**(1979) 02 BOM CK 0059**

**Bombay High Court**

**Case No:** Income-tax Reference No. 155 of 1970

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| Commissioner of Income Tax | APPELLANT |
| Vs | |
| Nauser K. Kanga | RESPONDENT |

**Date of Decision:** Feb. 9, 1979

**Acts Referred:**

- Income Tax Act, 1961 - Section 23, 23(2), 26

**Citation:** (1979) 120 ITR 404 : (1979) 2 TAXMAN 147(1)

**Hon'ble Judges:** M.N. Chandurkar, J; Desai, J

**Bench:** Division Bench

**Advocate:** R.J. Josh, for the Appellant; None, for the Respondent

**Judgement**

Desai, J.
The question referred to us is as follows :

"Whether, on the facts and in the circumstances of the case, each of the joint holders of the property was entitled to self-occupation allowance u/s 23(2) of the Income Tax Act, 1961 ?"

2. We are concerned in this reference with the assessment of an individual, the assessment years being 1963-64 and 1964-65. The assessee had a one-third share in certain immovable property of which he was also in self-occupation. At the time of the original assessments while working out income from this property allowance was given on the basis that the same was self-occupied property. This was done for both the years. Thereafter, the ITO took proceedings under s. 154 of the I.T. Act, 1961, for both the years on the footing that the "self-occupied property allowance" was allowed separately to all the occupants instead of restricting it proportionately. Although the assessee objected to the reassessment, the assessee''s contentions, both on the propriety of the reassessment as well as on the point on which reassessment proceedings were initiated, were overruled and the income reassessed for both the assessment years at a higher figure.

3. The assessee filed appeals before the AAC against the orders of rectification. It was contended that there was no such error apparent from the record which would justify action under s. 154 of the Act. This contention was overruled by the AAC who considered that action under 154 was fully justified. It was further contended before the AAC that allowance to the assessee had been properly given at the time of the original assessment in his own right as the co-owner of the property held jointly by him. The AAC read the relevant provisions and considered that the correct procedure was to work out the one-third share of the assessee in the bona fide annual value of the property and then allow the allowance due to him under s. 23(2) of the Act. The ITO was accordingly directed by the AAC to recompute the assessee''s income from property by allowing him deduction in respect of self-occupied portion as indicated by the AAC in his order.

4. It was the ITO who then carried the matter in further appeal to the Tribunal. Before the Tribunal the department representative referred to s. 26 of the Act and submitted that s. 26 would have to be applied where there are co-owners but that the allowance contemplated under s. 23(2) will not be available to the co-owners. the Tribunal did not accept this contention. In the approach of the Tribunal, the co-owners were not joint owners, but owners in common for which s. 26 had provided a special method of computation of income and if that method was logically applied then to the share of each co-owner, the allowance as was available to a full owner would have to be given also to a co-owner (but obviously restricted to his share). According to the Tribunal, s. 26 contemplated assessment of income from jointly-owned property in the hands of co-owners in separate compartments in accordance with their shares which are required to be ascertained. When the computation of this income is required to be made separately, then in the view of the Tribunal, the benefit of s. 23(2) cannot be excluded to one of such co-owners who, under s. 23(2), is treated not along with other co-owners as an association of persons but by a special provision individually and separately in respect of his specific share.

5. Mr. Joshi before us relied on the express phraseology of s. 23 and submitted that the benefit by way of reduction contemplated by sub-s. (2) of s. 23 was available where there was one owner who owned one full unit and by the very nature of things this benefit or relief was not available where the house was owned by more than one person. In his submission, as the phraseology was abundantly clear, there was no warrant for the Tribunal in applying it to the case of co-owners by considering the method of computation indicated by s. 26 of the I.T. Act, 1961. In his submission the bona fide annual rateable value of the house will be required to be considered and since the house is not owned by one owner and occupied by one owner, no reduction under s. 23(2) could be awarded. It is thereafter that the application of s. 23(2) will be required to be considered which provides that the whole income as calculated is not to be assessed to the co-owners regarded as an association of persons, but each of them is to be assessed for his separate specific

share.

