not ratio decidendi.
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> (4) The learned CIT(A) further erred in this connection in enhancing the assessed income by Rs. 1,18,75,000/-.
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> (5) The Appellant prays that the impugned addition of Rs. 34,57,01,137/- be demolished as unlawful, illegal and invalid and consequently, held to be null and void.
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> (6) The learned CIT(A) erred in sustaining the levy of interest under Sections 234B and 234C of Rs. 4,49,59,291/- and Rs. 43,302/- respectively.
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> (7) The Appellant craves leave to add to and/or amend and/or delete and/or modify and/or alter the aforesaid grounds of appeal as & when the occasion demands.
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> (8) All the aforesaid grounds of appeal are independent, in the alternative & without prejudice to one another.

2. At the outset, it would be appropriate to narrate the circumstances in which this Bench has been constituted. The dispute before the Division Bench was whether the mesne profit of Rs. 34,57,01,137/- received by the assessee pursuant to the consent decree dated 8th January, 2002, passed by the hon'ble Supreme Court constitutes revenue receipt assessable to tax. It was contended on behalf of the Revenue that this issue stood concluded by the decision of the Special Bench of the Tribunal in the case of Sushil Kumar & Co., 88 ITD 35{Kol)(SB), wherein it was held that the judgement of the hon'ble Madras High Court in the case of P. Mariappa Gounder, 147 ITR 677 holding that mesne profit received by the assessee was Revenue receipt chargeable to tax under the Income-tax Act, 1961 (the Act.) got merged in the subsequent judgement of the hon'ble Supreme Court which is reported as 232 ITR 2 (SC) and consequently the mesne profit received by the assessee was taxable as revenue receipt. However, the learned Counsel for the assessee contended before the Division Bench that the issue was not correctly decided by the Special Bench in the ease of Sushil Kumar & Co., inasmuch as the issue regarding the taxability of mesne profit was neither raised before nor considered by the hon'ble Supreme Court. The issue before the hon'ble Court was whether the mesne profit was assessable in assessment year 1963-64 or assessment year 1964-65. It was contended on behalf of the assessee that the hon'ble Madras High Court had decided two issues - (1) the issue regarding the taxability of mesne profit and (2) the year of assessability. The High Court decided both the issues against the assessee by holding that mesne profit was taxable as revenue receipt in assessment year 1963-64. However, the issue regarding taxability of mesne profit was neither raised before nor considered by the hon'ble Supreme Court since the assessee challenged only the issue regarding the year in which the mesne profit could be taxed. The apex court held that the High Court rightly held the same to be taxable in assessment year 1963-64. In these premises, it was contended that the judgement of the Madras High Court regarding the issue of taxability of mesne profit did not merge in the judgement of the hon'ble Supreme Court. Reliance was placed on the judgement of Supreme Court in the case of Kunhayanned v. State of Kerala 245 ITR 360, wherein it was held that subject matter of the two proceedings must be identical for applying the > theory of merger. The Division Bench considering the above judgement observed "it is difficult for us to concur with the view expressed by the hon'ble Special Bench in the case of Sushil Kumar & Co.". Consequently, reference Under Section 255(3) of the Act was made to the hon'ble President, ITAT, for constituting the Special Bench to resolve the controversy. In pursuance of the recommendation of the Division Bench, the hon'ble President vide order dated 7th August, 2006, constituted a Special Bench of three Members to resolve the Controversy referred to in the question mentioned earlier by us.

3. The Special Bench, constituted by three Members, heard the matter. Vide order dated 13th April, 2007, it was of the view that the correctness of the decision of the Special Bench in the case of Susheel Kumar & Co., can be decided only by a larger Bench of five Members. In view of such recommendation, the hon'ble President has constituted this Special Bench comprising of five Members to resolve the controversy as well as to dispose off the appeal.

4. Let us first proceed to consider the impact of the judgement of hon'ble Supreme Court in the case of P. Mariappa Gounder, 232 ITR 2, so as to resolve the controversy arising from the question referred. The contention of the learned senior counsel far the assessee, Mr. Dastur, is that the issue regarding the character of the mesne profit i.e.-whether revenue or capital was never before the

hon'ble Supreme Court in the above case. The only issue to be considered by the hon'ble Supreme Court was the year of taxability he., whether the mesne profit should be taxed in assessment year 1963-64 or assessment year 1964-65. Therefore, it cannot be said that the Supreme Court judgement is an authority for the proposition that mesne profit is to be treated as revenue receipt chargeable to tax. In this connection, he relied on the judgement of hon'ble Supreme Court in the case of Rameshwarlal Sanwarmal v. CIT 122 ITR 1, wherein it was held that if a question which is neither raised nor argued before the Supreme Court, then the decision delivered by the Supreme Court cannot be said to be a decision in respect of such question. It was further contended by him that theory of merger is not a doctrine of rigid and universal application and, therefore, it cannot be said that wherever there are two orders, one by the inferior authority and the other by the superior authority passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject matter of appeal or revisional order. Thus it has been contended that what is merged is the decision on the question considered and nothing else. In this connection he has relied on various decisions mentioned below:

CIT v. Amritlal Bhogilal & Co. 34 ITR 130.

S. Shanmugavel Nadar v. State of Tamil Nadu 263 ITR 658.

Kunhayarnmed and Ors. v. State of Kerala 245 ITR 360.

State of Madras v. Madurai Mills Co. Ltd. .

5. Proceeding further he drew our attention to the judgement of Madras High Court as well as the judgement of hon'ble Supreme Court in the case of P. Mariappa Gounder to point out that two references were made to the hon'ble High Court - one related to the character of mesne profit whether capital or revenue receipt and the other related to the year of taxability. The Madras High Court held that the mesne profit decreed by the Supreme Court constituted as revenue receipt and, therefore, it was chargeable to tax. Thus this reference was decided against the assessee. In respect to the other references at the instance of revenue it was held that income was chargeable to tax in assessment year 1963-64. Thus, the issue arising from the revenue's references was also decided against the assessee. However, the appeal by the assessee was preferred only in reaped of the year of taxability and the hon'ble Supreme court decided the issue against the assessee by holding that mesne profit accrued in assessment year 1963-64 as is apparent from the judgement of the apex court. On these facts it was vehemently pleaded by Mr. Dastur that the nature of mesne profit was not the subject matter of consideration by the hon'ble Supreme Court and, therefore, the decision of the hon'ble Supreme Court cannot be construed as decision on the taxability of mesne profit. What has been merged in the order of Supreme Court is the decision of hon'ble Madras High Court in respect of the question relating to the year of taxability and not in respect of the nature of character of mesne profit. On the other hand the learned senior DR has relied on the decision of Supreme Court in the case of Kunhayammed and Ors. v. State of Kerala 245 ITR 360 in support of the contention that entire judgement of the High Court merges in the order of the Supreme Court.

6. Rival submissions of the parties have been considered carefully. The issue for our consideration relates to the impact of the Supreme Court judgement in the case of P. Marippa Gounder, 232 ITR 2. At the outset, it may be mentioned that a judgement of the court has to be understood in the context of the question arose before the court, the arguments made by the parties, the provisions of enactment considered by the court, etc. Reliance can be placed on the Supreme Court judgement in the case of Sun Engineering Works Pvt. Ltd. 98 ITR 297, wherein it has been held that the judgement of Supreme Court should be understood in the context of the question under consideration and the judgement must be read as a whole. A decision of the court takes its colour from the question involved in the case in which it is rendered and while applying the decision to a later case the courts must carefully try to ascertain the true principle laid down by the decision.

7. The issue for our consideration is about the impact of the judgement of hon'ble Supreme Court in the case of P. Mariappa Gounder (supra). In order to appreciate the controversy, it would be appropriate to refer the facts of the case as well as the questions which were referred to by the Tribunal for the esteemed opinion of the High Court. At the outset, it may be mentioned that there appeared to be some confusion in the facts as stated by the hon'ble Supreme Court and as stated by the hon'ble Madras High Court. In the Madras High Court judgement it is mentioned that as per the ITO the mesne profit was chargeable to tax in assessment year 1964-65 while as per the judgement of Supreme Court-it was charged to tax in assessment year 1963-64. Again the High Court judgement says that the AAC, on appeal, held that it was chargeable to tax in assessment year 1963-64 while as per the judgement of Supreme Court the AAC held it to be taxable in assessment year 1964-65. Further, the High Court judgement says that on further appeal the Tribunal held it to be taxable in assessment year 1959-60 while as per the Supreme Court judgement the Tribunal held it to be taxable in assessment year 1963-64.

8. When such conflict was put to the learned Counsel for the assessee, it was clarified by him that two appeals were preferred before the Tribunal i.e., one against the order relating to assessment year 1964-65 which was the initial order of assessment and the second appeal against the order of assessment for assessment year 1963-64 which was the reassessment proceedings Under Section 147 of the Act as the ITO had reopened the assessment on the basis of the order of AAC relating to assessment year 1964-65. In order to clarify the same, the learned Counsel for the assessee has furnished the copy of the order of the Tribunal dated 29th July, 1975, delivered in the case of P. Mariappa Gounder. The very first para on the said order says that order of assessment for 1963-64, arose out of reassessment proceedings Under Section 147 of the Act. Para 6 of the said order also shows that the mesne profit was initially brought to tax in assessment year 1964-65 but the AAC held the same to be taxable in assessment year 1963-64. which has resulted in reopening of the assessment for assessment year 1963-64. Considering the order of the Tribunal mentioned above, it is clear that the issue arose in two proceedings i.e., one against the original assessment proceedings for assessment year 1964-65 and the other against the reassessment proceedings for assessment year 1963-64. Thus, it appears that the High Court has referred to the facts as per the original assessment proceedings for assessment year 1964-65 while the apex court has referred to the facts as per the reassessment proceedings for assessment year 1963-64. Therefore, in reality, there is no conflict of facts and the confusion had arisen only because both the courts referred to the facts relating to different assessment proceedings.

9. Now, it would be appropriate to refer to the facts in detail relating to the case of P. Mariappa Gounder (supra). In that case the assessee had agreed to purchase a tile factory, vide written agreement dated 22nd May, 1950. When the vendor did not convey the property as promised, the assessee filed a suit for specific performance which was ultimately decreed in appeal by the hon'ble Supreme Court vide its judgement dated 22nd April, 1958. In the terms of the decree, the assessee was required to deposit a sum of Rs. 85,000/- within 30 days of the decree and thereupon the title in the property was to be conveyed to the assessee. The hon'ble Court also passed a decree declaring that the assessee was entitled to mesne profit against the respondent which was to be quantified by the Trial Court after making due enquiry. The Trial Court determined the mesne profits at Rs. 57,093/- vide order dated 22nd December, 1962, relevant to assessment year 1963-64. However, the amount of mesne profit was received by the assessee in the following accounting year relevant to assessment year 1964-65. The Income-tax Officer held that the mesne profits constituted the assessee's-taxable income and was chargeable to tax in the assessment year 1964-65 on receipt basis. On appeal, the AAC held it be taxable in assessment year 1963-64 since the mesne profits accrued on 22nd December, 1962, when it was quantified by the Trial Court. On further appeal, the Tribunal held that the mesne profits were taxable as income but took the view that mesne profits should be deemed to have been accrued the moment the Supreme Court declared the assessee's right thereto which was in the previous year ending on 31st March, 1959, relevant assessment year 1959-60. In the meanwhile, the ITO reopened the assessment for A.Y. 1963-64 Under Section 147 on the basis of the order of the AAC pertaining to A.Y. 1964-65 & consequently assessed the same in A.Y. 1963-64. On appeal, the AAC held it to taxable in A.Y. 1964-65. On further appeal, the tribunal held it to be taxable in A.Y. 1963-64. Aggrieved by the said decisions of the Tribunal, the assessee as well as the Revenue sought reference Under Section 256 of the Act for the esteemed opinion of the hon'ble High Court. At the instance of the assessee, the following question was referred to:

> Whether the mesne profits decreed by the Supreme Court is of an income nature?
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> However, at the instance of the Revenue the following questions were referred to:
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> (1) Whether mean profits decreed by the Supreme Court accrued to the assessee earlier to the accounting year relevant to assessment year 1963-64?
>
> (2) Whether on the facts and circumstances of the case, the mesne profits received by the assessee is liable to be taxed in the assessment year 1964-65?

