

(1977) 01 MAD CK 0020

In the Madras High Court

Case No : Tax Case No. 202 of 1973 (Reference No. 28 of 1973)

Additional Commissioner of Income Tax

APPELLANT

Vs

M.B. Rajeswari

RESPONDENT

Date of Decision : 24-01-1977

Acts Referred:

Income Tax Act, 1961 — Section 23(1), 23(2)

Citation : (1978) ILR (Mad) 423 : (1977) 110 ITR 443

Hon'ble Judges : Sethuraman, J;Ismail, J

Bench : Division Bench

Advocate : J. Jayaraman and Nalini Chidambaram, for the Appellant; M. Uttam Reddi, for the Respondent

Judgement

Ismail, J.—The matter relates to assessment years 1968-69 and 1969-70. The assessee owned properties in Kodaikanal and Bangalore and both were admittedly occupied by the assessee for her own residence. The Income Tax Officer in his computation had not deducted the municipal tax paid by the assessee from the annual value for the purpose of arriving at the income from the property. However, on appeal preferred by the assessee, the Appellate Assistant Commissioner granted her the necessary relief. Against the order of the Appellate Assistant Commissioner, the department took up the matter in appeal and the Tribunal dismissed the appeal holding that the assessee was entitled to the deduction of the municipal tax from the annual value for the computation of the income from the property. It is, thereafter, at the instance of the department, the Income Tax Appellate Tribunal u/s 256(1) of the Income Tax Act, 1961, hereinafter referred to as the Act, has referred the following question for the opinion of this court:

" Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that municipal tax should be deducted u/s 23(1) of the Income Tax Act, 1961, from the income from owner-occupied property for the assessment years 1968-69 and 1969-70?"

2. For the purpose of answering the question referred to above, it is necessary to refer to the history of the relevant statutory provision. The corresponding section dealing with the income from the property in the Indian Income Tax Act, 1922, hereinafter referred to as the 1922 Act, was Section 9. Section 9(2) of that Act, before its amendment by the Indian Income Tax (Amendment) Act, 1952, stood as follows :

(2) For the purposes of this section, the annual value of any property shall be deemed to be the sum for which the property might reasonably be expected to let from year to year :

Provided that where the property is in the occupation of the owner for the purposes of his own residence and the aforesaid sum exceeds ten per cent. of the total income of the owner, the annual value of the property shall be deemed to be ten per cent. of such total income :

Provided further that where the property is in the occupation of a tenant and the taxes levied by any local authority in respect of the property are, under the law authorising such levy, payable wholly by the owner or partly by the owner and partly by the tenant-

(a) one-half of the total amount of such taxes or one eighth of the annual value of the property, whichever is less, shall, notwithstanding anything contained in such law, be deemed to be the tenant's liability for such taxes, and

(b) in determining the annual value of the property with reference to the rent payable by the tenant, a deduction shall be made equal to that part, if any, of the tenant's liability which is borne by the owner. "

From this, it will be seen that the main part of Sub-section (2) dealt with what constituted the annual value of any property and that was irrespective of whether the property was leased out or occupied by the owner. It was the first proviso which dealt with a case where the owner himself was in occupation of the property and it is the second proviso which dealt with a case where the property was occupied by a tenant. It will be further seen that only under the second proviso dealing with the property in the occupation of a tenant that a provision for deduction of a part of the municipal tax was made. The first proviso was amended by the Indian Income Tax (Amendment) Act, 1953, by substituting the following :

" Provided that, where the property is in the occupation of the owner for the purposes of his own residence, the annual value shall be determined in the same manner as if the property had been let to a tenant, so however that, where the sum so determined exceeds ten per cent. of the total income of the owner, the annual value of the property shall be deemed to be ten per cent. of such total income."

3. Thus, it will be seen that by virtue of this amendment, the owner-occupied property was brought on a par with the property leased to a tenant, with

reference to municipal tax. There had been subsequent amendments to Section 9 of the 1922 Act, but this part of the provision has not been affected by those amendments.

4. When the 1922 Act was replaced by the 1961 Act, Section 9 was split up and recast into Sections 22 to 27 and for the purpose of this reference, it is enough if we refer to Sections 22 and 23. Section 22 corresponding to Section 9(1) of the 1922 Act stated :

" The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried, on by him the profits of which are chargeable to Income Tax, shall be chargeable to Income Tax under the head "Income from house property". "

5. Section 23(1), as it stood prior to amendment by the Finance Act, 1968, which came into force on April 1, 1969, was as follows :

"23(1) For the purposes of Section 22, the annual value of any property shall be deemed to be the sum for which the property might reasonably be expected to let from year to year :

Provided that where the property is in the occupation of a tenant and the taxes levied by any local authority in respect of the property are, under the law authorising such levy, payable wholly by the owner, or partly by the owner and partly by the tenant, a deduction shall be made equal to the part, if any, of the tenant's liability borne by the owner.

Explanation.--For the purposes of this sub-section in the case of a property the construction of which was completed before the 1st day of April, 1950, the total amount of such taxes, and in the case of any other property, one half of the total amount of such taxes shall be deemed to be the tenant's liability :

Provided further that in the case of a building comprising one or more residential units the erection of which is begun and completed after the 1st day of April, 1961, the annual value as determined under this sub-section shall, for a period of three years from the date of completion of the building, be reduced by a sum equal to the aggregate of-- (i) in respect of any residential unit whose annual value as so determined, does not exceed six hundred rupees, by the amount of such annual value;

(ii) in respect of any residential unit whose annual value as so determined exceeds six hundred rupees, by an amount of six hundred rupees ; so, however, that the income in respect of any residential unit is in no case a loss."

6. The first proviso and the Explanation to the said sub-section were replaced by a new proviso with effect from April i, 1969, by the Finance Act of 1968, as follows:

" Provided that where the property is in the occupation of a tenant, the taxes

levied by any local authority in respect of the property shall, to the extent such taxes are borne by the owner, be deducted in determining the annual value of the property."

7. Sub-section (2) of this section is as follows :

" Where the property is in the occupation of the owner for the purposes of his own residence, the annual value shall first be determined as in Sub-section (1) and further be reduced by one-half of the amount so determined or one thousand eight hundred rupees, whichever is less :

Provided that where the sum so arrived at exceeds ten per cent. of the total income of the owner (the total income for this purpose being computed without including therein any income from such property and, before making any deduction under Chapter VI-A or Section 280-0), the excess shall be disregarded.

Explanation.--Where any such residential unit as is referred to in the second proviso to Sub-section (1) is in the occupation of the owner for the purposes of his own residence, nothing contained in that proviso shall apply in computing the annual value of that residential unit."

8. As far as Sub-section (1) is concerned, the provision, before the amendment with effect from April 1, 1969, contemplated the owner bearing the tenant's share of the liability in payment of taxes and getting deduction in respect of that share, where the property is in the occupation of a tenant. After the amendment, though the proviso refers to the property being in the occupation of a tenant, it provides for deduction of the taxes actually paid by the owner, from the annual value.

9. As far as the present reference is concerned, the controversy centers round the following expression occurring in Sub-section (2), namely, " Where the property is in the occupation of the owner for the purposes of his own residence, the annual value shall first be determined as in Sub-section (1)." The case of the revenue is that the expression "the annual value shall first be determined as in Sub-section (1) " occurring in Section 23(2) will refer only to the main part of Section 23(1) and that it will not take in the proviso and that, if it is so construed, there is no scope for deducting the municipal tax from the annual value in the case of properties occupied by the owner. As against this, the view taken by the Appellate Assistant Commissioner, as confirmed by the Income Tax Appellate Tribunal, is that the expression "the annual value shall first be determined as in Sub-section (1)" will take in not only the main part of Section 23(1), but also the proviso occurring in the sub-section dealing with the deductibility of the municipal tax paid by the owner. The question for consideration is which of the two views is correct.

10. Our attention was drawn to two decisions, namely, one of the Calcutta High Court in Liquidator, Mahmudabad Properties Ltd. Vs. Commissioner of Income Tax, and the other of the Gujarat High Court in Commissioner of Income Tax,

Gujarat III Vs. Arvind Narottam Lalbhai Dalpatbhai Vada, . The decision of the Calcutta High Court ^ cannot be said to be directly in point, though the decision of the Gujarat High Court is directly in point. In the decision of the Calcutta High Court, the following observations occur--See Liquidator, Mahmudabad Properties Ltd. Vs. Commissioner of Income Tax, :

" We shall dispose of the question of municipal taxes as deductions at this stage. The relevant provision which governs this question of municipal tax deduction is the proviso to Section 23 of the Income Tax Act, 1961, whose crucial expression is "provided that where the property is in the occupation of a tenant". It is only then, when such property is in the occupation of a tenant, that the municipal taxes can qualify for deduction in determining the annual value of the property. The basic fact is wanting in the present reference. This property, 3, Gun Foundry Road, was not in the occupation of a tenant within the meaning of those words in the proviso to Section 23 of the Income Tax Act, 1961. We have already discussed the finding on record that the property was not let at the relevant time. That finding binds us. Besides, the facts show, as we have indicated, that the property was requisitioned by the Government and was derequisitioned before the assessment in question and in any event in the case of such a requisition, under the West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947, the Government by requisition does not become a tenant and it is not a letting. We would also like to emphasise that both vacancy remission and deduction of municipal taxes cannot be claimed at the same time by reason of the language in the proviso to Section 23 of the Income Tax Act, 1961, as quoted above. That is one of the basic contradictions in the case made by Mr. Mitter, learned counsel for the assessee. The second fundamental contradiction in the assessee's case on this point has been that in one breath the assessee claims vacancy remission and in the other breath claims that there is no annual value for this property. The quantum of vacancy remission will ipso facto or ex hypothesi mean the proportionate amount of rent which would normally, though not conclusively, be the annual value. Therefore, we hold that municipal taxes cannot be deducted in the facts and circumstances of this reference."

11. We are of the opinion that the above observations are not of any assistance for deciding the present reference, because the Calcutta High Court in that judgment did not deal with Section 23(2) at all. That is the reason why the Gujarat High Court in Commissioner of Income Tax, Gujarat III Vs. Arvind Narottam Lalbhai Dalpatbhai Vada, , referred to already, had this to say on the above observations of the Calcutta High Court:

" The problem before the Calcutta High Court was not in respect of property occupied by the assessee for his own residence but it was pointed out that under Sections 22 and 23 what is charged is the annual value of the property. That annual value is deemed to be the sum for which the property might reasonably be expected to let from year to year. These are deeming provisions and are

based on the idea of hypothetical tenancy. These provisions also show that the property has to be considered as it is at the time of the determination of its annual value. The impact of Section 23(2) which provides for self-occupied property for purpose of residence was not considered by the Calcutta High Court and we will have to apply the well-known canons of construction to the provisions of Sub-section (2) of Section 23 in order to decide the question before us."

12. Before we proceed further, we shall refer to only a further amendment that was made to Section 23(2) by the Taxation Laws (Amendment) Act, 1970, with effect from April 1, 1971. Among others, for the expression, " the annual value shall first be determined as in Sub-section (1)" occurring in Section 23(2), the expression " the annual value.....shall first be determined in the same manner as if the property had been let " was introduced. It is after taking note of this amendment also that the Gujarat High Court in the decision referred to above traced the history of the relevant statutory provisions as follows (pages 383, 384) :

" Under the Indian Income Tax Act, 1922 (hereinafter referred to as " the 1922 Act "), in the Act as originally enacted, there was no provision whatsoever till 1939 regarding deduction of municipal taxes and even after the 1939 amendments there was no provision for deduction of municipal taxes. By the amendments which came into effect from assessment year 1950-51, it was provided that if a tenant was liable to pay the taxes but the owner paid the taxes, deduction was to be granted and the fiction was that the tenant's liability was to be one-half and there was no deduction for self-occupied properties. By an amendment in 1953, the self-occupied properties also became entitled to deduction for municipal taxes but a fiction was created in the statute by using the words "as if the property was let" and thus one-half of the taxes was to be deducted in respect of self-occupied properties also as in the case of tenant-occupied properties. Thereafter, in 1955, the restriction which was in force till then, namely, that deduction was not to exceed one-eighth of the annual letting value was removed. By the amendment of 1960 in respect of properties constructed prior to April 1, 1950, full deduction of municipal taxes was to be granted and in respect of properties constructed after April 1, 1950, one-half of the municipal taxes were to be deducted. Under the 1961 Act the provision in respect of tenant-occupied property is as set out in Sub-section (1) of Section 23 and in respect of self-occupied property, under Sub-section (2) of Section 23, the annual value was to be determined as in Sub-section (1) and further be reduced by one-half of the amount so determined or one thousand eight hundred rupees, whichever is less. Thereafter, with effect from April 1, 1969, an amendment was effected and by this amendment, the first proviso to Section 23(1) was recast and full deduction was granted for the tenant-occupied property and under the new proviso where the property is in the occupation of a tenant and the taxes levied by any local authority in respect of the property was to the extent such taxes are borne by the owner, to be deducted in determining the annual value of

the property. Thereafter, a further amendment was carried out which was to take effect with assessment year 1971-72, the Sub-section (2) of Section 23 has been amended and the words "as if let" have been substituted for the words "as in Sub-section (1)" so that the position so far as terminology is concerned is the same as prevailed since 1953 under the Act of 1922."

