IT : If under provision of section 4 an amount does not bear character of income and, hence, not chargeable to tax then same cannot be converted into an 'income' only because payer of sum deducts tax under misconception of law

FACTS

• Assessee, administrator of estate of NRI in India entered into development agreement with a company named Ferani to construct buildings upon land against 12 per cent sale price of said construction.

• Due to some disputes, assessee terminated said agreement and approached Bombay High Court for restitution of property in original form.

• Bombay High Court issued directions to Ferani to maintain the account of the amounts collected as sales consideration and deposited in the designated A/c and to make FDs out of same.

• Assessing Officer held that FDs with Indian Bank made by Ferani did not belong to assessee and as such interest on FDs made in did not constitute its income.

• CIT revised said order holding that interest of allegedly paid/credited on FDRs by Indian Bank was legally chargeable to tax as assessee's income. According to CIT, if the bank deducted the tax from interest and reported such tax deduction in Form -26AS of the assessee, then it was obligatory for the Assessing Officer to assess the income.

HELD

• An amount/receipt is assessable as income of an assessee only on the basis of charging provisions of sections 4 & 5 of the Act. Section 4 is the charging provision of the Act & it is therefore necessary for the Assessing Officer to prove that the receipt though received by some other person, constituted income chargeable to tax in the hands of the person sought to be charged. If under the provision of section 4 an amount does not bear the character of income and, hence, not chargeable to tax then the same cannot be converted into an 'income' only because the payer of the sum deducts tax under misconception of law.

• Further the directions of Bombay High Court made it clear that the deposits kept with the bank essentially constituted funds in custodia legis. In other words, upon the amounts being kept in FDs the funds remained in the custody of the Court. In such circumstances it was not a case where there was any failure on the part of the Assessing Officer to conduct proper enquiries and gather relevant information. CIT has not brought on record any cogent & conclusive material which would prove or show that the course followed by the Assessing Officer was unsustainable in law. Since Assessing Officer after conducting the enquiries, which the circumstances demanded, had followed one of the course permissible in law, then it was not open for the CIT to treat the assessment order erroneous within the meaning of section 263.

[2019] 103 taxmann.com 452 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'E'

Administrator of Estate of Lt. Edulji Framroze Dinshaw

v.

Commissioner of Income-tax, Mumbai

MAHAVIR SINGH, JUDICIAL MEMBER
AND N.K. PRADHAN, ACCOUNTANT MEMBER
IT APPEAL NO. 1033 (MUM.) OF 2018
[ASSESSMENT YEAR 2013-14]
MARCH 27, 2019

Dilip S. Damle *for the Appellant.* **Rajeev K. Gubgotra** *for the Respondent.*

ORDER

Mahavir Singh, Judicial Member - This appeal filed by the assessee is arising out of the revision order passed u/s 263 of Income Tax Act, 1961 (hereinafter 'the Act') of Commissioner of Income Tax (International Taxation)-2, Mumbai [in short CIT(IT)], dated 08.02.2018. The Assessment was framed by the Income Tax Officer-(IT) Ward-2(1)(1), Mumbai (in short 'ITO/AO') for the A.Y. 2013-14 vide order dated 30-03-2016 under section 143(3) of the Act.

2. The only issue in this appeal of assessee is against the order of CIT(IT) revising the assessment under section 263 of the Act by directing the AO to assessee the FD interest, which is in the name of Ferani Hotels Pvt. Ltd. and holding the assessment as erroneous and prejudicial to the interest of the Revenue. Against this the assessee preferred following grounds:

"1. *For that on the facts and in the circumstances of the case, the CIT was unjustified in law and on facts in revising the assessment order u/s 143(3) passed for the A.Y. 2013-14 revenue even though the order not assessing the FD interest of Rs.4,06,41,567/- was neither erroneous nor prejudicial to the interest of the revenue within the meaning of Sec. 263 of the Act.*

2. *For that on the facts and in the circumstances of the case, there was sufficient material available before the AO on the basis of which it was evident that the FDs with Indian Bank made by MIs. Ferani Hotels Pvt. Ltd. did not belong to the appellant and as such interest on FDs made in the name of Ferani Hotels Pvt. Ltd did not constitute appellant's income and in that view of the matter the AO had rightly not included such interest in the assessed income of the appellant for A.Y. 2013-14.*

3. *For that on the facts and in the circumstances of the case, the CIT was wrong in holding that because the tax deduction in respect of interest oil by Indian flank was reported against Permanent A/c No. of the appellant the said interest was liable to be assessed as income of the appellant.*

4. *For that on the facts and in the circumstances of the case, the CIT ought to have appreciated that in the appellate orders for the preceding years the appellate authorities having held that the amounts unilaterally collected by Ferani Hotels Pvt. Ltd; during the pendency of legal proceedings did not belong to the appellant any FD made out of such receipts also did not belong to the appellant and in that view of the matter interest accrued on such FD was not chargeable to tax as income of the appellant.*

