

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES “B” (SMC), HYDERABAD**

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER

I.T.A. No. 08/HYD/2016

Assessment Year: 2010-11

M/s. Astral Height Owners
Association,
HYDERABAD

[PAN: AABTA2325H]

(Appellant)

Asst. Director of Income
Tax (Exemptions)-2,
HYDERABAD

(Respondent)

For Assessee : Shri A.V. Raghu Ram, AR
For Revenue : Smt. U. Minichandran, DR

Date of Hearing : 08-11-2016

Date of Pronouncement : 11-11-2016

ORDER

This is an appeal by assessee against the order of the Commissioner of Income Tax (Appeals)-9, Hyderabad dated 10-11-2015. Assessee has raised the following grounds:

“1. The Learned Commissioner of Income Tax (Appeals) has failed to distinguish the basic difference between a Revenue Receipt and a Capital Receipt.

2. The Learned Commissioner of Income Tax (Appeals) has wrongly interpreted the collection of Rs. 9.50 lakhs towards Capital Receipt Fund as Revenue Receipt, even though the said collection was not made on monthly basis and routine repairs was shown as expenditure in Income and Expenditure Account.

3. The Learned Commissioner of Income Tax (Appeals) has ignored the concept of ‘Mutuality’ by treating the activities of Association of owners of commercial complex as a ‘Business Activity’ and thereby invoking the provisions of section 40(a)(ia), which are only applicable for business expenditure”.

Ground No. 4 is general in nature.

2. Brief facts of the case are that, assessee being a owners association of 'Astral Heights', a commercial building is a trust registered under the Societies Act but not u/s. 12 / 12A of the Income Tax Act [Act]. Assessee filed its Nil return of income declaring income of Rs. 3,17,711/-, claiming exemption on the principle of mutuality. In the assessment order completed u/s. 143(3) of the Act, the claim of mutuality has neither been discussed nor rejected. Assessing Officer (AO) however, taken the income in the Receipt and Expenditure A/c as total income, even though assessee has filed NIL income return. In the assessment order apart from taking the amount of Rs. 3,17,711/- as total income, AO has added back an amount of Rs. 5,20,283/- paid towards AMC Charges u/s. 40(a)(ia) of the Act on the reason that assessee has not deducted any tax. Further, an amount of Rs. 9.50 Lakhs received by assessee towards 'Capital Repairs Fund' and shown in the Balance Sheet, was added as 'revenue receipt' on the reason that assessee has claimed an amount of Rs. 5,69,086/- under the head 'Repairs and Maintenance'.

3. Before the Ld.CIT(A), it was contended that provisions of Section 40(a)(ia) are not applicable as assessee is not in the business and its receipts are exempt on the mutuality concept. With reference to the amount of Rs. 9.50 Lakhs, it was contended that AO has failed to test the nature of receipts in respect of maintenance charges and capital repairs fund which was received exclusively for any major capital works of the complex at a future date. Since this amount is capital receipt, the same is not taxable. However, Ld.CIT(A) rejected both the contentions and dismissed the appeal.

4. Ld. Counsel submitted that provisions of Section 40(a)(ia) cannot be invoked as assessee is not in the business. Further, it was submitted that the repairs which are incurred are day-to-day maintenance repairs spent out of the maintenance charges received, but the corpus fund received for future repairs is being accumulated in the Balance Sheet and this amount cannot be brought to tax.

5. Ld. DR however, relied on the orders of the AO and CIT(A) to submit that additions are correctly made. Referring to the bye-laws of the assessment placed on record by assessee, it was submitted that building is not assessee's property and as seen from the aims and objects of the assessment vide para 5 capital repairs are not within the domain of assessee. Accordingly, the amounts are to be considered as 'revenue receipt' only.

6. I have considered the submissions and examined the documents placed on record. It is a fact that even though assessee has claimed exemption on principle of mutuality, the AO has taken the total income of Rs. 3,17,711/- which is nothing but surplus in the Income and Expenditure A/c. AO should have examined the principle of mutuality before considering the amount as 'total income'. In addition, he also disallowed the amount u/s. 40(a)(ia), when assessee is not having any business activity and is only receiving maintenance charges towards maintaining the building. Assessee itself is constituted as an owners association and main object is only to maintain the building and utilise the common facilities. Since no business activity is involved, provisions of Section 40(a)(ia), which are meant for computing the business

income does not apply. Even if one were to consider the income under the head 'other sources', Section 58 of the Act specifically invokes only 40(a)(ia) vide sub-section (1A) of Section 58. Consequently, provisions of Section 40(a)(ia) cannot be invoked even if incomes are assessed under the head 'other sources'. On that ground, action of the AO cannot be upheld. Even otherwise, since the amount has already been paid, the decision of Special Bench in the case of *Merlyn Shipping and Transport Ltd., Vs. ACIT* reported as 136 ITD 23 (SB) [16 ITR 1] (SB)(Visakha.)(Trib.) will apply, as there is no outstanding amount at the end of the year. Considering these facts, I am of the opinion that the disallowance made by the AO, invoking the provisions of Section 40(a)(ia) was not correct. Accordingly, Ground No. 3 of assessee on this issue is allowed.

6.1. Coming to the issue of Rs. 9.50 Lakhs it is shown in the Balance Sheet only and is not the part of the Income and Expenditure statement. Since assessee has not registered u/s. 12/12A, its incomes are to be considered as per the principles applicable to assessees, other than registered Trusts. Provisions of Section 11 to 13 does not apply. It is the contention of assessee that the expenditures incurred and claimed in the Income and Expenditure statement are routine expenditures spent out of the maintenance charges collected but does not have any relation to corpus fund which is being collected and kept separately. This aspect has not been examined either by the AO or by the Ld.CIT(A). In case assessee is collecting separate corpus fund and is accumulating for future use, the same cannot be considered as income of the year. It is also seen that assessee has collected in

earlier years an amount to an extent of Rs. 33,64,400/- which is shown as opening balance. Ld. DR could not explain whether the said amount was treated as income in earlier year, like in this year. Considering the facts of the case, I am of the opinion that the corpus fund is not taxable as 'revenue receipt'. However, whether any nexus is there with the expenditure incurred in the Income and Expenditure statement towards repairs as contended by the AO in the order is required to be examined. In view of that, I am of the opinion that AO has to re-examine the entire issue based on the facts of the case. He is also directed to give findings whether assessee's income is covered by the concept of mutuality, as assessee has claimed exemption on that principle which was not considered at all by the AO. In view of that, the issue of receipt of Rs. 9.50 Lakhs and the principle of mutuality are restored to the file of AO for examination of facts and fresh adjudication as per law and facts on the above issue.

7. In the result, assessee's appeal is considered allowed for statistical purposes.

Order pronounced in the Open Court on 11th November, 2016

Sd/-
(B. RAMAKOTAIAH)
ACCOUNTANT MEMBER

Hyderabad, Dated 11th November, 2016

TNMM

Copy to :

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- 2. Asst. Director of Income Tax (Exemptions)-2 Hyderabad.*
- 3. Commissioner of Income Tax(Appeals)-9, Hyderabad*
- 4. Pr. Commissioner of Income Tax-6, Hyderabad.*
- 5. D.R. ITAT, Hyderabad.*
- 6. Guard File.*