13. Now, it requires to be considered whether the expression, "the annual value shall first be determined as in Sub-section (1)" occurring in subsection (2) of Section 23 takes in only the main part of Sub-section (1) of Section 23 or it takes in the proviso also. We are of the opinion that the structure and the contents of Sub-section (1) and Sub-section (2) of Section 23 lead to the inference that they cannot be considered in compartments and have to be considered together. In the first place, the main part of Sub-section (1) of Section 23 dealing with the annual value is applicable to properties in general, whether they are let out or occupied by owners. However, the first proviso to Sub-section (1) of Section 23 expressly refers to the property being in the occupation of a tenant. But the second proviso to subsection (1) uses the expression, " the annual value as determined under this sub-section ". Admittedly, this expression will take in not only the main part of Sub-section (1) of Section 23, but also the first proviso to Section 23(1). The same expression occurs in Section 23(2) also, namely, " the annual value shall first be determined as in Sub-section (1) ". Consequently, the expression "the annual value shall first be determined as in Subsection (1) " occurring in Sub-section (2) of Section 23 will necessarily take in the first proviso to Section 23(1), thereby providing for deduction of the municipal taxes paid by the owner.

14. Secondly, even though the first proviso to Section 23(1) expressly refers to the property being in the occupation of a tenant, the second proviso dealing with a building comprising of one or more residential units does not contemplate the said residential units being in the occupation of the tenants only- Having regard to the language of the second proviso, out of more than, one residential unit comprised in a building, one may be in the occupation of the owner and the other may be in the occupation a tenant. With reference to the unit in the occupation of the owner special provision has been made in the Explanation to Sub-section (2). If Sub-section (2) of Section 23 does not take in the second proviso to Sub-section (?) of Section 23, there is no need to provide for an. Explanation in Sub-section (2) of Section 23. In the context of the second proysso to Sub-section (1) of Section 23 not expressly contemplating the residential units falling within the said proviso being in the occupation of a tenant, the said proviso has necessarily to be read in the light of the Explanation to Sub-section (2) of Section 23.

15. Thirdly, Sub-section (2) of Section 23 states :

"Where the property is in the occupation of the owner fpr the purposes of his own residence, the annual value shall first be determined as in Sub-section (1) and further be reduced by one-half of the amount so determined or one

thousand eight hundred rupees, whichever is less."

16. The expression "further be reduced" necessarily contemplates an earlier reduction and that earlier reduction can only be deduction in the form of municipal taxes paid by the owner as contemplated by the first proviso to Section 23(1).

17. Thus, the above three circumstances clearly and indisputably lead to the conclusion that the expression "the annual value shall first be determined as in Sub-section (1)" occurring in Sub-section (2) of Section 23 will take in not only the main part of Sub-section (1) of Section 23, but also the proviso to that sub-section.

18. We may also point out in this behalf that but for the additional reduction provided for in Sub-section (2) of Section 23, the acceptance of the contention of the revenue will place a person occupying his own property in a less advantageous position than a person who has let the property and is deriving an income therefrom. Having regard to the above features, we are clearly of the opinion that the municipal tax paid by the owner in respect of the property occupied by him has to be deducted from the annual value for arriving at the taxable income from house property.

19. We may point out in this context that the Gujarat High Court in Commissioner of Income Tax, Gujarat III Vs. Arvind Narottam Lalbhai Dalpatbhai Vada, , to which we have drawn attention, has come to the same conclusion. Though the conclusion is the same, with respect, we may point out that we do not agree with the entire reasoning of the Gujarat High Court in this behalf. The Gujarat High Court pointed out in that decision (page 386):

"But the proviso and the Explanation only applied in the case of property in the occupation of a tenant and under the proviso to Sub-section (1) the requirements for the application of that proviso were : (1) that the property should be in the occupation of a tenant; (2) the taxes levied by the local authority in respect of the property should be under the law authorising such levy payable wholly by the owner or partly by the owner and partly by the tenant; and (3) the deduction was to be made equal to the part, if any, of the tenant's liability borne by the owner and by the legal fiction created by the Explanation, the whole or half of the municipal taxes were deemed to be the tenant's liability. It is obvious that, on the face of it, if a mere prima facie view were to be taken, the condition about deduction of the municipal taxes laid down in the proviso to Sub-section (1), namely, that the property should be in the occupation of a tenant, would not apply to property in the occupation of the owner for the purpose of his own residence and there is a great deal of substance in the submission made by Mr. Kaji that the words "shall first be determined" as in Sub-section (1) refer to the main body of Sub-section (1) and not to the proviso because it would be a contradiction in terms to say that the property which is in the occupation of the owner himself for the purpose of his

own residence, shall be treated as if it were in the occupation of a tenant without there being a legal fiction. If the words are " as determined in subsection (1) ", then the main body of Sub-section (1) will only apply, namely, that the annual value should be considered to be the same for which the property could reasonably be let from year to year."

20. Notwithstanding the above observations, the Gujarat High Court rested its conclusion in favour of the deductibility of the municipal taxes solely on the presence of the words "and further be reduced" occurring in subsection (2) of Section 23. The Gujarat High Court further observed (page 387):

" However, we must also take notice of the words, "and further be reduced". The words "further be reduced" indicate that some reduction from the annual letting value has already been carried out before further reduction contemplated by Sub-section (2) of Section 23 can be considered and that further (a mistake for "earlier" or "former") reduction can only be of the municipal taxes as contemplated by the proviso to Subsection (1) read with the Explanation to that proviso. There is no other meaning that can possibly be attached to the words " further be reduced ". If these words had not been there in Sub-section (2), we would have had no hesitation in accepting the contention urged on behalf of the revenue by Mr. Kaji. However, Sub-section (2) of Section 23 must be read as a whole and in the light of the words " further be reduced ". It must be held that some reduction, namely, the deduction of the municipal taxes, half or full, as the case might be, has to be first carried out and, thereafter, the reduction contemplated by Sub-section (2), namely, one-half of the amount so determined or one thousand eight hundred rupees, whichever is less, has to be carried out. It is, therefore, clear that by the use of the words " further be reduced ", the legislature has clearly indicated that the deduction of municipal taxes contemplated by the proviso and the Explanation to Sub-section (1) as they existed prior to April 1, 1969, has to be made and, thereafter, the amount so determined has to be further reduced as contemplated by Sub-section (2) of Section 23, so far as self-occupied properties are concerned."

21. With respect, though we agree with the conclusion of the Gujarat High Court, we are unable to share its reasoning. In the first place, we are of the opinion that it is too slender and fragile a ground to rest such a conclusion merely on the presence of the words " and further be reduced " without there being a specific provision for an earlier reduction. Simply because the words " and further be reduced " occur in Sub-section (2) of section 23, it cannot be held that these words themselves imply an earlier reduction. If the other considerations to which we have drawn attention are not present it may be said that the legislature while using these words proceeded on an erroneous assumption which will not justify the court holding that the assumption was really warranted by the language of the statute. However, the words "and further be reduced" are merely confirmatory of our conclusion on the use of the expression " the annual value shall first be determined as in Sub-section (1) ". The Gujarat High Court in the

extract given above has taken the view that the said expression will take in only the main body of Sub-section (1) of Section 23 and will not take in the proviso to Sub-section (1) of Section 23. For the reasons we have indicated already, it is not possible to dissociate the said proviso from the main body of Sub-section (1) of Section 23, when we construe the language, namely, " the annual value shall first be determined as in Sub-section (1) " occurring in Sub-section (2) of Section 23. It may be pointed out that there is nothing illogical in determining the income from house property occupied by the owner himself, "as if it was let out to a tenant ", because the very basic concept of the annual value is itself notional as being the sum for which the property might reasonably be expected to let from year to year.

22. Under these circumstances, for the reasons given above, we hold that the conclusion of the Appellate Assistant Commissioner, as confirmed by the Income Tax Appellate Tribunal, is correct in law and, therefore, we answer the question referred to this court in the affirmative and against the revenue. The assessee is entitled to her costs. Counsel's fee Rs. 500 (Rs. Five hundred only).