

IT : Where assessee, a renowned cricketer, could not find tenant for letting out a flat owned by him despite writing various letters to builder of said flat and as a result flat remained vacant throughout relevant year, he was justified in disclosing annual value of flat at nil after claiming vacancy allowance

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[2018] 96 taxmann.com 253 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'G'

Sachin R. Tendulkar

v.

Deputy Commissioner of Income-tax, Mumbai

SHAMIM YAHYA, ACCOUNTANT MEMBER
AND SANDEEP GOSAIN, JUDICIAL MEMBER
IT APPEAL NO. 3755 (MUM.) OF 2016
[ASSESSMENT YEAR 2012-13]
AUGUST 10, 2018

Pankaj Jain *for the Appellant.* **V. Vidhyadhar** *for the Respondent.*

ORDER

Shamim Yahya, Accountant Member - This appeal by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-34, Mumbai dated 15.03.2016 and pertains to the assessment year 2012-13.

2. The grounds of appeal read as under:

The Commissioner of Income Tax (Appeals)-34, Mumbai [hereinafter referred to as the CIT (A)] erred in arriving at the deemed rental income in respect of the vacant flat situated at Sapphire Park, Balewadi, Pune @ Rs.15,000 per month and computing the Annual Rent Receivable for the said flat at Rs.1,80,000/- and confirming the addition made by the AO on deemed rental income for the said flat at Rs.1,26,000/- as against Rs.8,60,445/- made by him.

The Appellant submits that since the property has not been let out and the Appellant has not derived any benefit therefrom during the year the AO ought to have granted vacancy allowance under section 23(2) and compute the Annual Value at NIL. The Appellant therefore prays that the entire addition of Rs.8,60,445/- be deleted.

3. The assessee is an individual and well renowned cricketer earning his income from playing cricket, modeling and endorsements. The assessee had filed the return of income for the assessment year 2012-13 on 28.09.2012 declaring an income of Rs.61,23,14,400/-. In the assessment order passed u/s.143(3), the Assessing Officer inter alia made an addition of Rs.8,60,445/- under the head income from house property.

4. Brief facts of the case on this issue are that the assessee owns two properties in Pune, i.e., flat at Sapphire Park and flat in Treasure park costing Rs.60,60,000/- and Rs.82,80,750/- respectively. The property situated in Treasure Park was let out for 9 months @ Rs.15,000/- per month. The Assessing Officer accepted the annual value @ Rs.15,000/- totaling to Rs.1,35,000/- and computed income from

house property of other flat. However, the assessee has shown the property situated at Sapphire Park as vacant for the whole year for the reason that the assessee could not find a suitable tenant. The assessee claimed vacancy allowance u/s.23(1)(c) and declared income in respect of the flat situated at Sapphire Park as Nil. The Assessing Officer during the course of the assessment proceedings asked the assessee to give reasons for not charging the rental income in respect of the flat at Sapphire Park since no rent was offered to tax on that flat. The assessee argued that it could not find a suitable tenant for that flat although he was desirous of letting out the same on rent and had calculated the annual value as nil by claiming vacancy allowances. The assessee had also argued that the deemed annual value based on the realizable rent in respect of flat at Sapphire Park could be Rs.1,35,000/-without prejudice to the argument that the annual value is required to be taken as nil.

5. The Assessing Officer rejected the assessee's explanation by commenting that the income offered alternatively by the assessee is too low and estimated the rental income @ 6% of the value of both the flats aggregating to Rs.1,43,40,750/- (Rs.82,80,750 + 60,60,000) as deemed rental income. Though the Assessing Officer had discussed regarding the house property income in respect of Sapphire Park on which no rental income was offered, however, while making addition the Assessing Officer has taken value of both the flats at Sapphire Park as well as Treasure Park. Therefore, he held that the decision of the Assessing Officer to charge rental income from the flat at Sapphire Park is a reasonable and correct decision.

6. Before the Id. Commissioner of Income Tax (Appeals), the assessee argued that he had made efforts for letting out of flat at Sapphire Park. The assessee submitted the copies of letters written to builder requesting him to identify tenants for the flat at Sapphire Park. The Id. Commissioner of Income Tax (Appeals) observed that these are copies of purported letters written on plain paper. That there are no evidences for dispatch of these letters as well as receipt of these letters by the builder. That the assessee has not submitted any copy of any response from the builder to these letters. Hence, the Id. Commissioner of Income Tax (Appeals) held that in absence of the supporting evidence of dispatching of the letters, receipt of the letters by the builder and replies from the builder, these are treated as insufficient evidences to support the assessee's claim. He held that any prudent person desirous of letting out house property will approach various real estate agents available in the market instead of simply writing few letters to the builder. Therefore, the Id. Commissioner of Income Tax (Appeals) held that the Assessing Officer's action to charge rental income from the flat at Sapphire Park is a reasonable. Thereafter, the Id. Commissioner of Income Tax (Appeals) distinguished the case laws referred by the assessee. These case laws were as under:

Premisudha Exports(P) Ltd. v. ACIT CC, Mumbai ([2008] 110 TTJ 158(Mum); *Kamal Mishra v. Income Tax Officer* [2008] 19 SOT 251 and *ACIT v. Dr.Prabha Sanghi* [2012] 27 Taxman.Com 317(Delhi)

7. However, the Id. Commissioner of Income Tax (Appeals) granted some relief to the assessee by holding that as per the information available on the website by name www.magicbricks.com, the probable rate for Sapphire Park should be Rs.15,000/- per month. Accordingly, he directed the Assessing Officer to restrict deemed rental income from the flat at Sapphire Park to Rs.1,26,000/- instead of Rs.8,60,445/- computed by the Assessing Officer.