10. The hon'ble Madras High Court vide its judgement dated 17th January, 1983 held that mesne profit decreed by the Supreme Court was a revenue receipt. Thus the question referred to at. the instance of the assessee was answered in favour of the Revenue and against the assessee. Further, it was held that such mesne profit was taxable in the assessment year 1963-64 and thus the questions referred to at the instance of the Revenue were also answered in favour of the Revenue and against the assessee.

11. In view of the above discussion, let us now peruse the judgment of the hon'ble Supreme Court. The very first sentence of the judgement reads as under:

> The question which arises for consideration in this appeal is as to in which assessment year the appellant is liable to be assessed in respect of mesne profits which were awarded in his favour.

12. After stating the facts of the case, their Lordships set. out the questions, which were referred by the Tribunal to the Hon'ble High Court for its esteemed opinion. Those questions are mentioned below:

> 1. Whether the mesne profits decreed by the Supreme Court accrued to the assessee earlier to the accounting year relevant to the assessment year 1963-64?
>
> 2. Whether, on the facts and in the circumstances of the case, the mesne profits received by the assessee is liable to be taxed in the assessment year 1964-65?

13. Proceeding further, their Lordships referred to the contentions of the parties. The contention on behalf of the assessee was noted as below:

> It is contended by Shri Balakrishnan that the right to receive the mesne profits accrued to the appellant on April 22, 1958, when this Court decreed the suit of the appellant and held that he was entitled to receive the mesne profits. Learned Counsel submits that as the right had accrued on that day, merely because the quantification of the same was postponed, it would not mean that the income accrued only at the time when the trial court computed the amount of mesne profits.

14. On the other hand the contention on behalf of the Revenue was noted as below:

> Shri Ahuja, learned Counsel for the respondent, however, submitted that with the passing of the decree by this Court the appellant only got an inchoate right and his right to receive the mesne profits got ascertained only when the trial court had determined the amount on December 22, 1962.

15. Thereafter the Hon'ble Court discussed the legal position regarding the date of accrual of income in the light of Order XX Rule 12 of the Code of Civil Procedure, the decision of Hon'ble High Court of Andhra Pradesh in the case of Khan Bahadur Ahmed Aliadin and Sons 74 ITR 651 and the judgement of its own court in the case of CIT v. Hindustan Housing and Land Development Trust Ltd. 161 ITR 524 held as under:

> Applying the ratio of the aforesaid decisions, it appears to us that the decree dated April 22, 1958, passed by this Court only created an inchoate right in favour of the appellant. It is only when the trail court determined the amount of mesne profits that the right to receive the same accrued in favour of the appellant. In other words, the liability became ascertained only with the order of the trail court on December 22,1962, and not earlier. Following the mercantile system of accounting, the mesne profits awarded by order dated December 22, 1962, were rightly taxed in the

> assessment year 1963-64 and it was wholly irrelevant as to when the amount awarded was in fact realised by the assessee. In our opinion, therefore, the High Court was right in deciding the reference in favour of the Department. We accordingly dismiss the appeals but in the circumstances of this case award no costs.

16. The above discussion clearly shows that the hon'ble Supreme Court was only concerned with one issue relating to the year of taxability of mesne profit, i.e., whether it was, taxable in assessment year 1963-64 or assessment year 1964-65. The issue whether mesne profit constituted revenue receipt or capital receipt was not before the Court as is apparent from the question posed by the Court for adjudication, the contentions raised by the respective parties as well as the operational part of the judgement. The decision given by the apex court is binding on all the subordinate courts as well as other authorities across the country in view of the provisions of Article 141 of the Constitution of India. What is binding is the decision given by the Court after considering the facts of the case, the question referred before it, the arguments made by the parties. Hence it. cannot be said that the apex court gave any decision regarding the nature of the receipt by way of mesne profit. The decision of the Madras High Court regarding the nature of "receipt remained unaffected by the judgement of the apex court.

17. The view taken by us is fortified by the decision of the apex court in the case of Rameshwarlal Sanwarmal v. CIT 122 ITR 1. In that case assessee was the HUF which was the beneficial owner of certain shares in a private limited company called Shamsunder Tea Company Pvt. Ltd. However, these shares stood in the name of S.N. Saharia, Karta of the HUF, in the register of shareholders of the company. The said company advanced loan to three concerns run by the assessee HUF and the same was treated as deemed dividend in the hands of assessee HUF Under Section 2(6A)(e) of the Indian Income-tax Act, 1922 (1922 Act) by the ITO for assessment years 19S5-56 and 1956-57. The order of the ITO was confirmed by AAC as well as the Tribunal. At the instance of the assessee six questions were referred by the Tribunal for the opinion of the High Court which inter-alia included the following question:

> Whether, on the facts and in the circumstances of the case, and on a true interpretation of the terms of Section 2(6A)(e) of the Indian Income-tax Act, 1922, the tribunal was right in holding that the amounts of Rs. 2,21,702 (gross) and Rs, 3,43,505 (net) were taxable as dividends in the hands of the applicant, HUF, for the assessment years 1955-56 and 1956-57, respectively, when the sharps were registered in the name of Sri S.M. Saharia, the karta of the family?

18. In answering the above question, the hon'ble High Court gave two findings - 1) that the loans advanced to the three business concerns of the assessee could not be regarded as deemed dividend within the meaning of Section 2(6A)(e) inasmuch as the word 'shareholder' in Section 2(6A)(e) meant a registered shareholder i.e., a shareholder whose name is recorded in the register of the company. Since the assessee was not the registered shareholder, such loans could not be treated as deemed dividend, and 2) even if it be assumed that advance was liable to be regarded as deemed dividend Under Section 2(6A)(e), it could be taxed only in the hands of registered shareholder and not of the assessee.

19. Aggrieved by the decision of the High Court, the Revenue preferred an appeal before the apex court. However, inadvertently, the Revenue challenged only the latter finding of the High Court. The correctness of the first finding given by the High Court remained unchallenged. After considering the contentions of the parties, the hon'ble Supreme Court decided the issue in favour of the Revenue. Since the High Court had not answered the other questions, the Supreme Court remanded the matter to the High Court. On remand, the High Court decided the other issues against the assessee. Aggrieved by the same, the assessee preferred the appeal before the apex court.

20. On behalf of the assessee it was contended before the hon'ble Supreme Court that amount of loans advanced to the three concerns of the assessee could not be regarded as deemed dividend within the meaning of Section 2(6A)(e} since the assessee was not a registered shareholder of the company. This contention was sought to be supported by the earlier decision of the Court in the case of CIT v. C.P. Sarathy Mudaliar 83 ITR 170 (SC). As against this, the argument urged on behalf of the Revenue was that it was not open to the assesses to raise this contention since it was covered by the decision of the apex court in assessee's own case 82 ITR 628 SC. However, the Revenue conceded that this contention was not specifically raised before the Court but it was submitted that it must be held to have been impliedly decided against the assessee by the earlier decision of the Court. The hon'ble Supreme Court rejected the contention of the Revenue by observing as under:

> ...The most important circumstance which it ignores is that when the reference was first heard by the High Court, the first question was decided in. favour of the assessee on two counts : one was that, since the assessee was not a registered shareholder of the company, the loans advanced to the three business concerns of the assessee could not be regarded as "deemed dividend" within the meaning of Section 2(6A)(e) and the other was that even if they could be treated as 'deemed dividend' under Section 2(6A)(e), they could be taxed only in the hands of S.M. Saharia, the registered shareholder, and not in the hands of the assessee who was merely a beneficial owner of the shares. When the revenue preferred an appeal against the judgement of the High Court, the revenue should have assailed the decision of the High Court in both its limbs, but through some inadvertence, which is difficult to understand, the revenue challenged only the second limb of the decision ignoring completely the first. The result was that the decision of the High Court that the amounts of loans advanced to the three business concerns of the assessee did not fall within the definition of "deemed dividend* in Section 2(6A)(e) remained intact and unaffected by the decision of this Court in the appeal. Now, it is true that this Court could not have answered the first question against the assessee without overruling this part of the decision of the High Court, but through sortie unfortunate error, this Court set aside the answer given by the High Court in favour of the assessee without considering whether this part of the decision of the High Court was right or wrong. When no contention was raised on behalf of the revenue before this Court the decision of the High Court on this point was wrong and that even though the assessee was not a registered shareholder, the amounts of loans advanced to the three business concerns of the assessee were still liable to be regarded as "deemed dividend" under Section 2(6A)(e) and no such contention formed the subject-matter

> of discussion before this Court and this Court had, therefore, no occasion to consider this question, it is difficult to see how it can be said merely from the answer given by this Court in favour of the revenue that this contention was impliedly decided in favour of the revenue. It would be straining logic to an absurd limit to say that though this contention was not raised, no argued, not discussed and not decided, yet it must be held to have been impliedly decided because, through an error committed by this Court, an answer was given in favour of the revenue in ignorance, of the true position. It would also not be right to hold that merely because this Court erroneously answered the first question against the assessee without considering whether the view taken by the High Court on this point was incorrect, the assessee must be precluded from raising the contention that the assessee not being a registered shareholder, the amounts of loans advanced to the three business concerns of the assessee did not fall within the definition of deemed dividend" under Section 2(6A)(e)....

21. The above judgement clearly lays down that any part of the judgement of the High Court which is not challenged before the apex court remains unaffected and to that extent it does not become the part of the judgement of the apex court. It has been repeatedly observed by the hon'ble Supreme Court that a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. (State of Orissa v. Sudhanshu Sekhar Misra). In Ambica Quarry Works v. State of Gujarat , it was held that ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides and not what logically follows from it. Similarly, in CIT v. Sun Engineering Works Pvt. Ltd. 198 ITR 297 it has been held by the apex court that a decision of the Supreme Court takes it colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision. In view of these judgements, it cannot be said that in the case of P. Mariappa Gounder (supra) the hon'ble Supreme Court adjudicated the issue regarding the nature and character of the mesne profit. The judgement of the apex court is restricted only to the issue regarding the year of taxability.

22. The learned senior DR, Mr. Gupta, has relied on the judgement of hon'ble Supreme Court in the case of Kunhayammed v. State of Kerala 245 ITR 360 for the proposition that where there is a dismissal of appeal by the apex court, the decision of the High Court is confirmed and the doctrine of merger applies. It is not necessary for us to adjudicate such contention in the present case since there was no appeal by the assessee against the opinion of the High Court expressed in the Reference Application at the instance of the assessee. As already mentioned by us in earlier part of the order that there were three Reference Applications before the High Court - one by the assessee and two by the Revenue. Only two appeals were filed before the apex court with reference to the opinion expressed by the High Court on the questions referred at the instance of the Revenue. Since no appeal was filed against the opinion expressed by the High Court on the question referred at the instance of the assessee, the question of applying the theory of merger does not arise.

