IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD

[Before Pramod Kumar, Accountant Member]

ITA No.423/Ahd/2012
Assessment Year: 2008-09

Bimanagar Co. Op. Housing Society Ltd. ***.....Appellant***
Opp. Shivranjani Cross Roads,
Satellite, Ahmedabad - 380015
[PAN : AAAAB 4535 A]

Vs.

Income-tax Officer,
Ward 7(2), Ahmedabad. ***.....Respondent***

Appearances by:

DK Parikh *for the appellant*
Dinesh Singh *for the respondent*

Date of concluding the hearing : 28.06.2017
Date of pronouncing the order : 22.09.2017

O R D E R

1. This appeal, filed by the assessee, is directed against the order dated 5th December 2011, passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2008-09.

2. Grievances raised by the appellant are as follows :

1. *The Ld. CIT (A) has erred in both in law and on facts in confirming the action of the Id AO disallowing the claim of Rs.480000/- as against legitimate claim of deduction Under Section 24 (a) of the Income Tax Act and assess the Income as 'Income from other Sources' as against the '"Income form House Property' as per Return of income filed by the Assessee. The Id CIT(A) failed to appreciate that renting out land appurtenant to the buildings owned by the Society for the purpose of erecting hoardings shall be in the nature of the 'Income from House Property' and not as 'Income from Other Sources'.*

2. *Both the lower authorities patently erred in law and on facts in holding that rent income from letting out land 'appurtenant' to Building owned by the Society is in the nature of 'Income form House Property' and not in the nature of 'Income from Other Sources'.*

3. *Without prejudice to the above, the Id CIT(A) also erred both in law and on facts in not appreciating that the claim of deduction of Rs.480000/- being 30% of the Rent Income shall be allowed as provided in Section 24(a) of the I.T. Act.*

4. *The Id CIT(A) failed to properly apply the ratio of various case laws which were applicable to the facts of the appellants case.*

5. *The Id CIT(A) ought to have allowed the appeal in toto.*

3. Briefly stated, the relevant material facts are like this. The assessee is a cooperative housing society. During the relevant previous year, the assessee received Rs.16,00,000/- from M/s Selvel Media Services Pvt. Ltd., in respect of hoarding rent. These hoardings, as is the claim of the assessee, are built on common land owned by the society. The assessee treated the hoarding rent receipts as income taxable under the head ñincome from house propertyò, and, accordingly claimed deduction under section 24(a) of the Act @ 30% of the annual value. The Assessing Officer, however, declined this claim by observing that ñthese hoardings are erected in the ground adjacent to satellite Road and there is no building nearby. Meaning thereby that the land on which there hoardings are erected cannot be termed as ôland appurtenant theretoõ. The Assessing Officer, in the impugned assessment order, further observed as follows :-

> *"Admittedly, these hoardings erected by the said M/s Selvel Media Services (P) Limited are in the back yard of some of the buildings owned by the members of the assessee society for their own residence. The core issue is whether the receipts in the hands of the assessee society can be taxed under the head income from house property. Section 22 of the Act reds as*
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> > *'22. The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income tax, shall be chargeable to income tax under the head "income from house property'*
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> > *Thus, it is clear that unless the property owned by the assessee is of such nature as could be let out, the charge under section 22 cannot be attracted. In other words, if the property is of such nature that it is inherently incapable of being let out and the assessee is the owner thereof, then the charge under section 22 cannot arise. In the case of the assessee co-operative society, the residential buildings are owned by the members and not by the society. Therefore, the assessee society is not in a position to let out the residential buildings which are owned by the members. Then how can the land on which hoardings are erected be termed as land appurtenant thereto. The assessee co-operative society is neither owner of the residential buildings constructed on the land on which*

> *hoardings are erected nor the assessee is in a position to let out these residential buildings. Therefore, the rent derived from hoardings cannot be termed as having been derived from land appurtenant thereto. In view of the foregoing, the receipts of Rs.16,00,000/- in the hands of the assessee co-operative society is taxed as income from other sources."*

4. Aggrieved, assessee carried the matter in appeal before the learned CIT(A) but without any success. Learned CIT(A), while confirming the action of the Assessing Officer, opined as follows :-

> *"I have carefully considered the assessment order and the submission made by the appellant during the course of appellate proceedings. The Assessing Officer has disallowed the claim of the appellant treating the payment received from Selvel Media Services (P) Limited for number of hoardings erected on common land owned by the society as income from house property. The Assessing Officer held that since the appellant society did not own the residential building, it cannot let out the residential building owned by the members and, therefore, the rent derived from the hoardings cannot be termed as having been derived from the land appurtenant thereto. The appellant has claimed that it was the owner of the land and all the residential units. The members have only been allotted the flats for use and they are not the absolute owners. Further, the hoardings have been put up in the backyard of some of the residential units which was the society land, and therefore, the hoarding were on the land appurtenant to building. The claim of the appellant is not acceptable. The appellant has not let out the land or any building from which it is deriving any income. The income is being derived by giving permission for installing the hoarding in the compound. The appellant has not given right of user of land to the advertising company. The income earned therefrom will therefore be not the income from letting out of land or building and, therefore, it cannot be assessed as house property income. The hoardings cannot be treated as part of the building and, therefore, the income can be assessed only as income from other sources. The reliance is also placed on the decision of Calcutta High Court in the case of Mukherjee Estate (P) Ltd. (224 ITGR 1). He ground of appeal is, therefore, dismissed."*

