

(2003) 02 KL CK 0095
In the High Court Of Kerala
Case No : O.P. No's. 13766 etc. of 2003

Koshy P. John

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 18-02-2003

Acts Referred:

Constitution of India, 1950 — Article 14
Kerala Building Tax Act, 1975 — Section 5A

Citation : (2003) 3 KLT 918

Hon'ble Judges : C.N. Ramachandran, J

Bench : Single Bench

Advocate : Varghese C. Kuriakose and Praveen K. Joy, for the Appellant; Raju Joseph, Special Government Pleader, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—The petitioners in all these cases are challenging the constitutional validity of Section 5A of the Kerala Building Tax Act, 1975, hereinafter called "the Act" which provides for the levy of luxury tax at a flat rate of Rs. 2000 payable every year on residential buildings with plinth area of 278.7 Square Metres or more and the construction of which is completed on or after 1st April, 1999. Though the challenge is essentially on the constitutional validity of Section 5A the Act, in some cases there is factual dispute with regard to the plinth area assessed.

2. I heard the various counsel appearing for the petitioners as well as the Special Government Pleader appearing for the respondents. The respondents have also filed a counter in O.P. 13766/2002 with a prayer to treat its counter affidavit for all the cases. The impugned Section is extracted hereunder.

"5A. Charge of luxury tax :-

(i) Notwithstanding anything contained in this Act, there shall be charge a luxury tax of two thousand rupees annually on an residential buildings having a plinth area of 278.7 Square Metres or more and completed on or after the 1st day of

April, 1999.

(ii) The luxury tax assessed under this Act shall be paid in advance on or before the 31st day of March, every year."

3. The first contention raised by the petitioners is that introduction of luxury tax on residential buildings under the Building Tax Act, 1975 is not permissible as there is a separate levy of luxury tax under another state legislation namely, Kerala Tax on Luxuries Act, 1976. According to the petitioners when there is a separate statute comprehensively dealing with levy of "luxury tax" the legislation is complete under Entry 62 of the State List under Seventh Schedule of the Constitution and there is no authority for the State to make a separate levy of luxury tax in another statute namely, Kerala Building Tax Act which otherwise provides for assessment and collection of building tax, a one-time levy on new buildings. The Government Pleader on the other hand submitted that so long as there is power under Entry 62 of the State List under Seventh Schedule to the Constitution the Legislature has the freedom to introduce "luxury tax" in any other statute. I am not able to accept the contention of the petitioners that the Legislature is bound to provide "luxury tax" on all commodities, services and assets, under one comprehensive legislation because no such restriction is provided on the Constitution. All that the petitioners contend is that the Legislature does not have competence to make a separate law of luxury tax on buildings under the Building Tax Act. The levy under challenge is brought to the Statute by an amendment by Act 23/99 providing for luxury tax on residential building completed on or after 1.4.1999 and with plinth area of 278.7 sq. metres and above. The Building Tax Act mainly provides for one time levy of building tax on the completion of construction of building and on reconstruction or extension of existing buildings and the revenue authorities, namely, the Tahsildar, Revenue Divisional Officer and the District Collector, are the authorities enforcing the Act through the assessment of tax, appeal, revision etc. Therefore, the provision for luxury tax on "residential buildings" is also including in the Building Tax Act as the very same statutory authorities familiar with the matter with the appropriate authorities to assess and collect luxury tax periodically every year. Moreover, luxury tax is payable for all residential buildings coming within the description u/s 5A constructed all over the State and needless to mention that Revenue officials in the field are the right people to trace such buildings and assess the tax. On the other hand, the authorities enforcing the provisions of Luxury Tax Act are officers of the commercial taxes department stationed only in trade centres and towns. Therefore, the Government rightly identified the revenue authorities under the Building Tax Act to assess, and collect luxury tax on residential building attracting liability. If the Legislature has the competence to levy luxury tax on residential buildings, then of course it is open to them to provide such levy under any legislation and provide machinery for collection. The competence for legislation on luxury tax on anything permissible is not affected by the reason that there is a separate legislation for luxury tax on other commodities and services. Therefore, this contention cannot be accepted and is therefore rejected.

