(2007) 08 MAD CK 0036

In the Madras High Court

Case No : Tax Case (Appeal) No. 333 of 2004

Commissioner of Income Tax-I APPELLANT

Vs

S.M.S. Gardens RESPONDENT

Date of Decision : 13-08-2007

Acts Referred:
Income Tax Act, 1961 — Section 143(1), 143(2), 143(3), 260A

Citation : (2009) 311 ITR 16

Hon'ble Judges : P.P.S. Janarthana Raja, J;D. Murugesan, J

Bench : Division Bench

Advocate : N. Muralikumaran, for the Appellant; S. Ramesh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

P.P.S. Janarthana Raja, J.—This appeal is filed u/s 260A of the Income Tax Act, 1961 by the Revenue, against the order of the Income

Tax Appellate Tribunal, Chennai Bench ''B'', Chennai in I.T.A. No. 2682/MDS/1995 dated 23.10.2003. On 19.07.2004, this Court admitted the

appeal and formulated the following substantial questions of law:

1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the Assessing Officer

was not justified in excluding the cost of lifts, Excalators, EPABX etc., since those assets were not purchased by the assessee but were owned by

a Sister Concern?

2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in upholding the order of the CIT

(Appeals) wherein only the cost of Swimming Pool has been reduced though the cost has rightly been arrived at by excluding the cost incurred by the Sister Concern in respect of certain assets and the Assessing Officer has worked out the proportionate cost of the flats sold accordingly?

2. The facts leading to the above substantial questions of law are as under:

The assessee is a firm consisting of two partners. The business of the firm is construction of commercial and residential flats, selling and / or letting

out the same. The assessee firm is the owner of a multi-storeyed compled known as ""Cheran Towers"" at Coimbatore. The relevant assessment

year is 1992-93 and the corresponding accounting year ended on 31.03.1992. The assessee filed its Return of income on 11.11.1.992 disclosing

a total income of Rs. 28,37,650/-. The Return was processed u/s 143(1)(a) of the Income Tax Act (""Act"" in short) on 19.11.1992. Later, notice

u/s 143(2) of the Act was issued to the assessee. After examination of the books of account, the assessment was completed u/s 143(3) of the Act

determining the total income at Rs. 80,27,050/-. The assessee claimed the cost of sale properties at Rs. 3,41,16,011/-. The Assessing Officer has

worked out the unit cost at Rs. 360/- per sq.ft. and adopted the cost of the area at Rs. 2,89,45,080/-. The difference of Rs. 51,70,931/- (Rs.

3,41,16,011/- minus Rs. 2,89,45,080/-) has been added back and assessed by the Assessing Officer. Aggrieved by the order, the assessee filed

an appeal to the Commissioner of Income Tax (Appeals). The C.I.T.(A) retained an addition to the extent of Rs. 1,88,940/- out of the total

addition of Rs. 51,70,931/- made by the Assessing Officer. The remaining addition was deleted. Hence the appeal filed by the assessee was partly

allowed. Aggrieved, the Revenue filed an appeal to the Income Tax Appellate Tribunal (""Tribunal"" in short). The Tribunal dismissed the Revenue''s

appeal and confirmed the order of the C.I.T.(A) in reducing the disallowance to Rs. 1,88,940/-, as proper and justifiable. Hence the present tax

case by the Revenue.

3. Learned Senior Standing Counsel appearing for the Revenue submitted that the Tribunal has erred in confirming the order of the C.I.T.(A),

wherein he has reduced the addition made by the Assessing Officer of Rs. 51,70,931/- to Rs. 1,88,940/-. The counsel for the Revenue also stated

that both the authorities have taken the irrelevant factors and determined the cost of construction. It is also submitted that the orders of both the

first appellate authority and the second appellate authority are wrong, whereas the Assessing Officer has correctly worked out the proportionate

cost. Therefore, the order passed by the Assessing Officer is justified.

4. Learned Counsel for the assessee submitted that an identical issue relating to the assessee''s earlier assessment year came up before the C.I.T.

(A) and the C.I.T.(A) allowed the claim of the assessee and that, against the said C.I.T.(A)''s order, the Revenue did not file any appeal. Following

its own earlier order, the C.I.T.(A) reduced the addition to the extent of Rs. 1,88,940/- out of the total addition of Rs. 51,70,931/-. The Tribunal

also confirmed the order of the C.I.T.(A) on the ground that C.I.T.(A) had given the necessary details as to why he has reduced the addition to

Rs. 1,88,940/- with facts and figures. Hence, the orders passed by both C.I.T.(A) and the Tribunal are in conformity with law.

5. Heard the counsel. The business of the firm is the construction of commercial and residential flats and sell / letting out the same. The only issue

arising for consideration in this appeal is with regard to the computation of the income from a portion of the property sold during the year. Out of

the total area of 2,05,875 sq.ft., an extent of 80,403 sq.ft. had'' been sold by the assessee to various persons during the year. There is no dispute

regarding the sale value disclosed in the accounts by the assessee. However for calculating the cost in respect of the portion of the property sold,

the Assessing Officer has worked out the unit cost at Rs. 360/- per sq.ft. as in the last year and thus adopted the cost of the area of 80,403 sq.ft.

at Rs. 2,89,45,080/-. The assessee had claimed the cost in respect of this portion of the property at Rs. 3,41,16,011/-, The difference of cost

fixed by the Assessing Officer and that of the assessee, i.e., Rs. 51,70,931/- was added to the total income declared by the assessee, by the

Assessing Officer. An identical issue relating to the assessee''s earlier assessment year came up before the C.I.T.(A), wherein the C.I.T.(A)

considered the various aspects and accepted the case of the assessee. In the present appeal, the C.I.T.(A) considered the factual aspect in detail

and held at Paragraph 2 of its order, as follows:

Shri S. Vaidyanathakrishnan, Advocate and Shri C.S.K. Prabhu, Chartered accountant appeared me to explain the case for the appellant. It is

pointed out that there was an identical issue involved in the earlier year also when there were sales to the extent of 40,178 sq.ft. The Commissioner of Income Tax (Appeals) had considered in detail the assessing authority''s working of the unit cost of the property at Rs. 360/-per sq.ft. For

arriving at this value, the Officer had deducted a sum of Rs. 1,33,3,9,272/- from the total cost of Rs. 8,73,55,258/- admitted by the assessee in

respect of the entire property. The Officer thus worked out the cost of the total area of Rs. 2,05,875 sq.ft. at the difference amount of Rs.

7,40,15,986/-. The unit cost then worked out to Rs. 359.52 which was rounded off to Rs. 360/- per sq.ft. The Commissioner of Income Tax

(Appeals) had found that the amount of Rs. 1,33,39,272/- excluded by the assessing authority for calculation of unit cost had actually related to

cost in respect of 5 numbers of lifts, 2 escalators, EPABX system, dish antenna, DPG interest provision and lease rent payable towards a

swimming pool. The Commissioner of Income Tax (Appeals) observed that the rates, at which the shops or offices or flats were sold in this

complex were inclusive of the above amenities. But for these facilities, the price for the flat, shop, office etc. would have been much lower. He was

of the opinion that if at all any amount could be disallowed, it was only the lease rent payable to the swimming pool because it was not an amenity

available to all the flat owners, but a special facility provided to the interested persons on separate payments. The Commissioner of Income Tax

(Appeals) held that the unit cost in respect of the swimming pool facility worked out to Rs. 2/- per sq.ft. and he therefore reduced the addition for

that year to Rs. 80,000/- from Rs. 25,83,954/- made by the assessing authority in respect of the area of 40,178 sq.ft. sold during that year. In my

opinion there is no reason to deviate from the view taken by my predecessor. I agree with this view that excepting for the facility of the swimming

pool, all the other benefits and amenities are commonly enjoyed by all the purchasers of flats / shops in this complex and therefore reducing such

amounts for calculating the unit cost is not proper or justified. However, I find that the unit cost relatable to the swimming pool will actually work

out to Rs. 2.l5 per sq.ft. The reduction in cost in respect of 80,400 sq.ft. area sold by the appellant during this year will therefore come to Rs.

1,88,940/-. Accordingly, I will retain an addition to the extent of Rs. 1,88,940/- out of the total addition of Rs. 51,70,931/- made by the assessing

authority. The remaining addition will be deleted.

The above C.I.T.(A)''s order was confirmed by the Tribunal. The authorities below have given a finding that all the other benefits and amenities are

commonly enjoyed by all the purchasers of flats / shops in the complex and that therefore, reducing such amounts for calculating the unit cost

would not be proper or justified. The rates at which the shops or offices or flats were sold in the complex were inclusive of the above amenities. It

is a pure question of fact. The findings given by the authorities below are based on valid materials and evidence. It is also seen that the earlier order

of the C.I.T.(A) relating to the assesses''s earlier assessment year, reached finality and the Revenue also stated that they have not filed any appeal

against the same.

6. In view of the foregoing reasons, we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference. Hence we

answer the questions referred to above, against the Revenue, in favour of the assessee. Accordingly the tax case is dismissed. No costs.