5. *For that on the facts and in the circumstances of the case, the CIT wrongly held that the appellant being non-resident was liable to pay tax on the income deemed to have been received in India: ignoring and overlooking the fact that even the Indian Bank had deducted the tax from interest u/s 194A and not u/s 195 meaning thereby the hank had not regarded the appellant to be the legal and beneficial owner of the FDs.*

6. *For that on the facts and in the circumstances of the case, the CIT order u/s 263 directing AO to enhance the assessed income by the sum of Rs.4,06,41,567/- be held to be contrary to the provisions of the law and consequently therefore such direction may kindly be vacated and/or cancelled.*

7. *For that on the facts and in the circumstances of the case, the CIT's order U/S 263 setting aside the assessment be cancelled and the AO's order u/s 143(3) he restored."*

3. Brief facts relating to this appeal as explained by Ld Counsel for the assessee in its submissions and not controverted by Ld CIT-DR, are that the assessee in the present case is Sri N N Wadia who was appointed by the Bombay High Court in 1972 as an administrator; for administering the Estate of Late Mr. E. F. Dinshaw (Estate of EFD) who had passed away in the USA in the year 1971. Sometime in early 1920's Late F. E. Dinshaw a Lawyer by profession; acquired large tracts of Land in North Mumbai which on his death were inherited by his 2 Children namely, Mr. E. F. Dinshaw & Ms. Bachoobai Woronzhow. Both the Legal Heirs of F.E. Dinshaw were Citizens & Residents of USA. Mr. E. F. Dinshaw had executed a Will in the USA appointing Bachoobai to be the executer of the Will besides being beneficiary of his Estate; for her life. Since Bachoobai was an US Resident in 1972, with her consent, Hon'ble Bombay High Court appointed Mr. Wadia to be the Administrator to the Estate of EFD. In that capacity the Administrator not only administered the affairs of the Estate but he regularly filed Income Tax Returns in respect of income derived by the Estate of EFD in India. In respect of the income earned by the Estate & which was assessable under the head Income from Other Sources, the assessee regularly followed cash system of accounting. This method of accounting was accepted by the Department in all the assessments including the assessment for the A.Y. 2013-14. Upon rapid urbanization in the City of Mumbai and with increasing pressure of population, the tracts of land owned by the Estate were considerably encroached upon by the unauthorized occupiers. Besides, after coming into force of ULCA in 1976, there was a danger to the lands belonging to Estate of EFD being declared and held as excess land. In the circumstances, in order to protect the interest of the beneficiary of the Estate of EFD, the Administrator with the consent of the beneficiary i.e. Baehoobai entered into two Development Agreements dated 02-01-1995 with Ferani Hotels Pvt. Ltd (Ferani) & Ivory Properties & Hotels Pvt. Ltd respectively. Under the Development Agreement dated 02-01-1995 Ferani was granted right to construct buildings upon land admeasuring 478.50 Acres. It was agreed that in consideration of the Estate EFD granting rights of development in favour of Ferani, the Estate of EFD would receive 12% of the sale price that would be realized upon sale of spaces constructed by Ferani on the demarcated land. The Agreement dated 02-01-1995 had envisaged that the sale of constructed spaces would be carried out by Ferani to independent third parties and not to parties which were related or which acted as fronts for Ferani to depress the actual sale price. Pursuant to the Agreement dated 02-01-1995 the actual construction started only in 2000. Clause-16(g) of the Agreement had provided for periodic audit of the joint development on half yearly basis and the same was conducted by M/S C. C. Choksi & Co. Chartered Accountants. After the construction commenced and Ferani started conducting sale of developed areas it came to the knowledge of the Administrator that in many cases the sale of constructed spaces was not made to genuine third parties, but many cases sales were made to Companies closely connected with or promoted by Ferani. The Administrator was advised that the