4. The next question raised is whether the residential apartment having plinth area of 278.7 Sq. metres answer the description of "luxury tax" provided under Entry 62 of the Second List in the Seventh Schedule to the Constitution. Entry 62 is as follows:

"62. Taxes on luxuries, including taxes on entertainments, amusement, betting and gambling,"

The term "luxury" is not defined in the Building Tax Act or under the charging Section 5A provided therein. However, "Luxury" is defined in the Kerala Tax on Luxuries Act which is as follows:

"Section 2(ee) "luxury" means a commodity or service that minister's comfort or pleasure."

The petitioners contend that since there is no definition for "luxury" u/s 5 A or elsewhere in the Building Tax Act, the levy is unauthorised for want of definition. I do not think the validity of the legislation can be questioned on the ground that there is no precise definition for a term. Definitions are given in a statute basically to assign specific meaning to the terms for the purposes of the statute especially when the ordinary meaning or connotation of the terms are insufficient for the purposes of the statute. Wherever the meaning of a term is not specified, or no definition provided, it should be given the ordinary meaning available in the common parlance or the literal meaning as the case may be, which suits the object and purpose of the statute. Probably a separate definition was given under the Luxury Tax Act to confine the levy to such of the commodities and services for which tax is provided in the statute. The definition of "luxury" contained in the Luxury Tax Act cannot in any case be made applicable as such, for the purposes of the Building Tax Act because if the Legislature so wanted the definition from the other statute would have been adopted by specific provision as is usually done in legislative practice. Moreover, it cannot be conceived and there is nothing in the Luxury Tax Act to assume that the whole of "luxury" covered by Entry 62 of the State Lists in the Seventh Schedule to the Constitution is covered by the definition clause in the Luxury Tax Act. Therefore, the question is whether a residential building of the description contained in Section 5A of the Building Tax Act is a "luxury" within the meaning of Entry 62 of the State List provided in the Seventh Schedule to the Constitution and if so, whether the absence of the definition for "luxury" is fatal to the validity of the charging Section. Section 5A provides for luxury tax on residential building having plinth area 278.7 Sq. metres, equivalent to 3000 sq.fts., and above itself gives the meaning of "luxury" contemplated by the Legislature. Therefore, any residential building completed after 1.4.1999 having a plinth area of 3000 sq. fts., and above is treated as an item of "luxury" by the Legislature and no particular definition is required to fix the liability. In this view of the matter. I do not think the absence of a separate definition affects the validity of the legislation when the charging section itself gives a clear idea or provides intrinsic evidence about what is intended to be "luxury" for the purpose of legislation.

5. The next question raised by the petitioners is as to whether residential building with 3000 and above sq.fts. Plinth area can be treated as "luxury" falling under Entry 62 of the State Lists under the Seventh Schedule. As already stated, "luxury" is not defined in the Act and going by the literal or common parlance meaning, luxury referred is in relation to commodities, services and even assets. The one shade of meaning in dictionary i.e., literal meaning shows that a "building" itself can be an item of luxury. In other words, among other things, an asset itself can be called a luxury. It is also to be noticed that accommodation in a hotel attracts luxury tax under the Luxury Tax Act itself. All that the Legislature has not done is to extend it to accommodation in residential houses of a particular type. Apart from certain items of services, goods or assets which are essentially not required for one's living and could be exclusively treated as items of luxury. It is also a relative concept and there can be luxury in anything and everything; that is when the quality or standards of anything transcends or exceeds the limits of requirement for reasonable living or even moderate comforts. Luxury certainly does not cover something which is required for bare existence. In the Luxury Tax Act "luxury" covers accommodation and a commodity or service that ministers comfort or pleasure. In *A.B. Abdul Kadir and Others Vs. State of Kerala*, the Supreme Court held that "tobacco" is an article of luxury. A residential building by itself cannot be treated as luxury and is only a bare necessity for anyone, though the millions of Indians living in miserable conditions and sleeping under the shades of trees, streets and in thatched sheds may call a proper house with walls and roof a luxury! Luxury is therefore only a relative and objective concept and is not just subjective. Houses may range from hut to palace. Luxury in respect of hotel accommodation contemplated in the Luxury Tax Act is with reference to daily rent which of course is directly proportional to the facilities, comforts, location, etc. The Legislature, so far as residential houses are concerned, decided to draw the line of distinction between luxury and non-luxury apartments based on the plinth area limit. The buildings that attract luxury tax u/s 5A are residential buildings having plinth area of 3000 sq.fts. and above. In the annual budget, the estimated collection of revenue in the year of introduction of the levy was at Rs. 20 lakhs, the rate of tax being Rs. 2,000 per building. Therefore, the number of building with 3000 sq.fts, and above plinth area expected to be completed in the year 1999 as estimated by the Government was only 1000 numbers in the State. This itself indicates that statistics with the Government show that only very limited buildings are constructed with such large plinth area. Further it is common knowledge that houses with 3000 sq.fts, and above plinth area are fairly large houses with 3 or 4 bed rooms and all other facilities including garage, outhouse etc. Going by the common knowledge, construction cost of such houses alone range from Rs. 15 to 20 lakhs depending on the nature of construction besides land cost. Therefore, the Legislature has identified the class of asset in the form of residential building valuing from Rs. 15 lakhs and above as an item of "Luxury" and the persons with capacity to spend around Rs. 15 lakhs and above for the construction of a house apart from the cost of land, as people enjoying the luxury of owning and or

