**INCOME TAX APPELLATE TRIBUNAL**
**MUMBAI 'D' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President)**
**And C.N Prasad (Judicial Member)]**

ITA No.1661/Mum/2019
Assessment Year: 2014-15

**Maker Tower Premises Co. Op. Society Ltd.** **…….. Appellant**
*56, Maker Arcade, Cuffe Parade,*
*Mumbai 400005*
*[PAN: AAAAM2065Q]*

***Vs.***

**Assistant Commissioner of Income Tax 17(2)**
**Mumbai** **…….Respondent**

**Appearances:**
**Mahendra Gohel** *for the appellant*
**Bharat Andhle** *for the respondent*

Date of concluding the hearing: : December 31st , 2020
Date of pronouncement : January 04th, 2021

**O R D E R**

**Per Pramod Kumar, VP:**

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 18th January 2019, passed by the Ld. CIT(A)-28, Mumbai in the matter of assessment u/s.143(3) of the Income Tax Act, 1961, for the assessment year 2014-15.

2. The grievances raised by the assessee are as follows.

**I. COMPUTATION OF INCOME FROM RENTING OF TERRACE UNDER THE HEAD 'INCOME FROM OTHER SOURCES:**

**1.1 On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) [CIT (A)] erred in confirming the additions made by the learned Assessing Officer by computing income from renting of terrace under the head 'Income from Other Sources' as against the same offered by the appellant under the head 'Income from House Property' resulting into addition for a sum of Rs.4,86,000/-.**

**1.2 The learned Commissioner of Income Tax (Appeals) and the learned Assessing Officer failed to appreciate the legal position emerging from the related case laws on the issue.**

**1.3 The learned Commissioner of Income Tax (Appeals) and the learned Assessing Officer erred in disallowing claim for deduction under Section 24(a) of-the Act and bringing the same to tax under the head 'Income from Other Sources'.**

**The appellant prays that the learned Assessing Officer be directed to compute the income from renting of terrace under the head 'Income from House Property' and grant deduction under Section 24(a), and revise the total income of the appellant accordingly.**

3. To adjudicate of this appeal only a few material facts need to be taken note of. The assessee before us is Co-Operative Housing Society in the course of scrutiny assessment proceedings it was noticed by the assessing officer that ***" the assessee has Leave & License Agreement with M/s. Reliance Infratel Limited to use the terrace of the building - Maker Tower – F for erection & installation of Antenna Tower and received a sum of Rs. 16,20,000/- for the same"***. The assessing officer, however, was of the view that section 22 covers only ***"The annual value of property consisting of any building or lands appurtenant thereto of which the assessee is the owner",*** *and* therefore income declared by the assessee cannot be treated as income from house property he held the entire income of Rs. 16,20,000/- as taxable under the head income from other sources.

4. Aggrieved, assessee the carried the matter in appeal before the learned CIT(A), but without any success. The learned CIT(A) upheld of the assessing officer and observed inter alia as follows:-

**6.3. I have very carefully perused the impugned order on this issue, the entire attendant facts and circumstances of the matter and the submissions of the Ld. AR. I have also perused with circumspection, the pertinent details and materials on record.**

**6.4. I find that I cannot bring myself to be in agreement with the arguments advanced by the appellant. This is because it is clear from the facts of the circumstances of the case that the agreements entered into by the appellant is not a Rent Agreement, rather it is a Service Agreement, Equipment Agreement and Maintenance Agreement etc. Therefore, it is clear that the terminology used by the parties to the Agreement [i.e. the appellant and M/s. Reliance Infratel Ltd.], themselves do not recognize that the agreements are entered into with a view to pay and receive the rent. Rather, they are for providing various services such as installation of antennas, their upkeep and maintenance. Therefore, the intent is very much clear which is that the antennas have not been hired but rather services of installation, upkeep and maintenance are being provided for and taken.**

**6.5. It is also seen that the income from antennas is not in the nature of income arising or accruing to the appellant from house property but rather partakes of the character of income from other sources due to the service aspects of the agreement entered into by the appellant with M/s. Reliance Infratel Ltd. Further, it is a trite law of contract, that due regard must be given to the understanding of the parties when they enter into a contractual arrangement with each other. In the instant case, it is clear that the understanding of the appellant and M/s. Reliance Infratel Ltd. is that services are being provided and taken. Further, it is to be noted, that all contracts are to be interpreted from yardstick of| ' CONSENSUS AD IDEM, which in other words means that only that can be construed in the contracts on which there is a meeting of the mind between the parties to the contract. In the instant case, the sense of the CONSENSUS AD IDEM' , is that the appellant and the telecom companies understand the real nature of the agreement which is clearly in the sense of services being given and taken rather than the same being in the nature of hiring of premises. This aspect is of utmost significance.**