5. The assessee is not satisfied and is in further appeal before me.

6. I have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

7. I find that, as learned Counsel for the assessee rightly points out, the assessee Society is a tenement co-operative housing society, in which ownership of the land and building vests in the society itself, and not the member of society. This legal distinction, in principle, in recognized by Hon'ble jurisdictional High Court in the case of Mulshankar Kunwerji Gor and others vs. J.S. Judga [AIR 1980 Guj. 62]. The very foundation of stand taken by the authorities below is thus legally unsustainable. Coming to the connotations of "land appurtenant thereto" in the expression "building or land

appurtenant thereto+, it does not mean that land should be used as an integral part of the building as a unit. The assessee in the present case is owner of entire set of housing units, which can be collectively referred to as housing complex, and, the vacant land in this complex is thus essentially an integral part of the housing complex. As observed by the Hon'ble Karnataka High Court in the case of CN Ananthram vs. ACIT [judgement dated 10.10.2014 in ITA No.1012 of 2008), which is equally valid in the present context.+When the legislature has used the word +or+which means the word buildings or land appurtenant thereto should be understood disjunctively having regard to the context in which it is used, it cannot be read as +and+as clearly, therefore, land being appurtenant to the building is sufficient; it need not be integral part of the building itself. In any case, having seen pictures of hoardings in question, I am satisfied that land on which hoarding rights were given is appurtenant to the building and cannot be viewed on standalone basis. As regards revenue's reliance on Hon'ble Calcutta High Court's judgement in the case of Mukherjee Estates Pvt. Ltd. Vs. CIT [(2000) 244 ITR 1 (Cal)], I may only refer to the following observations made by me in the case of Manpreet Singh vs. ITO [(2015) 38 ITR (Trib) 55 (Del)].

> *7. We find that so far as Hon'ble Calcutta High Court's judgment in the case of Mukerjee Estates Pvt. Ltd. (supra) is concerned, it is wholly misplaced inasmuch as it was a case in which the Tribunal had given a categorical finding that the assessee had "let out the hoardings" and in which the assessee's claim that he had let out the roof for advertisement and hoarding remained to be unsubstantiated inasmuch as when "a query was put to him (i.e. the assessee) whether there was an agreement to this effect to conclude whether the hoarding was let out or the roof is let out", the assessee "failed to produce that agreement nor there is (was) any reference to such an agreement before the authorities below". It was in this backdrop that Hon'ble Calcutta High Court concluded as follows:*
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> > *"…….Therefore, considering the finding of the Tribunal that the assessee has let out the hoarding, these are neither part of the building nor land appurtenant thereto. Therefore, permitting some companies to display their boards on hoardings cannot be taken as income from the house property as hoardings cannot be taken as part of the building"*
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> *8. Learned CIT(A) was thus clearly in error in observing, in the impugned order, that "Hon'ble High Court has held that if the rent is only for fixing the hoarding, it cannot be treated as part of the building, nor could it be treated as land appurtenant thereto, therefore such income will have to be separately considered as income from other sources (Emphasis by I.T.A. No.: 3976/Del/13 Assessment year: 2009-10 Page 5 of 7 underlining supplied by us)". As is clearly discernible from the extracts from the observations of Their Lordships of Hon'ble Calcutta High Court, the rent was taken as rent for hoardings per se rather than rights on the roof where hoardings could be installed or, as the learned CIT(A) puts it, 'fixed'. There was a categorical finding to that effect in the order of the*

Tribunal as well and this finding remained uncontroverted before Hon'ble Calcutta High Court as well. It was based on this uncontroverted finding that Hon'ble Calcutta High Court reached the conclusion that the income in question is taxable as income from other sources. This decision, therefore, cannot even be an authority for the proposition that the income from renting out the roof for placing the hoardings can be treated as income from other sources. Quite to the contrary to this interpretation, the observations made in this decision unambiguously show that when it can be demonstrated, as Their Lordships wanted the assessee to demonstrate in that case, that the consideration received is rent for letting out the roof rather than the hoardings, the legal position will be materially different."

8. In the present case also, the consideration received by the assessee is for the right to install the hoarding rather than rent for hoarding installed by the assessee. The above observations are thus equally valid in the present context.

9. In view of the above discussions, as also bearing in mind entirety of the case, I hold that the income earned by the assessee, in consideration of having given rights to have play hoardings etc. are taxable as income from house property. Accordingly, deduction under section 24(a) was indeed admissible in the present case. I direct the Assessing Officer to allow the deduction under section 24(a), as claimed by the assessee. The assessee gets the relief accordingly.

10. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 22nd day of September, 2017.

Sd/-
Pramod Kumar
Accountant Member)

Ahmedabad, the 22nd day of September, 2017

*PBN/**

Copies to:
(1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad