
(1995) 01 MAD CK 0114

In the Madras High Court

Case No : Tax Case No. 1352 of 1981 & Tax Case No. 1352 of 1981 Reference No. 698 of 1981

Commissioner of Wealth Tax

APPELLANT

Vs

W. Doraisamy

RESPONDENT

Date of Decision : 09-01-1995

Acts Referred:

Estate Duty Act, 1953 — Section 33
Income Tax Act, 1961 — Section 23(2)
Succession Act, 1925 — Section 270
Wealth Tax Act, 1957 — Section 25(2), 27(1), 5(1)(iv), 7, 7(4)

Citation : (1996) 87 TAXMAN 260

Hon'ble Judges : S.M. Ali Mohamed, J; P.K. Mishra, J

Bench : Division Bench

Advocate : N.V. Balasubramaniam, for the Appellant; P.P.S. Janarthana Raja, for the Respondent

Judgement

P.K. Mishra, J.—The assessee claimed assessment u/s 7(4) of the Wealth-tax Act, 1957 ("the Act") before its repeal and substitution by the Direct Tax Laws (Amendment) Act, 1989, with effect from 1-4-1989. The Commissioner, however, exercised the power u/s 25(2) of the Act, called for and examined the records of the proceedings, found that the order passed by the Assessing Officer was erroneous and prejudicial to the interests of the revenue and after hearing the assessee and enquiry set aside the assessment order and remitted the matter to the WTO (the assessing authority) to redo the assessment in accordance with law. The assessee appealed to the Tribunal. The Tribunal has set aside the Commissioner's order and restored the assessment. The revenue has since obtained a reference u/s 27(1) of the Act on the question whether, in the facts and in the circumstances of the case, it can be said that the house was exclusively used by the assessee for residential purposes throughout the period of 12 months immediately preceding the valuation date relevant to the wealth-tax assessment year 1976-77. The words in section 7(4) as the provision existed

before its substitution by the Direct Tax Laws (Amendment) Act, 1989, are retained more or less in subsection (2) of section 7 and the expression, the value of the house belonging to the assessee and exclusively used by him for residential purposes throughout the period of 12 months immediately preceding the valuation date may, at the option of the assessee, be taken to be the price which, in the opinion of the Assessing Officer, it would fetch, if sold in the open market on the valuation date next following the date on which he became the owner of the house, or on the valuation date relevant to the assessment year commencing on 1-4-1971, whichever valuation date is later, provided that where more than one house belonging to the assessee is exclusively used by him for residential purposes, the provisions of this sub-section shall apply only in respect of one of such houses which the assessee may, at his option, specify in this behalf in the return of net wealth; is the same even after the substitution except that the word "price" is substituted by the word "value" and the words following the word "price" are changed to read, "determined in the manner laid down in Schedule III as on the valuation date", other following words being retained. There has been no illusion at any time in the mind of the Courts as to the meaning of the expression "exclusively used by him for residential purposes throughout the period of 12 months immediately preceding". The Tribunal, by the words with which it has stated the law, has found no difficulty in interfering with the order of the Commissioner. The Commissioner, while setting aside the assessment order, observed as follows:

In completing the assessment as above, the Wealth-tax Officer overlooked the fact that the assessee was a non-resident and was away from India from August 11, 1972, onwards and his stay in India was only for a brief period of about a month from October 27, 1975 to November 24, 1975. The Wealth-tax Officer did not appear to have applied his mind and considered whether all the conditions laid down by section 7(4) of the Wealth-tax Act, were satisfied. For example, one condition is that the property should have been exclusively used by the assessee for residential purposes.

The Wealth-tax Officer had not seen whether this condition was satisfied.... It was contended that the assessee had kept the house property for his own dwelling even though he was away from India. According to the representative, so long as the house was kept for residential purposes and was not let out for a period of twelve months before the valuation date, it should be taken as adequate for satisfying the provisions of section 7(4) of the Wealth-tax Act. It was explained to the assessee's representative that while completing the assessment on February 25, 1977, the Wealth-tax Officer had not actually considered the fact that the assessee was away from India for a major portion of 12 months immediately preceding the valuation date and was not actually occupying the residential house and on that score, the assessment was prejudicial to the interests of the Revenue.

