Dy Cit Vs. Deepak Seth

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Aug-27-2004

Reported in : (2005)1SOT35(Delhi)

Appellant : Dy Cit

Respondent : Deepak Seth

Judgement :
This appeal of the revenue is directed against the order dated 25-9-2000 passed by CIT (A), New Delhi for assessment year 1997-98.

The ground of appeal states that on the facts and in the circumstances of the case the learned CIT (A) has erred in accepting the claim of exemption under section 23(2) in respect of property of Sushant Lok, Gurgaon owned by the minor son of the assessee who was residing with his parents in B-76, Vasant Vihar, New Delhi.

Briefly stated the facts are that the assessee is deriving income from property, business and other sources for which the assessee filed its return of income at Rs. 17,30,820. The assessing officer noticed that Master Pulkit Seth, minor son of the assessee. Shri Deepak Seth owned

(1) flat No. 308A at Raheja Vihar, Bombay

(2) at Flat No. F-92 DLF Qutab Enclave and

(3) at Sushant Lok, Gurgaon and

(4) Flat at D-301, Bombay. Thus the assessee was asked to explain as to for what purpose the said properties were used and why no rental income was shown therefrom in the return. The assessing officer after having considered the explanation of the assessee made the addition to the income of the assessee by including the notional income in respect of flat at Sushant Lok owned by Master Pulkit Seth, which was determined at Rs. 72,000 - by taking the ALV at Rs. 90,000. While making the addition the assessing officer made the following observations:- "The submissions of the assessee are not tenable in the eye of law and the same are not acceptable. In fact Shri Pulkit Seth is a minor son of the assessee and was residing with his parents at B-76, Vasant Vihar, New Delhi during the relevant period. This house has already been claimed as SOP. The facts of the case relied upon are different from the facts of this case. In that case, the wife got constructed the house through the funds provided by her husband. But in the instant case the minor son Shri Pulkit Seth was residing with his parents at B-76, Vasant Vihar, New Delhi and it cannot be said that he was occupying flat at Sushant Lok, Gurgaon "for the purpose of his own residence.' Occasionally visiting that house in Gurgaon does not mean that Pulkit Seth was occupying that house when he was staying with his parents at B-76, Vasant Vihar, New Delhi. Accordingly, the assessee's contention is rejected and ALV in respect of flat at Sushant Lok is taken at Rs. 90,000 being the reasonable ALV because the flat is in prime location. Also, because the ALV of flat No. 308-A, Raheja Vihar, Bombay has been shown by the assessee at Rs. 60,643 cost of which has been shown at Rs. 7,13,450 and the ALV of flat No. D-301 Gautam Complex, Bombay has been shown by the assessee at Rs. 91,941 cost of which has been shown by the assessee at Rs. 10,86,666. Hence, the ALV of flat at Sushant Lok whose cost has been shown by the assessee at Rs. 10,63,684 is reasonable at Rs. 90,00." On appeal the learned CIT (A) has held that even if income of the minor has been clubbed in the hand of the assessee, the deduction of self occupied property should be granted from the income from house property if the claim is made. Further, as per section 23(2), the exemption in the hands of the owner has to be granted even if the income has to be clubbed. Hence, he has held that assessing officer should accept the claim of granting the exemption for the self occupied property claimed by the assessee under section 23(2) in respect of flat owned by

Master Pulkit Seth at Sushant Lok.

Being aggrieved the revenue has preferred the present appeal before the Tribunal. The learned Departmental Representative has argued in support of the ground of appeal. He has submitted that since Master Pulkit Seth is residing with his parents at B-76, Vasant Vihar, New Delhi, the claim of exemption under section 23(2) of Income Tax Act in respect of property at Sushant Lok is not legally tenable. He has further submitted that the exemption under section 23(2) is available, only in respect of one house. Thus, he has supported the order passed by the assessing officer and has urged that the appeal of the revenue be allowed.

On the other hand, the learned counsel for the assessee has submitted that the provisions for exemption as occupied property are contained in section 23(2) of the Income Tax Act. This section provides for exemption of one house from tax where the house is on occupation of the owner. This section does not debar the exemption in case the income of the owner is clubbed with another person. The provisions of section 23 deal with exemption of one house occupied by the owner for his own use.

