

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA
[Before Sri J. Sudhakar Reddy, Accountant Member]**

I.T.A. No. 2460/Kol/2018
Assessment Year: 2013-14

Dilip Kumar Chowdhary.....Appellant
545, G.T. Road (South)
6th Floor
Howrah - 711 101
[PAN : ACDPC 4418 P]

Assistant Commissioner of Income Tax, Circle-46, Kolkata.....Respondent

Appearances by:

Shri S.S. Gupta, FCA, appeared on behalf of the assessee.

Shri Sankar Haldar, JCIT, Sr. D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : May 1st, 2019

Date of pronouncing the order : May 8th, 2019

O R D E R

Per J. Sudhakar Reddy :-

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals) - 14, Kolkata, (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dt. 27/09/2018, for the Assessment Year 2013-14.

2. The assessee is an individual and derives income from salary, house property and other sources. He filed his return of income for the impugned Assessment Year on 30/03/2014 electronically declaring total income of Rs.12,39,440/-.

3. I have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, I hold as follows:-

4. Ground No. 1, raised by the assessee reads as follows:-

"That the Id. CIT(A) has erred in confirming the addition of Rs.1,84,303/- being deemed rental income for a let out property which has remained

vacant. The addition has been made in disregard of provision of section 23(1)(c) of the I.T. Act, 1961."

4.1. The undisputed fact is that the premise was vacant throughout the year. The issue before me is as to whether under such circumstances the Assessing Officer was right in disallowing vacancy disallowance claimed by the assessee. This issue is no more *res-integra*. The Pune Bench of the ITAT in the case of *Shri Vikas Keshav Garud vs. ITO, ITA No. 747/PN/2014 order dt. 31/03/2016*, has considered the issue and held as follows:-

"7. We have carefully considered the orders of the authorities below and material placed on record. We observe that the Assessing Officer has denied the application of section 23(1)(c) of the Act for determination of ALV on the ground that clause (c) does not apply to a situation where the property has either not been let out at all during the previous year or even if let out, was not vacant during the whole or any part of the previous year. As per the Assessing Officer, words "where the property is let" cannot be read as "where the property is intended to be let". For this proposition, the Assessing Officer has heavily relied upon the decision of the Hon'ble Andhra Pradesh High Court in the case of Vivek Jain (supra). The Assessee ardently contested the action of the AO before CIT(A) and claimed that in view of S. 23(1)(c), the annual letting value (ALV) ought to have been determined at nil having regard to the fact the property could not be let out and remained vacant for the whole year. In support of this proposition, decisions of the Tribunal in the case of Premsudha Exports (P) Ltd. & Presmshree gems (P) Ltd. vs. ACIT, 110 ITD 158 (Mum-Trib.) and Shakuntala Devi vs. DDIT in ITA No.1524/Bang/2010 order dated 20.12.2011 were relied upon before CIT(A). We notice from the order of the CIT(A) that the property was actually let out in the financial year 2006-07 to M/s IDBI Home Finance Ltd. at an actual rental value of Rs.12,600/- per month i.e. Rs.1,51,200/- per annum. During the year relevant to assessment year 2009-10 in appeal, the assessee could not let out the property and thus remained vacant throughout the year. Therefore, the surrounding circumstances would suggest that the property was always available to be let out, however, could not be actually let out in reality. The intention to let out the property is thus loud and clear in the circumstances which did not however fructify.

8. The ALV of property remaining vacant for the whole year has to be computed with reference to section 23(1)(c) of the Act. This sub-section deals with a situation where the property remains vacant for the whole year. Section 23(1)(c) of the Act as relevant in the context is set out for ready reference as under :-

"[Annual value how determined.

23. (1) For the purposes of section 22, the annual value of any property shall be deemed to be—

(a) xxxxx

(b) xxxxx

(c) where the property or any part of the property is let 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 the owner in respect

thereof is less than the sum referred to in clause (a), the amount so received or receivable :

Provided that the taxes levied by any local authority in respect of the property shall be deducted (irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him. [underline is ours]

9. Section 23(1)(c) by its literal wording include a situation where a property which was vacant during the whole year by saying that "when a property is let and was vacant during the whole or part of the previous year actual rent received or receivable by the owner is less than sum referred to in clause (a), the amount so received or receivable". It goes without saying that a situation cannot co-exist wherein the property is let during the previous year and is also simultaneously vacant for the whole year. The word 'let' and 'vacant' are mutually exclusive. To appreciate it further, the underlying principle of this provision has to be viewed with regard to the intention together with efforts put by assessee in letting out the property, etc. and then gross annual value is required to be determined. If the assessee intended to let the property and took appropriate efforts in letting the property but ultimately failed to let the same, the actual rent received from it will have to be considered as "Zero" being less than the sum referred in section 23(1)(a) of the Act. The revenue has not brought anything on record in rebuttal to say that the property has not remained vacant for the whole year or was self occupied in some manner. As noted above, the fact that the assessee had on the previous occasion in the preceding year rented the property remains un-traversed. We are not inclined to agree with the interpretation suggested by the Revenue that property should be actually let out in relevant to previous year. This interpretation does not appear consistent with the phraseology mandated in S. 23(1)(c) which includes a situation where the property can remain vacant during the whole of the relevant previous year. Hence, both situations namely 'property is let' and remained vacant for the whole year cannot co-exist during the financial year. We also note from a reading of another provision i.e. sub-section (3) of section 23 of the Act, where the legislatures in their wisdom have used the word 'house is actually let'. This also shows that the expression 'property is let' cannot mean actual letting out of the property because had it been so, there was be no need to use the word 'actually' in sub-section (3) of section 23 of the Act. Applying the purposive interpretation, the expression 'property is let' has to be read in contrast to 'property is self occupied' to arrive at its true purport. We simultaneously note on facts that the property has been actually let out in the financial year 2006-07 as noted above. It cannot be reckoned to be in the control of the assessee to let out the property throughout necessarily. The decision of Hon'ble Andhra Pradesh High Court in the case of Vivek Jain (supra) relied upon by the revenue cannot be read in a manner that if the property remains vacant throughout the year, section 23(1)(c) do not apply at all more so when the property was let out in proceeding or subsequent year. Therefore, in the totality of the circumstances and having regard to the provisions of the Act, we are of the view that the ALV of the property at Dande Towers which remained vacant for the whole year has to be assigned Nil value in terms of section 23(1)(c) of the Act. Accordingly, the order of the CIT(A) stands modified to this extent. Ground No.1 is thus partly allowed."

4.2. The ld. CIT(A) has wrongly relied on the judgment of the Hon'ble Andhra Pradesh High Court in the case of *Vivek Jain vs. Asstt. CIT 337 ITR 74*. This judgment was prior to the amendment brought in the Act on this issue.

5. In view of the above discussion, consistent with the view taken by the Pune Bench of the ITAT in the case of *Shri Vikas Keshav Garud vs. ITO (supra)*, we delete this addition.

6. Ground No. 2, is against the addition made u/s 2(22)(e) of the Act.

6.1. After hearing rival contentions, I find that the accounts of the assessee in the books of M/s. Panchdeep Constructions Ltd. is placed page 11 of the paper book filed by the assessee. A perusal of the same demonstrates that, it is a current account. Entries were passed on the last day of the previous year i.e., 31/03/2013. Even the Director's remuneration has been credited on the last day of the Financial Year. In the case of *Mr. Purushottam Das Mimani vs. Dy. Commissioner of Income Tax in IT(SS)A Nos.60 to 62/Kol/2011, order dt. 17-10-2014*, the Tribunal from para 4 onwards held as follows:-

"4. We have heard rival submissions and gone through facts and circumstances of the case. We have gone through the facts of the case and found from the perusal of ledger account of assessee in the books of account of Ganesh Wheat Products (P) Ltd., the lender company, it is seen that as on the first day of the relevant accounting year 2005- 06 (A.Y. 2006-07) opening balance is at Rs.28,07,584/-. Thereafter, on several dates during the entire financial year there were several transactions through cheques and some in cash by either parties, i.e. the assessee and the loan giving company, resulting in shifting balances. On many occasions the balance was in favour of the assessee and on some other occasions the balance was in favour of Ganesh Wheat Products (P) Ltd. The ledger of the assessee further reveals that no payment by loan creditor is followed by a repayment by the loan debtor and, in fact, the payments by the assessee and Ganesh Wheat Products (P) Ltd. are independent of one another. No interest was charged by either side for advancing money on mutuality inasmuch as the loan account was a current account in nature. It is thus evident that there were reciprocal demands between the parties and thus mutual in characteristic. At the close of accounting year as on 31-03-2006, debit balance stood at a sum of Rs.18,87,522/- which was duly reflected in the balance sheet under the head Loans & Advances.