The representative saw the force of this argument and agreed that he has no

objection to the assessment being set aside. He, however, added that a full opportunity should be given to him to establish during the reassessment proceedings that the house was exclusively used for residential purposes of the assessee and that the conditions necessary for applying the provisions of section 7(4) of Wealth-tax Act were satisfied in the assessee's case.

The Tribunal has, however, stated as follows: The Commissioner of Wealth-tax is certainly not right in the view he held. Even if the assessee is away from India for such long periods, it is still a house belonging to him and exclusively used by him for residential purposes throughout the period of 12 months immediately preceding the valuation date. It has not been let out on rent. It is also not used for commercial purposes. The father and mother are not staying there in the house as of right but only out of filial love and affection. Only if the house is let out for rent or used for commercial purposes or if others are also staying there as of legal right it could be said that the house is not exclusively used for residential purposes. It may also be noted that the assessee was residing in this house from October 25, 1975 to November 24, 1975, which is a period falling within the period of 12 months immediately preceding the valuation date. We need not discuss that issue further Commissioner of Wealth Tax Vs. B.M. Bhandari (Executor of the Estate of the Late R.S. Pannalal Heralal Lahoti), fully supports the stand of the assessee. Further, the Commentaries to the Estate Duty Act by D.H. Nanavathi, Third edition, at page 456 (section 33 of the Act), also fully supports the stand of the assessee.

In Vishanji D. Futani v. Mohanlal [1994] 2 LW 289, in our attempt to give the correct meaning to the expression "fixed place of abode" in section 270 of the Indian Succession Act, 1925, we passed through the meaning of "abode", "dwelling", "place of dwelling", "residence", "domicile", etc., in Stroud's Judicial Dictionary, Black 's Law Dictionary, some judgments of the Courts in England, the High Courts in India and the judgments of the Supreme Court and noticed the most expressive definition of the word "residence" in Stroud's Judicial Dictionary, Volume IV:

A man's residence, where he lives with his family and sleeps at night, is always his place of abode in the full sense of that expression

a candid statement attributed to Lord Lindley in the judgment of the Court of Appeal of England, Gape's Will Trusts, In re [1952] 2 All ER 579:

...I take it to be clearly settled that no person who is sui juris can change his domicile without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicile is an intention to adopt the second residence as home, or, in other words, an intention to remain without any intention of further change except possibly for some temporary purpose....

and the view of the Supreme Court in Jagir Kaur and Another Vs. Jaswant Singh,

is in these words:

The first word is "resides". A wife can file a petition against her husband for maintenance in a Court in the district where he resides. The said word has been subject to conflicting judicial opinion. In the Oxford Dictionary it is defined as: "dwell permanently or for a considerable time; to have one's settled or usual abode; to live in or at a particular place". The said meaning, therefore, takes in both a permanent dwelling as well as a temporary living in a place. It is, therefore, capable of different meanings, including domicile in the strictest and most technical sense and a temporary residence. Whichever meaning is given to it, one thing is obvious and it is that it does not include a casual stay in, or a flying visit to a particular place. In short, the meaning of the word would, in the ultimate analysis, depend upon the context and the purpose of a particular statute. In this case the context and purpose of the present statute certainly do not compel the importation of the concept of domicile in its technical sense. The purpose of the statute would be better served if the word "resides" was understood to include temporary residence. The juxtaposition of the words "is" and "last resided" in the sub-section also throws light on the meaning of the word "resides". The word "is", as we shall explain later, confers jurisdiction on a Court on the basis of a casual visit and the expression "last resided", about which also we have something to say, indicates that the Legislature could not have intended to use the word "resides" in the technical sense of domicile. The word "resides" cannot be given a meaning different from the word "resided" in the expression "last resided" and, therefore, the wider meaning fits in the setting in which the word "resides" appears. A few of the decisions cited at the Bar may be useful in this context.

