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SooperKanoon Citation : sooperkanoon.com/75831

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Aug-31-2007

Judge : I Bansal, R Sharma

Appellant : Kamal Mishra

Respondent : ito

Judgement :

1. These are cross appeals filed by the assessee and revenue against the common order of Commissioner (Appeals) dated 5-5-2006 for the assessment year 2002-03, in the matter of order passed under Section 143(3) of the Income Tax Act, 1961.

2. Rival contentions have been heard and record perused. During the course of assessment, the assessing officer found that the assessee was having income from various heads including house property. The assessee was owning four properties at Vasant Vihar, Delhi, flat at Haridwar and a farm house at Masudpur. The assessee did not show any income from flat at Haridwar. Regarding property at Vasant Vihar the assessee had claimed that it was let out till December 2000 and after that it was lying vacant till April 2000 (sic). As per Sub-section (1)(c) of Section 23 where a property which is let, remains vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable in respect thereof is less than the ALV as computed under Section 23(1)(a) then such sum received or receivable will be deemed to be the ALV. It was stated since the property was not let and nil rent was received. The nil rent

being lower than the ALV as per Section 23(1)(a) the same alone is taken for computation of income. The assessing officer has not accepted the contention of the assessee. He has stated in his order that since the property in question was vacant the ALV is computed as per provision of Section 23(1)(a) and not as per Section 23(1)(c) as adopted by the assessee. As per assessing officer, the provision of Section 22 provides that annual value is to be charged to tax and not the actual rent. Since all the properties were vacant during the year, Section 23(1)(a) are applicable on these properties, i.e., the annual value is to be charged to tax. In the light of these facts the claim of the assessee was not accepted. The assessing officer has taken ALV as per wealth-tax return for assessment year 2002-03 at Rs. 37,42,800 on which he allowed statutory deduction at 30 per cent and taken income at Rs. 26,19,960 from those property.

3. The assessing officer also found that assessee was having property at Haridwar consisting of 2 rooms, and the assessee has not shown any income in respect of this property. There was also property at Masudpurin the form of agricultural land and farm house thereon, no income from such property was shown. The assessing officer, therefore, assessed income under Section 22 in respect of Haridwar property and also from agricultural farm house.

4. By the impugned order, Commissioner (Appeals) confirmed the action of the assessing officer with regard to determination of ALV for property at Vasant Vihar, New Delhi whereas in respect of property at Haridwar, he deleted the addition by observing that flat at Haridwar was in the nature of Dharmashala, no rent may be taken from it. The Commissioner (Appeals) also held that the assessing officer was correct in taking the valuation of farm house on the basis of ALV as municipal value.

5. The assessee was in receipt of certain shares and securities on the death of her husband in January 1998. The shares were sold during the year under consideration. While computing capital gain, the assessing officer allowed indexation by taking the year of acquisition of shares in the year 1998, instead of the year in which shares so devolved on the assessee by her husband, was acquired by her husband. By the impugned order, the Commissioner (Appeals)

allowed the claim of the assessee with regard to indexation of securities.

6. Aggrieved by the above order of Commissioner (Appeals), both the revenue and assessee are before us and following grounds have been raised by the assessee in their respective appeals and cross-objection: Grounds in IT Appeal No. 4556/Delhi/05.- (1) That on the facts and in the circumstances of the case, the learned authorities below erred in not holding that the appellant's property at 8-Vasant Vihar, New Delhi being let out till December, 2000 and after that it was lying vacant until 31-3-2002, the annual value of such property for assessment year 2002-03 could be only determined in terms of Sub-clause (c) of Sub-section (1) of Section 23 of the Act, and further erred in determining ALV of the property at Rs. 36,00,000.

(2) That on the facts and in the circumstances of the case, learned Commissioner (Appeals) erred in not holding that in the absence of a speaking order giving reasons in support of the conclusion drawn by him regarding assessability of income from the assessee's farm house at village Masudpur, the order of the learned assessing officer was liable to be quashed in terms of the judgment in Mool Chand Mahesh Chand v. CIT (3) That the learned Commissioner (Appeals) erred in not holding that the property at the farm at village Masudpur being in the nature of an out-house and well covered in the definition of 'agricultural income' under Section 2(2A)(c) of the Act, no income could be deemed to accrue under Section 22 of the Act and further erred in determining ALV of the property at Rs. 1,20,000.