enjoying such accommodation. Since there can be luxury in assets like residential buildings, I do not think the classification of building with plinth area above 3000 sq.fts., as luxury building is unreasonable or arbitrary.

6. Counsel for the petitioners relied on various decisions under Article 14 and contended that the test laid down by the Supreme Court are not satisfied because there is no intelligible differentia between the object taxed and those left out untaxed and there is no rational nexus between the object of the legislation and the classification. I am unable to accept this contention because even though taxation law also should satisfy the test of Article 14 by virtue of the settled law under various decisions of the Supreme Court, classification for the purpose of taxation is permissible. The object of the legislation is to levy luxury tax on luxurious residential building and the Legislature identifies residential buildings with plinth area above 278.7 sq. metres, as luxury building. Of course there may be various criteria for classification of residential apartments between luxuries and other categories. Probably investment may be criteria. Similarly, the nature of construction, location and facilities may also contribute for the purpose of classification. Whatever may be the other criteria for identifying luxurious residential buildings, I feel plinth area is also reasonable classification to identify luxurious residential building from other types. If the Legislature has chosen to fix below 3000 sq.fts, plinth area as cut off limit for ordinary houses, there is no reason for this Court to interfere in that. As long as the classification is reasonable and has a direct nexus to the object of the legislation i.e., to identify a levy tax on the luxurious apartments, petitioner's contention cannot be accepted.

7. The next contention raised is that the classification base on plinth area is not justified based on the decision of the Supreme Court in *State of Kerala v. Hajji Kutty Naha* 1968 KLT 649. In that case it was held that plinth area by itself cannot be basis for levy of building tax. The decision was rendered in an entirely different context where the building tax was levied in proportion to the plinth area. In these cases there is no such varying luxury tax based on plinth area. Plinth area is fixed only for the purpose of identifying two classes i.e., class of building which attracts luxury tax and that class which do not come in that category. All residential buildings having plinth area of 3000 sq.fts, and above irrespective of their size, square area, and location attract same luxury tax at Rs. 2,000 every year. Therefore, so long as plinth area is adopted only for classifying the buildings between luxurious and non-luxurious, there is no scope for challenge against the same. Since the classification is reasonable and has direct nexus to the object of levy, this argument cannot be accepted and hence rejected.