23. The above discussion clearly reveals that judgement of the hon'ble Supreme Court in the case of P. Mariappa Gounder (supra) only decides the issue, regarding the year of taxability of the mesne profits. That judgement, therefore cannot be said to be an authority for the proposition that nature of mesne profits is revenue receipts chargeable to tax. Accordingly, the contention of Revenue that the issue regarding the nature of mesne profits is covered by the aforesaid decision of the hon'ble Supreme Court cannot be accepted.

24. Having answered the question referred to by the hon'ble President in the present case, we now proceed to dispose off the appeal. The first issue arising in this appeal from Ground Nos. 1, 2, 3 and 5 is whether the sum of Rs. 34,57,01,137/- received by the assessee under the consent decree passed by the hon'ble Supreme Court is in the nature of capital receipt not chargeable to tax or is in the nature of revenue receipt chargeable to tax. Thus it will be appropriate to refer to the facts giving rise to this appeal. The same are being narrated as below:

a. The assessee is a company promoted by the members of Narang family. It owns various 'properties including shop Nos. 3, 3A, and 4 to 7 on the ground floor in the building known as Beach View' at Warden Road, Mumbai. This property was given by the assessee on leave and license basis to another company promoted by Narang family namely, Narang International Hotels Pvt. Ltd. (NIHPL) for a period of 11 months under an agreement dated 30th February, 1990. Under the agreement, the licensee i.e. NIHPL, could use and occupy the premises for carrying on the business of selling fast food under the name 'Croissants' subject to payment of commission by way of certain percentage of sales proceeds received by NIHPL.

b. Within a period of few months, the dispute arose between the members of Narang family in respect of the properties owned and held by the individual members of the family as well as through various partnership firms and companies promoted by the members. A family settlement was arrived at on 12.07.1990 which, inter-alia, provided that Rajesh Narang shall take over the assessee company namely, Narang Overseas Pvt. Ltd. (NOPL) exclusively both at Bombay and Delhi with al its assets and liabilities.

c. A suit (bearing no 8079/90) was filed in the Bombay Civil Court in the year 1990 by NIHPL against the assessee company seeking perpetual injunction to restrain the assessee company from disturbing the possession and the business in the suit shop at Warden Road, Mumbai. During the pendency of suit, another family settlement was arrived at on 3rd July, 1991 which, inter-alia, provided that all the assets of assessee company shall vest in and belong to Rajesh Narang. Further it was provided that the license created in favour of NIHPL in respect of the premises at Warden Road has bee mutually cancelled and terminated. However, this settlement also could not be implemented.

d. Subsequently, third family settlement was arrived at on 30th January, 1992 which, inter-alia, provided that NOPL shall belong exclusively to Rajesh Narang and for his

nominees. Further, NIHPL shall pay the arrears of commission to NOPL for the premises occupied by them and they shall continue to pay the commission until the said premises are vacated. It was also agreed that NIHPL shall vacate the said premises on or before 31st March, 1992. However this family settlement also could not be implemented.

e. Vide order dated 29th June, 1993, the Bombay Civil Court took cognisance of the family settlement dated 30th January, 1992 and, inter-alia, decreed that. NIHPL shall hand over the possession of the shops at Warden Road, Mumbai to NOPL. Aggrieved by this order, NIHPL carried the matter in appeal before the hon'ble Bombay High Court and also applied for stay of the operation of the order and decree dated 29th June, 1993 passed by the Bombay City Civil Court in Suit No. 8079 of 1990. The hon'ble Bombay High Court passed the following interim order on the said appeal/stay petition of NIHPL:

Stay in terms of prayer 'a' till disposal of appeal on the appellant depositing Rs. 10,00,000/- within 4 weeks towards arrears and continue to deposit of Rs. 1,25,000/- per month w.e.f 1st August, 1993. Appellant to maintain the status quo and not to create third party rights.

f. Aggrieved by the above order, the assessee company along with its Director Shri Rajesh Narang filed a Letter Patent Appeal praying for payment of arrears and commission as well as payment of mesne profits. On assessee's prayer for permission to withdraw the amounts so paid by NIHPL, the hon'ble High Court passed the following order on 21st March, 1994:

Amount deposited by respondent in pursuance of the order dated 24th August, 1993, in pursuance of order of Chauan J. in first appeal No. 591 of 1993 be paid over to the petitioner on their furnishing security to the satisfaction of the trial court.

On 28th April, 1994, the hon'ble High Court passed further orders directing NIHPL to deposit further amount of Rs. 10,00,000/- in the trial court within two weeks towards the arrears of compensation and permitted the assessee to withdraw the said sum as also further monthly deposits on the condition that NOPL shall give a written undertaking to the hon'ble High Court by 27* April, 1994 to the effect that NOPL shall not in any manner dispose off or encumber the suit property. On giving the said undertaking, NOPL was permitted to withdraw the UTI Bonds given as security earlier. NOPL was also required to make a statement that they shall give all necessary co-operation for renewal of various statutory licenses necessary" for running business by NIHPL. NIHPL shall intimate in writing to NOPL the requirements in this respect.

g. On 02.07.1994, Mr. Rajesh Narang, the Director of the assessee company, lodged a suit number 3578 of 1994 in the Bombay High Court, inter-alia, seeking specific performance and implementation by the defendants named therein of the Family

Settlement contained in the diverse writings embodying the Family Settlement. In this suit, Shri Rajesh Narang, inter-alia, petitioned the Court to Order and decree NIHPL.

a. to hand over forthwith quite, peaceful and vacant possession of the shop;

b. To pay arrears of commission with interest;

c. To pay the appellant mesne profits/damages of Rs. 10 lacs per month along with interest thereon for use and occupation of the shop premises; and d. To withdraw forthwith the first appeal number 591/1993 filed before the Bombay High Court arising out of Bombay City Civil Court's Order in suit number 8079 of 1990.

h. Besides the above litigation, several other proceedings were pending before various other authorities and courts. Litigations reached a stage where Shri Rajesh Narang and Shri Ramesh Narang had to bring suit of contempt of court against their father Shri Rama Narang. As a result of the contempt petition, the hon'ble Supreme Court considered Shri Rama Narang' as contemnor and issued a notice for award of punishment. However, soon after being held as contemnor, Shri Rama Narang decided to implement the Family Settlements and also to have all suits decreed by a consent decree, including the suit filed by Rajesh Narang before the Bombay High court (Suit No. 35.78/1.994). Eventually, the Hon'ble Supreme Court vide Order dated 8th January, 2002 decreed all the suits, including the suit filed by Shri Rajesh Narang on 2nd July, 1994, i.e. Suit No. 3578 of 1994, in terms of the minutes of the consent order. In meeting of the Board of Directors of NIHPL (to give effect to the Minutes of the Consent Order and order of the Hon'ble Supreme Court), inter-alia, the following resolution was passed:

12. RESOLVED THAT the license created by Narang Overseas Private Limited in favour of the company in respect of premises being flat Nos. 3,3A,5,6 and 7 on the ground floor of Beach View Cooperative Housing Society Limited, Ward Road, Bombay - 400 007 stands cancelled with effect from 3rd July, 1991, and that accordingly the said license in favour of the company has come to an end from the said date.

FURTHER RESOLVED THAT the company does agree and undertakes to hand over quite, peaceful and vacant possession of the said premises to Narang Overseas Private Limited on or before 1st January, 2002 and that the company agrees and undertakes to simultaneously pay to Narang Overseas Put. Ltd. Rs. 2,61,745/- (rounded off) being arrears of commission for occupation of the said premises till 31st March, 1992 along with interest @ 21% per annum till 31st December, 2001 amounting to Rs. 16,84,487/- and further agrees and undertakes to simultaneously pay damages and mesne profits for wrongful use and occupation of the said premises at the rate of Rs. 10,00,000/- per month from 1st April, 1992 till 31st December, 2001 along with interest at the rate of 21% per annum amounting to Rs. 34,57,01,137/-(less amount already paid through the Court of

Rs. 1,10,00,000/-).

i. Accordingly, the assessee company got vacant possession of the said shop premises and received Rs. 33,47,01,137/- on 21st December, 2001 as Rs. 1,10,00,000/- had been received over the years pursuant to inter order of Bombay High Court per para 6 above).

25. The assessee company did not offer the aforesaid amount as income in its return for the year under consideration since it was of the view that the damages/mesne profits received were on capital account and were therefore not liable to tax as income. A note was appended in the return of income filed by the assessee for Assessment Year 2002-03 which reads as under:

> 1. As per Narang Family Settlement vacant & free from all encumbrances possession of shop at Beach View was to be handed over on or before 31s1 March, 1992 & arrears of commission to be paid to Company by Narang International Hotels Pvt. Ltd. However, due to dispute and litigation the same were pending since 1992. The matter has been finally resolved in terms of settlement before Supreme Court vide order dated 12th December, 2001 & 8th January, 2002 and accordingly Company received Rs. 2,61,745/- being arrears of commission for occupation of the said premises till 31" March, 1992 along with interest @ 21% p.a. till 31st December, 2001 amounting to Rs. 16,84,487/-. The aforesaid receipt is accounted for in Profit & Loss Account.
>
> 2. In terms of settlement before Supreme Court vide order dated 12th December, 2001 & 8th January, 2002 the Company has also received damages arid mesne profit for wrongful use and occupation of the said premises from 1st April, 1992 till 31st December, 2001 along with interest @ 21% p.a. amounting to Rs. 34,57,01,137/- (less amount already received through the Court of Rs. 1,10,00,000/-) and implementation of Family Settlement. The said amount being received as damages & mesne profits for wrongful use and occupation of the said premises shown as 'Capital Reserve' after adjusting the expenditure incurred to receive the same and in implementation of Family Settlement.

Date	Amount Receivable For the Year	Total Principal + O/S interest	Interest for the year @ 21% p.a	Total amount receivable
(1)	(2)	(3)	(4)	(5)
April 92 to Mar 93	12,000,000	12,000,000	1,365,000	13,365,000

April 93 to Mar 94 12,000,000 23,65,000 4,171.650 29,536,650

April 94 to Mar 95 12,000,000 41,536,650 7,567,697 49,104,347

April 95 to Mar 96 12,000,000 61,104,347 11,676.913 72,781,260

April 96 to Mar 97 12,000,000 84,781,259 16,679,064 101,095,692

April 97 to Mar 98 12,000,000 113,430,324 22,665,368 136,095,692

April 98 to Mar 99 12,000,000 148,095,692 29,945,095 178,040,787

April 99 to Mar 00 12,000,000 190,040,787 38,753,565 228,794,352

April 00 to Mar 01 12,000,000 240,794,352 49,411,814 290,206,166

April to Dec 01 9,000,000 299,206,166 46,467,971 345,701,137

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26. In the course of assessment proceedings, the Assessing Officer asked the assessee to explain as to why the amount received as per the Supreme Court order should not be considered as Revenue in nature and as such why it should not be taxed as income in the year under consideration. The assessee vide letter dated 30th September, 2004 submitted as under:

> As regards your query, regarding amount received as per Supreme Court's order, we state that in or about 1989 disputes were arisen between the members of Narang family. The said dispute were resolved in terms of family settlement complaints of dated : 12.07.90, 09.07.91 & 30.01.92. There was a dispute in Narang family regarding implementation of family settlement. Therefore, the assessee company had filed a suit bearing No. 3578/94 before the Bombay High Court for specific performance of family settlement dated : 12.07.90, 03.07.91 & 30.01.92. We are attaching herewith the Suit No. 3578/94. There were several litigations which were finally settled/resolved in terms of decree before the Supreme Court vide their order dated : 12.12.2001 and 08.01.2002. In terms of this decree and prayer in Suit No. 3578/94, the assessee company has received the said amount.