6. Mr. Joshi before us relied on the express phraseology of s. 23 and submitted that the benefit by way of reduction contemplated by sub-s. (2) of s. 23 was available where was one owner who owned one full unit and by the very nature of things this benefit or relief was not available where the house was owned by more than one person. In this submission, as the phraseology was abundantly clear, there was no warrant for the Tribunal in applying it to the case of co-owners by considering the method of computation indicated by s. 26 of the I.T. Act, 1961. In his submission, the bona fide annual rateable value of the house will be required to be considered and since the house is not owned by one owner and occupied by one owner, no reduction under s. 23(2) could be awarded. It is thereafter that the application of s. 23(2) will be required to be considered which provides that the whole income as calculated is not to be assessed to the co-owners regarded as an association of persons, but each of them is to be assessed for his separate specific share.

7. Mr. Joshi drew our attention to the Explanation to s. 23(2) which was inserted by the Taxation Laws (Amend.) Act, 1975, with effect from 1st of April, 1976. He, however, submitted that this Explanation would not have any retrospective effect but would apply only and give relief to such assessees after 1st April, 1976. He then fairly drew our attention to a recent decision of the Calcutta High Court in Commissioner of Income Tax Vs. Bejoy Kumar Almal, , in which it has been held that the Explanation has retrospective operation. It has been observed by the Division Bench of the Calcutta High Court in the aforesaid case that when a provision is enacted for the express purpose of explaining or clearing up issues as to the meaning of a previous enactment, such Explanation should normally govern earlier Acts also. According to the Calcutta High Court, the Explanation is prima facie confined to the subject-matter of the prior enactment and governs the same and the presumption is that such an explanatory provision is retrospective. In this view of the matter, the said Explanation, although enacted in 1975, was given retrospective effect and it was held that the statutory allowance mentioned in s. 23(2) should be allowed separately to each co-owner while computing the income from house property falling to the share of the co-owner even prior to April 1, 1976.

8. Mr. Joshi on behalf of the commissioner drew our attention to the commentary to be found on s. 26 in V. S. Sundaram''s Law of Income Tax in India (1978-79 edn.) where reference is made to a circular of the Central Board, F. No. 45/230/63/-I.T.J., dated 22nd January, 1965. In the course of arguments he stated that he was urging the same contentions as have been indicated by the Board in the said circular.

9. In our opinion it is unnecessary to go to the extent what the Calcutta High Court has held in its decision in Commissioner of Income Tax Vs. Bejoy Kumar Almal, . Even assuming that the Explanation which was added in 1975 does not have retrospective operation, it would appear to us that the relief conferred on self-occupied properties by s. 23(2) can be given a restricted application or a more

liberal application depending upon whether one takes a narrow view of the provision or a board view of the provision. The argument advanced by Mr. Joshi initially that the special computation prescribed in s. 26 for jointly-owned property will not extend the relief granted under s. 23(2), is not one which can be rejected summarily. However this certainly is a matter on which two views are possible and it is well settled now that a provision determining the charge of tax is to be strictly construed in favour of the subject and similarly a provision allowing relief or reduction will be required to be liberally construed in favour of the person sought to be subjected to tax. As it is, the income which has to be added in the case of self-occupied property is a theoretical or fictional income since the owner residing in the property does not receive any money income as such. If any reduction or relief in calculation of such income is provided by the legislature, it would appear to us that where the legislature has provided a special method of computing such income of property jointly held, a reduction or relief also should be available to all such co-owners if they are in self-occupation of the property. It would be an error to read the relief or reduction under s. 23(2) in the narrow way in which Mr. Joshi wants us to read the same. In this view of the matter, we would hold that the AAC and the Tribunal were right in coming to the conclusion that relief under s. 23(2)was available to the assessee although he was only a co-owner of the property in question having one-third share affirmative and in favour of the assessee.

10. There will, however, be no order as to costs.