He has further submitted that the deeming provisions of section 64 cannot be considered to debar the exemption available to the owner by virtue of specific provisions of section 23(2) of the Act. In this connection, he has invited our attention to the decision of the Hon'ble High Court of Gujarat in the case of K.D. Thakkar v. CIT (1979) 120 ITR 190 (Guj) wherein their Lordships have held that the wife who had constructed the house through the funds provided by her husband and consequently her income was includible in the income of her husband in view of the provisions of section 64, she would be entitled to exemption under section 23(2) notwithstanding her income was clubbed with the income of the husband. He has further pointed out that the similar view was taken by the Hon'ble Madras High Court in the case of R. Ganeshan v. CIT(1965) 58 ITR 411 (Mad). Learned counsel has further submitted that use of a house for residential purpose does not require a compulsory house in that use and it only requires that house should be exclusively referred available for the residential purpose of the assessee all the time. The essential aspect of the matter would be

whether the assessee has retained exclusive control over the possession of the house owned by him and though he may not be actually present in the house when he is away from it, he still, is in the constructive possession of the residential house so long as he intends to use his house and retains it exclusively for residential purpose, the house would be said to exclusively used by him for his residential purposes.

The material aspect of the matter is that he has intention to remain in that house and not to give it up. Thus the assessee was having constructive possession of flat at Sushant Lok. In support of this contention he has made reliance upon which decision in the case of CIT v. Anil Kumar M. Virani (2002) 258 ITR 81 (Guj.). Thus, he has reported the order passed by the CIT (A).

We have heard the parties and have perused the material to which our attention has been drawn during the course of hearing of the present appeal. It would appear that Master Pulkit Seth, the minor son of the assessee has owned four properties and the claim exemption as self occupied property is only in respect of flat at Sushant Lok.

In the case of K.D. Thakkar (supra), the Gujarat High Court has held thus :- "Section 23(2) of the Income Tax Act, 1961, provides for the mode of computation of income from property which is in the occupation of the owner for purposes of his residence and under the proviso to sub-section (2), the maximum value of income from house property which is occupied by the owner himself is limited of 10 per cent of his total income.

Section 64 provides for inclusion of income of spouse, minor child, etc., in the income of an individual in certain cases. Section 64 and section 23(2) operate in different fields." Section 23 of the Act provides for the mode of computation of annual value of the property which is broadly deemed to be the sum for which the property might reasonably be accepted to let out from year to year, or where the properties let out and the annual rent received or receivable by the owner, subject to the reduction which has been provided in section 23(1) where the property is in the occupation of a tenant. Section 23(2) provides for mode of computation of the income of property which is in the occupation of the owner for the purpose of his

residence. According to sub-section 23(2)(b) a property consists of more than one house in the occupation of the owner for the purpose of his own residence the provisions of clause (a) shall apply only in respect of such houses, which the assessee may, at his option specify in this behalf. It would appear that Master Pulkit Seth has owned 4 properties and in regard to the flat at Sushant Lok owned by Shri Pulkit Seth, he has been claimed SOP. The assessing officer has denied the claim on the ground that he was residing with his parents at B-76, Vasant Vihar, New Delhi and it cannot be said that he was occupying at Sushant Lok for the purpose of his own residence. Occasionally visiting that house in Gurgaon does not mean that Pulkit Seth was occupying that house when he was staying with his parents at B-76, Vasant Vihar, New Delhi. Thus, in other words accoYding to the assessing officer the house in question was not in the occupation of Master Pulkit Seth. It is mentioned that house for residential purpose does not require a compulsory residence in that house and which only require that the house should be available for residential purpose of the assessee all the time. Inasmuch as the essential aspect of the matter would be whether the assessee has retained exclusive control over the possession of the house owned by him and though he may not be actually present in the house when he was away from it and as such he is still in the constructive possession of his residential house. Thus, we do not find any force in the reason given by the assessing officer in denying the claim of the assessee under section 23(2) of the Act. We, therefore, uphold the order passed by CIT (A).