27. The Assessing Officer considered the facts on record including the agreement between the assessee and NIHPL and formed the following view:

> a) there was no relationship of landlord and tenant between the assessee company and NIHPL as the possession of the property was given to facilitate NIHPL to carry on the business of selling fast foods against consideration of Fixed commission on the sale proceeds i.e. @ 17.5% up to monthly sale of Rs. 1.5 lakhs, 15% on monthly sales between 1.5 lakhs to 3 lakhs and 12.5% on sales exceeding Rs. 3 lakhs per month. There was no fixed monthly rent for use of the premises.
>
> b) there was no decree from any court determining any amounts on account of mesne profits.
>
> c) There was no decision or order of any court holding NIHPL as being in wrongful possession of the premises at Warden Road, Mumbai. On the other hand, NIHPL was in possession of the said property on the basis of a mutually agreed contract entered into for the purpose of running business against pre-determined rate of commission calculated on the sales effected by NIHPL.
>
> d) The dispute between the parties was on account of lack of agreement between the various members of Narang family regarding ownership, management and control of various properties of the family including business concerns. Such disputes had been finally settled by the family members themselves and the court had not passed any judgment resolving the dispute.

The Assessing Officer also considered the provisions of Section 2(12) of the Code of Civil Procedure as well as certain decisions" of various courts namely - decision of the Privy Council in Gishchandan Lahari v. Shashi Shikhareshwar Roy, the Supreme Court judgment in the case of Mariappa Gounder, Kerala High Court judgment in the case of Annamma Alexander. Finally, it was held by him that the amount received by the assessee could not be treated as mesne profits.

28. The next question posed by the Assessing Officer was whether such receipts could be treated as Revenue receipts or Capital receipts. The Assessing Officer was of the view that the amount received by the assessee was in the nature of Revenue. Such view was formed after considering the various decisions mentioned by him in his order from pages 19 to 25.

29. The order of the Assessing Officer was challenged before the learned CIT(A) who after considering the contentions raised on behalf of the assessee as well as the reasons recorded by the Assessing Officer, recorded various findings mentioned hereafter. Firstly, it was held by him that the amount received by the assessee under the consent decree passed by the Apex court represented mesne profits as against the finding of the Assessing Officer that it represented arrears of commission payable by NIHPL to the assessee under the agreement. The reasons for coming to his conclusion were recorded by him as under:

> i) The leave and license agreement of 13.2.1990 prescribed maximum commission of 17.5% of sales to be paid by NIHPL to NOPL. As per details furnished by the Assessing Officer with his report dated 12.4.2005, the sales of NIHPL from the Beach View shops varied from Rs. 1.07 crore in 1994-95 to Rs. 72.60 lakh in 2001 -02 peaking at Rs. 1.37 crore in 1996-97. So even at the maximum rate of 17.5%, the commission payable to NOPL on these sales would have remained well below Rs. 20 lakh in each year. However, the damages/mesne profit awarded to the appellant company @Rs 1,20 crore per year are greater than the sales of NIHP for most years. As such, the amount of Rs. 10 lakhs per month from 1/4/1992 to 31.12.2001 does not appear to have any relation to the sales of NIHPL from the said shop Croissants etc. at Warden Road.

Besides, there is also merit in the contention of the appellant that under the license agreement dated 13/2/1990 the commission payable by NIHPL to the assessee company was linked to sales. Being linked to sales, the commission would vary from week to week and month to month according to the quantum of sales However, the amount of Rs. 10 lakh per month awarded to the assessee from 1/4/1992 to 31.12.2001 was fixed and had no relation to sales. Therefore, the said amount could not be on account of commission on sates. Also, whereas the commission was to be determined on weekly basis, the amount of Rs. 10 lakhs was on a monthly basis.

(ii) The license agreement dated 13/2/1990 had been expressly terminated vide family agreement dated 3/7/1991. Clause I of the license agreement dated 13/2/1990 makes it very clear that the license was to terminate after 11 months. Clause 12 of the agreement required the license to vacate the premises on termination of license. Clause 13 provided that extension/ renewal of license would be at the sole discretion of the owner of the premises. The owner had expressly terminated the license first through the Supplemental Family Arrangement of 3.7.1991 and finally under the Third Family Settlement of 30.1.1992. Under the later Settlement, NIHPL was obliged to vacate the shops before 31/3/1992 and to pay arrears of commission till the time the shops were vacated. Based on these family arrangements, the Bombay City Civil Court vide its order dated 29/6/1993 has held that occupation of the shop premises by NIHPL after 31.3.1992 was illegal and unauthorised. This order as brought out by the appellant in para 7.2.3 above, has indeed, become final Thus, the license

agreement having been terminated before 31.3.1992, there could be no question of the terms of the said license agreement continuing to apply after the date of termination. As such, the amount of Rs. 10 lakhs per month can not be referable to the compensation payable in terms of the license agreement whether by way of commission on sales or rent. However, even if it be granted for the sake of argument that the amount in question represented arrears of commission or rent, it is noteworthy that in the case of Sardar Exhibitors (supra) cited by Assessing Officer, even arrears of rent arising from increase in rent awarded by arbitrator/ court was held by the Delhi Tribunal to be mesne profits.

The contention of the Assessing Officer that the appellant company continued to extend co-operation to NIHPL for obtaining the statuary permissions and getting the various licenses for carrying on business in the said shops renewed shows that the business was continuing after 31.3.1992 with the indulgence of the appellant company is, in my opinion, untenable. The undisputed Facts are that the appellant company was pressing NIHPL hard for uacating the shops in question. That is the reason why NIHPL, through suit No. 8079 if 1990, approached the Bombay City Civil Court for restraining Shri Rajesh Narang and NOPL through notice of motion filed before the Bombay City Civil Court on 22.6.1993 in which it again pressed for eviction of NIHPL in terms of the Family Settlements of 3.7.1991 and 30.11.1992. The prayer of the appellant was granted by the City Civil Court vide its order dated 29.6.1993, NIHPL appealed against this order before the Bombay High Court through suit No. 591 of 1993. The High Court passed an order staying the operation of the order of the City Civil Court on NIHPL depositing Rs. 10 lakh towards arrears and Rs. 1.25 lakh every month from 1.8.1993. Against this order of the Hon'ble High Court the appellant company along with its Director, Shri Rajesh Narang, filed a Letters Patent Appeal No. 43 of 1994 praying for inter-alia, payment of arrears of commission and for mesne profits. On 28th April, 1994, Hon'ble High Court passed orders directing NIHPL to pay amount of Rs. 10,00,000/- and permitted the appellant to withdraw the said sum, as also further monthly deposits, on the condition, inter-alia, that NOPL and Rajesh Narang shall make a statement that they shall give all necessary cooperation for renewal of various statutory licences necessary for running business by NIHPL which shall intimate in writing to NOPL the requirements in this respect- On 02.07.1994, Rajesh Narang, the Director of the appellant company, lodged a suit number 3578 of 1994 in the Bombay High Court, inter-alia, seeking specific performance and implementation of the Family Settlement. These facts, to my mind, do bear out the averment of the appellant that the co-operation it rendered to NIHPL for getting the statutory licenses renewed was under the conditions specified by the Hon'ble High Court and that this was without prejudice to the claim of the appellant for eviction of NIHPL from the said shop premises and for mesne profits. Thus, the continued possession of NIHPL was not because of the acquiescence of the appellant but despite the best efforts of the appellant to evict NIHPL. The facts also do not indicate any collusiveness between the, parties as suspected by the Assessing Officer. Actually, the facts show, quite to the contrary, that a bitter feud raged among the members of Rama Narang family over division/distribution of assets which manifested in various court battles. The litigation came to a head with Ramesh Narang charging his own father, Shri Rama Narang, for contempt of the court and actually getting him declared a contemnor by the Hon'ble Supreme Court. Surely, all this does not indicate collusiveness between the parties in obtaining the consent decree from the Hon'ble Supreme Court.

iii) The facts clearly show that Shri Rajesh Narang and the appellant company through family settlements and law suits was pressing for the eviction of NIHPL from the Beach View shops on the ground that the occupation of the said shops by NIHPL after 1.4.1992 was unauthorized and illegal It is on this ground that the appellant claimed mesne profits/damages in its Letters Patent Appeal No. 43 of 1994 and in suit No. 3578 of 1994 filed before the Hon'ble Bombay High Court. That indeed being the case, I quite agree with the appellant that the mesne profits/damages sought was for illegal deprivation of the shop premises by NIHPL and the damages sought had no relation to the compensation under the leave and license agreement of 13.2.1990. In this view of the matter, I am unable to agree with the Assessing Officer that there was no illegality in the continued occupation of the shop premises by NIHPL because Shri Rajesh Narang did not fulfil his obligations under the family settlement (para 6,v above). As pointed out by the appellant, this argument was expressly rejected by the Bombay City Civil Court in its order dated 29.6.1993. The City Civil Court had held the possession of the shops by NIHPL after 1.4.1992 as illegal and had decreed eviction. This decision, as brought out in para 7.2.3 above, has become final. That being the position, I do not find any substance in the contention of the Assessing Officer that possession of the shops by NIHPL after 1.4.1992 was not illegal Besides, it is also noteworthy that in the meeting of Board of Directors of NIHPL held on 31.12.2001 to give effect to the Minutes of the Consent Order filed before the Supreme Court on 12.12.2001, it has been inter- alia resolved in para 12 that NIHPL "further agrees and undertakes to...pay damages and mesne profits for the wrongful use and occupation of the said premises at the rate of Rs. 10,00,000 per month from 1st April, 1992.... Thus, even NIHPL which was at loggerheads with the appellant company has eventually accepted that its occupation of the shop premises was wrongful.

iv) There is no dispute that vide order of the Hon'ble Supreme Court dated 8.1.2002 the suit No. 3678/1994 filed by Shri Rajesh Narang before the Hon'ble Bombay High Court on 2.7.1994 claiming, inter-alia, mesne profits @Rs. 10 lakh p.m. was decreed in terms of the Minutes of the Consent Order. The contention of the Assessing Officer is that the decree of the Hon'ble Supreme Court merely gave effect to the consent terms agreed to between the parties. Therefore, the same cannot be regarded as an award of damages by the order of a court which is essential for mesne profits. However, I do not find any merit in this contention of the Assessing Officer. Just because a suit is disposed off by a consent decree it will not be any less than an award in a contested suit. In law there is no real difference between the two. Even a vigorously contested suit may eventually end up in an out of court settlement subsequently decreed by the court. In this instant case what has been decreed by the Hon'ble Supreme Court is the suit No. 3678 of 1994 of Shri Rajesh Narang before the Hon'ble Bombay High Court. In this suit Shri Rajesh Narang had, inter-alia, claimed mesne profits @ Rs. 10 lakh p.m. This claim has been decreed by the Hon'ble Supreme Court. The effect of this decree is the same as that of any other binding order of the court. As has been pointed out by the appellant, it has been held by the Hon'ble Bombay High Court in Anant Chunilal Kate v. Income-Tax Officer [2004] 267 ITR 482 that a decree in terms of the settlement arrived at by the parties before the court has the same binding force as any other decree.

Coming to the legal issue whether the amount received by the assessee represented Capital receipt or Revenue receipt, the Id CIT(A) observed that majority of High Court decisions were in favour of the assessee in as much as it was held by several High Courts that mesne profits constitute capital

receipt. However, it was further observed by him that judgment of Madras High Court in the case of CIT v. Mariappa Gounder 147 ITR 676 was in favour of revenue and the said judgment has been affirmed by the Hon'ble Supreme Court vide judgment represented as P. Mariappa Gounder v. CIT 232 ITR 2. The learned CIT(A), therefore, held that various decisions relied on by the assessee were of no avail. At this stage, it would be appropriate to mention that it was contended before the id CIT(A) that issue regarding taxability of the receipt was not before the Apex court and therefore the Supreme Court judgment could not be considered as an authority for the proportion that mesne profits constituted revenue receipts. This contention of the assessee rejected by the learned CIT(A) by observing that the Apex court was aware of the conspectus of the case and the controversy regarding taxability of the mesne profits. According to him, the Supreme Court impliedly upheld the- finding of the High Court that mesne profits constituted revenue receipt. Accordingly, it was held by him that mesne profits received by the assessee constituted revenue receipt.

30. Aggrieved by the order of learned CIT(A), the assessee has preferred the appeal before the Tribunal.

31. The learned Counsel for the assessee has challenged the later finding of the learned CIT(A) by contending vehemently that the issue of taxability of mesne profit was not before the hon'ble Supreme Court in the case of P. Mariappa Gounder (supra) and therefore, Id CIT(A) was not justified in holding that the Hon'ble Supreme Court upheld the finding of the hon'ble Madras High Court regarding taxability of mesne profits. According to him, the issue before the Apex Court was the year of taxability only as no appeal had been filed against the finding of High Court that mesne profits constitutes revenue receipt chargeable to tax. It was also contended that decision of Special Bench of the Tribunal in the case of Sushil Kumar & Co. is also incorrect in holding that Apex court decided the issue regarding the taxability of mesne profits. This contention of the learned Counsel for the assessee had resulted in constituting of larger Bench of 5 members. The following question was referred to this bench for adjudication:

> Whether in the light of decision in 232 ITR page 2 it must be held that the mesne profit received by the assessee is revenue income chargeable to tax?
>
> The above question has already been answered by us in the earlier part of our order. It has been held by us that the issue regarding the taxability of mesne profit was not before the apex Court in the case of P. Mariappa Gounder (supra) and therefore, the judgment of the Supreme Court is not an authority for the preposition that mesne profit constitute revenue receipt chargeable to tax. Consequently, it is held that learned CIT(A) was not justified in holding that the apex court impliedly upheld the finding of the Hon'ble Madras High Court that mesne profits tantamount to revenue receipt chargeable to tax.

32. Having held as above, the only issue which arises from the appeal of the assessee and requires adjudication by us is whether the mesne profits received by the assessee is revenue receipt or capital receipt in as much as the finding of the learned CIT(A) that amount of Rs. 34,57,01,137/- received by the assessee amounts to mesne profits has not been challenged by the department either by filing

cross appeals or cross objection. However, in the course of hearing, the learned Sr. D.R., Mr. Gupta, invoked the provisions of Rule 27 of Appellate Tribunal Rules, 1963 and contended that the aforesaid amount, cannot be treated as mesne profits since such receipts originates from the agreement between assessee and NIHPL. In support of his contention, he has relied on various judgments of Hon'ble Supreme Court & High Court as well as the decisions of the tribunal but the same need not be referred to since the learned Counsel for the assessee has not objected to the right of revenue for invoking Rule 27 of Appellate Tribunal Rules, 1963.

33. The contention of the learned Sr. D.R. is that arrangement between assessee and NIHPL was a business arrangement considering the entire facts and circumstances of the case. According to him, Rajesh Narang was controlling the assessee company as well as NIHPL since he was permanent whole time director in NIHPL; The purpose was to run the hotel business on sharing basis. The premises was to be provided by assessee company while it was to be managed by NIHPL. The profit was to be shared in as much as assessee was entitled to profits by way of commission on sales effected. According to him, it was not a mere letting out of the immovable property but was in substance a joint venture between the assessee and NIHPL. Proceeding further it was submitted that character of income would not change by the fact that the agreement was terminated and suit for possession was filed by the assessee against NIHPL. Reliance was placed on the decision of Calcutta High Court in the case of Sawaika Oil and Produce Co. 202 ITR 520 for the following proposition:

> Merely because the assessee has filed an ejectment suit or the assessee is not collecting rent or occupation charges, as the case may be, which are being deposited by the tenant to the Rent controller, it cannot be said that the annual value cannot be assessed. Whether the owner is in possession and enjoyment of the property or has let it out to a third person is not a relevant consideration for determination of the annual value of the property. The liability does not depend upon the right of the owner to enjoy or let. out the property.
>
> Proceeding further, it was submitted that it could not be a case of simple letting out since NIHPL never claimed itself as statutory tenant or protection under Rent Control Act. He also referred to page 34 & 35 of the paper book to point out that other flats owned by the assessee on first and second floor were let out to Manu Narang and in such cases the agreements referred to the terms 'monthly tenants or standard rent' etc. which are absent in the agreement between the assessee and NIHPL. This fact shows that agreement could not be considered as lease agreement. It could only be considered as business agreement. It was submitted by him that reading of the agreement as a whole would reveal that all the attributes of business are present in this case. It was pointed out that prior to the agreement, the flats were not used for commercial purpose. As per clause 4 of the agreement, the assessee was required to obtain the permission and licences to carry on the business from various authorities. Further, TDS was deducted in assessment year 1991-92 even though there was no provision for deducting tax at source on rent payment. This also showed that both the parties treated the payment in lieu of services and not as rent. Risk factor existed as the consideration depended on the sales effected in as much as it

was fixed on certain percentage of sales. Further, as per Clause 10, policies of the assessee were to be followed and certain circumstances, services of the employees could also be terminated by the assessee. Clause 11 permitted the assessee to have effective control over the accounts of the business which showed-contribution of investment by assessee in plant and machinery. Clause 12 shows that keys of the premises were always there with the assessee. According to him, all these facts considered as a whole shows that what the assessee was receiving was not rent but for the payment of services and therefore, the agreement between assessee and NIHPL cannot be considered as mere lease agreement. It is to be considered only as business agreement. Consequently, the amount received by the assessee could be treated only as business receipt and not as mesne profit. Reliance was also placed on the Supreme Court decision in the case of National Cement Mines Ind. Ltd. 42 ITR 69. He also relied on the decision of Bombay High Court in the case of Presidency Co-operative Hsg. Society 216 ITR 321 for the proposition that the issue whether receipt is capital or revenue should be examined from a commercial point of view. Certain other decisions were also referred to in support of the preposition that remuneration received by the assessee amounted to business receipt, which is liable to be assessed as income.

34. The learned Counsel for the assessee has strongly opposed such contention of learned Sr. D.R. by submitting that at the time when the agreement was made, Rajesh Narang was not controlling the assessee company. Rajesh Narang was to take over the assessee company but the agreement was not implemented. It was only in March, 1992 that shares of assessee company were vested in Rajesh group. Proceeding further, it was submitted that mesne profits of Rs. 34,57,01,137/- did not arise from the agreement as it was terminated w.e.f. 31.3.92. According to him, it arose only as a result of suit filed before the Bombay High Court in 1994 which has been upheld by the apex court. It was submitted by him that after the termination of the agreement, NIHPL was in unlawful possession of the property and therefore amount received by the assessee cannot be attributed to the agreement. It has to be treated as mesne profit which accrued to the assessee as a result of the suit decreed by the High Court. It was also pointed out by him that the consideration received for the period ending 31.3.1992 had already been offered as business income and is not in dispute before the Tribunal.

35. After considering the submission of both the parties, we are unable to accept the submissions made by the learned Sr. D.R. There is no dispute to the preposition that consideration received under the leave and license agreement amounts to revenue receipt chargeable to tax. The assessee itself has offered the same in assessment year 1991-92 and 1992-93 as business income as is apparent from the chart given at page 119 of the paper book. As per this chart, the assessee had shown the income of Rs. 21,23,911/- and Rs. 13,87,833/- in assessment year 1991-92 and 1992-93 respectively as business income. Therefore, it is not necessary for us to adjudicate about the nature of receipt under the agreement. The dispute relates to the amount received by the assessee @ Rs 10 lakhs per month along with interest @ 21% for the period commencing from 1.4.92 till the date of possession handed over to the assessee in terms of the decree awarded by the apex court. There is no dispute to the fact that leave and licence agreement between the parties was concluded and terminated and NIHPL was required to vacate the said premises on or before 31.3.92. This

agreement was taken cognisance by the city civil court in its order dated 29.6.1993. Accordingly, the agreement was no more in. existence. After the termination of the said agreement, neither the assessee could legally recover from NIHPL nor the NIHPL was liable to pay any amount to the assessee under the terms of the said agreement. What the assessee was entitled to was the compensation as per civil law against unlawful possession by NIHPL. Since the agreement ceased to exist, in our humble opinion, no part of the sum of Rs. 34,57,01,137/- can be said to arise from the said agreement. Consequently, the contention of the learned Sr. D.R. that the aforesaid disputed amount received by assessee represented business receipt chargeable to tax under the terms of the agreement cannot be accepted.

36. An attempt has also been made by the learned Sr. D.R. to contend that consent decree does not make the compensation as mesne profit. According to him, compensation can be said to be mesne profit only when it is determined by the court after considering various facts. The mere fact that a particular amount was claimed by the assessee as mesne profit in the suit filed before the court and the fact that the same has been accepted by the defendant would not make the compensation as mesne profit. We are unable to accept such contention in view of the judgment of the jurisdictional High Court in the case of Anant Chunilal Kate 267 ITR 482 wherein it has been held that consent decree has the same binding force as any other decree. This legal finding was given view of the Supreme Court judgment in the case of Kumar Sudhenden Narain Deb. v. Mrs. Renuka Biswas . Therefore, respectfully following he said judgments; the contention of the learned Sr. D.R. cannot be accepted.

37. The mesne profits has been defined in Section 2(12) of the Code of Civil Procedure 1908 as under:

> (12) 'mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

In view of the above statutory definition, it is not necessary for us to look into any other definition. The above definition clearly takes within its scope any receipt against wrongful possession of property. In the present case, the amount received under the decree of the court is related to the wrongful or unlawful possession of the property by NIHPL from 1.4.92 till handing over the property to the assessee. Therefore, in our opinion, the same has to be treated as mesne profits.

