

Loss due to vacancy allowable even if property remained vacant during previous year: ITAT

Summary – The Mumbai ITAT in a recent case of Metaoxide (P.) Ltd., (the Assessee) held that In order to avail benefit of clause (c) of section 23(1), it is not necessary that property should have been actually let in relevant previous year or during any time prior to relevant previous year

Facts

- The assessee-company was stated to be a re-seller in chemicals, dyes, solvents, plastics and adhesives. It filed its return of income declaring loss.
- In the course of assessment proceeding, the Assessing Officer while verifying the return of income filed by the assessee noticed that it had shown income of Rs. 50,229, under the head income from house property. From the balance sheet of the company, the Assessing Officer found that it was in possession of two flats in a very posh area.
- The Assessing Officer, thus, opined that income from house property shown by the assessee was very meager. Thus, invoking the provisions of section 23(1)(a), the Assessing Officer determined the ALV of the flat at higher amount. Accordingly, certain amount was added to the assessee's income.
- In appellate proceedings, the assessee raised a plea that since the properties were vacant for whole of the year, the ALV worked out in whatever manner would be allowable as deduction under section 23(1)(c) of the Act.
- The Commissioner (Appeals) having accepted the assessee's contention, held that in respect of both the properties, income from house property would have to be taken as nil and, accordingly, directed the Assessing Officer to delete the addition.
- On revenue's appeal:

Held

- Undisputedly, the flats in respect of which the Assessing Officer has determined the ALV under section 23(1)(a) remained vacant during the relevant previous year. It is evident, the Assessing Officer on the basis of information obtained under section 133(6) with regard to the rental income received in respect of some other flats in the same area has determined the ALV in terms of section 23(1)(a) of the Act, which provides that the annual value of any property shall be deemed to be the same for which the property might reasonably be expected to let from year-to-year in other words, the market value of the rent received/receivable. However, the issue which is to be decided is, when the properties were remained vacant during the relevant previous year, assessee could still avail deduction under section 23(1)(c) of ALV determined under section 23(1)(a) of the Act.
- A reading of provision of section 23(1)(c) reveals that where any part of the property is let out and was vacant during the whole or any part of the previous year and due to such vacancy rent received/receivable by the owner is less than the ALV determined under section 23(1)(a), in that

case, the actual rent received or receivable is to be treated as the ALV. Therefore, the issue to be considered is, whether the provisions of section 23(1)(c) are applicable or not. In this regard, the submissions of the revenue is, since the properties in dispute were not let out earlier, the assessee will not be eligible to avail the benefit of section 23(1)(c) of the Act. However, the aforesaid contention cannot be accepted.

- The expression - the property or any part of the property is let as used in clause (c) of section 23(1) does not mean that for availing the benefit of the said sub-clause the property must have been let out earlier. The Tribunal, Mumbai Bench, in *Premudha Exports (P.) Ltd. v. Asstt. CIT* [\[2007\] 17 SOT 293 \(Mum.\)](#) has also held that the expression-property is let under clause (c) of section 23(1) does not mean that the property should have been actually let in the relevant previous year or during any time prior to the relevant previous year. But it will mean the property is intended to be let out. Therefore, applying the ratio laid down in the decisions referred to above, it is held that the Commissioner (Appeals) was justified in directing the Assessing Officer to allow the deduction under section 23(1)(c) to the assessee.
- In the result, the revenue's appeal is dismissed.