8. Another argument raised is that building tax is already provided under item 49 of the State List under Seventh Schedule and, therefore, there cannot be a further levy of tax on building under the cover of luxury tax under item 62 of the State List. Of course there is a one time building tax provided under the Kerala

Building Tax Act on the construction of a new building and on modified buildings. However, recurring tax also is payable every year on buildings under the Municipalities Act or under Panchayat Act whereunder Legislature has made law under Article 243H of the Constitution of India authorising local authority to levy building tax in the form of "property tax". Therefore, beside the one time tax collected by the State under the Building Tax Act, recurring tax is paid to the local authorities in the form of property tax for all the buildings other than those exempted from payment to tax. The petitioners contend that the present levy in the form of luxury tax is also in effect a building tax though only on residential buildings having plinth area of 3000 sq.fts. and above and therefore, it is double tax particularly when the levy is brought under the Building Tax Act. Therefore, according to the petitioners, levy u/s 5A is a tax on buildings under Entry 49 of the State List under the Seventh Schedule to the Constitution providing for Taxes on lands and buildings". Here again as already stated, assets can also come under the category of "luxury" and can be subjected to tax of law made under Entry 62 of State List in the Seventh Schedule to the Constitution. Therefore, there is nothing prohibiting the State from levying tax on luxury even though the same commodity or asset attracts tax under any other statutory provision made under another enabling entry of the Constitution. In other words, the levy of building tax on a building under the law made under Entry 49 of the State List referred to above does not bar a further levy under Entry 62 of the State List in respect of the category of buildings which are styled as luxury houses or apartments. There is no prohibition under the Constitution against double taxation. Constitution entries also need not be read as mutually exclusive for the purpose of taxation. Entry 62 is vide enough to cover various objects on which luxury tax can be levied. There is nothing in the Constitution to indicate that the levy under Entry 62 is possible only when there is no other tax authorised on the service, commodity or asset under any other entry of the Constitution. It is to be noted that tobacco on which luxury tax is upheld by the Supreme Court in the decision above referred attracts excise duty, sales tax, octroi, etc., under different legislations of the centre and State Governments made under different enabling entries of the Seventh Schedule to the Constitution. Therefore, the levy of building tax on the very same building does not bar levy of luxury tax under law made under Entry 62 of the State List. The validity of the Statute is not affected for the reason that the different charging sections one for "building tax" and another for "Luxury Tax" are made under the same statute in exercise of legislative powers conferred under separate entries of list II of VIIth Schedule to the Constitution.

9. The petitioners have contended that the legislation is absolutely imperfect and incapable of implementation. There is no mention as to who is liable to tax and whether tax is on the residence. According to them even if the building is a luxury apartment, it becomes a luxury only for the person who occupies It. There may be cases where the owners may not be residing or the building is let out, in which case the levy should be on the tenant and not on the owner. Similarly

residential apartments may be used or let out-atleast rarely for other purposes, such as office commercial use etc., in which case there is no luxury enjoyed by anyone as no one is residing in such building. So much so according to them, without enjoyment of luxury, i.e., residence there cannot be a luxury tax. The validity of a statute is to be tested with reference to normal conditions and not based on exceptions or abnormal condition. A house is normally built for one's own residence and renting out or use for non-residential purpose are only exceptions and may be only temporary. The validity of the levy is not be tested based on such contingencies. Moreover so long as the tax is on an asset which is styled as a luxury based on normal use, it's actual use also is immaterial because tax is not on use but on the asset. The Act essentially identifies the person who owns residential building with plinth area of 278.7 sq. metres and above as capable of paying tax as the owner of a luxury asset. Therefore, luxury tax is on the asset which answers the description of luxury. So long as the levy contemplated u/s 5A is not on enjoyment of luxury as such, but on the residential building above 3000 sq.fts., plinth area, residence by owner or actual enjoyment of luxury is immaterial. If tax is to be levied based on actual enjoyment of luxury by the owner residing in the building, then the levy becomes subjective because someone with a large family may find a 3000 sq.fts. house inadequate and another with less number of family members may enjoy luxury in a house with less then 3000 sq.fts. also. As already stated validity of the legislation is not be tested with reference to it's effect on each and every individual case or against abnormal conditions prevailing in exceptional cases. Therefore, I find the validity of Section 5A is not affected by any of the situation pointed out by the petitioners.

