

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Sanjay Arora, AM & Shri Manomohan Das, JM

ITA No.23/Coch/2023: Asst. Year:2014-2015

Peringattu Health Foundation Private Limited, G-202, Panampilly Nagar, Ernakulam – 682 036. [PAN: AADCP5050H] (Appellant)	vs.	The Income Tax Officer Corporate Ward 2(3), Ernakulam. (Respondent)
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Appellant by: Smt. Parvathi Ammal, CA
Respondent by: Smt. J.M. Jamuna Devi, Sr. DR

Date of Hearing: 05.09.2023	Date of Pronouncement: 28.11.2023
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ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee agitating the Order dated 05.06.2022 by the Commissioner of Income Tax (Appeals), Income Tax Department [CIT(A)], dismissing the assessee's appeal contesting its assessment under section 143(3) of the Income Tax Act, 1961 ('the Act') dated 14.12.2016 for assessment year (AY) 2014-2015.

2. The appeal, filed on 09.01.2023, is delayed by 148 days. It is accompanied by a sworn affidavit of even date by Dr. Thampi Mathew, Executive Director and Principal Officer, also signing the appeal memo before the first appellate authority and the Tribunal, averring that the impugned order, not received physically, and its transmission on mail, presumably on 15.06.2022 (i.e., the date of the order), was also not noticed inasmuch as he, a senior citizen, did not check his email account. In Form 35, i.e., the appeal memo before the first appellate authority, the company had

specifically opted for conveyance of notices and other communications other than by e-mail. The appellant became aware of the impugned order; there being no representation before the first appellate authority, and for the same reason, on the same being downloaded by the tax consultant. The ld. Sr. DR did not rebut any of the said contentions, even as opting out of the transmission on email (in Form 35) is a matter of record. The provisions of the Information Technology Act, 2000 (sec.12), clearly state of transmission to be complete on being acknowledged. Under the circumstances, we find sufficient reason/s for condoning the delay.

3. Inasmuch as the impugned order is an *ex parte* and an *in limine* dismissal of the assessee's appeal, it was clarified by the Bench that it would be disinclined to adjudicate, and prefer to restore the matter for an adjudication on merits to the file of the ld.CIT(A). While hearing was proceeded with on this basis, Ms. Ammal, the ld. counsel for the assessee, would submit that on both the issues raised by the assessee before the said authority, it has been successful before the first appellate authority for the earlier years, i.e., AYs. 2012-2013 and 2013-2014, which though came to be decided later.

4. The first issue concerns the allowance of interest u/s.24(1)(b) in computing the income from house property, being rent on a multi-storied building by the name, Mithun Towers, Kadavanthra, Cochin. The assessee's claim stands denied by the assessing authority, admitting the interest on capital borrowed to be for constructing a house property, income from which is assessable u/s.22 r/ws. 23, for want of evidence. The basis for the disallowance for the two immediately preceding years, on the other hand, was a footnote in the assessee's returns stating of non-claim of interest inasmuch as no interest on the unsecured loans of the Directors had been allowed by the company. The first appellate authority allowed relief for the said years on the basis that the claim could not be denied on that basis where a claim had been in fact preferred; the footnote in the returns being explained to an inadvertent

carry-over of the said remark in the returns for the earlier years where no such claim was, for that reason, i.e., non-payment, made. The non-claim and, consequently, non-allowance for the earlier years, would therefore be of no consequence; the disallowance by the Assessing Officer (AO) under such circumstances being in fact perverse inasmuch as he 'disallows' interest which he claims has not been paid in the face of accounts reflecting the payment.

There has accordingly been no adjudication on the merits of the claim for any of the preceding years; the disallowance of interest – since reversed in first appeal, for the two preceding years being on account of a misconception as to non-payment of interest by the assessee, which fact did not obtain. The assessee has before us relied on the relevant parts of the balance-sheet for the earlier years, i.e., the schedule of fixed assets, as well as its face, reflecting the source and application of funds, to substantiate that the building was financed primarily from secured (from bank) and unsecured (from directors) borrowings. On the basis of the 'Grounds of Appeal' before the first appellate authority, also filed physically (copy on record), it is also shown that the same were also adduced before the AO. Under the circumstances, we only consider it fit and proper that the matter is restored back, which we do at the request of Ms. Ammal, to the file of the AO, for determination afresh, setting aside the impugned order. We decide accordingly.

5. The second issue is in respect of computation of annual value (AV) u/s.23, i.e., whether with or without reckoning the non-receipt of any rent for the seventh (top) floor of the building inasmuch as no rent was received for the same, either during the current year or even the preceding years, and which informs the AO's order relying on the decision in *Vivek Jain v. Asst. CIT* [2011] 337 ITR 74 (AP). The basis for the acceptance of the assessee's claim in first appeal for the earlier years is the non-applicability of the said decision, stated to be inapplicable to commercial properties, as against the decision by the Tribunal in *Premudha Exports Pvt. Ltd. v.*

Asst. CIT [2008] 110 ITD 158 (Mum), relied upon by the assessee, and accepted as applicable for commercial properties.

6. We have heard the parties, and perused the material on record.

6.1 The controversy before us is the true interpretation of sec. 23(1)(c). We find no basis whatsoever for the said distinguishing by the Id.CIT(A), i.e., as at para 5, either in the language of sec.23, reproduced here-under, or the decisions relied upon:

Annual value how determined.

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

(a) the sum for which the property might reasonably be expected to let from year to year; or

(b) where the property or any part of the property is let and the *actual rent* received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable; or

(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.....

Explanation.—For the purposes of clause (b) or clause (c) of this sub-section, the amount of *actual rent received or receivable* by the owner shall not include, subject to such rules as may be made in this behalf, *the amount of rent which the owner cannot realise.* (emphasis, ours)

6.2 The Tribunal in *Premisudha Exports Pvt. Ltd.* (supra), read out during hearing, was of the view that the words “property is let” in sec.23(1)(c) implies an intention to let, coupled with the demonstration of efforts to let it – which would only clarify the said intent. The basis for the same is the use of words, in contradistinction, “actually let” in sec.23(3), signifying, by the Legislature, the condition of the property being actually let. As such, as long as there is an intent to let the property, demonstrated by efforts to let it, the reduction in the annual value u/s.23(1)(a), on the basis of it being vacant, would arise u/s. 23(1)(c). The said contention, also advanced in *Vivek Jain* (supra), did not find favour with the Hon’ble High Court, relying for the purpose on the canons of interpretation of statutes (paras 12, 13). The apparent

contradiction between the words ‘property is let’ and ‘property is vacant for the whole of the previous year’ was also explained by it. The fiction created by the word ‘actually’, qualifying the word ‘let’, absent in sec.23(1), it clarified, would be relevant where a property is let for more than one year, and is vacant for a part of such period, giving a meaning to the word ‘whole’ occurring in sec.23(1)(c). Reference in this context be made to paras 10 and 11 of the Judgment.

Apart from the fact that the said decision is by a higher Court, which would therefore prevail over the decision by the Tribunal on the strength of judicial precedence, the premise of the decision in *Premisudha Exports Pvt. Ltd.* (supra) is, with respect, flawed. This is as the words “actual rent” in s. 23(1)(c) leave no room for any doubt that the condition of letting referred to in s. 23(1)(c) refers to actual letting, which only could result in ‘actual rent’, with reference to which the rent in terms of and u/s. 23(1)(a) is to be compared. Why, the words “is let” and “actual rent” occur in both clauses, (b) & (c), of section 23(1). The same, *which are to be accordingly read in the same manner*, signify that the provisions contemplate actual letting. The words “received or receivable” following the same further clarify that what is contemplated is a state of actual letting, which only can result in the rent being either received or receivable. In fact, the interpretation by the Tribunal in *Premisudha Exports Pvt. Ltd.* (supra), besides making s.23(1) as internally inconsistent, renders sec.23(1)(a) otiose. Where a property is not actually let, it’s annual value (AV) would always be nil u/s. 23(1)(c). *Where, then, is the question of AV being computed on the basis of rent expected to be fetched?* Sec. 23(1), as indeed sec.23 itself, is to be read as a whole. Clause (a) defines the AV as the expected lettable value, and at which income is to be normatively taxed. Clauses (b) and (c) provide for a revision, upward or downward, therein, based on actual letting, depending on a higher or lower rent being received/receivable; the latter being on account of vacancy. *Explanation* to sec. 23(1), providing that the actual rent received or receivable would not include, subject to rules, unrealizable rent, further clarifies

the matter beyond any doubt. As explained in *Vivek Jain* (supra), s. 23(3) concerns a different fact-situation altogether, with which we are not presently concerned here.

6.3 Ms. Ammal would during hearing advance another argument. Even going by the clear language of sec.23(1)(c) and, further, as interpreted in *Vivek Jain* (supra), the assessee is entitled to relief on account of vacancy, due to the 7th floor being not let during the relevant previous year. This is as the property is actually let. The entire building (Mithun Towers) is to be regarded as one building, six floors and, therefore, a substantial part of which is actually let. The condition of s.23(1)(c) is, thus, satisfied. True, the seventh floor of the building, without doubt a part of the building, was never let. So, however, no one-to-one correspondence is contemplated for letting, and the positive condition of letting of the whole or part of the property stands satisfied, for the reduction on account of vacancy to obtain. It was further clarified by her, on inquiry, that the said (7th) floor is not retained by the company, whose office is housed in a separate building in Panampilly Nagar, Cochin.

6.4 The argument, appealing at first blush, does not stand the test of scrutiny, and is, rather, seriously flawed. To begin with, we find no support for the same in the decision in *Vivek Jain* (supra) which, as afore-noted, concerns the inapplicability of s. 23(1)(c) in the absence of actual letting. The seventh floor of the building is admittedly separately lettable. For the purpose of letting, only on the basis of which annual value of a house property is to be reckoned, it is thus a separate property, independent of others, as indeed is each of the other floors, even as confirmed during hearing, even though more than one floor may be occupied by a single tenant. It cannot be regarded as part of a property, as in that case the entire property would be let or, as the case may be, not let. As for example where there is a common entrance, or the different floors are functionally linked, as where they together represent a residential house or an office spread across different floors of a building. The said (7th) floor being therefore not let, which it is capable of, the benefit of its vacancy in

computing it's AV does not arise. That apart, the law does not admit the argument being made. The reason is simple. As explained hereinbefore, s. 23(1)(c) is applicable only in case of actual letting of a property or a part of the property. It is thus only where it is let that the benefit of vacancy u/s. 23(1)(c) would be available. *Not so read, the benefit of vacancy translates into a benefit for non-letting, vitiating the purpose thereof.*

6.5 In sum, a property, *whether let or not*, is liable to be assessed at it's annual value, defined as the rent reasonably expected on being let from year to year (s. 23(1)(a)). Sections 23(1)(b) and (c) provide for adjustment to the said value on account of actual rent, received or receivable, being either higher or lower, the latter being on account of vacancy. And which would, where so, obtain instead of a notional rent expected on a year-to-year letting contemplated u/s. 23(1)(a) as the 'annual value', at which income from a house property is to be otherwise assessed. That is, in case of actual letting, precedence is to be given to the real state of affairs. Vacancy can only follow a state of actual letting, envisaged u/ss. 23(1)(b)/(c). Reduction due to vacancy u/s. 23(1)(c) would accordingly follow a condition of actual letting, absent in the instant case for the top floor of the building. A part of the property referred to therein is one which admits of an actual and separate letting. The AV of the 7th floor would therefore be computed u/s. 23(1)(a), while that for other floors, being let, u/s. 23(1)(a) r/w ss. 23(1)(b)/(c). We decide accordingly, remitting the matter back to the file of the AO to do the needful after hearing the assessee.

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

*Order pronounced on November 28, 2023 under Rule 34 of The Income Tax
(Appellate Tribunal) Rules, 1963*

Sd/-
(Manomohan Das)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Cochin; Dated: November 28, 2023
Devadas G*

Copy to:

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The Sr. DR, ITAT, Cochin
5. Guard File.

Assistant Registrar
ITAT/Cochin