

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.1089 OF 2011

The Commissioner of Income Tax-2
Room No.384, 3rd floor, Ayakar Bhavan
M.K.Road, Mumbai - 400 020. ..Appellant

versus

M/s.J.K.Investors (Bom) Ltd.
New Hind House, N.M.Marg,
Ballard Estate, Mumbai - 400 001 ..Respondent

Mr. Suresh Kumar for the Appellant.
None for the Respondent.

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**CORAM : S.J.VAZIFDAR &
M.S.SANKLECHA, JJ.**

DATE : 25th July, 2012.

(JUDGMENT PER M.S.SANKLECHA, J)

1 This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('the Act') challenges the order dated 09.09.2010 of the Income Tax Appellate Tribunal ('the Tribunal') relating to the assessment year 2004-2005. The appellant has raised the following questions of law for the consideration of this court.

(a) Whether on the facts and in the circumstances of the case and in law, the

Tribunal was correct in holding that compensation of Rs.1.23 crores received for providing amenities and facilities under separate agreement other than the rent agreement is chargeable to tax u/s. 22 of the Act as 'Income from House Property' and not as income from other sources as assessed by the AO?

(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in holding that compensation of Rs.1.23 crores received for providing amenities and facilities to a tenant is chargeable to tax u/s. 22 of the Act as 'Income from House Property' and not as income from other sources as assessed by the AO?

2 During the assessment year 2004-2005, the assessee received rent and service charges in respect of 2 floors owned by it at Mahindra Towers, Worli, Mumbai. The rent received was Rs.492.73 lacs and service charges received was Rs.123 lacs. The respondent claimed both rent income and service charges as 'Income from House Property' and offered the same for tax as 'Income from House Property'. The Assessing Officer by his order dated 29.09.2006 accepted Rs.492.73 lacs as 'Income from House Property'. However, so far as service charges were concerned, the Assessing Officer held that these

service charges were for ancillary services and therefore assessable under the head 'Income from Other Sources' and not as 'Income from House Property'.

3 In Appeal, the Commissioner of Income Tax (Appeals) allowed the respondent's appeal by following the order of the Tribunal for assessment year 2001-2002. The Tribunal in its order for assessment year 2001-2002 upheld the finding of fact of the Commissioner of Income Tax (Appeals) that there was no service/facility provided by the respondent-assessee to the occupants of its premises at Mahindra Tower, Worli under the agreement for service charges.

4 On revenue's appeal, the Tribunal upheld the order of the Commissioner of Income Tax (Appeals) and held that the respondent-assessee was providing no services/facilities to the occupants of its property. The services, if any were being provided by the society. To reach the above

finding, the Tribunal relied upon the decision of this court in the matter of C.I.T. v. Bhaktawar Construction Pvt. Ltd. reported in 162 ITR 452 to conclude that mere spitting of rent is not decisive and each case has to be examined on its own facts to determine whether the service charges are a part of the rent. Therefore, the Tribunal held that the service charges cannot be taxed under the head 'Income from Other Sources', but has to be taxed alongwith rent income as 'Income from House Property'. This was all the more for the reason that the service charges received by the respondent were considered by the tax Authority to determine the net maintainable rent and fair market value of the property under the provisions of the Wealth Tax Act.

5 We have been informed that the appeal for the assessment year 2000-2001 from the order of the Tribunal dated 05.01.2007 has been dismissed by this Court on account of delay on 21.06.2008. We therefore, have to consider the impugned order of

the Tribunal dated 09.09.2010 independently on its own merits.

6 We find that there are concurrent findings of fact by the Commissioner of Income Tax (Appeals) as well as the Tribunal that no services are being provided by the respondent to the occupants of its property and that the service charges have to be included as a part of its rental income. The aforesaid finding of the Tribunal is on the basis of the order of this Court in the matter of C.I.T. v. Bhaktavar Construction Pvt. Ltd. (Supra). The test to determine whether the service agreement was different from the rent agreement would be whether the service agreement could stand independently of the rent agreement. In this case the service agreement is dependent upon the rent agreement as in the absence of the rent agreement there could be no service agreement. It may also be pointed out that according to the respondent, the services being provided under the service agreement by the respondent-assessee are in the nature of staircase

of the building, lift, common entrance, main road leading to the building through the compound, drainage facilities, open space in/around the building, air condition facility etc. These are services, which are not separately provided but go alongwith the occupation of the property. Therefore, the amounts received as service charges are to be considered as a part of the rent received and subjected to tax under the head 'Income from House Property'.

7 In view of the concurrent finding of facts by the Commissioner of Income Tax (Appeals) and the Tribunal, we find that no substantial question of law arises. Consequently, the appeal is dismissed on both questions of law, as formulated by the Revenue.

(M.S. SANKLECHA, J.)

(S.J.VAZIFDAR, J.)