Agreement dated 02-01-1995 was vitiated by fraud because instead of the sales being made to third party sales, many instances sale of constructed spaces was made to related parties with a view to depress the land owner's share of 12%. Since the Agreement dated 02-01-1995 was vitiated by fraud, the assessee terminated the said Agreement on 12-05-2008 and pursuant thereto filed a Suit being Suit No. 1628 of 2008 before Hon'ble Bombay High Court seeking reliefs inter-alia including restitution of the property in the original form. The assessee also published notices of lis-pendency informing the public at large that the Development Agreement dated 02-01-1995 was terminated and therefore the members of the public should not enter into any Agreement for sale with Ferani. Copies of the relevant notices of lis-pendency are at Pages 67 to 70 of the Assessee's Paper Book. In spite of the fact that the Estate of EFD terminated the Development Agreement and filed Suit in Bombay High Court in 2008 Ferani continued to construct new buildings on the demised land. Additionally, Ferani also continued to execute registered Agreements for sale of the constructed spaces on behalf of the Administrator even though the registered Power of Attorney granted in favour of Ferani was revoked by the Administrator. Prior to termination of the Agreement in 2008, when Ferani was entering into Agreements for sale with prospective Flat Purchasers, 12% share of the sale value was deposited in an Account with ICICI Bank which was maintained by Estate of EFD for collection purposes. Upon termination of the Development Agreement in May 2008, the Administrator had instructed ICICI Bank not to accept deposits being 12% share of the sale proceeds receivable under the Agreement dated 02-01-1995. Since Estate of EFD as well as its Banker i.e. ICICI Bank was not receiving or accepting the payment of 12% share of the sale proceeds but Ferani suo motto opened a Current A/c bearing No.843 184512 with Indian Bank, Bandra Branch, Mumbai under the nomenclature/ cause title of "Ferani Hotels Pvt. Ltd-NN Wadia share". Although such A/c was opened by Kerani, the Administrator was never informed about opening of such an A/c. The Administrator came to know about existence of such A/c only in 2012 when the statement was made before Hon'ble Bombay High Court in that behalf.

4. Be the same as it may, even after Estate of EFD terminated the Agreement in May 2008, Ferani continued to construct and thereafter sale the constructed Flat/Unit to the Purchasers and continued to deposit 12% share in the Bank A/c with Indian Bank. Since Ferani was creating third party interest in the property belonging to Estate of EFD, the Administrator was advised to move a Notice of Motion in the pending Suit No. 1628 of 2008, seeking Injunction, restraining Ferani from acting upon the Power of Attorney dated 02-01-1995 from alienating, encumbering, parting with possession, transferring or creating any third party rights by using license or recovering any rent or compensation in respect of the suit premises and for an appointment of Court Receiver. After the Notice of Motion was moved by the Administrator in February 2010, the hearing of the motion was conducted in June 2008 and the order thereon was pronounced by the Single Bench of Hon'ble Bombay High Court on 19th July 2010. Copy of the relevant order dated 19-07-20 10 is enclosed at Pages 96 to 126 of assessee's Paper Book. In its order dated 19-07-20 10 Hon'ble Bombay High Court found prima-facie merit in the assessee's charge that a wrong was being committed by Ferani. In Para-68 Hon'ble High Court observed as follows: -

> *"It may be mentioned that a defendant, who is on the wrong side of the law, upon having committed acts of fraud and deceit and put up construction after having committed such fraud cannot make bold to state to Court that no matter what his act is; he must be entitled to construct and develop the property. Once a prima- facie case is made out by the plaintiff for grant of interim relief in equity, the defendant cannot defeat the relief being granted upon his own convenience and to seek to balance it with the prima-facie case. it is only if the convenience of the defendant is such as can be balanced with plaintiff's case that the concept and doctrine of the term 'balance of convenience, can weigh in favour of the defendant."*

5. Further in Para-70, the Court observed that the ease for grant of injunction against handing over of possession of the flats constructed by Defendant No. 1 under the Contract was made out by the plaintiff.

Having recorded these observations, the Court however noted that even though the Suit was filed in May 2008, the Plaintiff i.e. Estate of EFD did not apply for ad interim relief by making notice of Motion in May 2008, but such an application was moved only in February 2010 and as such there was lapse of considerable time. In this regard, the defendant Ferani raised the plea of limitation in terms of Sec. 9A(1) of the Civil Procedure Code. The Court noted that since the plea regarding bar of limitation was a preliminary issue which went to the root of jurisdiction of the Court, it had to be decided in the first instance. Since the preliminary issue of limitation was required to be decided first, in Para-81 of its order the Court ordered Ferani not to put any party either genuine third party or related parties in possession of the constructed premises except with the approval of the plaintiff pending the Suit. The Court also directed that the issue relating to limitation would be decided first on 26-07-2010 being the jurisdictional issue. Since in the order dated 19-07-2010 Hon'ble Bombay High Court had issued injunction against Ferani from handing over possession to the Flat purchasers, an appeal No. 817 of 2010 was moved before the Division Bench of Hon'ble Bombay High Court by Ferani. Similarly, since the injunction as sought for by Estate of EFD was not granted, counter appeal No. 806 of 2010 was filed by Estate of EFD before Division Bench of Hon'ble Bombay High Court. The Division Bench of Hon'ble Bombay High Court by its judgment dated 19-07-2012 decided these Cross Appeals which arose from the judgment of Hon'ble Bombay High Court dated 19-07-2010 passed in relation to Notice of Motion No. 1863 of 2010 seeking ad interim relief. This is apparent from the opening para of the Judgment which reads: -

