आयकर अपीलीय अधिकरण, बी खंडपीठ मुंबई

INCOME TAX APPELLATE TRIBUNAL MUMBAI - 'B' BENCH MUMBAI

सर्वश्री बी.आर्.मित्तल,न्यायिक सदस्य /एवं श्री राजेन्द्र, लेखा सदस्य

Before S/Sh. B.R.MITTAL,Judicial Member & RAJENDRA, Accountant Member

आयकर अपील सं. /ITA/8067/M/2011,निर्धारण वर्ष/Assessment Year 2007-08

Income Tax Officer, 12(3)(1) 114,Aaykar Bhavan, M K Road Mumbai-400020	बनाम Vs.	Bajaj Bhavan Owners Premises C.S.L. Bajaj Bhavan 226,Nariman Point, Mumbai-400021
PAN: AAATB0644H		

(अपीलार्थी /Appellant) (प्रत्यर्थी /Respondent)

अपीलार्थी ओर से / Appellant by :Shri Manjunath Karkihalli

प्रत्यर्थी की ओर से/Respondent by :Shri M.A. Gohel

सुनवाई की तारीख / Date of Hearing :18.04.2013

घोषणा की तारीख / Date of Pronouncement : 18.04.2013

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

PER RAJENDRA, A.M.

The present appeal is directed against the order dt.14.09.2011 passed by the CIT(A)-23,Mumbai. Following Grounds of Appeal have been raised by the Assessing officer (AO):

1."The Ld. CIT (A) has erred on facts and in law deleting the addition of Rs.2,98,000/- on account of transfer fee / charges."

1 a."While allowing relief and placing reliance on the order of Hon'ble TAT dtd 04.11.2009and the Judgment of jurisdictional High Court dtd. 7.07.2009 in the case of Mittal Court Premises Co-op Soc. Ltd, the Id CIT(A) has erred in facts and in law in not appreciating the fact that the revenue has filed SLP against the order of Hon'ble High Court in the Mittal Court Premises Co-op Soc. Ltd, on the identical issue before the Hon'ble Supreme Court and the issue is subjudice."

2."The Ld. CIT(A) has erred on facts and in law in directing the AO to assess the rent receipts of Rs. 16,39,284/- for letting out of the terrace for erecting of Antenna as income from House Property subject to deduction u/s. 24."

2 a."While doing so, the Ld. CIT(A) has ignored the decision of Hon'ble High Court of Calcutta in CIT Vs. Modei Manufacturing Co. Pvt. Ltd.(1989) 175 ITR 374 and also Hon'ble hAT 'F' Bench in ITA no. 3421/Mum/2009 dtd. 17.09.2010 in the case of CIT Vs. Twin Star Jupiter Hsg. Soc. Ltd. wherein it was held that the receipts for letting out terrace has to be assessed as income from other sources."

3.'The appellant prays that the order of the CIT(A) on the above ground(s) be set aside and that of the Assessing Officer be restored.'

4."The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

2.Assessee-co-operative society had filed its return of income on 18.10.2007 declaring total income of Rs.10,97,750/-.AO finalised the assessment order u/s.143(3) of the Act on 29.12.2009, determining the total income at Rs.28,05,380/-.
2.1. First Ground of appeal pertains to deletion of an addition made by the AO,of Rs.2.98 lakhs, on account of transfer fee/charges.During the assessment proceedings AO found that the assessee has collected contribution towards betterment charges/transfer fee to the extent of Rs.3.23 lakhs from transferees and same was not offered for taxation on the principles of mutuality.Following the special bench decision of ITAT,Mumbai delivered in the case of Walkeshwar Triveni Cooperative Society(ITA/3497/Mum/2001-AY1997-98),AO held that the transfer fee received from new members of the society does not fall under the purview of principles of mutuality and thus exigible to tax.He further held that as per Notification of Maharashtra State Govt. Rs.25, 000/- per transfer can be allowed.He found that during the year under consideration one premises was transferred and the assessee had charged Rs.3,23,000/-as transfer/betterment charges. Giving a relief of Rs.25,000/- to the assessee AO added Rs.2.98 lakhs(3,23,000/-25,000/-)to the total income of the assessee.
2.2. Against the order of the AO assessee preferred an appeal before the First Appeal Authority (FAA).After considering the submissions of the assessee and the assessment order he held that ITAT Mumbai had deleted the addition made by the AO in assessee's own case while deciding the appeals for the AYs.2001-02to2003-04,that ITAT had followed the order of the Hon'ble juris -dictional High court while deciding the appeals of the assessee.
2.3. Before us,Departmental Representative (DR) supported the orders of the AO. Authorised Representative(AR)submitted that issue was squarely covered in the favour of the assessee by the orders of the ITAT for earlier year.

