Adarsh Associates Vs. Ito

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jul-04-2005

Reported in : (2006)7SOT517(Mum.)

Appellant : Adarsh Associates

Respondent : ito

Judgement :

These appeals filed by the assessee are directed against two separate orders dated 11-2-2002 of the learned Commissioner (Appeals) XIII, Mumbai treating the income earned by the partnership firm on leasing of its properties as income under the head "Income from house property", pertaining to the assessment years 1998-99 and 1999-2000, respectively.

The facts in brief are that the assessee is a partnership firm carrying on business as "dealers and investors in properties and giving the same on rent". For the years under consideration, the assessee-firm has shown a receipt of Rs. 5,04,120 by way of rent on letting out the premises as Vapi to Central Excise department in each year. This amount of Rs. 5,04,120 was credited to profit and loss account against which, depreciation, office expenses and interest on partner's capital were debited to profit and loss account and net loss of Rs. 11,215 is worked out and shown in the return of income for the assessment years 1998-99 and 1990-2000, respectively. The assessing officer taxed the rent receipt under the head "Income from house property" for both the assessment years as under: On appeal, before the Commissioner (Appeals), the assessee contended that return of income is assessable as income from business and not income from house property. The Id. Commissioner (Appeals) upheld the action of the assessing officer mainly following the decision of Calcutta High Court in Commercial Properties Ltd, Inre AIR 1928 Cal.

456 (Cal). Aggrieved by this order of the learned Commissioner (Appeals), the assessee is in appeal before us.

At the time of hearing, on behalf of the assessee, Shri V.H. Patil appeared and contended that the learned Commissioner (Appeals) erred in upholding the action of the assessing officer taxing the income under the head "Income from house property" thereby not allowing the deduction on account of depreciation. The counsel for the assessee submitted that in the assessment year 2001-02, the department itself accepted the rental income is business income and assessed it as such.

Therefore, on this ground alone, the assessing officer be directed to tax the income under the head "Business".

Without prejudice to above, the counsel submitted that the assessee is not the owner of the property. Therefore, the same is not assessable under the head "Income from house property". In support of this, reliance is placed on the provisions contained in section 27 of the Income Tax Act, which provides that under certain circumstances, though legally and technically the assessee may not be owner of the property, still the assessee would be treated as owner of the property for the purpose of assessment in respect of the house property income under section 22. One of such cases is that the lease of a property where the lease is not more than one shall be deemed to be the owner of the property for the purpose of section 22, as provided under clause (iiib). The relevant provisions of section 27 are as under :- (iiib) a person who acquires any rights (excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in clause (f) of section 269 UA, shall be deemed to be the owner of that building or part thereof." It was further submitted that in section 27, there is reference to section 269UA which section refers to the various kinds of transactions which are treated as transfer. One of the specified transactions is lease. Therefore, lease would be covered by the provisions of section 27. No doubt, section 269UA provides for a lease for a period of twelve years or more. However, though the transaction referred to under section 269UA are taken by reference as a part of the provisions of section 27 for the purpose of section 22, only the nature of the transactions like lease are incorporated in section 27 but not the period of 12 years, as required, under the provisions of section 269UA.For the period of lease for the purpose of section 27 it is incorporated in section 27 itself, wherein, the bracketed portion would exclude only that lease which is from month to month and which is for a period not exceeding one year. As such, on reading the provisions under the said provisions if the property which is leased out for a period exceeding one year, the lease shall be deemed to be owner of the property for the purpose of section 22. If one includes the period of twelve years for the purposes of section 27 then the bracketed portion of the clause will become redundant and by rule of interpretation such interpretation cannot be made which makes a particular portion of the section redundant. As such one will have to give effect to the bracketed portion of the section where the exclusion is of a lease for a period of less than one year. As such, one may refer to section 269UA for considering the nature of the transaction and for the period of the transaction one will have to confine to section 27 itself. As such, a lessee who is a lessee for a period of more than one year under the provisions of section 27 read with section 22 will be the deemed to be owner of the property. Now, one the lessee is deemed to be the owner for the purpose of section 22 the lessee will be assessed as owner of the property and real owner of the property cannot be assessed under section 22. It goes without saying that two persons cannot be owners for the purposes of section 22. Only one person would be the owner and as section 27 deems that for the purpose of section 22 the lessee would be the owner. The real owner of the property cannot be treated as owner for the limited purposes of assessing the house property income under section 22. The reason for the deeming provisions under section 27, is that a person who is really enjoying the right of possession, an important right of ownership should be assessed in respect of house property income.

Continuing his arguments, the learned Counsel for the assessee submitted that in case of the assessee, lease period is initially for five years which is renewable for five years which is for period of more than one year the lessor shall be deemed to be owner for the purpose of section 22 and accordingly, as the assessee cannot be treated as owner for the purpose of section 22, the income in question cannot be assessed as income from house property in the hands of the assessee. Finally the counsel submitted that it purchased 40 galas for the purpose of letting out, considering the heavy investment made as well as the number of galas which are acquired for the purpose of leasing out will show that it is on business scale. On this ground also rental income is assessable under the head "Income from business".

On the other hand, the learned Departmental Representative appearing for the revenue, supported the orders of the authorities below. He further relied on the decision of the ITAT Mumbai Bench 'E' in the case of Dy. CIT v. Godrej Properties Investments Ltd. (2005) 93 ITD 308 (Mum) therein, it is held that in case of owner of the property, rental income received by it was assessable only under the head "Income from house property' and the assessee could claim only such deduction as were permissible under sections 22 to 27, which do not make any provision to allow depreciation out of rental income. The Departmental Representative submitted that the assessee is the owner and not Government of India. From the perusal of the lease deed, it is clear that the assessee is the land-lord and the Government of India was simply tenant. Therefore, the order of the Commissioner (Appeals) be upheld.Having heard both the sides, we have carefully gone through the lease deed. Clause 5 of the lease deed reads as under: - "The Government of India shall be entitled to use the said premises for any purpose whatsoever during the continuance of the tenancy." Clause 9 provides that the land shall execute necessary repairs or repairs usually made to premises in that locality. Clause 15 provides that Government of India shall be entitled to terminate the lease at any time giving to the landlord one month's previous notice in writing of is intention to do so. Thus, various clauses of the lease deed clearly indicate that the assessee-firm is the owner and Government of India was simply tenant.

Now coming to reliance placed by the learned Counsel for the assessee that under clause (iiib) of section 27 and section 269 UA(f) of the Income Tax Act, we may point out that clause (iiib) of section 27 refers "person" who acquire any right. Person is defined in sub-section (31) of section 2 of the Income Tax Act, 1961 which do not include Government of India. The lease deed also provides that Government of India will pay the monthly rent. It is clear from the provisions of sub-section 27(iiib) and 269UA(f) that where the period of lease is more than 12 years, lessee deemed to be the owner of the property for the purpose of assessment under the Act. Admittedly, in the case before us, the period of lease is of 5 years, which is less than 12 years.

In view of the foregoing, keeping in view the totality of the facts and circumstances of the case, in our humble view, the assessee continued to be the owner of the property in question for the purpose of section 22. Therefore, rental income is rightly assessed by the assessing officer under the head "Income from house property". For this reliance can be placed on the decision of the Hon'ble Supreme Court in the case of Sambhu Investments (P.) Ltd. v. CIT (2003) 263 ITR 143 (SC). We, therefore, decline to interfere.