> *"These appeals arise from a judgment dated 19.07.2010 of a Ld. Single Judge on a Motion for interim relief in his Suit. When an application for Ad interim relief came up for hearing before the Ld. Single Judge; an objection to the maintainability of the Suit was raised on behalf of the first defendant on the ground that the claim was barred by limitation."*

After considering the arguments on behalf of the rival parties; in Para-35 Hon'ble High Court recorded the following findings: -

> (*i*) *Appeal No. 817 of 2010 filed by Ferani Hotels Private Limited shall stand allowed and the impugned order of the Learned single Judge dated 19-07- 2010 shall stand set aside;*
>
> (*ii*) *The following issue is raised under Section 9A of the Code of Civil Procedure, 1908 and shall be tried as a preliminary issue:*
>
> *"Whether the claim of the Plaintiff in the suit is barred by limitation."*
>
> (*iii*)** ** **
>
> (*iv*) *Pending the hearing and final disposal of the preliminary issue, Ferani Hotels Private Limited is directed to maintain accounts and to continue depositing an amount equivalent to 72% of the gross sale consideration in a designated bank account. The amount upon deposit shall be invested in a fixed deposit to abide by further orders of the Learned Trial Judge;*
>
> (*v*) & (*vi*)** ** **
>
> (*vii*) *Liberty is reserved to the Plaintiff to apply before the Learned Single Judge for appropriate interim reliefs after the final decision on the preliminary issue;*
>
> (*viii*) *Appeal No. 806 of 2010 filed by Mr. Nusli Wadia shall stand disposed of in the aforesaid terms;*
>
> (*ix*) *We clarify that all the observations contained in this judgment are confined to the issues which have arisen before this Court at the present stage and the view expressed by the Court on the merits of the rival contentions shall not come in the way of the disposal of the Notice of Motion or the suit in terms of the directions issued."*

From bare perusal of the judgment dated 19-07-2012, it will therefore be clear that the Division Bench of Hon'ble High Court did not adjudicate the Suit filed by the assessee, wherein the assessee had requested for granting relief in the form of cancellation of Agreement dated 02-01-1995 and restitution of the property. Hon'ble High Court while disposing the appeal on 19-07-2012 only dealt with the Notice of Motion moved by the applicant seeking interim directions restraining Ferani from constructing the new buildings, creating third party interest and handing over possession.

6. The CIT (International Taxation)-2, Mumbai passed revision order u/s 263 of the Act dated 08.02.2018 for the A.Y. 2013-14 directing AO to pass an assessment order afresh by bringing the sum of Rs.4,06,41,567/-to tax in accordance with the discussions made by him in the Revision Order. According to CIT prior to passing of the assessment order u/s 143(3) of the Act, the AO had not applied her mind and had failed to consider taxability of interest received by the assessee from Indian Bank during FY 2012-13, which made the assessment order erroneous and prejudicial to the interest of Revenue. The assessee objected to the validity of the proceedings u/s 263 of the Act as also to the findings recorded by the CIT holding that interest of Rs. 4,06,41,567/- allegedly paid/credited on FDRs by Indian Bank was legally chargeable to tax as assessee's income for the A.Y. 2013-14. Ld Counsel argued that it is incorrect on the part of the CIT to interpret & hold that the judgment of Hon'ble Bombay High Court dated 19-07-2012 finally adjudicated upon the rights and obligations of the parties arising from the Development Agreement dated 02-01-1995. He argued that inadvertently, the AO while completing the assessment for A.Y. 2011-12 & onwards interpreted the judgment of the High Court dated 19-07-2012 in the manner that the Court had finally decided on the assessee's entitlement to receive the consideration on sale of the constructed spaces in its own right even though the Suit has remained pending even till today.

7. Ld Counsel stated that vide Para-33 of the Judgment of Hon'ble High Court dated 19-07-2012 Ferani had admitted that during the period 06-07-2009 when Ferani opened Current A/c No. 843184512 with Indian Bank and till the date of judgment in July 2012, it had collected and deposited sum of Rs.57 Crores in the said Bank A/c. Taking into consideration this fact in Para-35(iv), Hon'ble High Court directed that pending hearing and final disposal of the preliminary issue, Ferani would maintain the accounts and to continue depositing an amount equivalent to 12% of the gross sale consideration in the designated Bank A/c. The Court further directed that the amount upon deposit would be invested in Fixed Deposits to abide by the further orders of the Ld. Trial Judge. From the foregoing and on careful reading of Para-35 of the judgment of the Bombay High Court dated 19-07-2012, he argued that Hon'ble High Court while deciding the appeal filed by Ferani (and not by Estate of EFD) had directed Ferani to maintain accounts of the sums deposited in the designated A/c and had further required Ferani to invest the amount collected in Fixed Deposits and such deposits were to be abided by further orders of the Trial Judge who was trying the Suit filed by the Estate of EFD.