38. Now the only question which survives in the appeal of the assessee and requires our adjudication is whether the mesne profits received by the assessee under the consent decree granted by the Apex court is Revenue receipt chargeable to tax or Capital receipt not chargeable to tax. The learned Counsel for the assessee has vehemently contended that mesne profits is in the nature of damage or compensation which the person, in wrongful or unlawful possession and enjoyment of immovable property, has to pay to the actual owner of the property. Reliance was placed on the judgement of the Hon'ble Supreme Court in the case of Lucy Kochuvareed v. P. Mariappa Gounder AIR 1979 Supreme Court 1214. On the basis of this legal position, it has been contended that damages and

compensation for wrongful possession and enjoyment of the immovable property must be held as capital receipt as it is compensation against deprivation of property, which' is a capital asset. In respect of this submission, he has relied on the following judgments:

1. CIT v. Rani Prayag Kamani Debi 8 ITR 25 (PAT)

2. CIT v. J.D. Italia 141 ITR 948 (AP}

3. CIT v. Smt. Lila Ghosh 205 ITR 9 (Cal)

4. CIT v. Periyar & Pareekanni Rubber Ltd. 87 ITR 686 (Kar.)

5. CIT v. Mrs. Annamma Alexender and Ors. 191 ITR 551 (Kar.)

6. Mrs. Annamma Alexender and Ors. v. CIT 199 ITR 303 (Kar.) The learned Counsel for the assessee also drew our attention to the observations of Hon'ble Calcutta High Court in the case of Lila Ghosh at Page where their Lordships dissented from the judgment of hon'ble' Madras High Court in the case of Mariappa Gounder [supra] on the ground that the Judgement of the Privy Council in the case of Girish Chandra Lahiri 27 IA 110 as well as the judgment of Hon'ble Supreme Court in the case of Lucy Kochuvareed v. P. Mariappa Gounder (supra) were neither cited nor noticed by the Madras High Court. It was further observed that decisions of Patna & Kerala High Court, mentioned above were also not cited or considered by the Madras High Court. Accordingly, it was submitted that in view of the above judgment, the meane profits received by the assessee must be held as Capital receipt. Alternatively, he relied on the preposition that where two views are possible.' then the view favourable to the assessee should be preferred.

39. On the other hand, the learned Sr. D.R. has strongly approved the submission of the learned Counsel for the assessee by contending that mesne profits received by the assessee is against deprivation of the use of the property and therefore, the receipt is of revenue nature as rightly held by the Hon'ble Madras High Court in the case of P. Mariappa Gounder 147 ITR 676. The emphasis is on the fact that if a property is used by some one and consideration is paid for such use of the property, then such compensation is of revenue character and therefore, if mesne profit is against use of the property, even unlawfully, then it will assume the same character. Reliance was placed by him on the following decisions:

1. Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraj Sir Kameshwar Singh No. 2 23 ITR 212 (Pat.]

2. Rai Bahadur H.P. Bannerji v. Commissioner of Income-Tax, Bihar and Orissa 19 ITR 596 [Pat]

3. Gopaldas Mohta v. Commissioner of Income-Tax, C.P. and Berar 20 ITR 516 [Nag.]

4. Income-Tax Officer v. Hazari Lal Marwah And Sons 41 ITD 1 : ITAT Del. 'C Bench.

5. Kailash Narain Gupta v. Commissioner of Income-Tax 225 ITR 921 (Raj.)

6. Commissioner-of Income-Tax, Bombay v. Vishnukantham Chetty 123 ITR 140 [Bom.]

7. Govinda Choudhury and Sons v. Commissioner of Income-Tax, Orissa 109 ITR 497 [Orissa].

8. Commissioner of Income-Tax v. Govinda Choudhury and Sons 203 ITR 881 [Supreme Court] It is contended by him that the words 'profits and gains' is not restricted to business only. It is used in other cases also. Hence, it would include mesne profits also. Reliance is placed on the following decisions:

1. Kilbum Properties Ltd. v. CIT 17 ITR 134 (Cal.)

2. Karamchain Union v. UOI 243 ITR 143 (SC)

3. ACIT v. Bal Bharti Nursery Shool 82 ITD 71 (All) Lastly, he distinguished the decisions relied on by the learned Counsel for the assessee. Regarding Patna High Court decision in the case of Rani Prayag Kamari Debi (supra), it was submitted that the court referred to three types of cases and assessee's case was that of second type while in the present case, the assessee's case falls under the third type of the cases. It is also submitted that Patna High Court in 23 ITR 212 & 19 ITR 596 itself had not followed its decision in Rani Prayag Kamani Debi (supra) The decision of Patna High Court has also been distinguished by Nagpur High Court in 20 ITR 516.

40. Regarding Kerala High Court decision in 87 ITR 666, it is submitted that case related to compulsory acquisition of land and the issue related to nature of interest for the period between the date of acquisition and date of award. According to him, this judgment does not lay down the preposition that mesne profit irrespective of nature would always be considered as capital receipt. As against this he relied on the decision of Rajasthan High Court in the case of Kailash Naiain Gupta 225 ITR 921 wherein their Lordships did not follow the above Kerala High Court decision. Similarly, the Bombay High Court did not follow the same in the case of Vishnudayal Dwarkadas 123 ITR 140. It was further submitted by him that Hon'ble Orissa High Court in the case of Govinda Choudhary 109 ITR 467, decided that interest received, neither under Statute nor under a contract is not chargeable to tax as revenue receipt. This decision was rendered following the above Kerala High Court decision but on appeal, the Apex Court has decided the issue in favour of Revenue by holding that, such profit was taxable. Hence, it is pleaded that the decision of Kerala High Court stand over-ruled. Further, it was contended by him that the decision of hon'ble Patna High Court in the

case of Rani Prayag Kumari Devi is no more good law since the hon'ble Patna High Court itself has not followed the same in subsequent judgements viz., H.P. Banerjee v. CIT 19 ITR 596, CIT v. Kameshwar Singh 23 ITR 212 as well as by the hon'ble Nagpur High Court in the of Gopaldas Mohta v. CIT 20 ITR 517. Proceeding further, it was rated that the judgement of hon'ble Calcutta High Court in the case of Lila Ghosh (supra) cannot be applied to the present case since the same stands impliedly overruled by the judgement of hon'ble Bombay High Court in the case of CIT v. Vijaykumar Ajitkumar 186 ITR 693. It has been submitted by him that in the above judgement, the hon'ble Bombay High Court differed from the hon'ble Calcutta High Court judgement in the case of Ashoka Marketing Ltd., 164 ITR 664 which was relied upon by the hon'ble Calcutta High Court in the case of Lila Ghosh. In view of the above submissions, it has been prayed by him that the judgement of hon'ble Madras High Court in the case of P. Mariappa Gounder (supra) should be followed.

41. Rival submissions of the parties have been considered carefully in the light of case-law referred to by both the parties. The question for our consideration is whether mesne profits inclusive of interest received by the assessee under the consent decree awarded by the hon'ble Supreme Court is in the nature of revenue receipt chargeable to tax or is in the nature of capital receipt not chargeable to tax. There is no dispute that there is a cleavage of opinion expressed by the High Court s on this issue. On one hand, the hon'ble Madras High Court in the case of P. Maxiappa Gounder 147 ITR 676 has held that mesne profit is in the nature of revenue receipt chargeable to tax. On the other hand, various High Courts have expressed the view that the mesne profit is in the nature of capital receipt not chargeable to tax. This view has been taken by the hon'ble Patna High Court in the case of Rani Prayag Kuraari Devi, 8 ITR 25, hon'ble Andhra Pradesh High Court in the case of J.D. Italia, 141 ITR 948, by the hon'ble Calcutta High Court in the case of Smt. Lila Ghosh, 205 ITR 9, by hon'ble Kerala High Court in the case of Periyar and Pareekanni Rubbers Ltd., 87 ITR 666 and in the case of Mrs. Annamma Alexander and Ors. 191 ITR 551 and 199 ITR 303. In order to appreciate the controversy let us analyse the above judgements hereafter:

42. In the case of P. Mariappa Gounder 147 ITR 675, the assessee agreed to purchase a tile factory under an agreement dated 22"d May, 1950. The vendor contray to the agreement and in breach thereof, sold it to K and put him in possession. The assessee thereupon sued his vendor for specific performance In the said suit, K impleaded himself and ultimately the trial court deemed the suit for specific performance. The hon'ble Kerala High Court allowed the appeal of K but the hon'ble Supreme Court reversed the said decision and restored the trial court's decree for specific performance. The Court also sustained the assessee's claim for mesne profits payable and the amount of mesne profits was fixed by the trial Court in the year ending March, 1963, and paid to the assessee some time during the financial year ending on March, 31, 1964. The ITO, the AAC as well as the Tribunal held that the mesne profits were taxable as income. On reference, the High Court affirmed the view of the Tribunal and decided the issue against the assessee by observing as under:

> we do not think it should take us long to find the correct answer. A claim for mesne profits is usually directed against one who has deprived the true owner of possession of his property and who has thereby prevented the true owner from enjoying the income or usufruct of the property. When, in such a suit or proceeding, the court

awards mesne profits to the true owner, that represents a just recompense to him for the deprivation of the income which ought properly to have come into his hands but far the interference of the person in wrongful possession of the properly.

43. In the case of Rani Prayag Kumari Devi 8 ITR 25 (Patna), the facts were these. The assessee who was the widow of the deceased holder of an impartible Raj instituted a suit for recovery of all the movables and immovables left by the deceased holder against a collateral of the latter, who had taken possession of them; and a decree was passed in 1933 awarding to the assessee {i) a number of movables, (ii) the value of such movables as could not be returned, and (iii) damages to the extent of Rs. 22 lacs for wrongful detention of them. After some part-payments, a compromise was arrived at to the effect that all payments which will be paid should be credited in the proportion of 6 annas towards the balance of principal amount (Rs. 7,16,463) and 10 annas towards the balance of damages (Rs. 10,83,536). In the accounting year 1936-37, the assessee received rupees 1 lac out of which Rs. 62,500 was adjusted towards damages according to the compromise. The question before the Court was whether the sum of Rs. 62,500 was taxable as income in the hands of the assessee. On reference, the High Court held that the damages for wrongful detention of the moveable properties of the assessee constituted capital receipt not chargeable to tax.

44. In the case of J.D. Italia 141 ITR 948 (AP), the facts of the case were that the land of the assessee was unauthorisedly occupied and the civil suit instituted by the assessee for recovery of possession was decreed in his favour. During the pendency of appeal, the parties arrived at a compromise where under the assessee was paid a sum of Rs. 1,45,000/- which inter alia included what was styled as interest of Rs. 40,000/-. The question arose whether this amount could be treated as income in the hands of the assessee. The assessing authority accepted the contention of the assessee that the sum of Rs. 40,000 was not taxable as revenue receipt. However, the Commissioner of Income-tax assumed the revisionary jurisdiction Under Section 263 of Income-tax Act, 1961 (the Act) and held that such sum was taxable in the hands of the assessee. On appeal, the Tribunal held that the aforesaid sum was not a revenue receipt since it was an interest paid otherwise than under the provisions of the statute. On reference, the High Court held that interest was in the nature of damages for use and occupation or compensation for the deprivation of the use and possession of land and in either event could not be classified as revenue receipt.