10. The next contention raised by the petitioners is that there is total discrimination because commercial buildings are not subjected to luxury tax like residential buildings. Residential buildings and commercial buildings are distinct and separate in every respect and therefore they do not constitute one class to attract violation of Article 14 of the Constitution of India. Moreover even if tax could be levied on any other category of building or any other asset or commodity, it is a well settled position that in order to tax something, everything need not be taxed. Therefore, the validity of the legislation cannot be questioned on the ground that Legislature was free to levy tax on various other items of luxury, but has not so far chosen to do so.

11. The next ground raised is that there is discrimination insofar as those who have constructed residential apartment prior to 1.4.1999 are not liable, while buildings constructed after 1.4.1999 only attract luxury tax. Of course, since the Legislature has identified every building above 3000 sq. fts. as luxury apartment and since the levy is recurring liability for every year, it was open to the Legislature to levy tax on every such building irrespective as to when the construction of a luxury residential building was completed. However, this cannot be a ground for declaring the law illegal because in the first place by levying tax in respect of luxury apartments constructed before 1.4.1999 also the Legislature

can always correct the mistake. Moreover, the levy contemplated u/s 5A is only in respect of new buildings (completed after 1.4.1999), which is a reasonable classification, and therefore is no discrimination to attract violation of Article 14 of the Constitution.

12. In the result, I feel the contentions raised by the petitioners are devoid of merits, and therefore, the challenge against Section 5A is to be rejected and I do so.

13. Some of the petitioners have raised a contention about wrong assessment of plinth area leading to liability. While some have filed appeals against assessment or revision thereafter, others have not. In fact, the dispute on this factual aspect cannot be decided by this Court and the issue should be sorted out before statutory authorities. I feel in some cases the petitioners have misunderstood the scope of "plinth area" and consequently raised objection against assessments. It is for the petitioners to again measure the plinth area of the building with reference to its definition including the structures referred to in Section 5(5) of the Building Tax Act and if they are still satisfied that there is a mistake in the measurement, it is open to them to approach the assessing officer for re-measurement and the Tahsildar in such case will take the assistance of a local PWD Engineer who will measure the plinth area in the presence of the Tahsildar and the petitioner. I make it clear that the PWD Engineer will take the request by the Tahsildar as a direction by this Court to him and he will measure the plinth area in the light of the definition contained in the Building Tax Act particularly Section 5(5) in the presence of the Tahsildar and the building owner and file a report to the Tahsildar who will give copy of the report to the building owner. If there is mistake the Tahsildar will make correction based on the measurement taken by the PWD Engineer with reference to the definition and Section 5(5). If the Tahsildar does not accept the measurement of the PWD Engineer, it is open to him to issue detailed order rejecting the measurement report giving reasons thereof and the building owner can in that event file appeal. However, if re-measurement by the PWD Engineer is insisted by the building owner and on measurement by the PWD Engineer the original assessment of plinth area made by the Tahsildar is found to be correct, then the re-measurement requested by the building owner should be taken to be without any bona fides and in that case the Tahsildar shall collect an amount of rupees three thousand towards cost from the concerned building owner payable to the Government. However, if on re-measurement the plinth area originally assessed is found to be excess by 50 sq.ft. or more, then there is no need to collect the cost.

14. There is no scope for deciding any other factual issues mainly, date of completion of the building which attracts tax. It is for verification by the Tahsildar and if there is a grievance, the petitioner should file an appeal. This Court has already held that the Tahsildar should independently decide this aspect by referring to the date of completion of construction declared in the building tax return, electricity bills raised from commencement of occupation, etc. and not

just based on local authority's tax receipt which would have been paid for getting the building numbered to apply for electricity or water connection. It was also held that the house wanning held on an auspicious day before completion also should not be the sole criteria for deciding the date of completion of the house. Since the matter was pending in this Court, the petitioners are granted one month's time from the date of receipt of a copy of this judgment for filing appeal on factual issues and if appeal is filed by any petitioner within such time, the RDO will decide the same on merits treating the same as filed in time. Since luxury tax is a continuing liability there will be a direction to the RDOs to entertain appeals against assessments on luxury tax and decide appeals on merits without insisting on payment of luxury tax as a condition for entertaining the appeal.