Similarly, in respect of Mima Flour Mills opening balance was Nil and there were several shifting of balance and the resultant debit balance was Rs.5,00,833/-. For A.Y. 2007-08, in respect of Mima Flour Mills, opening balance was Rs.5,00,833/- and after shifting balance, the debit balance came to nil. In respect of Ganesh Wheat Products, opening balance was Rs.18,87,522/- and after shifting balance the credit balance came to Rs.9 lakhs. On perusal of the ledger account of the assessee in the books of M/s. Mima Flour Mills (P) Ltd. it is seen that on several dates there were shifting balances. On many occasions the balance was in favour of the assessee and on some other occasions the balance was in favour of Ganesh Wheat Products (P) Ltd. It is thus evident that there were reciprocal demands between the parties and thus

mutual in characteristic. The account so maintained in respect of such mutual transfer of amount by way of giving and taking financial assistance is, therefore, a current account and this current account is different from a loan account for the sole reason that feature of mutuality is not present in a loan transaction.

5. Here in the present case, from the facts narrated above, it is clear that both the parties are beneficiary of the transaction being current account of the above transactions i.e. shifting balances. This issue has been answered by Hon'ble Calcutta High Court in the case of [Pradip Kumar Malhotra v. CIT](#) 338 ITR 538 (Cal) wherein Hon'ble High Court held as under:

"The phrase "by way of advance or loan" appearing in sub-clause (e) of [section 2\(22\)](#) of the Income-tax Act, 1961, must be construed to mean those advances or loans which a shareholder enjoys simply on account of being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent. of the voting power; but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to be deemed dividend within the meaning of the Act. Thus, gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of [section 2\(22\)](#) but not cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder."

From the above facts and legal proposition decided by Hon'ble jurisdictional High Court, it is clear that [section 2\(22\)\(e\)](#) of the Act was inserted to bring within the purview of taxation those amounts which are actually a distribution of profits but are disbursed as a loan so that tax thereon can be avoided. It is pertinent to note here that when dividends are declared by a company, it is solely the shareholders who benefit from the transaction. No benefits accrue to the company by way of dividend distribution. Thus, [section 2\(22\)\(e\)](#) of the Act covers only such situations, where the shareholder alone benefits from the loan transaction, because if the company also benefits from the said transaction, it will take the character of a commercial transaction and hence will not qualify to be dividend. In the case of the assessee, by giving and taking financial assistance from each other, both the assessee and the company were benefited and such transactions between them were nothing but commercial transactions and dividend attributable to the shareholder is nothing to do with such business transaction. From the above discussions it can be said that sec. 2(22)(e) of the Act covers only those transactions which benefit the shareholder alone and results in no benefit to the company. On the other hand, if the transaction is mutual by which both sides are benefited, it is undoubtedly outside the purview of provisions of sec. 2(22)(e) of the Act. From the above, it is clear that the loan account differs from current account and the provisions of [section 2\(22\)\(e\)](#) of the Act, being a deeming section, cannot be applied to current account. In such circumstances, we delete the addition and this common issue of assessee's appeals is allowed."

6.2. Applying the propositions of law laid down in this case-law to the facts of the case on hand, I have to delete the addition as the account in question is a current account and it is not a loan account. Moreover, it can be seen that the

company M/s Panchdeep Constructions Ltd. received money from the assessee which makes it a commercial transaction of mutual benefit to both the parties and hence outside the purview of Section 2(22)(e) of the Act. Accordingly this ground of the assessee is allowed.

7. Ground No. 3 is on the issue of disallowance of interest.

7.1. The assessee's case is that the Assessing Officer restricted the claim of the assessee of deduction of interest to the extent of income earned by it under the head income from other sources. This, the assessee claims, is factually incorrect as the interest payment is related to income offered under the head income from house property.

7.2. I find from the computation of income that rental income has been offered to tax under the head income from other sources and has been assessed as such. This, in our view, is not correct. The rental income of Rs.1,71,200/- may have to be brought to tax under the head income from house property if it is rent from a building. The claim for interest may be examined afresh under such circumstances. If the money borrowed is for the purpose of acquisition of property, the deductions should be considered only under the head house property. Accordingly, this issue is restored to the file of the Assessing Officer for fresh adjudication in accordance with law.

8. In the result, appeal of the assessee is allowed for statistical purposes.

Kolkata, the 8th day of May, 2019.

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated : 08.05.2019
{SC SPS}

Copy of the order forwarded to:

1. Dilip Kumar Chowdhary

545, G.T. Road (South)

6th Floor

Howrah - 711 101

2. Assistant Commissioner of Income Tax, Circle-46, Kolkata

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches