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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 03.11.2017

\+ **ITA 931/2017**

ANSAL HOUSING & CONSTRUCTION LIMITED .... Appellant

versus

ASSISTANT COMMISSIONER OF INCOME TAX .... Respondent

\+ **ITA 934/2017**

ANSAL HOUSING & CONSTRUCTION LIMITED .... Appellant

versus

DEPUTY COMMISSIONER OF INCOME TAX ... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Ajay Vohra, Senior Advocate with Mr Gaurv Jain, Advocate.

For the Respondent : Mr Ashok Manchanda and Mr Raghvendra Singh, Advocates.

CORAM:-
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

S. RAVINDRA BHAT, J. (OPEN COURT)

C.M. 39547/2017 (exemption) in ITA 931/2017
C.M. 39549/2017 (exemption) in ITA 934/2017

Allowed, subject to all just exceptions.

ITA 931/2017 & ITA 934/2017

1. The present appeals by the assessee, under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as *'the Act'*), arise out of the common order dated 28.03.2017 passed by the Income Tax Appellate Tribunal (ITAT) with respect to the Assessment Years (AYs) 2005-06 and 2006-07.

2. The assessee is aggrieved by findings of the ITAT, which accepted the revenue's appeal and held that unsold inventory of built-up residential houses/flats were subject to the provisions of Section 22 read with Section 23 of the Act and accordingly the notional annual letting value was taxable in the hands of the Assessee under the heads *"Income from House Property"*

3. The assessee's contention that since the flats/spaces occupied by it, were for the purposes of its business (the profits of which were chargeable to the Income Tax under profits and gains of business and profession), no notional annual letting value could be assessed/charged to tax under Section 23 of the Act, was rejected by the ITAT, relying on the decision of this Court dated 31.10.2012 in the assessee's own case ITA No. 18/1999 titled *CIT Delhi versus M/s Ansal Housing Fin. Leasing Limited* and other connected appeals. The ITAT noticed that the Assessee's claim that its property was stock- in-trade under the head "*Income from Business"*, had been decided against it.

4. The ITAT also noticed that the Division Bench by judgment 26.07.2016 in the assessee's case for AY 1994-95 reported at 389 ITR

373 had rejected the reliance placed by the assessee on the decision of the Supreme Court in the case of *Chennai Properties & Investments Limited versus CIT*, (2015) 373 ITR 673 SC on the ground that the main object of the Assessee was not letting out properties, (as was the case in respect of Assessee in *Chennai Properties* (supra) – where the main object of the Assessee was holding the properties and earning income by letting out properties) but some other commercial activity. Factually, the ITAT noticed that the assessee was held commercial and residential flats and spaces for being sold to prospective buyers as its stock- in-trade for business purposes and were in self-possession till their sale.

5. The assessee's counsel argued that in view of the amendment to Section 23 of the Act with effect from 1st April 2002 in the assessee's case, the annual letting value of the properties held as stock in trade was to be considered as "Nil". Counsel for the assessee argues that Section 23(1)(c) of the Act, inserted after the amendment, applies in its case and where the property was vacant for the whole of the previous year the annual letting value shall be taken to be nil. Section 23(1)(c) of the Act is reproduced below:

> "*Section 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.*"

6. The assessee relied on a decision of the Mumbai bench of the ITAT in *Premsudha Exports (P.) Ltd. v. Additional Commissioner of Income Tax*, 110 ITD 158 (Mum) to argue that since the flats held as stock in trade were vacant during the whole of the previous year, the annual letting value of the property would be taken as nil. The relevant portion of the ITAT's decision is reproduced below:

> "*16. From the above, we find that here, the Legislatures in their wisdom have used the words 'house is actually let'. This shows us that the words 'property is let' cannot mean actual letting out of the property because had it been so, there was no need to use the word 'actually' in sub-section (3) of the same section 23. Regarding the scope of referring to actual let out in preceding period, we find no force in the contention of the DR, as the Legislature has used the present tense. Even if we interpret it so, it may lead to undesirable result because in some cases, if the owner has let out a property for one month or for even one day, that property will acquire the status of let out property for the purpose of this clause for the entire life of the property even without any intention to let it out in the relevant year. Not only that, even if the property was let out at any point of time even by any previous owner, it can be claimed that the property is let out property because the clause talks about the property and not about the present owner and since the property was let out in past, it is a let out property although, the present owner never intended to let out the same. In our considered opinion, it is not at all relevant as to whether the property was let out in past or not. According to us, these words do not talk of actual let out also but talk about the intention to let out. If the property is held by the owner for letting out and efforts were made to let it out, that property is covered by this clause and this requirement has to be satisfied in each year that the property was being held to let out but remained vacant for whole or part of the year. We feel that the*

words 'property is let' are used in this clause to take out those properties from the ambit of the clause in which property are held by the owner for self-occupation i.e., self-occupied property (i.e. SOP) because even income on account of SOP, excluding one such SOP of which annual value is to be adopted at nil, is also to be computed under this head as per clause (a) of section 23(1) if we see the combined reading of sub-sections (2) and (4) of section 23. One thing is more important because we find that where the Legislatures have considered that actual letting out is required, they have used the words 'house is actually let'. This can be seen in sub-section (3) of same section 23. But in clause (c) above, 'actually let' words are not used and this also shows that meaning and interpretation of the words 'property is let' cannot be 'property actually let out'. In our opinion, it talks of properties, which are held for letting out having intention to let out in the relevant year coupled with efforts made for letting it out. If these conditions are satisfied, it has to be held that the property is let and the same will fall within the purview of this clause."

7. It is clear that the ITAT concluded that only when the property is held for letting out and efforts were made to let it out, would Section 23(1) (c) apply, to assist an assessee. In the present case, it is clear that neither the properties held as stock in trade were for the purpose of letting out, nor were efforts made to let them out and hence even going by the *ratio* in *Premsudha (supra)*, the assessee's case would not be covered under Section 23(1) (c). More importantly however, this Court notices that the ITAT's decision in *Premsudha (supra)* goes against the decision of the Andhra Pradesh High Court in *Vivek Jain v. Assistant Commissioner of Income Tax,* (2011) 337 ITR 74 (AP). In that case, the Andhra Pradesh High Court, faced with the task of interpreting Section 23(1)(c) of the Act held:

"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 The Liquidator of Mahamudabad Properties Private Limited v. The Commissioner of Income Tax, West Bengal-II, Calcutta (1980) 3 SCC 482, 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 under Section 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 zseparate 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 v. Commissioner of Customs, New Delhi 2006 7 SCC 714.) 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 under Section 23(2)(a) and, where the house cannot actually be occupied by the owner on account of his employment, business or profession, as nil under Section 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. (Gurudevdatta VKSSS Maryadit v. State of Maharashtra 2001(4) SCC 534. The legislature may be safely presumed to have intended what the words plainly say. (Bhaiji v. Sub-Divisional Officer, Thandla 2003 (1) SCC 692).

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. Under Section 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, under Section 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 under Section 23(1)(c) of the Act*."

8. Thus, the Andhra Pradesh High Court's view is that the "vacancy allowance" in Section 23(1)(c) is applicable where the property is let out and was vacant for the whole or any part of the previous year and owing to such vacancy, the actual rent received or receivable by the owner was lesser than the annual letting value in Section 23(1)(a). Thus, the decision in *Vivek Jain (supra)* is clear on the point that in a case where the property has been let out for more than one year, if in one of those years, owing to vacancy for the entire year, the rent received or receivable is lower than the annual letting value, then the assessee would be entitled to take the benefit of Section 23(1)(c). In the present case however, the properties held as stock in trade were not let out for any previous years either, and hence there would be no question of availing the vacancy allowance given in Section 23(1)(c). This Court is in agreement with the views of the Andhra Pradesh High Court in *Vivek Jain (supra)*, that actual letting out of the properties in the concerned year, or any of the previous years, is essential for application of Section 23(1)(c). Since none of the properties held as stock in trade were actually ever let out, Section

23(1)(c) cannot come to the assessee's aid.

9. Furthermore there is no dispute that the effect of the amendment, inserting Section 23(1)(c), would not be to change the incidence of taxability of the properties held as stock in trade. Therefore, this Court's finding that such properties were to be assessed as income from house property and not income from "business or profession", in its judgement dated 31.10.2012, would be good law, even in view of the insertion of Section 23(1)(c). That being the position, in the assessee's case, the properties held as stock in trade will be taxable under the notional annual letting value method prescribed under Section 23(1)(a), since in view of the decision in *Vivek Jain (supra)*, the assessee cannot claim the benefit of Section 23(1)(c) having never actually let out the properties held as stock in trade.

10. Finally, this Court notices that the Finance Act, 2017 has amended Section 23 of the Act to insert sub-section (5), which provides:

> *"(5) Where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil*."

11. Therefore, it is clear that in the assessee's factual situation, sub-section (5) would be squarely applicable, but for the fact that sub-section (5) has been inserted w.e.f. 1 April 2018. Moreover, sub-

section (5) does not use language which would indicate that it has been inserted as a clarification (which would make clear that it was always the legal position) or by way of abundant caution. The amendment therefore clearly applies prospectively and since a separate sub-section was inserted in Section 23, it is clear that the legislative intent is that the peculiar situation in sub-section (5) was not already covered by sub-section (3). That being the case, for the relevant assessment years, the properties held as stock in trade would be taxable on the basis of notional annual letting value under Section 23.

12. In view of the above, we are of the opinion that no substantial question of law arises in these Appeals.

13. The Appeals are accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

SANJEEV SACHDEVA
(JUDGE)

NOVEMBER 03, 2017/rs