2.4. We have heard the rival submissions and perused the material before us.We find that while deciding the appeals for the AY.2001-02,2002-03 and 2003-04(ITA/5048/Mum/2004,1433/ Mum /2007,1434/Mum/2007)in assessee's own case B bench of the ITAT,Mumbai had decided the issue of transfer /betterment charges as under:

> "*"11.We have carefully considered the submissions of the ti\Jal parties and perused the material available on record. We have also considered the relevant bye-laws of the society and found that the same are almost similar to the bye-laws of MCPCSL supra, except difference in amount.*
> *12.In Mittal Court Premises Co-operative Society Ltd. supra, it has been held vide para-7 of the judgment as under*
>
> > ***"7.** Arguments advanced on behalf of the Appellants/petitioners are based on the principles of mutuality which we have adverted to in the other appeals. It is, therefore, submitted that because of mutual relationship of the members of the Co-*

operative Housing Society inter-se, neither the society nor the members can make profits from amongst themselves in transactions relatingto. society. Considering the objects of the society, society is not carrying on any trade, occupation or business. In the case of Tenant Co-operative Housing Society, it is pointed out that the building is owned by the society and the members occupying flats in the said society are only tenants who have limited right to occupy the premises subject to the charges payable to them but determined by the society. It is contended that the principle of mutuality has been denied mainly on the ground that the contribution is from the incoming members and not outgoing members. It is pointed out that relying on the observations in Walkeshwar Triveni Co-operative Housing Society Ltd. that the Special Bench arrived at the conclusion that the contributior. by way of transfer fee by members, the principle of mutuality' would apply however, not applied in the case of incoming rr embers. We have referred •to the bye~ laws of both, the Mittal Court Premises Co-operative Society 1 . Ltd. and Maker Chambers-Ill Premises Co-operative society Ltd. The bye-laws are nothing but the contract between the Society and the m2mber. Under these bye-laws, it is the member who has to make the payment. Any inter-se arrangement between the incoming members and the transferee is irrelevant in so far as the society is concerned. There is an agreement by which the amount is paid by the transferee. In so far as society is concerned, even if receipt is issued in the name of transferee it is the nature of admission fee which could be appropri -ated, only on the transferee being admitted. Merely because the amount may be appropriated earlier, it will not loose the character of the amount being paid by a member. In the~e circumstances, the identity of the contributor and bene -ficiary being satisfied and considering the provisions of Maharashtra Co-operative Societies Act and Rules framed thereunder, surplus can be disposed off in favour of the members only or for the objects for which they may specify. As held by us in Income tax Appeal No.931 of 2004 the same reason -ing will apply to the appellants/petitioners before us. In these circumstances, question(a) as framed has to be answered in the negative in favour of the assessee and against the Revenue."

In the absence of any distinguishable feature brought on record by the revenue we respectfully following the decision of the Hon'ble Jurisdictional High Court supra hold that the principle of hiutuaiity will apply to the assessee society and hence the transfer fee/charges Rs.1i,01,500/- are not taxable in the hands of the assessee society and accordingly the same are deleted. The ground taken by the assessee in this regard is, therefore, allowed."

Respectfully following the same we decide Ground no.1 against the AO.

3.Next Ground of appeal pertains to treatment to be given to rent received from letting out of terrace.During the assessment proceedings AO found that the assessee had received lease rent of Rs.16,39,284/- from six parties including Bharati Airtel,Hathway,that rent receipt was claimed as income from house property,that assessee has claimed deduction u/s .24(a) of the Act for the rent recieved.After considering the submissions of the assessee-society AO held that assessee itself was not clear about the head of income under which should be assessed i.e. as income from house property or income from other sources,that society had not provided any house property, that it only rented terrace for erection of antenna for which the amount of Rs.16,39,284/- was received. Relying upon the order of Model Manufacturing Co. Pvt. Ltd.,delivered by the Hon'ble High Court of Calcutta(175 ITR 374)AO held that amounts received by the assessee from six parties had to assessed under the income from other sources and not income from house property.He did not allow any deduction to the assessee-society u/s.57 of the Act.

3.1. Against the order of the AO assessee preferred an appeal before the First Appeal Authority (FAA).Following the order of the ITAT for the earlier years for the same issue in assessee's own case FAA held that income received as rent had to be assessed under the head income from house property.He held-"….letting out of the terrace has to be assessed under head income from house property subject to deduction u/s.24 of the Act."

3.2. Before us,Departmental Representative (DR) supported the orders of the AO. Authorised Representative(AR)submitted that issue was squarely covered in the favour of the assessee by the orders of the ITAT for earlier year.

3.3. We find that while deciding the appeals for the AY.2001-02,2002-03 and 2003-04(ITA/ 5048/ Mum/2004,1433/ Mum /2007,1434/Mum/2007)in assessee's own case B bench of the ITAT,Mumbai had decided the issue of rent received from letting out of terrace as under:

"*35.Ground No.5, 6, 7 and 8 are against the sustenance of addition of rental income Rs.5,93,700/- as income from other sources.*

36.The brief facts of the above issue are that it was found by the Assessing Officer that the assessee has allowed M/s. Hutchison Max Telecom Ltd. to erect the tower on their terrace in consideration of an amount of Rs.5,93,700/- and claimed as income from house property subject to deduction u/s.24 of the Act. However, the Assessing Officer while observing that the assessee's society has not provided any house property to the company and it is only the open terrace which has been let out, treated the same as assessable under the head income from other sourdds without allowing any expenditure in this regard. On appeal the Id. CIT(A) while confirming the Assessing Officer's action treating the income from other sources directed the Assessing Officer to allow 20% of the gross receipts as expenses to earn such income.

39.After carefully hearing the submissions of the rival parties and perusing the material available on record we find that the facts are not in dispute. We further find that in the case of Sharda Chamber Premises vs. ITO in ITA Nio.1234/M/08 dated 1.9.2009 for Assessment Year 2003-04 in which JM was one of the party, on the similar facts, the Tribunal after considering the decision in ITO v/s. Cuffe Parade Sainara Premises Co-operative Society Ltd. 7225/Mu m/05 dated 28th April, 2008 for Assessment Year 2002-03 and also the decision in the case of Sohan vs. ITO (1986) 16 lTD 272 supra has held vide para 6 and 7 of its order dated 1.9.2009 as under

> *"6. We have carefully considered the submissions of the rival parties and perused the material available on record. We find merit in the plea of the Id. Counsel for the assessee that in the case of M/s.Dalamal House Commercial Complex-Premises Co-operative Society Ltd., the Tribunal while admitting the additional ground being a legal issue has also held that the letting out of the terrace, erection of antenna and income derived from letting out has to be taxed as 'income from house property' and not as 'income from other sources'.The Tribunal while deciding the issue has followed the order of the Tribunal in the case of M/s. Cuffe Parade Sainara Premises Co-op. Society Ltd.(supra).*
>
> *7.In the absence of any distinguishing - feature brought on record by the revenue we, respectfully following the order of the Tribunal (supra),and keeping in view the consistency while admitting the additional ground taken by the assessee hold that the letting out of terrace has to be assessed under the head 'income from house property' as against 'income from other sources' assessed by the Assessing Officer and also allow deduction provided u/s.24 of the Act and accordingly the additional ground taken by the assessee is allowed."*

Respectfully following the order of the Tribunal supra, we are of the view that the letting out of the terrace has to be assessed under the head income from house property subject to deduction u/s.24 of the Act as against income from other sources assessed by the Assessing Officer.We hold and order accordingly. The grounds taken by the assessee are therefore allowed."

Respectfully following the same we decide Ground no.2 against the AO.

As a result,appeal filed by the AO stands dismissed.

परिणामतः निर्धारिती अधिकारी की अपील निरस्त की जाती है.

Order pronounced in the open court on 18th April,2013

आदेश की घोषणा खुले न्यायालय में दिनांक 18 अप्रैल,2013 को की गई ।

Sd/-	**Sd/-**
(B.R.MITTAL/बी.आर्.मित्तल)	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य /JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई/Mumbai,दिनांक/Date:18.04.2013

TNMM

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
3. The concerned CIT (A) /संबद्ध अपीलीय आयकर आयुक्त
4. The concerned CIT /संबद्ध आयकर आयुक्त
5. DR "B" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि बी खंडपीठ,आ.अ.न्याया.मुंबई
6. Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai**