

**आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE**

**BEFORE SHRI R.K. PANDA, VICE PRESIDENT**  
**AND**  
**MS. ASTHA CHANDRA, JUDICIAL MEMBER**

**आयकर अपील सं. / ITA Nos.91 & 92/PUN/2024**  
**निर्धारण वर्ष / Assessment Years : 2016-17 & 2017-18**

Sunil Ramnarayan Mantri, 173, Navi Peth, Second Floor, Saraswati Bhavan, M.G. Road, Jalgaon-425001  PAN : AAQPM9214J	<b>Vs.</b>	DCIT, Circle – 1, Jalgaon
<b>अपीलार्थी / Appellant</b>		<b>प्रत्यर्थी / Respondent</b>

Assessee by :	Shri Sanket Joshi
Department by :	Shri Sourabh Nayak
Date of hearing :	08-05-2024
Date of Pronouncement :	28-06-2024

**आदेश / ORDER**

**PER ASTHA CHANDRA, JM :**

Two appeals filed by the assessee are directed against the two separate orders dated 28.11.2023 and 18.12.2023 of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi [**"CIT(A)"**] pertaining to Assessment Years (**"AYs"**) 2016-17 and 2017-18 respectively. Since the common issue is involved, both the appeals were heard together and are being disposed of by this consolidated order.

2. The assessee has raised the following common grounds:-

- “1. The learned CIT(A) erred in confirming the addition of Rs.52,83,945 towards deemed rent by applying the provisions of section 23(1)(a) to the property at Devs Arcade Mall, Ahmedabad owned by the appellant without appreciating that the provisions of section 23(1)(c) were applicable on the facts of the present and therefore, the addition made by the A.O. u/s 23(1)(a) was not justified in law.
2. The learned CIT(A) failed to appreciate that the impugned property was let out in the earlier years and this fact was also categorically accepted by A.O. in paras 4.1, 4.2, 4.6 and 4.7 of the asst. order and therefore, even if it is assumed that the said property was vacant for the whole of the current year, still the provisions of section 23(1)(c) were

*attracted in view of the law laid down by Hon'ble ITAT, Pune in M/s. Classic Citi Investments Pvt. Ltd. [ITA No.435 & 436/PUN/2023] dated 21.09.2023 and other judgments and therefore, the addition made u/s 23(1)(a) was not justified.*

3. *Without prejudice, if ground no. 2 is not allowed, the assessee submits that the impugned property was let out for a period of 15 days from 01.04.2016 to 15.04.2016 during the current year and the said fact was substantiated by documentary evidences furnished by the appellant and therefore, the provisions of section 23(1)(c) were applicable on facts of the present case and hence, the addition made by A.O. by applying the provisions of section 23(1)(a) was not justified in law.*
4. *Without prejudice, if ground no. 2 or 3 is not allowed, then the assessee submits that the assessee always intended to let out the impugned property on rent, however, the said property could not be let out in spite of efforts undertaken by the assessee and therefore, the provisions of section 23(1)(c) were attracted in the present case and hence, the addition made by the A.O. u/s 23(1)(a) may be deleted.*
5. *Without prejudice to the above grounds, if at all, it is held that the provisions of section 23(1)(a) are attracted to the instant case, then the assessee submits that the A.O. may please be directed to adopt the municipal ratable value of the property as annual value u/s 23(1)(a) and the addition made by A.O. by estimating market value of rent may be deleted.*
6. *The assessee submits that while computing the annual value u/s 23(1), the A.O. may please be directed to allow deduction in respect of municipal taxes paid by the appellant as per first proviso to section 23(1) of the Act which has remained to be considered by the A.O. while computing the income under the head 'Income from House Property'."*

3. The facts in brief are that the assessee filed his returns for AYs 2016-17 and 2017-18 on 16.10.2016 and 30.10.2017 declaring income of Rs.1,57,63,230/- and Rs.30,48,900/- respectively. Both the return(s) were selected for scrutiny under CASS. Statutory notice(s) were issued and served upon the assessee who uploaded the replies from time to time which were considered/verified by the Ld. Assessing Officer (**"AO"**).

3.1 During the course of assessment proceedings, the Ld. AO found that the assessee owned a Mall at Ahmedabad (Gujarat) and received total rent amount of Rs.60,000/-. He requested the assessee to reconcile receipt from house property as per audit report vis-à-vis return of income. The assessee submitted his reply, the relevant portion of which the Ld. AO reproduced in para 3 of the assessment order(s). It was stated therein that the assessee had given on rent the property situated in Dev Arcade Mall for the period from 16.03.2016 to 15.04.2016 for Rs.60,000/-. The said income has been recorded by the assessee in the Financial Year (**"FY"**) 2016-17 relevant to AY 2017-18. Further details, i.e. the name of tenant (Mr. Himansu B. Dave), his PAN, the purpose for which the 12000 Sq. Ft.

of the property was given on rent (Exhibition) were given along with documents, namely (i) a confirmatory certificate from the tenant Mr. Himansu B Dave; (ii) letter from Mall management confirming the fact of leasing out the said premise to Mr. Dave. It was also stated that the entire rent of Rs.60,000/- in cash (Rs.30,000/- pertaining to AY 2016-17 and Rs.30,000/- pertaining to AY 2017-18) were declared in the return for AY 2017-18 for tax. Copies of advertisement published in Times of India on 16.08.2016 and Gujarat Samachar on 22.08.2016 for leasing out of the property were also submitted. The advertisement expenses of Rs.45,200/- have suo-moto been offered to tax by the assessee.

3.2 The Ld. AO perused/analyzed the above contention of the assessee. In para 4.1 of the assessment order, the Ld. AO observed that Mall was not let out in FY 2016-17 (AY 2017-18) for the first 15 days of the year. In para 3.2 in AY 2016-17 and in para 4.1 in AY 2017-18 the Ld. AO stated that in all the earlier years the assessee has given the Mall on rent only after making registered rent agreement with tenant having lock in period. The assessee had also taken advance rent and deposit from the tenants. Now no deposit or advance is taken. No copy of agreement with the tenant is furnished. Similarly, no intimation to Police authority regarding tenant was furnished. The rent is received in cash. The cash rental was said to have been received in FY 2016-17 and accounted as income in FY 2016-17 (AY 2017-18) as income of prior period. The Ld. AO therefore held that the confirmation furnished by the tenant is not reliable.

3.3 The Ld. AO further observed that 12000 Sq. Ft. was let out only for Rs.60,000/-. Earlier deposit shows that the Mall was given on much higher rent. According to the Ld. AO the certificate from Manager of Dev Arcade Pvt. Ltd. is also not reliable as the rent is received in cash and not accounted on regular basis. He, therefore declined to entertain the assessee's claim that the Mall was given on rent as in his view the assessee could not establish that the property was let out during FY 2015-16 and 2016-17. Circumstantial evidence also showed that the property was not let out during the whole year.

3.4 Accordingly, in para 3.2 in AY 2016-17 and in para 4.3 in AY 2017-18 of the assessment order, the Ld. AO held that the assessee is not eligible for vacancy allowance u/s 23(1)(c) of the Income Tax Act, 1961 (**the**

“Act”) as the property remained vacant during the FY 2015-16 and FY 2016-17. Vacancy allowance is available only for a property that was let out. Intention to let out is not relevant. The Act allows deduction from the taxable rental value in cases where a let out property was vacant during the year. He referred to the case of Sharan Hospitality Private Limited wherein Mumbai ITAT held that vacancy allowance cannot be availed where a property was not let out during the year, irrespective of the ‘intention to let such a property’. The Ld. AO extensively reproduced the decision of the Hon’ble Andhra Pradesh High Court in the case of Vivek Jain Vs. ACIT reported in (2011) 337 ITR 74 (AP) in para 3.3 in AY 2016-17 and in para 4.4 in AY 2017-18 of the assessment order.

3.5 Relying on the decision in the case of Vivek Jain (supra) and holding that the Mall was not rented, hence vacancy allowance is not admissible to the assessee, the Ld. AO proceeded to determine the annual value of property at Rs.6,29,041/- per month and worked out ALV at Rs.75,48,492/- in AY 2016-17 and 2017-18. After allowing standard deduction @ 30%, the Ld. AO determined the ALV at Rs.52,83,945/- which he added to the income of the assessee under the head ‘income from house property’. Accordingly, the Ld. AO completed the assessment for AY 2016-17 on 26.12.2018 and for AY 2017-18 on 15.12.2019 on total income of Rs.2,15,53,035/- and Rs.96,15,704/- u/s 143(3) of the Act including therein the impugned addition of Rs.52,83,945/-, respectively.

4. Aggrieved, the assessee filed appeal before the Ld. CIT(A) for both the AYs. It was the common contention of the assessee that the property under consideration was let out in the earlier years and was also let out for a period of 15 days from 16.03.2016 to 31.03.2016 in AY 2016-17 and for a period of 15 days from 01.04.2016 to 15.04.2016 in AY 2017-18. The assessee was not able to let out the said property during the remaining part of the year(s) in spite of making efforts for letting out the same and therefore, the property was vacant for part of the year. Accordingly it was claimed that the annual value of the said property has to be worked out as per the provisions of the section 23(1)(c) of the Act and thus, annual value for the period for which the property was vacant ought to be considered at Rs. Nil.

4.1 The assessee further submitted that the entire premise of the Ld. AO in making the impugned addition is that the provisions of section 23(1)(c) are not attracted since the property was not let out during any part of the current year. None-the-less the Ld. AO has accepted that the said property was let out by the assessee to three different tenants during the FYs 2008-09 to 2014-15. Paras 3.2 and 3.4 in AY 2016-17 and paras 4.1, 4.2, 4.6 and 4.7 in AY 2017-18 of assessment order referred. It was clarified that the impugned property was let out for a period of 15 days each during the AYs 2016-17 and 2017-18 which claim is substantiated by furnishing documentary evidence. However, the assessee submitted that assuming, though not admitting that the property was not let out during any part of the current year(s), still, admittedly the property was let out for a substantial period in earlier years as stated above during FYs 2008-09 to 2014-15. Under these circumstances, the provisions of section 23(1)(c) are clearly attracted.

4.2 It was also submitted that on plain reading of provisions of section 23(1)(c), it is clear that the provisions are attracted even in a scenario wherein the property was let out in earlier years but the same remained vacant during the whole of the current year. It was pointed out that the Ld. AO had admitted that property was let out in earlier years and he has contended that the property remained vacant for the whole year. The assessee contended that even if conclusion drawn by the Ld. AO is assumed to be correct, still the ALV has to be determined as per the provisions of section 23(1)(c). Hence, the addition is not justified in law.

4.3 According to the assessee, the Ld. AO misinterpreted the decision of Hon'ble High Court of Andhra Pradesh in the case of Vivek Jain (supra). Reference to para 4 thereof was made wherein the Court noted that if a property is let out for more than a year and it remains vacant during the whole of any subsequent year, then the provisions of section 23(1)(c) will be attracted. It was the contention of the assessee that the ratio of the decision in the case of Vivek Jain (supra) supports the claim of the assessee.

4.4 Many decisions including the decision of Pune Tribunal in the case of Vikas Keshav Garud Vs. ITO (2016) 160 ITD 7 (Pune-Trib.) were cited and relied upon.

4.5 It was also submitted that the impugned addition is not warranted on facts as well. The Ld. AO rejected the claim of the assessee on the basis of suspicion and surmises.

5. The Ld. CIT(A) only dittoed the order of Ld. AO and confirmed the impugned addition in both the AYs which has brought the assessee before the Tribunal and all the common grounds for AYs 2016-17 and 2017-18 relate thereto.

6. The Ld. AR submitted that during the course of assessment proceedings, it was explained that during the AY 2016-17 the assessee could let out the impugned property in the Mall only for a period of 15 days from 16.03.2016 to 31.03.2016 for exhibition purposes on a rental of Rs.30,000/-. The property was let out from 16.03.2016 to 15.04.2016 for an exhibition on total rent of Rs. 60,000/-. Prior to 16.03.2016, the impugned property could not be rented out in spite of substantial efforts and hence, the said property remained vacant for a substantial period during this year. This claim was substantiated by filing copies of Newspaper Advertisement published by the assessee for letting out the commercial premises. In view of the above facts, it was claimed that the ALV of the property had to be considered as Rs. Nil as per the provisions of section 23(1)(c) of the Act. However, for the reasons recorded, the Ld. AO held that the assessee was unable to establish that he had actually rented the property during 16.03.2016 to 15.04.2016 and concluded that the property was lying vacant for the entire year and it was not let out during any part of the current year. Thereafter, the Ld. AO held that the mere intention to lease out the property would not be sufficient to avail the benefit of section 23(1)(c) of the Act. Relying on the decision in the case of Vivek Jain (supra) the Ld. AO held that if the property is vacant for the entire year, then the annual value has to be determined as per the deeming provisions of section 23(1)(a) and not as per the provisions of section 23(1)(c) as claimed by the assessee.

6.1 The Ld. AR reiterated the same arguments which were advanced before the Ld. CIT(A).

6.2 The Ld. AR submitted that the judicial consensus is that where the property was let out in earlier years but the same has remained vacant for the whole of the current year, then the annual value of such property has to be taken as Nil by invoking the provisions of section 23(1)(c) of the Act. He cited the following decisions :

1. DCIT Vs. Dhaval D. Patel (2023) 198 ITD 293 (Ahd.).
2. Sonu Realtors (P) Ltd. Vs. DCIT (2018) 173 ITD 82 (Mum.)
3. Vikas Keshav Garud Vs. ITO (2016) 160 ITD 7 (Pune).
4. Asfa Technologies & BPO (P) Ltd. Vs. CIT (2022) 197 ITD 323 (Chennai).
5. Ms. Priyananki Singh Sood Vs. Asst. CIT (2019) 198 TTJ 507 (Del.).
6. M/s. Classic Citi Investments Pvt. Ltd. Vs. ITO in ITA Nos.435-436/PUN/2023 dated 21.09.2023.

6.3 The Ld. AR argued that even on facts submitted before the Ld. AO/CIT(A) which have been rejected merely on suspicion the impugned addition is not justified. The assessee always intended to let out the property during the year under consideration which is evident from Newspaper Advertisement published by the assessee. Hence, provisions u/s 23(1)(c) of the Act were attracted as decided in the case of Vikas Keshav Garud (supra) and Sonu Realtors (P) Ltd. (supra).

7. The Ld. DR heavily relied upon the decision of Hon'ble Andhra Pradesh High Court in the case of Vivek Jain (supra) and the decision of Chandigarh ITAT in the case of Susham Singla Vs. ACIT 58 taxmann.com 252. He submitted that the facts of the assessee are different from those of M/s. Classic Citi Investments Pvt. Ltd. (supra) as in assessee's case the entire Mall was not let out and remained vacant. The Ld. DR placed reliance on the decision of ITAT Pune in the case of Mr. Arihant Patni and Smt. Shruti Patni Vs. ITO, a copy of which was placed before us.

8. We have considered the rival submissions and perused the records.

9. Let us first resolve the dispute on fact. The undisputed fact is that the assessee is owner of the property 'Dev Arcade Mall', Ahmedabad. It is also not in dispute that the assessee has given the Mall on rent in all the earlier years (as cited by the Ld. AO in para 3.2 of assessment order for AY 2016-17) and more specifically in para 3.4 wherein the Ld. AO stated that

the assessee has given the property on rent to Cinemax Ltd. @ 9,77,720/- per month in FY 2008-09; 8454 Sq. Ft. to Ozone Entertainment Pvt. Ltd. @ 26.80/- per Sq. Ft. in FY 2011-12 and 2000 Sq. Ft. to Quick Carrier @ 13.40/- per Sq. Meter in FY 2014-15.

9.1 Before the Ld. AO during the assessment proceedings, the assessee submitted that out of property admeasuring 22622 Sq. Ft. he had given on rent property admeasuring 12000 Sq. Ft. for the period from 16.03.2016 to 15.04.2016 on monthly rent of Rs.60,000/- to Mr. Himansu B Dave for the purpose of exhibition. The said income has been recorded by the assessee in FY 2016-17 as prior period income of Rs.30,000/- for the period from 16.03.2016 to 31.03.2016 and rental income of Rs.30,000/- from 01.04.2016 to 15.04.2016. Copies of ledger extract of rent received during the year along with copy of municipal taxes paid were produced. In para 4 of the assessment order, the Ld. AO admitted that the assessee has submitted confirmation of the tenant and Mall management confirming the fact that the said premises was leased out during 16.03.2016 to 15.04.2016.

9.2 The submission of the assessee was not acceptable to the Ld. AO for the reasons – (i) that in all the earlier years property was given on rent by entering into registered agreement having lock in period and by accepting deposit. However, no deposit or advance is taken while renting the property to Mr. Dave and no copy of agreement with the tenant is furnished; (ii) rent is received in cash; and (iii) no information regarding the tenant is furnished, to Police authorities.

9.3 The assessee submitted that in earlier years i.e. up to FY 2014-15 the property was let out for a period of more than 12 months to a single tenant. Therefore, the assessee had entered into registered lease deed as per the law and accepted security deposit from the lessee. However, during FY 2015-16 the property could not be let out despite publishing advertisement etc. due to market slow down. Therefore, when the assessee was approached by event managers to let out the property for a period of 30 days for the purpose of exhibition, the assessee rented it out instead of keeping it vacant. Non-acceptance of deposit from the tenant was commercial decision of the assessee. It was also submitted that expenses of Rs.60,000/- in cash did not violate the legal provision under the Act. It

was offered to tax in income tax return and has been accepted by the Ld. AO. It has also been contended that while leasing out of commercial property in Mall for exhibition purposes, permission from Police authority is not required which is a condition for renting out residential flats. Moreover, the lessee has assured that necessary permission for setting up exhibition had been obtained by them.

9.4 None of the above submissions/contentions could be controverted by the Ld. DR by bringing on record any adverse material. The Revenue has disbelieved the evidence of certificate of tenant and Mall Manager without going into the genuineness or otherwise thereof. Enquiry could have been conducted but it was not done.

9.5 Having regard to the evidence available in the records, we are of the considered view that the Ld. AO/CIT(A) were not justified in holding that the property was not actually leased out during 16.03.2016 to 15.04.2016. Their view is solely based on suspicion and surmises. The law is settled. However strong suspicion may be, it can never partake the character of evidence. Having accepted the rental income offered to tax by the assessee in his income tax return, the Ld. AO/CIT(A) cannot deny that the property was leased out in both the AYs, though for short period.

9.6 Accordingly, we hold that it is factually correct that the property under consideration was let out in both the AYs presently involved.

10. Now, let us come to the legal provision. Section 23(1)(c) of the Act reads as under :

*“23. Annual Value how determined –*

- (1) *For the purposes of section 22, the annual value of any property shall be deemed to be-*
- (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: shall be the annual value of the property.”*

10.1 A bare reading of the above provision would reveal that in order to attract section 23(1)(c) of the Act, the following conditions precedent must be satisfied;

- (i) the property or any part thereof must be let; and
- (ii) it should have been vacant during the whole or any part of the previous year; and
- (iii) 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).

10.2 It is only if these conditions are satisfied would clause (c) of section 23(1) apply in which event the amount received or receivable, in terms of clause (c) of section 23(1), shall be deemed to be the annual value of the property.

11. Let us test the facts of the assessee's case on the anvil of the legal provisions of section 23(1)(c) set out above.

11.1 In para 9.6 above after considering the factual matrix of the case, we have held that part of the impugned property, namely Dev Arcade Mall owned by the assessee was in fact let out during the previous year relevant to the AY 2016-17 and also AY 2017-18 for a period of 15 days each. The property was vacant during the remaining part(s) of each previous year relevant to AY 2016-17 and 2017-18. Resultantly, owing to such vacancy the actual rent received or receivable by the owner had been less than sum referred to in clause (a). In our opinion all the three conditions precedent to attract section 23(1)(c) of the Act are fulfilled in the case of the assessee.

12. The contention of the assessee is that even if it is assumed that the impugned property was not let out for any part of the previous year relevant to assessment year concerned as held by the Ld. AO, still annual value of the property will have to be determined as per the provisions of section 23(1)(c) and the addition made is not justified. The Ld. AR submitted that the contention of the Ld. AO is that if property is not let out for any part of the current year i.e. if was vacant for the whole year, then provisions of section 23(1)(c) are not attracted. The Ld. AR argued that this interpretation placed by the Ld. AO is directly contradictory to the clear wordings of section 23(1)(c). If the legislature intended so, it would never have used the words "was vacant during the whole or any part of the

previous year” in section 23(1)(c). Thus, the interpretation adopted by the Ld. AO, shall render the word “whole” used in section 23(1)(c) as otiose or redundant and hence, such an interpretation which goes against the plain language of the provision may be avoided. We find merit and substance in the above argument of the Ld. AR.

13. As stated earlier, the admitted position is that the impugned property of the assessee was let out in the earlier years. The Ld. AR has contended that assuming without admitting that the property remained vacant for whole of the current year (as held by the Ld. AO), even then the annual value of such property has to be taken as Nil by invoking the provisions of section 23(1)(c). He relied upon the decisions referred to by us earlier in para 6.2 of this order. Nothing adverse has been commented by the Ld. DR in this regard. He relied upon the decision of Co-ordinate Bench dated 07.06.2022 in the case of Mr. Arihant Patni in ITA Nos. 2695/PUN/2016 and 1248/PUN/2017 for AYs 2013-14 and 2014-15. In that case the property was never let out during the year or year earlier to that. It was in this factual backdrop that the Tribunal placing reliance on the decision of Hon’ble Andhra Pradesh High Court in the case of Vivek Jain (supra) and the decision of Punjab and Haryana High Court in the case of Susham Singla (supra) held that section 23(1)(c) will not be applicable if the property was vacant throughout the previous year and it was not let out at all. This decision of the Co-ordinate Bench in the case of Mr. Arihant Patni (supra) does not help the Revenue as in the case before us the property was admittedly let out in earlier years and was let out during the relevant previous year(s) as held by us.

14. Heavy reliance has been placed by the Ld. AO/CIT(A) and the Ld. DR on the decision of Hon’ble High Court of Andhra Pradesh in the case of Vivek Jain (supra) to negate the benefit of section 23(1)(c) to the assessee. We have gone through the decision (supra). In para 11 of their judgment, the Hon’ble Andhra Pradesh High Court held that clause (c) of section 23(1) does not apply to situations 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. None of the situation applies to the facts of the assessee’s case wherein as held by us the part of the property was let out during the relevant previous year for a period of 15 days and it was vacant during the whole of the remaining part of the previous year(s).

15. For the reasons set out above, we hold that on the facts and in the circumstances of the assessee's case the provisions of section 23(1)(c) of the Act apply in both the AYs involved. Accordingly, we decide ground Nos. 1 to 4 in favour of the assessee and direct the Ld. AO to allow the benefit of section 23(1)(c) of the Act to the assessee and amend the assessment order(s) accordingly.

16. Consequently, ground Nos. 5 and 6 become academic and need no adjudication.

17. In the result, the appeals of the assessee for both the AYs 206-17 and 2017-18 are allowed.

**Order pronounced in the open court on 28<sup>th</sup> June, 2024.**

Sd/-  
(R.K. Panda)  
**VICE PRESIDENT**

Sd/-  
(Astha Chandra)  
**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 28<sup>th</sup> June, 2024.  
रवि

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT concerned.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,  
पुणे / DR, ITAT, "B" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

वरिष्ठ निजी सचिव / Sr. Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune