

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

Before Shri Saktijit Dey, JM & Shri Ramit Kochar, AM

ITA No.988/Mum/2014
Assessment Year : 2009-10

Mrs. Usha Srichand Matta, Sannidhi Plot No.721, 4 th floor, Flat No.401, 12 th Road, Khar (W) Mumbai- 400 052. PAN AEVPM4813Q	Vs.	ITO 19(1)(2) Mumbai
(Appellant)		Respondent)

Appellant By : Shri Pritesh Mehta
Respondent By : Shri Airiju Jaikarau

Date of Hearing :11.01.2016	Date of Pronouncement : 29.01.2016
-----------------------------	------------------------------------

ORDER

Per Saktijit Dey, Judicial Member

The aforesaid appeal of the assessee is directed against the order dated 02.12.2013 of the learned CIT(A)-30, Mumbai, for A.Y. 2009-10.

2. Ground No.1 with its sub grounds relates to disallowance of indexation of cost of improvement of Rs.1,25,000/- while computing Long term capital gains on sale of flat. Briefly, the facts are that the assessee, an individual, filed return of income for the assessment year under consideration on 02.09.2009 declaring loss of Rs.4,40,368/-. In the course of assessment proceedings, the Assessing Officer found that during the relevant previous year the assessee had sold capital asset in the form of a flat at plot no. 721, Matta House Bunglow, 1st floor, Khar (W), Mumbai, and received sale consideration of Rs.46,33,400/-. From the working of

Long term capital gains furnished by the assessee, the AO noted that he had claimed indexation of Rs.7,27,500/- on cost of improvement of Rs.1,25,000/-. He therefore, called upon the assessee to furnish proof of cost of improvement claimed of Rs.1,25,000/-. As observed by the AO, in response to the query the assessee's AR submitted letter on 28.12.2011 stating that no supporting evidence in respect of cost of improvement is available. The AO further observed, in the said letter assessee's AR also agreed for removal of indexed cost of improvement. This fact was also recorded in order sheet entry dated 25.12.2015. On the basis of the aforesaid fact, the AO worked out Long term capital gain afresh. In the re-working of Long term capital gain, though, the AO allowed cost of improvement of Rs.1,25,000/-, he disallowed assessee's claim of indexed cost of improvement. As a result, net Long term capital gain was computed at Rs.6,02,500/-. Being aggrieved of the aforesaid decision of the AO, the assessee challenged the same in appeal preferred before the first appellate authority.

3. The learned CIT(A) while disposing of the appeal ex-parte vide order dated 02.12.2013 sustained the computation of Long term capital gain made by the AO by observing that the assessee during assessment proceedings has agreed and accepted the working of the AO.

4. The learned counsel for the assessee submitted that Long term capital gain has to be computed as per statutory provisions. He submitted, once the AO allows cost of improvement then as a natural consequence indexation of cost of improvement has to be allowed. He submitted, a deduction provided under the statute cannot be taken away by an agreement between the AO and the assessee's AR. The learned DR, on the other hand submitted since the assessee in the course

of assessment proceedings himself agreed for disallowance of indexed cost of improvement, the computation of Long term capital gain by the AO is correct.

5. We have considered the submissions of the parties and perused the material on record. The mode of computation of Long term capital gains has been provided u/s. 48 of the Income Tax Act 1961. As per the said provision income chargeable under the head Long term capital gain shall be computed after deducting the following amounts -

i) expenditure incurred wholly and exclusively in connection with such transfer

ii) the cost of acquisition of the asset and the cost of any improvement thereto.

The said provision further provides that in case of Long term capital gains arising from the transfer of long term capital asset in case of a resident, cost of acquisition and cost of any improvement would mean indexed cost of acquisition and indexed cost of any improvement. Keeping in view the aforesaid statutory provision if we examine the facts of the present case, it is noticed that the AO has accepted the assessee's claim of cost of improvement of Rs.1,25,000/-, which is evident from the working of Long term capital gains made by the AO. Therefore, the AO in principle having accepted assessee's claim of cost of improvement of Rs.1,25,000/- as a natural consequence indexed cost of improvement has to be allowed in terms with section 48 of the Act. A deduction allowed under the provisions of a statute cannot be taken away/disallowed by mutual agreement between the assessee and the department, if at all there is any. Moreover, the AO being a creature of the statute has to act within the four corners of the statutory provisions. Since as per mode of computation provided u/s. 48 of the Act cost of any improvement would mean

indexed cost of any improvement, which is to be reduced from the full consideration, while computing Long term capital gains, in our view, the AO cannot disallow assessee's claim of indexed cost of any improvement. Accordingly, we direct him to allow assessee's claim of indexed cost of improvement. This ground is allowed.

6. In ground no.2 along with the sub grounds, the assessee has challenged the addition of Rs.2,26,600/-. From the computation of income furnished by the assessee, the AO noticed that the assessee had shown a compensation of Rs.2,66,600/- as income from house property and after deducting the rent paid by him towards alternative accommodation and standard deduction of 30%, net income of Rs.14,691/- was shown. The AO however, did not agree with the assessee. He was of the view that the amount received by the assessee towards alternate accommodation from the builder is in the nature of income from other sources, from which no deduction is allowable. Accordingly, he added the entire amount of Rs.2,66,600/- as income from other sources. Being aggrieved, the assessee challenged the same before the CIT(A). The CIT(A) also confirmed the addition by rejecting the claim of the assessee.

7. The learned counsel reiterated the stand taken before the AO and referring to the statement of facts submitted before the CIT(A) contended that the amount of Rs.2,66,600/- received by the assessee is in the nature of compensation towards cost incurred by the assessee for rent paid for alternate accommodation. He submitted, though compensation is capital in nature but considering the fact that the assessee has received more than the cost actually incurred by him towards alternate accommodation, he has offered the excess amount of income under the

head income from house property after deducting there from actual rent paid on net basis and statutory deduction u/s. 24(a).

8. The learned DR, on the other hand, relied upon the reasoning of the AO.

9. We have considered the rival submissions and perused the material on record. As could be seen from the submissions of the learned AR, the assessee is challenging the nature of receipt as capital. However, it is seen that the assessee has herself shown the receipt as income under the head house property and claimed deduction of net rent paid along with statutory deduction as available u/s. 24(a). Considering such fact, assessee's claim of capital receipt has to be examined. Further, if at all the amount has to be assessed under the head income from house property, whether assessee can still claim deduction of rent paid over and above the statutory deduction u/s. 24(a) requires to be examined. Since the CIT(A) has disposed of assessee's appeal exparte, merely accepting the AO's view on this issue without recording an independent opinion, in the interest of fairplay justice, we deem it proper to remit this issue back to the file of the CIT(A) for decision afresh after due opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

10. In the result, the assessee's appeal is partly allowed.

Order pronounced in the open court on this day of 29th January 2016.

Sd/-
(Ramit Kochar)
ACCOUNTANT MEMBER

Sd/-
(Saktijit Dey)
JUDICIAL MEMBER

Mumbai; Dated :29th January, 2016.

SA

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'F' Bench, ITAT, Mumbai

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
Income Tax Appellate Tribunal, Mumbai