
(2011) 01 AP CK 0071
In the Andhra Pradesh High Court
Case No : Appeal No: 186 of 2007

Vivek Jain

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 25-01-2011

Acts Referred:

Income Tax Act, 1961 — Section 143(2), 22, 23, 23(1), 23(2)

Citation : (2011) 337 ITR 74

Hon'ble Judges : V.V.S. Rao, J; Ramesh Ranganathan, J

Bench : Division Bench

Advocate : B. Chandrasen Reddy, for the Appellant; J.V. Prasad, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, J.—This appeal, u/s 260-A of the Income Tax Act, 1961 (hereinafter called "the Act"), has been preferred against the order of the Income Tax Appellate Tribunal, Hyderabad in ITA No. 156/Hyd/06 dated 31.10.2006. The Tribunal had rejected the Appellant's contention that the annual let out value of the property at Flat No. 101, Marigold Apartments, Dwarakapuri Colony, Hyderabad for the assessment year 2002-03 was nil, and estimation of the actual rental value at Rs. 1,44,000/- was not justified.

2. The Appellant, a practicing advocate, filed his return of income for the assessment year 2002-03 on 6.8.2002 declaring a total income of Rs. 3,01,610/-. His case was taken up for scrutiny u/s 143(2) of the Act. A notice dated 11.3.2005 was issued calling upon him to show cause why the annual value, in respect of the flat, should not be included in the computation of his income from house property. The Appellant, vide letter dated 23.3.2005, contended that, as per Section 23(1)(c) of the Act, the annual value of the flat was nil and, hence, he was not liable to tax.

3. The assessing authority, in his order of assessment dated 28.3.2005, held that

Section 23(1)(c) would apply only when the property was let out; what could be seen from the computation of income was that this property was not let out during the accounting year; the question of allowing any deduction on account of vacancy would, therefore, not arise; in the earlier year also, i.e. the accounting year relevant to assessment year 2001-02, the property was let out only for a period of 15 days; and hence the annual value must be taken in terms of Section 23(1)(a) of the Act. The annual value was thus estimated at Rs. 1,44,000/-.

4. Aggrieved thereby the Appellant carried the matter in appeal to the CIT (Appeals) - I, Hyderabad who, in his order dated 5.12.2005, held that the annual let out value of the property could not be taken as nil; and the order of the assessing officer computing the annual let out value (ALV), on the basis of rent received in the earlier years which was not disputed by the Appellant, must be upheld. The Appellant carried the matter in further appeal to the Income Tax Appellate Tribunal, Hyderabad (hereinafter called the "ITAT"). The ITAT held that Section 23 visualizes the following possibilities in respect of a property owned by the Assessee:

- (a) the property may be occupied by the Assessee himself;
- (b) the property cannot be occupied by the owner on account of his employment, business or profession at some other place. He has to reside at that place in a property not belonging to him; and his own property is lying vacant.
- (c) the property referred to in (b) above is let out or the Assessee is deriving some benefit from it;
- (d) an Assessee may be having more than one property, say two properties. The Assessee may reside in one of them, and the other property is let out either for the whole year or for a part of the year;
- (e) in case of the second property referred to in (d) above, it may not have been let out at all, and is lying totally vacant.

5. The ITAT observed that it is only in cases covered by (a) and (b) that the ALV is to be taken as nil; even in these two cases, as provided in Section 23(4), nil value could be taken only in respect of one property if the properties in those two cases was more than one; in the rest of the cases i.e., those mentioned in (c) to (e), and the additional properties in (a) and (b), the value had to be determined either notionally or actually as the case may be, and the higher of the two should prevail; it was necessary at the first instance to determine the notional value in respect of any property whether let out or not let out; if the property was not let out then the notional value should be the income from the property; this is what Section 23(1)(a) provides for; however, if the property is let out, and the actual rent received or receivable is higher than the notional value, then such actual rent should be the income from the property as provided in Section 23(1)(b); at times it may so happen that, despite the property being let out, it remains vacant and, on account of such vacancy, the actual rent received or receivable

may be lesser than the notional value; in such a case the actual rent should only be taken as the income from property; and the legislature had taken care to see that the Assessee was not unduly taxed on that part of the income where, despite such letting out, the property remained vacant either for the whole or a part of the year, and the actual rent fell below the notional value. This benefit, provided in Section 23(1)(c) of the Act, was to be extended only where the property was let out, and the actual income had fallen from what it would have been had the property not remained vacant; the benefit could not be extended to a case where the property was not let out at all; if it was not let out, then the notional value would be the income from the property; if the Assessee's argument was accepted then, in addition to the two cases where the ALV could be taken to be nil, there could also be a third eventuality to take the ALV at nil which was not envisaged by any of the provisions of the Statute; and it would also render Section 23(1)(a) otiose, and the scope of Section 23(2) would get unduly extended. The ITAT concluded that, in cases where the property had not been let out at all during the year under consideration, there was no question of any vacancy allowance as provided in Section 23(1)(c), and hence the order of the CIT (Appeals), determining the ALV of the property at Rs. 1,44,000/-, was being upheld. Aggrieved thereby the present appeal u/s 260-A of the Act.

6. Income tax, under the head "Income from house property", is chargeable u/s 22 of the Income Tax Act, 1961 on the annual value of the property, consisting of any building or land appurtenant thereto, of which the Assessee is the owner. However such portion of the property, as the Assessee may occupy for the purpose of his business or profession the profits of which are chargeable to income tax, is not to be charged to income under the head "income from house property". As income from house property is charged to tax on the annual value of the property, consisting of a building or the land appurtenant thereto, Section 23 provides for the manner in which the annual value of the property is to be determined for the purpose of Section 22 of the Act. Section 23(1) creates a legal fiction in that, for the purpose of Section 22, the annual value of the property is to be deemed to be the sum mentioned in any one of Clauses (a) to (c) thereof.

7. Section 23(1) deals with three distinct situations enumerated in Clauses (a) to (c) thereunder. Under Clause (a) the annual value of the property is deemed to be the sum for which the property may reasonably be expected to let from year to year. Under Clause (b) where the property, or any part thereof, 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 shall be the actual value of the property. While the situation to which Clause (a) relates is where the property has not been let out, (for it is in such an event alone would the question of the sum for which the property might reasonably be expected to be let from year to year arise), the situation to which Clause (b) relates is when the property, or any part thereof, has been let out. Clause (b) does not relate to a situation where the rent actually received, or receivable, is less than the sum

for which the property may reasonably be let from year to year. While the pre-amended Section 23 did not provide for such an eventuality, Section 23 was amended by Finance Act, 2001 with effect from 01.04.2002, and Clause (c) was inserted to Section 23(1) to deal with such a situation. Section 23 of the Income Tax Act, which fell for consideration in Liquidator of Mahamudabad Properties P. Ltd. Vs. Commissioner of Income Tax, West Bengal-II, was as it stood prior to its amendment by Finance Act, 2001 with effect from 01.04.2002. The assessment year, in the present case, is 2002-2003 and it is the amended Section 23 which is applicable, and not the pre-amended provision. Under the amended Section 23(1) (c) where the property, or any part thereof, 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. The notes on clauses relating to the amendment to Section 23(1) reads thus:

Clause 14 seeks to substitute a new section for Section 23 of the Income Tax Act relating to determination of annual value of house property.

The existing provision of the said Section provides for the determination of annual value of a property in certain circumstances including where the property is let, or is self-occupied, or is vacant, or is partially let, or is let for part of the year. The annual value so determined is subject to the deductions allowable u/s 24, including deductions on account of vacancy for any part of the year in respect of the property let, and on account of rent which cannot be realized.

It is proposed to substitute the said section so as to provide for determination of annual value in certain circumstances specified in the proposed new section after allowing deductions in computing the annual value on account of vacancy and unrealized rent.

This amendment will take effect from 1st April, 2002 and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years.

8. The effect of substitution of Section 23 has been elaborately dealt with in Departmental Circular No. 14 of 2001, the relevant portion of which reads as under:

29.2. The substituted Section 23 retains the existing concept of annual value as being the sum for which the property might reasonably be expected to let from year to year i.e., annual letting value (ALV). However, in case of let out property, the concept of "annual rent" has been removed. The new section provides that where the property or any part of the property is let and the actual rent received or receivable is in excess of the ALV, the amount so received or receivable shall be the annual value. This will be the case even if the property (or part of the property) was vacant for a part of the year, but the actual rent received, or receivable during the year is higher than the ALV. 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 is less than the ALV, the sum so received or receivable shall be the annual value. In case the actual rent received or receivable during the year is less than the ALV, but not because of vacancy, it is the ALV which shall be taken to be the annual value.

(emphasis supplied)

9. The effect of the amendment has been succinctly explained in Sampath Iyengar's Law of Income Tax (10th edition) as under:

.... The new section provides that the higher of the amount as between what is actually received or receivable and the annual value in relation to what the property might reasonably fetch if let from year to year would be adopted as annual value for purposes of determination of property income. In the result, even where the property is vacant for part of the year, if the rent received for the remaining part is higher than the annual value, it is such annual value which will be adopted because for the component of actual rent what is receivable or received during the year whichever is higher will have to be adopted, though it is not so expressly spelt out. But if the actual rent received or receivable is less than the annual letting value, but not because of vacancy, the actual receipt will be the annual value. This impact is more implied than express. But in view of the Board's Circular No. 14 of 2001, this is a matter which is required to be borne in mind, since such an interpretation would dispense with the need for separate deduction for vacancy allowance, though the interpretation as now placed may not take into consideration, where the property is vacant for the major period during the year "

(emphasis supplied)

10. While interpreting a statute, the Court may not only take into consideration the purpose for which it had been enacted, but also the mischief it seeks to suppress. *Sneh Enterprises Vs. Commr. of Customs, New Delhi*, It is evident that Clause (c) has been inserted as a protection to the Assessee in cases where, on account of vacancy, the rent received or receivable on a property which has been let out is less than the sum referred to in Clause (a). Prior to its amendment, even in such cases it was the sum referred to in Clause (a) which was to be taken as the annual value of the property.

11. In order to attract Section 23(1)(c), the following requirements must be fulfilled (i) the property, or any 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 should be less than the sum referred to in Clause (a). It is only if these three 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. Clause (c) 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. Under the explanation to Section 23(1), for the purposes of Clause (b) or (c), the amount actually received or receivable by the owner shall not include the amount of rent which the owner cannot realize. Self-occupation by the owner of a house would require the annual value of such house, or part of the house, to be taken as nil u/s 23(2)(a) and, where the house cannot actually be occupied by the owner on account of his employment, business or profession, as nil u/s 23(2)(b) provided that, in terms of Section 23(3)(a), the house or part of the house had not actually been let during the whole or any part of the previous year. As a legal fiction is created the word "actually", as used in Section 23(3)(c), does not find mention in Section 23(1) of the Act.

12. The construction placed on Section 23(1)(e), by Sri B. Chandrasen Reddy, Learned Counsel for the Petitioner, that if there is an intention to let out the property during the relevant year, coupled with efforts being made for letting it out, it must be held the property is let, would necessitate reading words into Section 23(1)(c) which do not exist. The words "where the property is let" cannot be read as "where the property is intended to be let". Provisions of a tax statute must be strictly construed. The words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning. *Gurudev datta VKSSS Maryadit and Others Vs. State of Maharashtra and Others*, The legislature may be safely presumed to have intended what the words plainly say. *Bhaiji Vs. Sub Divisional Officer, Thandla and Others*,

13. The intention of the Legislation must be found in the words used by the Legislature itself. The question is not what may be supposed and has been intended but what has been said. AIR 2003 SC 2103 The Court must look squarely at the words of the Statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed. It cannot imply anything which is not expressed; it cannot import provisions in the Statute so as to supply any assumed deficiency. The object of this rule is to prevent a taxing statute being construed "according to its intent, though not according to its words". It has even been said that "if the provision is so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect". (*Gursahai Saigal v. CIT* 1963 48 ITR 1 (SC) ; *Cape Branday Syndicate v. Inland Revenue Commissioners* 1921 KB 64 ; *In re: Bethlehem Hospital* 1875 19 Eq 457; *A.V. Fernandez Vs. The State of Kerala*, ; *Inland Revenue Commissioners v. Bladnoch Distillery Co. Ltd* 1948 All ER 616 ; *Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd.*, ; *Commissioner of Income Tax, Madras Vs. V. Mr. P. Firm, Muar*, ; *Controller of Estate Duty v. Kantilal Trikamlal* AIR 1976 SC 1935 ; *Aphali Pharmaceuticals Ltd. Vs. State of Maharashtra and Others*, ; *Baidyanath Ayurved Bhawan (Pvt) Ltd., Jhansi Vs. The Excise Commissioner, U. P. and Others*, The question as to what is covered must be found out from the language according to its natural meaning fairly and squarely read. (*IRC v. Duke of Westminster* 1963 AC 1 , 24, *M/s. Saraswati Sugar Mills Vs. Haryana State Board and others*, The meaning and intention of a statute must be collected from

the plain and unambiguous expression used therein rather than from any notions which may be entertained by the Court as to what is just or expedient. The expressed intention must guide the Court. *Commissioner of Income Tax, Patiala and Others Vs. Shahzada Nand and Sons and Others*, Legislature does not waste its words. Ordinary, a grammatical meaning is to be assigned to the words used while interpreting a provision to honour the rule. The legislature chooses appropriate words to express what it intends and, therefore, must be attributed with such intention as is conveyed by the words employed so long as this does not result in absurdity or anomaly or unless material -- intrinsic or external -- is available to permit a departure from the rule. *Harbhajan Singh Vs. Press Council of India and Others*, Courts have adhered to the principle that effort should be made to give meaning to each and every word used by the legislature, and it is not a sound principle of construction to brush aside words in a statute, as being inapposite surplusage, if they can have a proper application in circumstances conceivable within the contemplation of the statute. *Manohar Lal Vs. Vinesh Anand and Others*, When the legislative intent is found specific mention and expression in the provisions of the Act itself, the same cannot be whittled down or curtailed and rendered nugatory. *Manohar Lal Vs. Vinesh Anand and Others*, . Effect should be given to all the provisions and a construction that reduces one of the provisions to a "dead letter" must be avoided. *Anwar Hasan Khan Vs. Mohammad Shafi and Others*, Courts should not, ordinarily, add words to a statute or read words into it which are not there, especially when a literal reading thereof produces an intelligible result. *Delhi Fin. Corpn. and Another Vs. Rajiv Anand and Others*, . A construction which requires, for its support addition or substitution of words, or which results in rejection of words, has to be avoided. *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. Vs. Custodian of Vested Forests, Palghat and another*, , *Smt. Shyam Kishori Devi Vs. Patna Municipal Corporation and Another*, , *A.R. Antulay Vs. Ramdas Srinivas Nayak and Another*, , *Dental Council of India and Another Vs. Hari Parkash and Others*, , *J.P. Bansal Vs. State of Rajasthan and Another*, and *State of Jharkhand v. Govind Singh* There is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. Courts expound the law, they do not legislate. *State of Kerala Vs. Mathai Verghese and Others*, , *Union of India v. Deoki Nandan Aggarwal* AIR 1992 SC 96). A Judge is not entitled to add something more than what is there in the Statute by way of a supposed intention of the legislature. *Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc.*, . The legislative casus omissus cannot be supplied by judicial interpretative process. *Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others*, , *State of Jharkhand v. Govind Singh*

14. The contention that, as Clause (c) provides for an eventuality where a property can be vacant during the whole of the relevant previous year, both situations i.e., "property is let" and "property is vacant for the whole of the relevant previous year" cannot co-exist does not merit acceptance. Clause (c) encompasses cases where a property is let out for more than a year in which

event alone would the question of if being vacant during the whole of the previous year arise. A property let out for two or more years can also be vacant for the whole of a previous year bringing it within the ambit of Clause (c) of Section 23(1) of the Act.

15. The contention that, if the owner had let out the property even for a day, it would acquire the status of let out property" for the purpose of Clause (c) for the entire life of the property even without any intention to let it out in the relevant year is also not tenable. The circumstances in which the ALV of a house property should be taken as NIL is as specified in Section 23(2) of the Act. u/s 23(1)(c) the period for which a let out property may remain vacant cannot exceed the period for which the property has been let out. If the property has been let out for a part of the previous year, it can be vacant only for the part of the previous year for which the property was let out and not beyond. For that part of the previous year during which the property was not let out, but was vacant, Clause (c) would not apply and it is only Clause (a) which would be applicable, subject of course to Sub-sections (2) and (3) of Section 23 of the Act. Such a construction does not lead to any hardship, inconvenience, injustice, absurdity or anomaly and, therefore, the rule of ordinary and natural meaning being followed cannot be departed from. (Sneh Enterprises²). We are in agreement with the interpretation of Section 23(1)(c) by the Tribunal, and are of the opinion that the benefit thereunder cannot be extended to a case where the property was not let out at all.

16. We find no merit in the submission that the words "property is let" are used in Clause (c) to take out those properties which are held by the owner for self-occupation from the ambit of the said clause. As noted hereinabove, Section 23(2)(a) takes out a self-occupied residential house, or a part thereof, from the ambit of Section 23(1) of the Act. Likewise, u/s 23(2)(b), where a house cannot actually be occupied by the owner, on account of his carrying on employment, business or profession at any other place requiring him to reside at such other place in a building not belonging to him, the annual value of the property is also required to be treated as nil, thereby taking it out of the ambit of Section 23(1) of the Act. Section 23(3)(a) makes it clear that Section 23(2) would not apply if the house, or a part thereof, is actually let during the whole or any part of the previous year. Thus only such of the properties which are occupied by the owner for his residence, or which are kept vacant on account of the circumstances mentioned in Clause (b) of Section 23(2), fall outside the ambit of Section 23(1) provided they are, as stipulated in Section 23(3)(a), not actually let during the whole or part of the previous year. Clause (c) was not inserted to take out from its ambit properties held by the owner for self-occupation in as much as Section 23(2)(a) provides for such an eventuality. It is only to mitigate the hardship faced by an Assessee, and as Clause (b) does not deal with the contingency where the property is let and, because of vacancy, the actual rent received or receivable by the owner is less than the sum referred to in Clause (a), was Clause (c) inserted. In cases where the property has not been let out at all,

during the previous year under consideration, there is no question of any vacancy allowance being provided thereto u/s 23(1)(c) of the Act.

17. The order of the Tribunal, in I.T.A. No. 156 dated 31.10.2006, is upheld and ITTA No. 186 of 2007 is, accordingly, dismissed.