We, accordingly, found as follows:

...Generally stated no decision goes so far as to hold that "resides" in the sub-section means only domicile in the technical sense of that word. There is also a broad unanimity that it means something more than a flying visit to or a casual stay in a particular place. They agree that there shall be animus manendi or an intention to stay for a period, the length of the period depending upon the circumstances of each case. Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases thereon, we would define the word "resides" thus : a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case....

2. The expression "place of residence" in *Sukh Lal and Others Vs. State Bank of India and Others*, has been given the same meaning by the Supreme Court in these words:

...The expression "place of residence" connotes a place where a person has his dwelling house, which need not necessarily be permanent or exclusive. A person

may have more places of residence than one at a given time. A place occupied by a person with the intention of setting up a fixed, though not permanent, abode, would be deemed to be a place of residence. Sojourn for a purely temporary purpose will not constitute residence, and the place of sojourn will not be deemed a place of residence within the meaning of the Act: but where a person possesses establishments at more places than one and spends time more or less considerable in all those places, as exigencies of his occupation, vocation or fancy demand, he would be deemed to have a place of residence at each of those places.

3. Before we come to the language of the law with which we are concerned, we may refer to a judgment of the Queen's Bench Division in which the occasion was to consider the expression "occupation". In the case of *Queen v. St. Pancras Assessment Committee* [1877] 2 QBD 581, the Bench said:

Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against anyone who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year.

On the other hand, a person who, without having any title, takes actual possession of a house or piece of land, whether by leave of the owner or against his will, is the occupier of it. It is, of course, a question of fact in each case. If a man is merely there for a night or two, as in the case of a tramp sleeping in an outhouse -- he is not in occupation. But if he is living on the land for a continuous period of time, the Magistrate may properly draw the conclusion that he is in occupation of it.

4. Dealing with a case of a British subject, who had leased out a house in London on facts, inter alia, that he had surrendered the lease and sold his furniture and had no fixed abode but he stayed at hotels either in Britain or abroad, between December 1919 and 1925, he spent four or five months each year in the United Kingdom, in 1925, he leased a flat abroad and expected to continue to make visits to the United Kingdom though not to such an extent as in the past, in *Levene v. IRC* [1928] 13 TC 486 (HL), the Court held that the assessee in that case has changed his sky and not his home and in *Cooper (Surveyor of Taxes) v. Cadwalader* [1904] 5 TC 101 (C. Exchq.), in the case of an American resident of New York, who had taken a house in Scotland, which was at all time available for his occupation, the Court held, the assessee was a resident of Scotland in spite of the fact that he had only occupied the house for two months. In *CIT v. Rani Kaniz* 1972 Tax LR 587, a Bench of the Allahabad High Court of which Pathak, J., as he then was, was a member, held for the purpose of section 23(2) of the income tax Act, 1961, that the assessee who owned a house in Karachi and used to go there very often and even though the assessee's daughter and son-in-law

resided in that place, it cannot be said that the assessee was not in occupation of the house as owner in her residence. The Andhra Pradesh High Court in *Commissioner of Wealth Tax Vs. B.M. Bhandari (Executor of the Estate of the Late R.S. Pannalal Heralal Lahoti)*, has considered the expression in section 5(1) (iv) of the Act, "exclusively used by him for residential purposes", and observed:

...The requirement of exclusive use by the assessee of the house property for residential purposes must be construed pragmatically, fairly and reasonably. But it cannot be construed in a pedantic sense or impracticable method. An assessee may himself live or use the building for residential purpose. He may allow any member of his family to live or use the same for residential purpose. The assessee need not also or is not expected to use his building throughout the year or without any interruption. He may not actually use the house by himself. He may go out for some time and some of his relatives or friends may be there for a few months with his permission. Unless, he has let out the same for rent or has allowed it to be used for any commercial purpose, it cannot be said that he has not exclusively used it for residential purpose. The requirement of exclusive use of the building for residential purpose must, therefore, be construed in a practical and pragmatic way rather than in a pedantic sense. The trend of law also is in favour of such a Construction....

