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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Dec-09-2005

Reported in : (2006)6SOT403(Delhi)

Appellant : Amit Gupta

Respondent : Dy. Cit

Judgement :

This is an appeal by the assessee against the order dated 23-4-2002 of Commissioner (Appeals)-XXII, New Delhi relating to the assessment year 1998-99.

The only issue for consideration in this appeal is as to whether the revenue authorities were justified in denying the benefit of exemption under section 54F of the Income Tax Act to the assessee. The facts which are not in dispute are as follows. The assessee who is an individual had sold a commercial property at GT Karnal Road, Delhi on 5-9-1997 for Rs. 10 lakhs. The assessee purchased basement in property No. 3/27, Roop Nagar, Delhi for Rs. 5,35,680 on 24-9-1998. The assessee claimed that since the assessee had invested the capital gain in purchase of residential house, he was entitled to exemption under section 54F of the Act from taxation of the capital gain. The assessing officer was of the view that since the assessee was residing with his parents at 7/28, Roop Nagar, Delhi and not using the basement for residential purposes, the exemption claimed was not to be allowed.

Apart from this reason, the assessing officer also gave the following reasons for denying the claim of the assessee under section 54F of the Act : (a) that the basement was used for storing commercial goods by the assessee; (b) that in the purchase deed of the basement, there was no mention about any bedroom, living room and kitchen. The basement was only a hall and not meant for use as a residential house; (c) that for the above reasons the assessee had not purchased residential house out of the sale proceeds of the commercial property and, therefore, the claim for exemption under section 54F was not acceptable.

(a) that the property No. 3/27, Roop Nagar, Delhi the basement area of which was purchased by the assessee was located in a residential area as per the master plan of the Delhi; (b) the whole property of 3/27, Roop Nagar, Delhi has been constructed after due approval of plan as a residential house; (c) the entire house has been treated as a residential property by the MCD authorities for purposes of levy and collection of property tax. A copy of the order dated 1-9-1998 of the joint assessor and Collector of the MCD is available on record; (d) property tax bills of the MCD were filed to show that the property including the basement was a residential unit; (e) that the basement was used by the assessee for storage of his house hold goods belonging to his family and also for accommodating guests.

The assessee would also use it for doing his office work at home. The servants are also accommodated in the property. The use of the property can, therefore, be said to be predominantly for residential purpose; (f) that the law does not require that the assessee should use it as his residential house. The fact that the assessee was staying with his parents in a nearby lane will not disentitle the assessee to the claim of exemption under section 54F; (g) that the basement had a water connection, separate electricity connection and also telephone. Though there was no toilet, the toilet in the ground floor was being used. The basement also had a kitchen.

The Commissioner (Appeals) however, was not convinced with the submissions made by the assessee and he agreed with the view of the assessing officer for the reasons, which reads as follows : "The appellants arguments are not acceptable. Although the property was constructed as a residential property, the basement has been separately sold by the owner. Under the Bye-Laws of the MCD, use of a basement for residential purposes is not allowed. A basement cannot be allowed to have a kitchen, bathroom or a toilet as per MCD Rules. Therefore, there is no force in the appellant's arguments that the basement was a separate residential unit. The appellant has also admitted that it was actually being used by him for commercial purposes. Therefore, the assessing officer's action is confirmed. The appeal is dismissed".

Aggrieved by the order of the Commissioner (Appeals), the assessee is in appeal before the Tribunal. We have heard the submission of the learned counsel for the assessee as well as the learned Departmental Representative. The assessee has filed an affidavit before the Tribunal in terms of rule 10 of the ITAT Rules, 1963. Under rule 10 of the ITAT Rules, it has been provided that where a fact that cannot be borne out by, or is contrary to, the record is alleged, it shall be stated clearly and consciously supported by a sworn affidavit. In the aforesaid affidavit filed before the Tribunal, it is stated that the observations of the assessing officer that the assessee used the basement portion for storing commercial goods is not correct as no such admission was made by the assessee before the assessing officer.

Several instances where the assessee has asserted before the assessing officer as well as the Commissioner (Appeals) about the basement being used as a residential house has also been highlighted in this affidavit. Apart from filing the aforesaid affidavit, it is contended by the learned counsel for the assessee that the basement had three entrances with an independent toilet in the ground floor with two gates one from the inside of the basement and another from the roadside. The basement also had water connection, kitchen, electricity connection and a telephone. The learned counsel reiterated the other facts as were submitted before the Commissioner (Appeals) about the nature of the property being a residential property. The contention regarding the use of the property by the assessee was also reiterated. The learned counsel submitted that under section 54F, it was only the purchase of the residential house property that has to be considered while allowing the exemption under section 54F of the Act. The learned counsel brought to our notice the order of the joint assessor & collector, NDMC whereby the property tax payable for the property at No. 3/27, Roop Nagar, Delhi had been determined. The learned counsel pointed out that even the NDMC had considered the entire property as residential property for the purpose of assessment of Municipal Taxes. The learned counsel also drew our attention to the document (sale deed) under which the aforesaid property was purchased by the assessee. He highlighted the fact that the basement portion was considered as an independent unit with all amenities when the same was sold to the assessee. Reliance was placed by the learned counsel for the assessee on the following decisions :Addl. CIT v. Vidya Prakash Talwar and it was submitted that since the assessee had purchased the residential property exemption under section 54F should be allowed.

The learned Departmental Representative however, submitted that the provisions of section 54F "contemplate purchase of a residential house". According to him, the residential house should be a place capable of living besides being actually used as residential house. He pointed out that the purpose of introducing section 54F was to boost construction of residence in the country, He drew our attention to the plan of the property which is annexed to the sale deed under which the basement was purchased by the assessee. The learned Departmental Representative pointed out that the plan contains only a big hall within no facilities such as kitchen, bathroom or a toilet. He drew our attention to the order of the MCD and submitted that prior to the purchase by the assessee the basement as well as the ground floor was one unit and this was considered as residential unit while finalizing the assessment to be made on this property. According to him, the sale of the basement alone by the erstwhile owner of the basement and ground floor will change the character of the basement area, therefore, it has to be ascertained as to whether the basement area can be considered as residential area. Besides the above the learned Departmental Representative also pointed out that the assessee in his written submissions filed before the Commissioner (Appeals) has clearly accepted that there is no toilet in the basement and the toilet in the ground floor was being used by the occupant of the basement. He submitted that this use of the toilet in the ground floor was not the subject-matter of transfer in the sale deed under which the assessee purchased the basement of the property. He also relied on the decision of the Punjab & Haryana High Court in the case of Dr. A.S. Atwal v. CIT (2005) 277 ITR 462 (P&H) and submitted that the probability of a particular place being used as a residence should be considered as held in the aforesaid decision. He drew our attention to the provisions of section 54F(2) of the Act which provides that after purchase of a new asset and after claiming exemption under section 54F(1) of the Act, if the assessee purchases within a period of two years any residential house, the income of which is chargeable to tax under the head "Income from House Property", other than the new asset, the capital gain allowed as exemption will be brought to tax in the previous year in which the second residential house is purchased. He submitted that residential house in own occupation is not charged to tax under the head "Income from house property". The fact that under section 54F(2) purchase of the second residential house which is chargeable to tax under the head "Income from house property" disentitles the claim for deduction already allowed would only go to show that the first residential house and the new asset should be in actual residence of the assessee. On the facts as brought out on record, he submitted that the assessee was not residing in the new asset and therefore, the claim of exemption under section 54F should be denied. As to when a person can be said to be residing in a house he relied on the principles laid down by the Hon'ble High Court in the case of Globe Theatres Ltd. v.Khan Saheb Abdul Gani AIR 1956 Mys. 57 and the Hon'ble Kerala High Court in the case of Poonen v. Rathi Verghese AIR 1967 Ker. 1.

We have considered the rival submissions and perused the records. The point for determination is as to whether by purchase of basement area of the property bearing No. 3/27, Roop Nagar, Delhi the assessee has complied with the conditions necessary for grant of exemption under section 54F of the Income Tax Act. The provisions of section 54F(1) reads as follows : "Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereafter in this section referred to as the new asset), the capital gain shall be dealt within accordance with the following provisions on this section, that is to say.

The assessee had purchased the basement of the property under a sale deed on 24-4-1998. One Smt. Amita Garg owned the basement as well as the ground floor portion of the property. She sold the entire basement floor to the assessee. The sale deed recites that the basement is fitted with water and electric connection. The assessee has also been given some rights to be enjoyed with the other co-owners of the building in property at No. 3/27, Roop Nagar, Delhi. The assessee had the right to install his water tank and TV Antenna on open terrace over the second floor of the property at 3/27, Roop Nagar, Delhi. A perusal of the order of the MCD determining the municipal tax for the property at 3/27, Roop Nagar, Delhi reveals that originally this property consisted of basement and ground floor owned by Smt. Amita Garg. The first floor owned by Shri Ramesh Kumar Gupta and second floor owned by Shri Kishan Chand Aggarwal. While completing the assessment for the purpose of municipal tax, this property has been considered as one meant for residential use. The building plans were also got sanctioned as one intended for residential use. The assessment have been made accordingly by the MCD. It is also been recorded in the said order that the purchasers are using it for residential use. Smt. Amita Garg had sold the basement of the property to the assessee. A perusal of the plan attached to the sale deed reveals that there were two separate entries to the basement area. In the submissions made by the assessee before the Commissioner (Appeals), it has been made clear that the basement also consists of a kitchen and was used by servants and as a guest room. From the above description of the property and the right which the assessee purchased under the sale deed it is clear that the property was capable of being used as residential accommodation. There is no basis for the finding given by the assessing officer and the Commissioner (Appeals) that the basement was used for strong commercial goods by the assessee." The requirement of law is that the property should be a residential house. The expression residential house has not been defined in the Act. The popular meaning of the word is a place or building used for habitation of people. It is used in contradistinction to a place which is used for the purpose of business, office, shop, etc., It is not necessary that a person should reside in the house to call it a residential house. If it is capable of being used for the purpose of residence than the requirement of section is satisfied. We do not find any direct support from various case laws which have been relied upon by the learned counsel for the assessee as well as the learned Departmental Representative except for the decision in the case of Sham Sunder Mukhija (supra). The decision in the case of Vidya Prakash Talwar (supra) dealt with a different aspect altogether. The court has held that the expression house property takes into account an independent residential unit. To this extent, the said decision is of some assistance to the case pleaded by the assessee. The decision in the case of Pushpalata Kanodia (supra) is in the context in the provisions of Wealth Tax Act and in the context of the definition of a 'house' under the said Act and they are therefore, are not of much of use to the case pleaded by the assessee. In the case of Purshottam Das (supra) in the context of the provisions of section 23(i)(b)(ii) of the Act, the court held that to determine as to whether a property is residential or not the intention at the time construction intended user, actual user, potentiality for a different user and several other related factual aspects have to be considered. The court held that the actual user is only one of the factors but not conclusive factor to determine whether a particular unit is residential house. The court held that a temporary use for office purpose did not render the property as non-rcsidential unit. The case relied upon by the learned Departmental Representative namely Dr. A.S. Atwal case (supra) is again of no assistance to the case of the revenue. It was a case under section 54 of the Act where the user of the premises as a residence was a condition, whereas under section 54F the user as a residential house is not the requirement. The decision of the Hon'ble High Court in the case of Poonen (supra) was a case where residence at a particular place to decide jurisdiction of court in a matrimonial proceeding under the Indian Divorce Act, 1869. The consideration are different in such cases. The decision of the Hon'ble Mysore High Court in the case of Globe Theatres Ltd. (supra) is in the context of 'Residence' under the Rent Control Legislation where again the considerations are different.

Apart from the above, we have already held that the property should be capable of being used as a residential house and need not be actually used as a residence. In view of the above conclusion, the above case laws are not of much relevance to decide the controversy in the present case. In the decision in the case of Sham Sunder Mukhija (supra), the Tribunal has taken a view that a farm house is also a residential house as it was capable of being used as a residence. Taking into consideration all these aspects, we are of the view that in the facts and circumstances of the present case the basement was capable of being used as residence. The fact that the assessee did not actually use the same for his residence will not disentitle him to the claim of exemption under section 54F of the Act. On the facts and the circumstances of the case, we are of the view that the exemption under section 54F deserves to be allowed. Accordingly, we direct that the same should be allowed. The appeal of the assessee is allowed.