8. From bare perusal of the Para-35(iv) of the High Court's judgment; it was evident that nowhere the High Court had in any manner expressed any opinion or made any observation that the moneys deposited in the designated A/c by Ferani could be appropriated by Estate of EFD or that the Estate of EFD could exercise contract or domain either over the amounts deposited in the designated A/c or over the fixed deposits made by Ferani out of the sums deposited in the designated A/c. Nowhere the Court had even indicated that in its opinion Estate of EFD could have any access to the sums collected by Ferani. Keeping in mind the fact that Estate EFD in the Suit filed had requested for cancellation of the Agreement dated 02-01-1995, the assessee had sought restitution of the property in its original form and the Court had categorically directed that the amounts invested by Ferani in fixed deposit would abide by the further orders of the Trial Judge trying the Suit filed by Estate of EFD.

9. Ld Counsel also stated that the Court was very categorical in its direction that the amount collected by Ferani would remain under its exclusive control and over which Estate of EFD would neither have any

control or access. Even CIT acknowledged in para 2.2 of supplementary show cause notice u/s 263 of the Act dated 24.11.2017 as follows: -

> *"Even though the amount is not accessible to assessee, as per Court Order it is paid / accrued to assessee in his Bank A/c.*

Hence, Ld Counsel argued that once the CIT admitted that the amount deposited in the designated A/c or Fixed Deposit made out of such designated A/c was not accessible to the assessee then he could not record a conclusion that the assessee was liable to account the amount received in its books. The CIT was factually and legally wrong in holding that as per the Court Order the amount was paid to the assessee in his Bank A/c. The judgment of Hon'ble Bombay High Court nowhere even suggested that the sums deposited in the designated A/c or FDs made out of such account constituted the amount paid to the assessee. Accordingly, the conclusion of CIT that the interest on FDs was chargeable to tax in the hands of Estate of EFD is wrong. Ld Counsel again reiterated that the Agreement for Sale was terminated in May 2008 and the Suit was filed but Ferani continued to execute Agreements for Sale in favour of the Flat purchasers by using the Power of Attorney executed in its favour in January 1995 even though the same was legally revoked in 2008. Since the value of registered Agreements for Sale exceeded Rs.30 Lacs, the Registration Authorities reported these sale transactions to the Authorities through AIR Reports furnished u/s 285 of the Act. It was claimed before us that since Administrator was never party to any of the Agreements unilaterally executed by Ferani after 2008 and no part of the consideration ever reached the Bank A/c of Estate of EFD, the assessee neither accounted the receipt of the part consideration in its books nor reported any gain or profit accrued on execution of Sale Agreements.

10. The fact was brought to our notice by Ld Counsel that in the assessment order for A.Y. 2011-12, the Assessing Officer for the first time based on the AIR information obtained as well as based on the information gathered u/s 133(6) from Ferani and Indian Bank made addition on account of 12% share of sale proceeds under the head 'Income from Other Sources'. Following the assessment order for the A.Y. 2011-12, similarly additions were made in the A.Ys. 2012-13 & 2013-14 as well, which are under challenge? Ld Counsel further stated the facts that during the course of assessment proceedings u/s 143(2) of the Act for the A.Y. 2013-14, the AO had issued notice u/s 133(6) of the Act to Indian Bank. In response, the Bank had furnished statement in respect of A/c No. 843184512 for the F.Y. 2012-13 in which Ferani had deposited various sums being 12% of the sale price collected by Ferani from Flat purchasers. Indian Bank also provided a statement of fixed deposits made during F.Y. 2012-13 out of the amounts deposited in A/c No. 843184512. The relevant copy of the letter of Indian Bank addressed to the AO and the relevant Bank statements & Fixed Deposit statement are attached at Pages 367 to 353 of the assessee Paper Book. It would be noted from the said Bank statements that even though certain entries appeared in the Bank statement indicating transfer of funds from Current A/c to Fixed Deposit A/c, there is no entry appearing in the Bank statement which in any manner shows that Indian Bank had actually paid or credited any interest on FD to the A/c No. 843184512. Even the statement of FDs for F.Y.2012-13 nowhere indicates that during F.Y. 2012-13 the Bank had actually paid any interest on FDs made with the said Bank.

11. Ld Counsel in view of the above facts argued that in the Show cause notice u/s 263 of the Act the CIT however alleged that the AIR Data available with the AO indicated that it contained 10 entries which pertained to Indian Bank totaling Rs.4,06,41,567/- indicating payment of interest and TDS thereon. The CIT therefore came to conclusion that the interest of Rs.4,06,41,567/- paid by Indian Bank should have been assessed in the assessee's hands for the A.Y. 2013-14. For AO's failure to include such interest in the total income of the assessee, the CIT treated the AO's order to be erroneous and prejudicial to the interest of the Revenue and accordingly he revised the AO's order. Accordingly, in view of the above facts and argument he stated that the CIT was not justified in law and on facts in

coming to conclusion that for non inclusion of interest of Rs.4.06,41,567/- in the assessed total income and the order of assessment could not be held to be erroneous and prejudicial to the interest of the Revenue.