5. The Andhra Pradesh High Court judgment referred to a judgment of the Delhi High Court in *CWT v. Mrs. Avtar Mohan Singh* [1972] 83 ITR 52, wherein it was held that the physical residence of the family of the assessee without any legal right to share the use of the house by the assessee does not come in the way of exclusiveness of the use of the house by the assessee.

6. The learned counsel for the revenue has, however, pointed out that the legislative intent in "the exclusive use for residential purposes by the assessee throughout the period of 12 months immediately preceding the valuation date," does not appear to permit a wider meaning of residence being imported to understand, the expression, "residential purposes" and the expression "exclusively used by him I should be taken to exclude altogether occupation of the house by any other person and the absence of the assessee in any period of 12 months immediately preceding the valuation date. He has canvassed before us that any liberal meaning to the expression so purposely used by the Legislature, will harm the interest of the revenue and thus the interest of the public at large. We are, however, not impressed enough to depart from the consensus of judicial opinion and put any note of dissent to a view which, in our opinion, is the only reasonable and correct view of the law. The expression "house belonging to the assessee" is referable to the ownership of the house. The expression "exclusively used by him for residential purposes throughout the period of 12 months immediately preceding the valuation date" can mean nothing but that the intention or animus manendi of the assessee was to live in the house whenever he returned and that he had not created any interest in the said property of any other person, that is to say, there is no element of right in

property of any other person in the house. In such a case, the house belonging to the assessee is exclusively used by him for residential purposes throughout the period he has kept it available to himself for occupation whenever he desired. Any trespass or permissive possession cannot rob the owner, who has chosen to keep the house vacant, of his right of residence and so long such a right of residence is not disturbed, it is he who is in occupation and thus it is he alone, who is using it exclusively and no one else. The position is completely different, however, of a person, who has admitted a lessee upon the land on rent or even licensed for use to another on receiving a fee. In the case of a lease, there is an element of transfer of property. In the case of licence, there is a withdrawal, by the owner on conditions of payment of a fee, from occupation and the use is not exclusively by him. The law is so clear and unambiguous that we expected no error by the Tribunal and in fact we have found no mistake in the order of the Tribunal in this regard. We have, however, felt dissatisfied by the manner adopted by the assessee and almost a helping hand extended to him by the Tribunal. There is nothing before us from which we can gather that there was an element of transfer of property involved in the occupation of the father and the mother of the assessee or in fact whether the father and the mother of the assessee were in the occupation of the house at the relevant time, everything on behalf of the assessee has been done by the power of attorney, whether he brought full disclosure in this behalf before the assessing authority or before the Commissioner after notice was served upon him for enquiry u/s 25(2) how and why the Tribunal accepted such a statement about the occupation of the building by the power of attorney, is not clear. The Courts have often pointed out that the task of the revenue enforcement agencies is not easy. It has to, on the one hand, ensure that all the revenue is collected and no person escapes tax and if he has to pay tax, he must pay. It has, on the other hand, to see that a law-abiding assessee is not subjected to any unnecessary harassment and if he has made no deliberate default, he is not subjected to harsh treatment. A cautious and careful enquiry before assessment and in the case of any doubt as to the correctness of the return and information otherwise showing that the assessee has not made a correct disclosure, a scrutiny of the materials in accordance with law alone can achieve the necessary balance between the interest of the assessee and the interest of the revenue. The appellate authorities can, no doubt, entertain such facts which are made available to them but are expected in such a case, to see why the facts brought before them were not brought to the notice of the assessing authority and why such facts should be accepted as true. The appellate authorities can hardly afford to just casually glance at the revenue when such materials are produced at the appellate stage and say why not accept them. The well-known procedures of taking materials in the shape of additional evidence or at least opportunity to the revenue to verify the correctness or otherwise of the facts, are the minimum which is expected from the appellate authorities. In the instant case, however, we have no reason to think that the revenue shall suffer any serious prejudice. In terms of the order of the Tribunal itself, the Assessing Officer is required to redo the assessment. The order to redo the assessment

cannot be taken as a command to ignore any information which may be found helpful to the revenue. The reference is answered accordingly.