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Court : Income Tax Appellate Tribunal ITAT Cochin

Decided On : Sep-19-1994

Reported in : (1995)52ITD122(Coch.)

Judge : G Santhanam, P Ammini

Appellant : inspecting Assistant

Respondent : Ranka Construction (P.) Ltd.

Judgement :

1. Of these appeals, one is by the assessee and the other two are by the revenue.
2. The assessee is a private limited company. It constructed a multi-storeyed building known as "Chandralok Apartments" and allotted the apartments to its shareholders. The shareholders continued to occupy the apartments constructed by the company. At least one of them has sold the flat allotted to him. However, the Assessing Officer was of the view that as the construction of the multi-storeyed building was done by the company with its own funds on the site purchased by it, the ownership of the building was with the company; even though the company did not derive any rental income from the shareholders who occupied the flats on allotment of such flats to them, the company could be assessed notionally under the head "Income from house property". In this view of the matter, he determined the income from house property as under and brought the same to tax: towards maintenance Rs. 72,228 -----Less : Municipal Taxes Rs. 23,993 -----for repairs Rs. 1,39,196 ----- Insurance premia paid Rs. 1,245 -----

Total income Rs. 6,94,740 ----- The Assessing Officer did not agree with the contention of the assessee that the shareholders were in possession and enjoyment of the property and as one of the objects of the company was to enable the shareholders to have a flat in the metropolitan town, by receiving not only capital but also contributions from them for the construction of the flats and as the company further did not derive any rental income from the shareholders, there was no case for assessing the company on notional rent. *Dewan Daulat Rai Kapoor v. New Delhi Municipal Committee* [1980] 122 ITR 700 (SC).

The learned CIT (Appeals) held that these decisions are not applicable to the facts of the case. He did not agree with the alternative contention of the assessee that the annual letting value even on notional basis should not exceed the annual municipal valuation, which was 34 paise per sq. ft. per mensem. He also did not accept the contention of the assessee that, in as much as, some of the shareholders have been assessed to tax under the head "Income from house property" in respect of the some of the flats in the apartments, there was no scope for assessing the company as such in respect of the flats comprised in the building. He did not see any reason to accept the contention of the assessee that in the case of one of the shareholders, by name Sri Vasantrai C. Shah, the annual letting value in respect of the flat occupied by him was fixed at Rs. 6,000 and computing on that basis the total annual letting value of the 28 flats would come only to Rs. 1,50,885. Thus, he confirmed the action of the Assessing Officer in- (a) assessing the company in respect of the flats allotted to its shareholders; (b) assessing the company on the annual letting value at the rate of Rs. 2 per sq. ft. per mensem as against Rs. 2.25 per sq. ft. per mensem adopted by the Assessing Officer; (c) directed the Assessing Officer to grant deduction for the maintenance expenditure under Section 23(1)(c) of the I.T. Act, 1961; (d) confirmed the levy of interest under Sections 139(8) and 217 of the I.T. Act; and (e) cancelled the levy of interest under Section 217 in an order passed under Section 154 of the Act.

The department is in appeal against the reduction of the sq ft. rate and granting of deduction of maintenance expenditure and also against cancellation of interest under Section 217. The assessee is in appeal against the assessment made in respect of the "Income from house property" and also against the adoption of

higher annual letting value in excess of the municipal valuation and against levy of interest under Section 139(8).

3. We have heard rival submissions at great length. The assessee relies on the following decisions: (4) Addl. CIT v. Sahay Properties & Investment Co. (P.) Ltd. [1983] 144 ITR 357 (Pat.); Sri K.R. Prasad, the learned counsel for the assessee contended that the Finance Act, 1987, has amended Section 27 of the IT Act, 1961 and the Finance Minister in his Budget speech to the Parliament at para. 77 had stated that the amendment proposed was only clarificatory in nature in CIT v. Mussadilal Ram Bharose [1987] 165 ITR 14 (SC) and being a clarificatory amendment it is retrospective in operation. He referred to Section 6 of the Finance Act, 1987, which sought to substitute clause [HO to Section 27 of the I.T. Act - 166 ITR 7 (sic). Since it was only a "substitution", it amounted to clarificatory in nature and retrospective in operation and for this proposition he relied on the decision of the Karnataka High Court in the case of K.T. Venkatappa v.K.N. Krishnappa [1988] 173 ITR 678. Sri Prasad, the learned counsel for the assessee, alternatively submitted that in case the Tribunal took the view that the assessment in the hands of the company was justified on the notional income from house property, the annual letting value adopted should be scaled down as the annual letting value adopted by the Assessing Officer exceeded the municipal valuation and for this proposition he relied on the following decisions : Sri C. Abraham, the learned senior departmental representative on the other hand, submitted that the assessee continued to be the owner of the property and, therefore, the assessment was proper. He relied on the following decisions : (1) CIT v. Union Land & Building Society (P.) Ltd. [1972] 83 ITR 794 (Bom.); and As for the relief granted to the assessee in respect of the square feet rate the learned senior departmental representative submitted that such relief was given without any material. He also submitted that, inasmuch as, the assessee was granted deduction for repairs, there was no need to give any further deduction in respect of maintenance charges. The cancellation of interest under Section 217 was not called for and that too in an order under Section 154.

4. Thus we have heard rival submissions and perused the records. One of the main objects of the assessee-company, as seen from its Memorandum of

Association, is as follows : To acquire by purchase or otherwise plot or plots of land, develop, build houses, housing flats, shops, offices, accommodation, facilities for recreation and public utilities or similar other facilities for the use and benefits of its members in the first instance.

One of the objects incidental to the attainment of the main object of the company is as follows: To allot or allocate properties of the company to its members under ownership basis or otherwise and to make rules and regulations on that behalf and for the management of the Company's buildings and other properties.

In the Articles of Association of the assessee-company clause 9 is as follows: Members who are allotted shares in the above company shall rank in priority for the allotment of flats, apartments, offices, or shops though as between members of equal duration such members holding the larger number of shares shall be given preference and as between members equally qualified, if the circumstances so necessitate their right to allotment shall be determined by lot.

In pursuance of the above-mentioned clauses found in the Memorandum of Association and Articles of Association of the assessee-company, the company obtained share capital, raised loans from its members and also received contribution from the members which were kept in building fund account. The company called (owners) entered into an agreement with Arihant Construction Company called (developers) and the agreement is found at page 28 of the paper book. The task of constructing the multi-storeyed building consisting of apartments, flats, etc., for the benefit of the members of the assessee-company was entrusted to Arihant Construction Company. The latter was allowed to enter into separate agreements with prospective members for the allotment of the said flats/shops/offices/ garages/open parking spaces and collect proportionate amounts from them directly in lump sum or instalments at the rates determined by the company and appropriate the amounts towards the cost of construction of the project. The construction company was obliged to render accounts for the money received by it towards allotment of flats from prospective members. Some of the clauses in the agreement are as follows: 3. The prospective members will not be admitted as members of the Owner Company until the building is completed and

prospective members have paid the full contribution to the Developers when due possession of the flat will be delivered to them.

4. On receipt of appropriate intimation from the Developers the Owners shall admit the prospective buyers as members of the Owners Company and shall not withhold consent to such applications without any valid or justifiable reason.

6. The Developers while allotting the flats etc. to the prospective members shall obtain an express undertaking that they shall become members of the Owners Company on completion of the building and abide by the Memorandum and Articles of Association of M/s. Ranka Constructions Pvt. Ltd. and also the Bye-Laws and Regulations framed thereupon. The Developers shall also collect from the prospective members such sum not exceeding Rs. 6,000 (Six thousand only) each towards share money, entrance fee and other expenses incurred for the purpose of the registration of the company and such collections or the unutilised portion thereof, as the case may be, shall be paid over to the Company.

7. Unless and until all the amounts payable as herein provided are received or realised by the Developers the physical as well as the legal possession of the said land described in the schedule hereunder and the building and/or buildings and other structures thereon shall remain with the Developers.

8. It is agreed by and between the Owners and Developers that the Developers shall have the first lien and paramount charges over the said land as well as the building and/or buildings for any sums outstanding in respect of this agreement.

In the above manner, flat owners became members of the company. They have paid the full cost of the flat or space to the developers and have thus obtained possession. Flats cannot be allotted to them unless they agreed to become members of the company. In other words, the flats or the space in the multi-storeyed building stand allotted to the members only and not to any outsiders. The assessee has furnished before us the agreement to sell executed between Sri K.V. Shah as vendor and Smt.

Kantidevi and Smt. Sushama M. Jain as vendees. The agreement to sell is dated 11 -4-1985 and is at page 36 of the paper book and the same is as follows: Whereas Vendor is the absolute owner and in possession of a Flat bearing No. 61, in the VI Floor, Chandraloka Apartments, No. 27-28, V Cross Gandhinagar, Bangalore-9, having purchased the same from its owners Arihant Construction Co., under an agreement dated 18-10-1980.

And whereas the Vendor is in possession and enjoyment of the said flat since the date of purchase.

And whereas the Vendor has decided to sell the aforesaid flat, more fully described in the schedule herein to the purchasers for a consideration of Rs. 2,50,000 (Rupees two lakhs fifty thousand only) free from all encumbrances to which the purchasers have agreed to purchase.

And whereas the parties desire that the terms of this Sale be reduced to writing this agreement is executed on the day, month and year first abovementioned.

1. The Vendor hereby agrees to convey, transfer and sell the Flat No. 61, VI Floor, No. 27-28, V Cross, Chandraloka Apartments, Gandhinagar, Bangalore, more fully described in the schedule herein to the purchasers for a sum of Rs. 2,50,000 (Rupees two lakhs fifty thousand only) free from all encumbrances.

2. The Vendor agrees to transfer his membership and shares in the Ranka Constructions P. Ltd., the Builders of Chandraloka Apartments pursuant to their agreement between the Vendor and the purchasers.

3. The Vendor hereby acknowledges and reports receipt of the entire sale consideration of Rs. 2,50,000 (Rupees two lakhs fifty thousand only) from the purchasers by means of bank draft issued by the New Bank of India for Rs. 2,50,000 (Rupees two lakhs fifty thousand only) No. 003648/35/85-dated 1-4-1985 in full and final satisfaction. The Vendor has this day put the purchasers in possession of the flat No. 61, VI Floor, Chandraloka Apartments, No. 27-28, V Cross, Gandhinagar, Bangalore, agreed to be sold under this deed.

5. From the above documents placed before us it is clear that the members of the company have acquired the flats or apartments or space on payment of proportionate cosmo Arihant Construction Company under instruction from the assessee. In fact, one of the members, who had acquired the flat by paying up the construction cost, had in turn sold the same to another by agreeing to transfer his membership and shares in the assessee-company to and in favour of the vendee. There is force in the contention of Sri Prasad that in these days of exorbitant cost of land and scarcity of space for building purposes, sky-scrappers which involve intricate technology in construction are the order of the day in cities and therefore it would be well-nigh impossible for any middle class individual to have a separate house of his own except through the medium of a society or company with a view to acquire a flat or apartment of his choice. In fact, this is one of the purposes for which the assessee-company has been floated. We, therefore, uphold the contention of Sri Prasad as it is well supported by the realities of situation. We uphold his contention also for the reason that the Memorandum of Association of the assessee-company authorised the assessee to enable its members to acquire flats or apartments through it. So, if regard is had to the substance of the transaction rather than its form, we have no hesitation in holding that the person coming to possession and enjoyment of a flat or apartment on payment of the proportionate cost of construction to the developers is the real owner in respect of the flat or apartment that falls to his share.

6. Sri C. Abraham, the learned senior departmental representative vehemently argued that the site belonged to the assessee-company and, therefore, the building constructed thereon also belonged to it legally. In our considered opinion the English doctrine of what is attached to the land is part of the land is not applicable to India, and, therefore, merely because the construction was set up on the site owned by the assessee, it cannot be held that the super-structure is also owned by the assessee-company. Further, we are not on the issue whether the property "belonged to" the assessee-company, but rather we are on the issue whether the property is "owned" by the assessee-company. There is a material difference between the expressions "assets belonging to the company" and "assets owned by the company". Their Lordships of the Supreme Court in Nawab Sir Mir Osman Ali Khan's case (supra) noticed this material difference between the

two expressions and at page 898 commented on the decisions of certain High Courts as follows: The Punjab and Haryana High Court in the case of Kala Rani v. CIT [1981] 130 ITR 321 (P & H) had occasion to discuss this aspect of the matter. But the Punjab and Haryana High Court was construing the meaning of the expression 'owner' under Section 22 of the Income-tax Act, 1961. There, the Division Bench of the Punjab & Haryana High Court held that the assessee occupied the property after the execution of the agreement of sale deed in his favour and after completion of the building, he was in a position to earn income from the property sold to him, though the registered sale deed was executed subsequently in April 1969. It was held that the assessee was 'owner' in terms of Section 22 of the Income-tax Act, 1961.