12. On the other hand, the Ld CIT-DR argued that the details received from Indian Bank Bandra Branch under section 133(6) of the Act dated 18.02.2016 revealed that the interest received from the said bank account is as per the directions of the court opened by Ferani because the account is in the name of Ferani Hotels Pvt. Ltd. A/c NN Wadia share. Further, he argued that even in AY 2014-15 similar additions was made in regular assessments. He drew our attention to assessment order for AY 2013-14 and stated that for AY 2013-14 also, the 26AS report was showing money received as lease rent from Ferani and Ivory as well as the amount paid/ credited by Indian Bank. It is further seen from the perusal of assessment order of AY 2013-14 that although lease rent from Ferani and Ivory upto Rs. 13,20,000/- were added in the computation of total income by the AO, the amount paid/ credited by Indian Bank amounting to Rs. 4,06,41,567/- was not added by the Assessing Officer. It is seen from a perusal of 26AS that there are 10 entries related with Indian Bank which totals upto Rs. 4,06,41,567/-. It is also seen that interest income from other Banks like Standard Chartered Bank, Central Bank of India and HDFC have been offered to tax by the assessee. In view of the above, the learned CIT DR argued that, as mentioned above, the amount of Rs. 4,06,41,567/- was not included in the computation of income either by the assessee or by the Assessing Officer and this amount was required to be brought to tax in the assessment order of the AY 2013-14 in the same way that it was done by the same AO in the assessment of the AY 2014-15. Since this was not done in the assessment order of the AY 2013-14 there has been under assessment of the total income of the assessee by Rs. 4,05,41,567/- and hence, the assessment order is erroneous and prejudicial to the interest of the revenue.

13. We have heard rival contentions and gone through facts and circumstances of the case. We have gone through the detailed arguments made by Ld Counsel for the assessee. We have also heard LD CIT-DR and gone through case records. We noted that the amount of Rs.4,06,41,567/- credited by Indian Bank on the FDs did not constitute income chargeable to tax for the A.Y. 2013-14 for the present assesse merely on the ground that the bank had deducted tax at source and the tax payment was reported against the PAN allotted in the name of Estate of EFD. We have notice from the judgment of Hon'ble Bombay High Court dated 19.07.2012 that the relevant directions of the High Court were pronounced while disposing the appeal filed by Ferani against the judgment of the Single Judge disposing Notice of Motion for Interim relief. We are of the view that CIT was unjustified in drawing inference against the assessee on the ground that it was the assessee who had approached the Court and therefore assessee could not deny the fact that the fixed deposits were made in its favour on the basis of Court directions & the FDs legally belonged to the assessee. We have noted the fact that the assessee had filed Suit before Hon'ble Bombay High Court in 2008 after terminating the Agreement dated 02-01-1995 and prayed for restitution of the property in its original form. The said Suit was pending and therefore the rights of the Parties flowing from the Agreement dated 02-01-1995 were inchoate and/or indeterminate. Even the CIT (A) in his appellate order for the A.Y. 2011-12 dated 28.10.2014 had held that no income arising from Agreements for Sale unilaterally executed by Ferani during F.Y.2010- 11 was legally chargeable to tax in assessee's hands because the entire matter was sub-judice and the assessee was never a party to the Agreements for Sale executed by Ferani and for which the amounts were deposited in the Bank A/c opened by Ferani in its own name. But it is to be mentioned that these facts itself is enough to create the debate and this order of CIT(A) is pending adjudication before Tribunal. Moreover, we make it clear that this order of ours will in no way affect the hearing of that appeal. Copy of the appellate order for the A.Y. 2012-12 is enclosed at Pages 172 to 347 of the assessee's Paper Book. The same view was taken by the CIT (A) for A.Y. 2012-13 as well. The appeal against the order u/s 143(3) for A.Y. 2013-14 is pending before CIT (A). However, it is evident that on the same set of facts as prevailed in the prior years and the appellate authorities have held that since the assessee was not a party to any of the Sale

Agreements after the Agreement dated 02-01-1995, which was terminated in May 2008, no income could be legally inferred with reference to amounts unilaterally collected by Ferani. However, until the Suit was decided one way or other no income in law could be inferred in the assessee's hands on substantive basis and in case revenue want to assessee the same here it can only be assessed on protective basis at the most. But that is not the case here because revenue has to give find where this has to be assessed on substantive basis.

14. Be the same as it may, in the present case the issue is not whether the part of the sale price deposited in the A/c No. 843184512 was assessable as income of the assessee. After the A/c No. 843184512 was unilaterally opened by Ferani in July 2009, the amounts collected & kept in said Current A/c did not yield any further income. In July 2012 the Division Bench of Hon'ble Bombay High court while disposing of the appeal of Ferani, however issued directions to Ferani to maintain the account of the amounts collected and deposited in the designated A/c. The Hon'ble High Court further directed Ferani (and not Estate of EFD) to make FDs out of the sums collected. The Hon'ble High Court's order further clarified that the amount invested in the Fixed Deposit would abide by further orders of the Trial Judge. As such the directions of Hon'ble Bombay High Court were express in their intent and language. Nowhere the order Court required Estate of EFD to take any steps with regard or with reference to amounts collected by Ferani. It was not for Administrator to keep account of the moneys collected. The directions of the Court expressly bound Ferani to deal with the amounts collected by it in a particular manner. Even though the Court permitted Ferani to proceed with collecting the sale proceeds from the Flat purchasers and the Court had required Ferani to maintain the accounts in respect of 12% share of the sale proceeds collected by it and further required Ferani to periodically keep such sale proceeds in fixed deposits so that Ferani did not have free and unfettered access to sums so collected. The Court also made it expressly clear that the amounts upon being invested in Fixed Deposits would ultimately be governed by the orders of the Trial Court. The directions of Hon'ble Bombay High Court made it clear that the deposits kept with the Bank under the orders of Hon'ble Bombay High Court essentially constituted funds in custodia legis. In other words, upon the amounts being kept in FDs the funds remained in the custody of the Court. In the circumstances therefore interest accruing on these fixed deposits also constituted integral part of the funds under the custody of the Court and not accessible to the Administrator.

15. We have gone through the case law relied on by Ld Counsel of Hon'ble Delhi High Court in the case of *UCO Bank* v. *Union of India & On* (369 ITR 335). In this case the Court had directed one of the Parties to the Suit to deposit certain sums in the High Court. Upon the deposit being made the amount was invested in Fixed Deposit by the Registrar General of the High Court with UCO Bank. On such fixed deposit the interest was credited by UCO Bank in its books in the name of Registrar General of the High Court. The TDS Wing of the Income Tax Department in the survey proceedings held the Bank to be assessee in default for non deduction of tax u/s 194A of the Act since the Bank did not deduct any tax from the interest on FDs. It was the Bank's case that since the Registrar General was merely a custodian of the funds on behalf of the High Court and Registrar General per se was neither an assessee nor he was beneficiary entitled to receive any interest on the fixed deposits, the Bank had no obligation to deduct tax at source because the Registrar General was not the payee of the interest. Upholding the contention of the Bank, the Court observed that the deposits kept with the Bank under the Court's order essentially were the funds in custodia-legis and therefore even the interest credited in the name of Registrar General formed part of the funds under the custody of the Court & therefore not liable to be taxed as income of the Registrar General in whose name the fixed deposit was made. The Court therefore held that Bank had no obligation to deduct tax at source.

16. We have also noted that the CIT further observed that in the AIR information the Bank had reported the interest of Rs.4,06,41,567/-against the assessee's name and against the PAN No. allotted to the

assessee. It is further observed in Para-11 of the order that similar information was reported in Statement 26AS which reports the tax deductions made by the tax deductors from the payments made. According to CIT, if the Bank deducted the tax from interest and reported such tax deduction in Form-26AS of the assessee, then it was obligatory for the AO to assess the income because the tax was deducted at source from income reported in the name of Estate of EFD. We are of the view that an amount/receipt is assessable as income of an assessee only on the basis of charging provisions of Sec. 4 & 5 of the Act. Sec. 4 is the charging provision of the Act & it is therefore necessary for the AO to prove that the receipt though received by some other person, constituted income chargeable to tax in the hands of the person sought to be charged. If however in law the receipt does not constitute "income" then the same cannot be taxed as income of the "person" merely because the tax is deducted from such amount by the payer of the sum. It may be true that See. 198 of the Act provides that the sums deducted in accordance with Chapter-XVII shall for the purpose of computing income of an assessee be deemed to be income received. However, it is to be borne in mind that Sec. 198 of the Act is part of Chapter-XVII which contains machinery provisions for collection and recovery of taxes. These machinery provisions of the Act cannot be converted by the Department into charging provisions. In the circumstances, we are of the considered view that if under the provision of Sec. 4 of the Act an amount does not bear the character of income and hence not chargeable to tax then the same cannot be converted into an "income" only because the payer of the sum deducts tax under misconception of law. Even Hon'ble Supreme Court in the case of *CIT* v. *Karnal Co-Operative Sugar Mills Ltd* (243 ITR 2) has held that if an FD is made by an assessee in the process of setting up new project as a security for opening an L/C for import of plant & machinery, then interest on such FD does not constitute income, but is liable to be netted off against cost of setting up of the project. In such cases the interest on FD does not constitute income under the charging provisions of Sec. 4 of the Act. In such cases however the Revenue cannot claim the interest to be chargeable to tax u/s 4 of the Act if the Bank deducts tax on such interest income u/s 194A of the Act by taking recourse to Sec. 198 of the Act.

17. We have also noted the facts that on receipt of the show cause notice u/s 263 of the Act, the assessee filed an application under Right to Information Act 2005 with Indian Bank, copy of which is at Page 365 of the Paper Book and in response to the application, the Bank admitted that the A/c No. 843184512 was opened by an existing A/c Holder and admittedly appeared as "Ferani Hotels Pvt. Ltd-Account NN Wadia Share" and therefore there was no need for introducer. The assessee before us maintained that the Estate of EFD never maintained any Bank A/c with Indian Bank, Bandra Branch, Mumbai, whereas Ferani always maintains it's A/c with Indian Bank. This fact clearly proves that A/c No. 843184512 belonged to Ferani which was an existing A/c Holder of Indian Bank. The Bank also admitted that in order to comply with KYC requirements, a/c Holder had provided PAN Cards & Ration Cards of Gopal L Raheja through Sonali N Arora, who have no connection with Estate of EFD. The Bank informed that as per its record A/c No. 843184512 was authorized to be operated by Gopal L Raheja, Sandeep G Raheja or Durga S Raheja. None of the said 3 persons were related with the affairs of Estate of EFD. The Bank further admitted that it never had in its possession any A/c opening or A/c operating documents which bore signature of Mr. N N Wadia even though the cause title of the a/c contained his name. As regards making of the fixed deposits the Bank admitted that the FDs were created or made on the basis of instruction letters issued by Ferani Hotels Pvt Ltd addressed to the Bandra Branch and not because of any instruction issued by the Administrator of EF Dinshaw. Lastly the Bank admitted that the TDS from interest was reported against PAN: AAEPD8394A belonging to Estate of EFD as per the instruction given by Ferani Hotels Pvt Ltd and based on such instructions only the TDS was reported by the Bank in the name of Estate of EFD.

18. Even from the perusal of the assessment order u/s 143(3) of the Act, it is apparent that the AO had conducted enquiry before completion of assessment. The AO had issued notices u/s 133(6) of the Act to Ferani as well as Indian Bank and obtained required information. The AO had also examined the

judgment of Hon'ble Bombay High Court dated 19-07-2012 and interpreted in her own way the directions. The directions of the Hon'ble Bombay High Court were of course open for interpretation in more than one manner. Accordingly, by interpreting the directions in her own way the AO had come to conclusion that the amounts collected by Ferani from Flat purchasers constituted assessee's income liable to be taxed in A.Y. 2013-14. Without going to the merits or demerits of the AO's interpretation of the High Court judgment, we are of the considered opinion that the evidence on record shows that the AO had applied her mind to the contents of Hon'ble Bombay High Court judgment. Wherever the AO found that inference was required to be drawn against the assessee, such inference was drawn. The same judgment had directed Ferani to maintain account in respect of sums collected from Flat purchasers and further directed Ferani to invest the amounts collected in Fixed Deposits which would be governed by the final order of the Trial Court. If interpreting the said directions of the Court to mean that the deposits were made by Ferani and in that view, the AO did not include the interest in the assessed total income then it would only mean that the AO had followed one of the legal course permissible in law. Since in AO's opinion interest on FD was not assessable as assessee's income, the AO also did not allow the credit for taxes paid by way of TDS from interest on FD which by CIT's own admission was reported by the Bank in Statement-26AS. According to us, in such circumstances it was not a case where there was any failure on the part of the AO to conduct proper enquiries and gather relevant information. The AO had in fact gathered relevant material and information from Ferani & Indian Bank.

19. In view of the above, we are of the view that CIT sought to interpret the directions of Hon'ble Bombay High court in a manner different from the AO and has directed the AO to assess even the interest on FD as assessee's income. We also noted that the CIT has not brought on record any cogent & conclusive material which would prove or show that the course followed by the AO was unsustainable in law. In the circumstances therefore when the AO after conducting the enquiries, which the circumstances demanded, had followed one of the course permissible in law, then it was not open for the CIT to treat the assessment order erroneous within the meaning of Sec. 263 of the Act. For this we are in agreement with the argument of LD Counsel placing reliance on the judgment of Hon'ble Supreme Court in the case of *Malabar Industrial Company* v. *CIT* (243 ITR 83). Hence, we quash the revision order and allow the appeal of assessee.

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

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