**6.6. As regards, the various judicial pronouncements, quoted by the appellant it is clear that each judicial decision is rendered in the very peculiar and factual matrix of that case and therefore it is not either judicially expedient or prudent to superimpose the facts of the various case laws cited. In this sense, each case is undisputedly unique and stands on different pedestal.**

**6.7. Therefore, in view of the above discussion, the action of the AO in taxing the income from the antennas as income from other sources is right and proper. Therefore, the requisite appeal of the appellant on this issue/ ground is decided against the appellant and therefore, the ground nos.1.1 to 1.3 is hereby, DISMISSED.**

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

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

7. We find that there is no basis whatsoever for learned CIT(A) conclusions that the payment made to the assessee is not under a rent agreement but rather under a ***"service agreement, equipment agreement, maintenance agreement etc."*** he also do not find any basis for Ld. CIT(A) conclusion that the assessee appellant is provided various services such as ***"installation of Antenna Tower"*** there are keep and maintenance.

8. As the matter of fact in terms of the Leave & Licence Agreement dated 11.12.2013, a copy of which was placed before us at pages 17 to 35 of the paper book. The Reliance Infratel Limited, as a licensee is under an obligation to install and erect and run the antenna tower and maintain the same. The obligations of the assessee appellant do not extent to any services being rendered in this regard. The learned Departmental Representative, could not also enlighten us about any specific requirements for admission of the kind of services which have been referred by the learned CIT(A) in the Leave & Licence Agreement. Under clause 3C of the Leave & Licence Agreement, it is provided licensee shall ***"(b)e responsible to obtain all prior approvals from all concerned authorities, as necessary under the relevant laws in force from all authorities concerned, to carry out installation and erection of and to run and maintain the antenna tower and BTS equipment in the semi permanent structure, or the installation thereof, including work of any other nature".*** Similarly, under clause 3K of the Leave & Licence Agreement the assessee shall ***"(a)t its own costs, charges and expenses keep and maintain the Licensed Area in good condition and wind and water tight."*** the very foundation of the impugned order of the learned CIT(A), therefore, is unsustainable in law. We further find that as held by a coordinate bench of this tribunal in the case of ***Manpreet Singh vs ITO, [2015] 53 taxmann.com 244 (Delhi - Trib.)*** speaking through one of us (i.e., Vice President) has *inter alia* observed as follows:

> **6. We find that Section 22 of the Act provides that "annual value of property consisting of a building or land appurtenant thereto of which the assessee is owner" is taxable under the head "income from house property". There is no dispute on the facts of this case that the assessee is owner of the property but the authorities below have rejected the taxability under the head "income from house property" only on the ground that the rent in question is not in respect of any part of the building but for an unrelated attachment, i.e. mobile antenna, to the roof. It is thus contended that the rental income in question can only be taxed as "income from other sources", i.e. residuary head. In other words, according to the stand taken by the revenue, the rent in question cannot form part of the annual value as it is sine qua non for its such inclusion that the rent must be for**

**"the property or any part of the property", whereas the rent in question is not for any part of the property but an unrelated attachment to the roof or terrace. The revenue implications of this change of head lie in the fact that whereas an income from house property is eligible for standard deduction, under section 24(a), @ 30% of the annual value, the taxability under the head 'income from other sources' does not entitle the assessee for such a deduction. The basis on which learned CIT(A) has upheld that taxability under the head 'income from other sources' and thus reject the claim of deduction under section 24(a), is his understanding of the law laid down by Hon'ble Calcutta High Court in the case of Mukherjee Estates (P.) Ltd. v. CIT [2000] 244 ITR 1/113 Taxman 313.**

**7. We find that so far as Hon'ble Calcutta High Court's judgment in the case of Mukherjee Estates (P.) 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:**

**"…….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"**

**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 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. Such being the correct position, it is**