The Madras High Court had occasion to discuss this aspect in M.P. Gnanambal v. CIT [1982] 136 ITR 103 (Mad.). There the facts were entirely different and the Madras High Court held that the rights with reference to the properties in question in that case could only be described as a delusion and a snare so long as the sons continued to occupy the property which they were entitled to under the will and to describe the assessee's right as owner of the property would be a complete misnomer. There, the court was construing a will under Section 22 of the IT Act, as to who were the owners in terms of the will.

In all these cases, as was reiterated by the Calcutta High Court in S.B. (House & Land) P. Ltd. v. CIT [1979] 119 ITR 785, the question of ownership had to be considered only in the light of the particular facts of a case. The Patna High Court in Addl. CIT v. Sahay Properties & Investment Co. P. Ltd. [1983] 144 ITR 357, was concerned with the construction of the expression 'owner' in Section 22 of the IT Act, 1961. There, the assessee had paid the consideration in full and had been in exclusive and absolute possession of the property, and had been empowered to dispose of or even alienate the property. The assessee had the right to get the conveyance duly registered and executed in its favour, but had not exercised that option. The assessee was not entitled to say that because of its own default in having a deed registered in its name, the assessee was not the owner of the property. In the circumstances, it was held that the assessee must be deemed to be the owner of the property within the meaning of Section 22 of the IT Act, 1961,

and was assessable as such on the income from the property. This is only an illustrative point, where in certain circumstances, without any registered conveyance in favour of a purchaser, a person can be considered to be 'owner'. It may incidentally be mentioned that this court has granted special leave to appeal against this judgment. [See in this connection [1983] 143 ITR (St.) 60].

After adverting to Salmond's conception of "ownership" the Apex Court observed as follows: The position is that though all statutes including the statute in question should be equitably interpreted, there is no place for equity as such in taxation laws. The concept of reality in implementing a fiscal provision is relevant and the Legislature in this case has not significantly used the expression 'owner' but used the expression 'belonging to'. From the discussions found in the case dealt with by the Supreme Court, there is a perceptible difference between the expressions 'owner' and 'belonging to' and therefore we have no hesitation in holding that it cannot be said that the assessee-company is the owner of the impugned flats which are in possession and enjoyment of its members upon payment of cost of such flats. The case laws cited by the assessee do support its contention.

7. Even admitting that the assessee-company had the husk of a title to the flats, because the conveyance deed was not executed in favour of the flat owners though they have paid the cost of the flats and entered possession and enjoyment of such flats, what is to be let out is only the husk of the title that vested with the company. The Bombay High Court in the case of Shree Nirmal Commercial Ltd. (supra) on a similar issue held as follows: That having regard to the manner in which the non-refundable deposits were taken from the shareholders, the shareholders were allotted floor space area which they were not only entitled to occupy but were also entitled to assign to others on payment of compensation and to transfer their occupancy rights by sale of shares and the purpose for which the compensation was charged, the whole transaction was, in reality, a sale of floor space by the assessee-company to its shareholders. The assessee-company had kept with itself only the right of the management of property as a whole, the compensation being charged by way of reimbursement of the expenses which were likely to be incurred. After parting with the right of occupancy of the floor area to every member, what remained with the assessee was merely ownership in the

technical sense of the word. The residuary rights of ownership which remained with the assessee-company were negligible and of dubious value. The residuary ownership rights were incapable of being let out. The charge under Section 22 failed and the deposits had to be treated as trading receipts.