(4) That the order of the learned authorities below being contrary to the facts and circumstances of the case and in law the appeal be allowed.

(i) In directing the assessing officer to take the indexation with reference to the date of acquisition of Dhanvarsha units in the hands of her husband and not the date of year in which the assessee held the assets (Explanation (iii) to Section 48 of the Income Tax Act).

(ii) In not allowing notional income from property at 401 and 403, Sadhu Bela, Haridwar, Farm House at Masudpur, Delhi and Vasant Vihar, New Delhi.

(1) That the learned Commissioner (Appeals) erred in not holding that in the event of any doubt regarding the base year to be adopted for indexation under Section 48 of the Act relating to the securities devolving upon the assessee on the death of her husband, the benefit of such doubt should in any case be given to the assessee.

(2) That the learned Commissioner (Appeals) erred in not holding that the order of the assessing officer not being a speaking order was bad in law and no income in respect of the apartments at Sadhu Bela, Haridwar could be assessed in respect thereof.

7. We have considered the rival contentions. As per provisions of Section 23(1)(c) of the Income Tax Act, 1961 annual value of property, where the property or any part of the property is let out and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by owner in respect thereof is less than the sum referred to in Clause (a) of Section 23(1), the amount so received or receivable will be the annual value for the purpose of Section 22 of the Act. This Clause (c) has been inserted in the statute book by the Finance Act, 2001 with effect from 1-4-2002, there is no justification in the action of the assessing officer for taking the annual value of the property as per provisions of Section 23(1)(a) of the Act. Neither the assessing officer nor the Commissioner (Appeals) has alleged the action of the assessing officer regarding property at Vasant Vihar, New Delhi remained vacant from December, 2000 till April 2002. We are therefore inclined to agree with the learned Authorized Representative that both the lower authorities were not justified for taking the income from house property under Section 23, as per provisions of Section 23(1)(c) (sic) of the Act.

Accordingly, we reverse the action of the lower authorities and direct the assessing officer to delete the addition made with respect to property at 8-Vasant Vihar, New Delhi.

8. With regard to the computation of capital gain, in respect of shares devolved on the assessee on the death of her husband, the provisions of the Act are very clear. According to Section 49 of the Act, where the capital asset becomes the property

of an assessee in any one of the various modes as stated therein then, the 'cost of acquisition' of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of improvement as undertaken by the previous owner or by the assessee himself. Property devolving by succession or inheritance is an instance covered under Section 49. Thus, for the purpose of indexation, the cost of the property transferred which the assessee inherited upon death of her husband has to be determined keeping in view provisions of Section 49 and indexed as though it was being disposed of by the previous owner himself. In the instant case, the assessing officer has correctly adopted the cost of acquisition of the shares/securities sold at the cost to Mr. H.C. Misra. However, in substituting the "indexed cost of acquisition", he has changed the base year from the year of actual purchase to 1997-98 when these devolved upon the assessee. The base year as determined by the learned assessing officer is erroneous. There cannot be two different dates in respect of the same asset devolving on the heir, one date to determine the date of cost of acquisition and another to determine the indexed cost of acquisition. Even otherwise the period of holding for determining long-term capital gains includes the period for which the original owner held the asset that devolved upon the legal heir. Accordingly, the assessing officer is directed to recompute capital gains on sale of securities by indexing cost of acquisition with reference to the year in which husband of assessee acquired them.

9. With respect to property at the farm house at Village Masudpur being in the nature of farm house, there is no merit in the action of the assessing officer for taking the rental income under Section 22 of the Act. In the interest of justice and fair play, this ground is restored to the file of the assessing officer for deciding the issue afresh after considering the submissions of the assessee and the definition of the agricultural income contained under Section 2(2A)(c) of the Act.

10. The cross-objection was in support of the Commissioner (Appeals)'s action, which we have decided hereinabove.

11. In the result, both the appeals of the revenue and assessee are partly allowed and cross-objection is dismissed as infructuous.