**certainly stretching the things a bit too far to suggest that rent for roof, for installation of mobile antennas, cannot be taxed under the head 'income from house property'. Learned CIT(A)'s observations to the effect that "On the same analogy, rent from the installation of mobile antennae which has been erected on the top at the building would not be taxable under the head "income from property" as the rent was only for providing space for installation of the mobile antennae on the top of building, and the same cannot be treated as part of the building nor can it be treated as land appurtenant thereto" is a classic case of fallacious logic. Once learned CIT(A) agrees that "rent was only for providing space for installation of the mobile antenna", there is no occasion to consider whether antenna will be a part of a building or land appurtenant thereto as the true test is whether such a space, as has been rented out, is part of the building or land appurtenant thereto. The rent is not for the antenna but for the space for installation of antenna. It is not the case of the Assessing Officer that the rent is for the antenna, and, therefore, it is wholly irrelevant whether antenna is part of the building or land appurtenant thereto. What is relevant is the space which has been rented out and, therefore, as long as the space, which has been rented out, is part of the building, the rent is required to be treated as "income from house property". Learned counsel for the assessee has filed copies of leaves and licence agreements with the Bharti Airtel Limited and the Idea Cellular Limited. In both of these agreements, it is specifically mentioned that the rent is for use of "roof and terrace" area (not more than 900 sq ft in the case of Bharti Airtel Ltd and approx 800 sq ft in the case of Idea Cellular Limited). The agreement with Bharti Airtel Ltd mentions that the assessee "permits the licences to install, establish, maintain and work on the licenced premises, inter alia, including the following – (a) transmission tower/pole, with multiple antennas; (b) pre-fabricated equipment shelter; (c) D G Set upto 25 KVA: and (d) two earthing connection and laying of other cables to ground an one lightning arrestor, necessary cabling and connecting to each antenna/ equipment, and space for installation of electricity meter and power connectivity etc". Similarly, agreement with Idea Cellular Ltd, inter alia, states that the assessee gives permission and licence "to use and occupy a portion admeasuring approx. 800 sq ft terrace and roof area for installation of prefabricated temporary assembled air conditioned shelter, tower/antenna poles and such other equipment as may be necessary". All these installations are to be done by the related companies and the obligation of the assessee does not extend beyond permitting use of space for such installations. It is thus clear that the rent is for space to host the antennas and not for the antennas. As long as the rent is for the space, terrace and roof space in this case and which space is certainly a part of the building, the rent can only be taxed as 'income from house property'.**

**9. In view of the above discussions, and as the rent received by the assessee for use of space, by Bharti Airtel Limited and Idea Cellular Limited, in a building, or part thereof, owned by the assessee, in our considered view, the rent so received must be taken into account in computation of annual value to be taxed under the head "income from house property". Accordingly, as learned counsel for the assessee rightly contends, the deduction under section 24(a) is admissible on the facts of the present case. We, therefore, reverse the stand of the**

**authorities below and uphold the stand of the assessee. The Assessing Officer is, accordingly, directed to delete the impugned disallowance.**

**10. Learned counsel for the assessee has taken pains to compile several unreported and reported judicial precedents in support of the stand taken by the assessee, and with a view to distinguish Hon'ble Calcutta High Court's decision in the case of Mukherjee Estates (P.) Ltd. (supra), but, having reached our conclusions on the first principles and not having found any judicial precedent coming in the way of these conclusions, we see no need to deal with this meticulous work. We leave it at that.**

9. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the same, we uphold the plea of the assessee and accordingly direct the assessing officer to treat the amount received by the assessee on account of renting out of terrace to M/s. Reliance Infratel Limited for the purpose of installation of antenna tower as income from house property in terms of the claimed made by the assessee. The assessee gets the relief accordingly.

10. In the result, the appeal is allowed. Pronounced in the open court today on the 04th day of January, 2021

Sd/-
**C.N Prasad**
(Judicial Member)

Sd/-
**Pramod Kumar**
(Vice President)

**Mumbai, dated the 04th day of January, 2021**
*N.V, Sr. PS*

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| *Copies to:* | *(1)* | *The Applicant* | *(2)* | *The respondent* |
| | *(3)* | *CIT* | *(4)* | *CIT(A)* |
| | *(5)* | *DR* | *(6)* | *Guard File* |

*By order*

*Assistant Registrar*
*Income Tax Appellate Tribunal*
*Mumbai benches, Mumbai*