Thus we conclude that if regard is had to the substance of the transaction, it cannot be held that the assessee-company is the owner of the impugned flats. Even though the husk of the title remained with the assessee (such husk being an important element in property) yet it represented only a residuary ownership right left lying with the company and such residuary ownership right is incapable of being let out. In this view of the matter, we hold that the assessee-company is not liable to be assessed under the head "Income from property". The department also has not been adopting a consistent stand. In the case of Sri Vasantrao C. Shah, one of the flat owners, he has been assessed to tax on an annual letting value of Rs. 6,000. We are not on the issue whether the annual letting value should be taken at Rs. 6,000 per annum in the case of the company. We advert to this fact to show that one of the plot owners has been assessed to property income and thus the department has been adopting inconsistent stand by assessing the flat owner as well as the assessee-company, which is nothing short of double taxation.

8. There is force in the contention of Sri Prasad that Clause (iii) of Section 27, which defined the ownership of a house property, annual charge etc., as substituted by the Finance Act, 1987 with effect from 1-4-1988 is clarificatory in nature and retrospective in operation.

Section 27 defines the ownership of house property and annual charge for purpose of Sections 22 to 26 of the IT Act. Clause (iii) of Section 27 was as follows: (iii) a member of a co-operative society to whom a building or part thereof is allotted or leased under a house building scheme of the society, shall be deemed to be the owner of that building or part thereof.

With effect from 1-4-1988, the said clause was substituted by the following clause: (iii) a member of a co-operative society, company or other association of persons to whom a building or part thereof is allotted or leased under a house building scheme of the society, company or association, as the case may be, shall be

deemed to be the owner of that building or part thereof; If a section or a clause is substituted in an Act, the substituted section or clause should be deemed to be in operation from the inception as has been held by the Karnataka High Court in the case of K.T. Venkatappa (supra). In that case, the Karnataka High Court held (as per head notes) as follows: The substitution of an existing provision by a new provision does not attract Section 6 of the General Clauses Act, 1897. When an amending Act states that an old provision has been substituted by a new provision, the inference is that the Legislature intended that the substituted provision should be deemed to have been part of the Act from the very inception.

Viewed from this angle also we hold that the assessee-company cannot be held to be the owner of the impugned flats and, therefore, the charge under Section 22 fails. Should in a reference or otherwise, our view is held to be not sustainable in law, we hold that even if the assessee is construed as the owner of the impugned flats, the annual letting value cannot exceed the municipal valuation as has been held by the Madras High Court in M.R. Alagappan's case (supra) and the Delhi High Court in Jr. Dalmia's case (supra) 163 ITR 517. If at all anything is assessable in the case of the assessee, the computation should start with the adoption of the annual letting value at Rs. 1,50,885, subject to the deductions admissible under Sections 23 and 24 of the Act.

9. In the revenue's appeal objection is taken to the adoption of Rs. 2 per sq. ft. as the rental value as against Rs. 2.25 per sq. ft. adopted by the Assessing Officer. In the view that we have taken that in case the is ultimately found to be assessable it is the municipal valuation that should be the basis for determining the annual letting value, we dismiss this ground of appeal.

10. The other grievance of the revenue in its appeal is against the deletion of Rs. 72,228. This issue will arise only if the assessee is found to be liable for assessment on income from house property. The CIT(Appeals) has found that the assessee had collected this amount towards maintenance charges. As the annual letting value was estimated, it was not proper to make a further addition to it in the above sum. He further held that the assessee did not receive the impugned amount as owner of the property, but it was towards the arrangement for

maintaining certain common facilities and, therefore, it cannot be added to the annual letting value.

11. Having heard rival submissions, we decline to interfere. The annual letting value, once it is determined, can have no further addition to it. Further, the revenue has not placed any material to say that the charges collected by the assessee-company were in lieu of rent or by way of addition to rent. In the circumstances, we dismiss this ground of appeal.

12. There are other grounds in the assessee's appeal as well as in the revenue's appeal against the levy of interest and cancellation of interest. The only income on which the company has been assessed is the "income from house property" as if it is the owner of the house property consisting of flats, comprised in the multi-storeyed building.

As we have held that the charge under Section 23 failed against the assessee-company, for the reasons stated in para. 7 above, the taxable income of the assessee-company will be 'nil and, therefore, the levy of interest is not justified. The assessee's ground of appeal against the levy of interest is upheld. The revenue's appeal against the cancellation of interest levied under Section 217 is dismissed as devoid of substance.

13. In the result, the assessee's appeal is allowed and the department's appeals are dismissed.

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