45. In the case of Smt. Lila Ghosh 205 ITR 9 (Cal.) the facts were these. The assessee inherited, "on the death of her husband in 1960, a property which was under a lease. The lease expired in 1970. However, the lessee did not give possession to the assessee. The assessee filed a suit for eviction and mesne profits. The suit was decreed in favour of the assessee in August, 1971. While the execution of the said decree and the quantification of the mesne profits were pending, the Government requisitioned the demised property in December 24, 1979. The requisition order was challenged and subsequently a settlement was arrived at. Under the terms of the settlement, the property in question was to be acquired by the State under the Land Acquisition Act, 1894, and compensation for such acquisition was to be paid to the assessee. Apart from the compensation for acquisition of the said premises, the assessee received a sum of Rs. 2 lakhs from the State on account of mesne profits for the use and occupation of the said premises by the erstwhile tenant. While making the assessment, the Income-tax Officer assessed the said sum of Rs. 2 lakhs representing mesne profits

as a revenue receipt in the hands of the assessee under the head "Income from other sources". The Tribunal held that the mesne profits of Rs. 2 lakhs arose as a result of transfer of a capital asset and the same was assessable under the head "Capital gains". The Tribunal held that it was also possible to determine the cost of acquisition of the asset in question which according to the Tribunal, consisted of the amount spent by the assessee towards stamp duty and other legal expenses incurred for obtaining the decree. On reference, it was held by the High Court that the mesne profits of Rs. 2 lakhs received by the assessee was in the nature of damages and therefore, a capital receipt not chargeable to tax. This conclusion was reached by the hon'ble Kerala High Court after considering the judgement of hon'ble Patna High Court in the case of Rani Prayag Kumari Devi (supra) of hon'ble Kerala High Court in the case of Periyar and Pareckanni Rubbers Ltd. (supra), of hon'ble Andhra Pradesh High Court in the case of J.D. Italia (supra) as well as the judgement of hon'ble Supreme Court in the case of Lucy Kochuvareed v. P. Mariappa Gounder AIR (1979) SC 1214. It is also pertinent to mention that their Lordships expressly dissented from the views; of hon'ble Madras High Court in the case of P. Mariappa Gounder 147 ITR 676 The relevant observations al page 17 of the order are being reproduced as under:

> With great respect to the teamed judges, we could not persuade, ourselves to agree with the views expressed by the Madras High Court in the aforesaid decision so far as it holds that mesne profits awarded by the court for wrongful possession are liable to be assessed as income. Neither the decision of the Privy Council in Girish Chunder Lahiri (1900) 27 I.A. 110, nor the decision of the Supreme Court in Lucy Kochuvareed, AIR 1979 SC 1214, were either cited or noticed by the learned judges of the Madras High Court. In fact, even the decision of the Patna High Court in CIT v. Rani Prayag Kumari Devi (1940) 8 ITR 25, and that of the Kerala High Court in CIT v. Periyar and Pareekanni Rubbers Ltd. 87 ITR 666, were neither noticed nor considered by the Madras High Court.

46. In the case of Periyar and Pareekanni Rubbers Ltd., 87 ITR 666 (Ker.), the land of the assessee was acquired by the Government on the basis of an agreement between the assessee and the Government. Apart from the compensation, the assessee also received interest of Rs. 24,103/- for the period commencing from the date of acquisition and the date of award. The question arose before the High Court was whether this interest could be treated as revenue receipt. The Court held that such interest was in the nature of capital receipt not chargeable to tax. It may be pertinent to mention that the hon'ble Court pointed out the distinction between the possession of land assumed under the provisions of Land Acquisition Act and possession otherwise taken. In the former case, Section 16 and 17 of the Act stipulated that on possession being taken the property will vest in the Government. In the absence of any such statutory provisions of law or by agreement or unauthorisedly, there is deprivation of property and therefore, interest paid by the Government is merely compensation for deprivation of property. The fact that such compensation is calculated as a percentage of interest of that amount does not affect the question. It is still compensation for deprivation of property.

47. In a later decision, the hon'ble Kerala High Court in the ease of Mrs. Annamma Alexander and Ors. 191 ITR 551 and 199 ITR 303 again made out a distinction between the "interest proper" and

"damages by way of interest" by observing as under:

> There is a difference between "interest proper" and "damages by way of interest". If the quality of the claim for interest is compensation, for the reason that the claimant has been deprived of the use of the money and has not had his money at the due date, it would be income in his hands. It may be regarded either as representing the profit he might have made if he had had the use of the money in time, or, conversely, the loss he had suffered, because he had not had that use. If, on the other hand, the claim is for loss of property or loss of goods, or some other injury to capital and the element of interest comes in by way of estimating the compensation to be granted for such capital loss or capital injury, then, the receipt would be capital. Mesne profits are received for wrongful occupation of property. It is in the nature of damages which the court may mould according to the justice of the case. Mesne profits themselves being award of compensation in the nature of damages and not taxable, interest thereon which is an integral part of the mesne profits is also not a revenue receipt and will not be taxable as income. The fact that mesne profits are estimated with reference to the profits which the person- in wrongful possession of such property actually received or would have ordinarily received for the purpose of compensation or determination of the compensation will not in any way render them an "income" or a revenue receipt. The amount of interest received on mesne profits cannot be treated as a revenue receipt:
>
> In coming to the above conclusion, their Lordships followed the judgement of hon'ble Patna High Court in Rani Prayag Kumari Devi (supra), of hon'ble Kerala High Court in the case of Periyar and Pareekanni Rubbers Ltd. (supra), the judgement of hon'ble Supreme Court in the case of Lucy Kochuvareed v. P. Mariappa Gounder (supra) as well as in the case of Mahant Narain Dasjee Varu v. Tirumala Tirupati Devaathanam AIR (1965) SC 1231 and dissented from the judgement of hon'ble Madras High Court in the case of P. Mariappa Gounder (SC).

48. The above analysis clearly reveals that there is cleavage of opinion between High Courts. The hon'ble Madras High Court has held that mesne profits is recompense for deprivation of income which the owner would have enjoyed but for the interference of the persons in wrongful possession of the property. Consequently, the same is revenue receipt chargeable to tax. On the other hand the hon'ble High Courts of Andhra Pradesh, Calcutta, Kerala and Patna have held that mesne profit is in the nature of damages for deprivation for use and occupation of the property and therefore capital receipt not chargeable to tax. There is no judgment of the jurisdictional High Court on this issue. In our view, such conflict can be resolved only by the hon'ble Supreme Court in some appropriate case. In the absence of the judgement of the highest court of land or of the jurisdictional High Court, the legal position is that, where there are two views then the view favourable: to the subject should be preferred. Reference can be made to various judgements of the apex court : CIT v. Vegetable Products 88 ITR 192 (SC), CIT v. Naga Hills Ten Co. Ltd. 89 ITR 236 (SC), CIT v. Madho Prasad Jatia 105 ITR 179 (SC), CIT v. J.K. Hosiery Factory 159 ITR 85, Shashi Gupta v. LIC 84 Comp. Cases 436. Therefore, following the same, it has to be held that mesne profit received for deprivation of

use and occupation of property would be capital receipt not chargeable to tax. We hold accordingly. Consequently, the decision of the Special Bench of the Tribunal in the case of Sushil Kumar fit Co. (supra), holding to the extent that mesne profit is taxable as revenue receipt is overruled.

49. In the present ease, after the termination of lease, NIHPL was occupying and using the property unauthorisedly and thus the assessee was deprived of the use and occupation of the property and therefore, the mesne profit received by the assessee under the consent decree awarded by the apex court @ Rs. 10 lakhs P.M. was on account of damages for deprivation of use and occupation of the profits and therefore, the sum so received was capital in nature not chargeable to tax.

50. The next question for our adjudication is whether interest awarded from the date of termination of lease agreement till the date of consent decree can be said; to be capital in nature. The learned Senior DR has heavily relied on the decision of the apex court in the case of Dr. Shamlal Narula v. CIT 53 ITR 151 (SC) for the proposition that interest on compensation is always revenue in nature. On the other hand, the learned Counsel for the assessee has relied on the Kerala High Court decision in the case of Periyar & Pareekanni Rubber Ltd. (supra) and A.P. High Court decision in the case of J.D. Italia (supra). According to him, interest up to the date of determination of mesne profit would be in the nature of damages and therefore, capital in nature while the interest received after such date would be revenue in nature since it would be deprivation of use of money.

51. We are in agreement with the contention of the learned Counsel for the assessee. The hon'ble A.P. High Court as well as the Kerala High Court in the cases referred to by the assessee's counsel have considered this issue. The judgement of hon'bie Supreme Court in the case of Dr. Shamlal Narula (supra) was referred to and considered by the above High Courts. The hon'ble Kerala High Court in the case of Periyar & Pareckanni Rubber Ltd. (supra) considered the situation where the interest was paid to the assessee up in the date of award under Land Acquisition Act, 1894. Their Lordships held as under:

> A distinction has been drawn in relation to possession assumed under the provisions of the Act and possession otherwise taken. In the former case, Sections 16 and 17 of the Land Acquisition Act stipulate that on possession being taken, the property will vest in the Government In the absence of any such statutory provision, even when possession is assumed by the Government, whether under some provision of law or by agreement or even sometimes unauthorisedly, the view is that there has been deprivation of property and the interest paid by the Government is merely compensation for deprivation of such property. The fact that compensation that is payable for such deprivation is calculated on a percentage of interest on that amount does not affect the question. It is still compensation for deprivation of property. This is the distinction that has been drawn by the Supreme Court in the decision of Dr. Shamlal Narula v. Commissioner of Income-tax referred to by the Tribunal That this distinction is real, cannot be disputed and in a later decision of the Supreme Court in T.N.K. Gvindarajulu Chetty v. Commissioner of Income tax the earlier decision is referred to and approved. In the nature and in the circumstances of this case, we are unable to hold that the amount paid to the assessee and allowed by the Tribunal as a

> deduction represented anything other' than compensation for deprivation of property. The property was not vested in the Government till the award was passed on August 31, 1962. The nature of the possession changed from that date and, we think, the Tribunal refused to allow deduction of interest payable from that date till September 6, 1962, rightly. But, as regards the payment of interest for the anterior period, the view taken is in consonance with the Supreme Court decision. The principle is that slated by the Privy Council in Vallabhdas Naranji v. Development Officer, Bandra and in Jnglewood Pulp and Paper Co. Ltd. v. New Brunswick Electric Power Commission. The latter decision has been approved by the Supreme Court in Dr. Shamlal Narula v. Commissioner of Income-tax.

52. In the later judgement in the case of CIT v. Mrs. Annamma Alexander (supra), the hon'ble Kerala High Court again considered this issue. Their Lordships made a distinction between "interest proper" and "damages by way of interest" by approving the view of the author Law of Income Tax by A.C Sampath Iyengar, Seventh Edition, Volume I page 518, which is reproduced, even at the cost of repetition, as under:

> If the quality of the claim for interest is compensation, for this reason that the claimant has been deprived of the use of the money and has not had his money at the due date, if would be income in his hands. It may be regarded either as representing the profit he might have made if he had had the use of the money in time, or, conversely, the loss he had suffered, because he had not had that use. If on the other hand, the claim is for toss of property or loss of goods, or some other injury to capital and the element of interest comes in by way of estimating the compensation to be granted for such capital loss or capital injury, then, the receipt would be capital.
>
> In view of the above, the High Court held that interest up to the date of award of mesne profits is nothing but damages for deprivation of use and occupation of the property and thus receipt is in the nature of capital not chargeable to lax. It may also be mentioned that their Lordships dissented from the view of hon'ble Madras High Court in the case of P. Mariappa Gounder (supra) which has been relied upon by the Revenue.

53. The hon'ble A.P. High Court in the case of J.D. Italia (supra) also held that interest awarded was in the nature of damages and therefore, capital receipt not chargeable to tax. The decision of the Supreme Court in the case of Dr. Shamlal Narula was also considered by the court.

54. The judgement of hon'ble Supreme Court in the case of Dr. Shamlal Najrula (supra) is quite distinguishable on facts. In that case, the interest under the Land Acquisition Act was awarded from the date of possession till the date of payment of compensation. Their Lordships observed that under the provisions of the Land Acquisition Act, the ownership of land is vested in the Government the moment the possession is taken by the Govt. Thus the money by way of compensation becomes due on the date of possession taken by the Government and thus interest is for deprivation of use of use of money and therefore, character of such receipt is revenue in nature. After considering this

judgement of hon'ble Supreme Court, the hon'ble Kerala High Court and hon'ble Andhra Pradesh High Court in the cases mentioned in the preceding paragraphs held that interest for the period up to the date of decree was capital in nature since till such date, the interest was by way of damages for deprivation of use and occupation of property.

55. The above discussion clearly reveals that if the interest is paid for deprivation of use of money fallen due to them it is revenue receipt chargeable to tax. On the other hand, if the interest is paid on account of the injury to the capital i.e., deprivation of use and occupation of the property then it is capital receipt not chargeable to tax In the present case, it. has already been held by us that mesne profit was for deprivation of use and occupation of the property. The interest received by the assessee is also for the same period as it is awarded up to the date of decree. The money has become due on the date of decree. Accordingly, it is held that interest from the date of termination of lease till the date of decree would be capital receipt not chargeable to tax. However, if any interest is received by the assessee beyond that period then, it would be revenue receipt chargeable to tax.

56. Before parting with this issue it would be appropriate to deal with the contentions raised on behalf of the Revenue. The contention of the Revenue that the judgement of hon'ble Kerala High Court in the case of Periyar & Pareekanni Rubbers Ltd., stands overruled by the judgement of hon'ble Supreme Court in the case of Govinda Chowdhary & Sons, 203 ITR 881 is without force and therefore, cannot be accepted for the reasons given hereafter. We have gone through the judgement of hon'ble Orissa High Court in the case of Govinda Chowdhary & Sons, 109 ITR 497 wherein their Lordships, following the Judgement of hon'ble Supreme Court in the case of Govindaraju Chetty's case 66 ITR 465, held that where interest has been awarded under the statute or under the contract, the same is income exigible to tax. and where it is not attributable either to the statute or to the contract but has been awarded on ex-gratia basis it would partake the character of compensation. Then, it was observed that this principle has also been adopted by the hon'ble Kerala High Court in the case of CIT v. Periyar & Pareekanni Rubbers Ltd. (supra). On appeal, the assessee conceded before the hon'ble Supreme Court that interest income was a revenue receipt chargeable to income-tax. In view of such concession, the court did not adjudicate upon the nature of the interest receipt. Therefore, it cannot contended that the decision of hon'ble Kerala High Court stood overruled by the judgement of hon'ble Supreme Court. A judgement can be said to be overruled only when a contrary proposition is laid down by the superior court. Therefore, where the superior court did not decide the issue but proceeded on the basis of concession made by the assessee, we are of the view that the decision of the inferior court cannot be said to be overruled either impliedly or expressly, it may also be mentioned at this stage that the judgement of hon'ble Supreme Court in the case of Govindaraju Chetty (supra), the court was concerned with the interest Under Section 28 and 34 of the Land Acquisition Act, 1894 i.e., interest from the date of award till the payment of compensation. Their Lordships considered the earlier decision in the case of Dr. Shamlal Narula wherein it was held that after the possession of land was taken by the Collector, the ownership in the land vested in the Government and therefore, subsequent to such event, the compensation had become due and therefore, interest was for deprivation for the use of money and not of the land and consequently, the interest income was of revenue in nature. Following the earlier decision, the court held that interest awarded Under Section 28 or 34 of the Land Acquisition Act was income chargeable to tax. Those decisions are distinguishable since in those cases the court was concerned

with the interest after the ownership in the land had vested in the Government. On the other hand, in the present case, the assessee was deprived of the possession and enjoyment of the immovable property and the mesne profits had not fallen due till the consent decree was passed by the hon'ble Supreme Court. Thus the decisions of the hon'ble Supreme Court in the case of Dr. Shamlal Narula as well as Govindaraju Chetty cannot be applied to the present case.

57. The contention of the Revenue that the hon'ble Rajasthan High Court in the case of Kailash Narayan Gupta, 225 ITR 921 did not accept the judgment of hon'ble Kerala High Court in the case of Periyar & Pareekanni Rubbers Ltd., is also without force. The perusal of the judgment of hon'ble Rajasthan High Court shows that it was the Income-tax Officer who had not followed the judgment of hon'ble Kerala High Court as is apparent from page 922 of the report. Nowhere in the judgment, the court discussed the ratio laid down by the hon'ble Kerala High Court. Therefore, it cannot be said that the judgement of hon'ble Kerala High Court was commented upon by the hon'ble Rajasthan High Court. On the contrary at page 924 it was held that award of interest was under statute and therefore, it was in the nature of revenue receipt. Even the said judgement of hon'ble Rajasthan High Court does not help the Revenue since in the present case before us interest was awarded neither under a statute nor under a contract.

58. The contention of the Revenue that the judgment of hon'ble Kerala High Court in the case of Periyar & Pareckanni- Rubbers Ltd. (supra) was not accepted by the hon'ble Bombay High Court in the case of CIT v. Vishnu Dayal Dwarkadas 123 ITR 140 (Bom.) is also without force. In that case, in pursuance of an agreement to sell, concluded on May 1, 1958, the assessee agreed to sell certain agricultural properties to one 'R' for a price of Rs. 2,28,442/-. Since the vendee was not in a position to pay the price it was agreed that assessee could carry out the agricultural operations on behalf of the vendee until the date of the execution of the sale deed. The assessor was also entitled to interest @ 6.75 per cent from May 1, 1958 till the execution of sale deed. The sale deed was executed on 25th January, 1959 when the entire sale price was paid along with interest of Rs. 15,083/-. The question arose whether such interest income could be taxed as revenue receipt. A contention was raised on behalf of the assessee before the High Court that such interest was in the nature of capital receipt in view of the hon'ble Kerala High Court judgment mentioned above. The court observed that facts in the case before the hon'ble Kerala High Court and the facts before them were different inasmuch as they were not concerned with the case dealing with the rights of the parties to receive the compensation under the Land Acquisition Act. On the contrary, they were concerned with the mutual rights between the parties under the agreement of sale. Thus the judgment of hon'ble: Kerala High Court was distinguished by the hon'ble Bombay High Court and therefore it cannot be said that the hon'ble Bombay High Court did not accept the judgment of hon'ble Kerala High Court. Even otherwise the judgment of hon'ble Bombay High Court does not help the Revenue since the interest was under a contract which is not the case before us.

59. Another contention of the Revenue is that the decision of hon'ble Patna High Court in the case of Rani Prayag Kumari Devi (supra) has not been followed by the said court itself in subsequent cases viz., H.P. Banerjee v. CFT 19 ITR 596, CIT v. Kameshwar Singh 23 FTR 212 as well as by the hon'ble Nagpur High Court in the case of Gopaldas Mohta v. CIT 20 ITR 517. After going through the said decisions, we are unable to accept this contention of the Revenue. Nowhere in these judgements the

courts had expressed any different opinion. On the contrary, the courts have distinguished the earlier decisions of the hon'ble Patna High Court in the case Rani Prayag Kumuri Devi (supra). In the case of H.P. Banerjee the court was concerned with the amount paid to the assessee by the military authorities as compensation for use of land. That means, that was not a case of wrongful possession of property. In the case of Kameshwar Singh (supra) the court was concerned with the amount of interest on the dues recoverable from the other party. Similarly in the case of Gopaidas Mohta the amount related to interest against non payment of the principal amount. Therefore, in none of the cases, the compensation related to wrongful detention of the property. In the above cases the courts have distinguished the earlier decision and, therefore, the senior DR was not justified in contending the decisions of the hon'ble Patna High Court in the case of Rani Prayag Kumari Devi (supra) had not been followed in subsequent cases.

60. Mr. Gupta on behalf of the Revenue has also contended that the judgement, of hon'ble Calcutta High Court in the case of Lila Ghosh (supra) stands impliedly overruled by the judgement of hon'ble Bombay High Court in the case of Vijaykumar Ajitkumar, 186 ITR 693. It has been submitted by him that the hon'ble Bombay High Court differed from the judgement of hon'ble Calcutta High Court in the case of CIT v. Ashoka Marketing Ltd. 164 ITR 664 which relied upon by the hon'ble Calcutta High Court in the case of Lila Ghosh. After going through the hon'ble Bombay High Court judgement relied upon by the learned DR we are unable to accept his contention. In the case before the hon'ble Bombay High Court the assessee entered into an agreement with one Captain Dhuru, whereunder assessee agreed to purchase an immovable property. Upon execution of the said agreement for sale, the assessee paid to the vendors the sum of Rs. 17,500/- as earnest money. However, the assessee had to a file a suit for specific performance and in the alternative for damages for its breach. Finally consent decree was granted in favour of the assessee for a sum of Rs. 1,17,500/- and interest. The question before the High Court was whether the sum received by the assessee was capital receipt and secondly, whether the earnest money could be deducted in computing the capital gain. The perusal of the said judgement shows that the amount received by the assessee was held to be capital receipt. Regarding the second question, the High Court held that the sum of Rs. 17,500/- could be considered as cost of acquisition of the capital asset acquired. It is in the context of the second question, that the judgement of hon'ble Calcutta High Court in the case of Ashoku Marketing Ltd., was referred to. Therefore, the reference in the judgement of hon'ble Calcutta High Court judgement had no relevance in deciding the issue whether the compensation related to capital receipt or not. Accordingly, the hon'ble Bombay High Court judgement relied upon by the learned DR docs not help the Revenue.

61. Certain more judgements were also referred to by the learned Senior DR Mr. Gupta in support of the proposition that the amount received by the assessee constitutes revenue receipt. Since we have referred to the conflict between the opinions of the High Courts and since we have preferred the majority of the High Courts, it is not necessary to burden the order with the other authorities.

62. In view of the above discussion, Ground Nos. 1, 2, 3 and 5 raised by the assessee are allowed. The order of CIT(A) confirming the addition of Rs. 34,57,01,137/- is hereby set aside and consequently, the addition sustained by him is hereby deleted.

63. The Ground No. 4 raised by the assessee, challenges the enhancement of addition by Rs. 1,18,75,000/- made by the CIT(A). Since we have held that compensation received by the assessee is not chargeable to tax, this ground does not survive being infructuous.

64. Ground No. 6 challenging the levy of interest Under Section 234B and 234C of the Act is consequential in nature and, therefore, does not require any comment of the Bench. The Assessing Officer is directed to recompute the same after giving effect our order. Ground Nos. 7 and 8 are general in nature and, therefore, do not require any adjudication.

65. In view of the above discussion, the legal position is summarised below:

> (1) That the hon'ble Supreme Court in the case of P. Mariappa Gounder (supra) was not concerned with the issue whether the mesne profit received against the wrongful possession of the property is in the nature of revenue receipt or capital receipt. The only issue before the court related to the year of taxability. Hence it cannot be said that the hon'ble Supreme Court adjudicated upon the issue relating to the nature and character of the receipt by way of mesne profits.
>
> (2) That the amount received against wrongful possession of the property amounts to mesne profits whether determined by the court or under a consent decree within the ambit of Section 2(12) of the Code of Civil Procedure, 1908.
>
> (3) There is a difference of opinion amongst various High Courts on the issue relating to nature and character of the mesne profits. Therefore, following various judgements of the hon'ble Supreme Court mentioned in Paragraph No. 48, it is held that the mesne profits constitute capital receipt not chargeable to tax.

66. Before parting with this order, it may be mentioned that the learned Counsel for the assessee has also taken an additional plea to the effect that the arrangement between the parties was in the nature of family settlement not involving accrual of any income in the hands of any of the parties. Since the assessee succeeds on the major ground raised by it, it is not necessary for us to adjudicate upon such plea of the assessee's counsel.

In the result, the appeal of the assessee is allowed.

Order pronounced on 20th February, 2008.