8. Against this order, the assessee is in appeal before us.

9. We have heard both the counsels and perused the records. The Id. Counsel of the assessee submitted that the assessee has been unable to let out the property for the concerned period. Hence, he claimed that the assessee is duly entitled to deduction u/s.23(1)(c). In this regard, he submitted the copies of 3 letters written by the assessee to the builders. First letter was dated 15.05.2011 in which the assessee thanked the builder for identifying the tenant for the flat at Treasure Park but also requested to identify tenant for

another flat in builder's project at Sapphire Park. Subsequently, the assessee has further written letter dated 18.08.2011 and 04.12.2011 being reminders for identifying the tenant to let out flat at Sapphire Park. The Id. Counsel of the assessee further placed reliance upon the following case law:

Premudha Exports (P) Ltd. v. Asst. CIT [2008] 108 ITD 158 (Mum)

10. Per contra, the Id. Departmental Representative relied upon the orders of the authorities below.

11. Upon careful consideration, we find that it will be apposite to refer to the relevant provision of section 23 in this regard which reads as under:

Annual value how determined.

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

- (a) the ⁵⁷sum for which the property might reasonably be expected to let from year to year; or
- (b) where the property or any part of the property is let⁵⁷ and the actual rent⁵⁷ received or receivable⁵⁷ by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable; or
- (c) where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (a), the amount so received or receivable :

12. From the above provision of law, it can be construed that in case the property or part thereof was vacant during the period, the proportion deduction should be allowed from the sum on which the property might reasonably be let out from year to year. We find that it is the plea of the assessee that the assessee had made reasonable effort by requesting the builder to identify the tenants for the concerned flat. Since appropriate tenant could not be find out, the flat remained vacant. Hence, the assessee has claimed benefit of section 23(1)(c) which duly permits deduction in this regard. We find that the ITAT in the case of *Premudha Exports (P) Ltd.* (supra) had the occasion to deliberate on the identical issue. The tribunal had expounded as under:

From a reading of the provisions of sub-section (3) of section 23, it appears that the Legislatures in their wisdom have used the words 'house is actually let'. This shows that the words 'property is let' cannot mean actual letting out of the property because had it been so, there was be no need to use the word 'actually' in sub-section (3) of section 23. Regarding the scope of referring to actual letting out in preceding period, there was no force in the contention of the revenue, as the Legislature has used the present tense. Even if it is interpreted 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 would acquire the status of 'let out property' for the purpose of clause (c) of section 23(1) 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 could 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. Therefore, it is not at all relevant as to whether the property was let out in past or not. 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 are made to let it out, that property is covered by clause (c) 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. Above discussion shows that meaning and interpretation of the words 'property is let' cannot be 'property

actually let out'. Thus, if a property is held with an intention to let out in the relevant year coupled with efforts made for letting it out, it could be said that such a property is a let out property and the same would fall within the purview of clause (c) of section 23(1). [Para 16]

13. Now we examine the present case on the touch stone of the provision of section 23(1)(c) of the Income Tax Act, 1961 and the case law as afore-said. We find that the assessee has claimed that the said flat had remained vacant throughout the year despite assessee's reasonable effort to let out the same. That the assessee had requested the builder to identify the tenants. In this regard, the assessee has submitted three letters written to the builder. It may be noted that as emanating from the records and the letter, the same builder had identified the tenant for another flat of the assessee which was let out and whose rent has been offered and accepted for taxation. In this factual scenario, the authorities below have doubted the veracity of these letters and doubted the credentials of the assessee's claim. In our considered opinion, this does not display application of mind to the facts of the case. The assessee is a well renowned cricketer. He is furnishing the return of income of Rs.61,23,14,400/-. The let out value of the property in dispute is assessed as only Rs.1,26,000/- by the Id. Commissioner of Income Tax (Appeals) as rent for the whole year. When the same builder has helped the assessee to find tenant for another flat, why his letters to the same builder to help him identify one more tenant, can be considered as fake, defies logic. That the assessee should maintain a dispatch register for his letters as expected by the authorities below, is also abnormal expectation. That the assessee should get stamped receipt from the builder for the receipt of his letters, is equally quixotic proposition. In these circumstances, the insinuation that the assessee has submitted bogus and fake documents to support the case that reasonable efforts were made to find out a tenant for the vacant flat, is not sustainable in law. The expectation that despite his unarguably busy professional engagements commanding huge amount of money Shri Sachin Tendulkar should have embarked upon and displayed a more robust and exuberant expedition to find a tenant for his vacant flat by approaching other real estate brokers and keeping an infallible record thereof, is beyond normal conception. Hence, we have no hesitation in setting aside the orders of the authorities below and deleting the addition. Hence, we decide the issue in favour of the assessee.

14. In the result, the appeal by the assessee stands allowed.

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