

(2000) 05 KL CK 0006
In the High Court Of Kerala
Case No : O.P. 1631 of 1999

Mahamood

APPELLANT

Vs

Tahsildar

RESPONDENT

Date of Decision : 22-05-2000

Acts Referred:

Kerala Building Tax Act, 1975 — Section 5(2)

Citation : (2000) 2 KLJ 419

Hon'ble Judges : J.B. Koshy, J

Bench : Single Bench

Advocate : E.V. Nayanar, for the Appellant; E. Muraleedharan, Govt. Pleader, for the Respondent

Judgement

Hon''ble Mr., Justice J.B. Koshy

1. Petitioners are the owners of a building construction of which was completed as early as on 1.2.93. Petitioners filed a return in time to the Tahsildar, Thalassery showing the completion date as 1.2.93 under the Building Tax Act. But the assessment order was passed only on 26.11.1977 with the rate of tax existing on the date of assessment. By that time when assessment order was passed the rate in the schedule was changed. Petitioner questioned the assessment on two grounds. According to the petitioner the measurement was not correct. Secondly the rate of tax should be based on the date of completion of the building, the taxable event, The matter was considered by the appellate authority. The appellate authority wanted a further measurement and remanded the matter for remeasuring. With regard to the rate of tax, there was no finding as the matter was remanded to the authority. Again the matter was considered and it was reported that it was correctly measured and measurement is 966.92 M2. However, the authority did not go through the contention of the petitioner regarding the rate of tax as that contention was not considered by the appellate authority. Ext.P3 shows that appellate authority did not make any finding regarding the rate of tax. In fact, the operative portion is as follows:

The above section was substituted by Act 3 of 1992 with effect from 10.2.1992. Before the above amendment Section 5(1) was as follows:

5. Charge of building tax:-(I) Subject to the other provisions contained in Act there shall be charge a tax (hereinafter referred to the "building tax" at as rate specified in the schedule in respect of every building the construction of which is completed on or after the 1st day of April, 1973, and the capital value of which exceeds twenty thousand rupees.

Thus with effect from 10.2.1992 assessment made on capital value was changed to plinth area. But in both sections chargeable event is completion of the building which is explained in Explanation as follows:

Explanation I. For the purpose of this Act, the construction of a building shall be deemed to have been completed when it is ready for occupation or has been actually occupied, whichever is earlier.

Section 5(2) was substituted by Act 13 of 1993 with effect from 1.3.1993. It is as follows:

5. Charge of building tax:-

(2) In the case of any building, the construction of which is completed prior to the appointed day but the assessment of which has not been initiated or completed or against which appeal or revision has been filed, building tax shall be assessed on the basis of the plinth area at the rate specified in the Schedule.

Section 5(2) of the Act only says that if the assessment is not completed or even if pending due to filing of appeal, tax should be assessed on the basis of the plinth area. Therefore even if building was constructed before plinth area assessment method was adopted, i.e. before 10.2.92, the appointed day, it should be assessed on the basis of the plinth area if the final assessment is after the appointed day. Validity of such a provision is being tested in a Division Bench of this court and I am not going to that aspect in this case. In this case on the date of completion of building, method of assessment was already changed from the capital value basis to plinth area basis as building was completed after 10.2.92. A close reading of Section 5(2) makes it clear that above section is applicable only regarding building constructed before the appointed day but assessment of which was not completed finally due to pendency of appeal or otherwise. Therefore, Section 5(2) only deals with the method of assessment with respect to such buildings construction of which was completed before the appointed day, but assessments were finalised only after the appointed day. It is not dealing with rate of tax for building constructed after introduction of plinth area method i.e after 10.2.92, otherwise there is no meaning for the words "any building, the construction of which is completed prior to the appointed day".

2. Section 5 (2) also says that rate of tax for assessment on such buildings constructed before appointed day should be as mentioned in the Schedule. It may possibly refers to the schedule as existing on the appointed day, when

method of assessment was changed, even though taxable event was before the appointed day. Since the building herein was constructed after the change of method of assessment, this question may not be of much relevance in this case. In any event, as a general rule to be followed in all assessment under the Act, it is not stated that rate of tax should be based on the Schedule existing as on the date assessment. Section 5(2) in its plain terms say that method of assessment should be on the basis of plinth area if assessment is finalised (for whatever reason) after the appointed day. There is no clear express provision that rate of tax for assessment should be based on the schedule as existing on the date of assessment and not on taxable event. In Maxwell on the Interpretation of Statutes (Twelfth Edition) at page 256 it is stated as follows:

It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties: the subject is not to be taxed unless the language of the statute clearly imposes the obligation, and language must not be strained in order to tax a transaction which, had the legislature thought of it, would have been covered by appropriate words.

In *Cape Brandy Syndicate v. I.R.C.* (1921) 1 K.B. 64) principles were formulated by Rowlatt J in his words:,

In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in nothing is to be implied. One can only look fairly at the language used.

Therefore it can be seen that law is well settled that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of law. The onus is on the Revenue to satisfy the court that the case falls strictly within the provisions of the law. If the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the Legislature and by considering what was the substance of the matter. The above view was taken by the Supreme Court in *A.V. Fernandez Vs. The State of Kerala*, . It is also clear that if a section in a taxing statute is of doubtful and ambiguous meaning, it is not possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer. In order to extract more tax u/s 5(2) after the words the schedule, one cannot add the following words "as existing on the date of assessment". Therefore, when the method of assessment is not in question, rate of tax should be only as per the schedule existing at the time of taxable event as per the charging section.

3. On the facts of this case, in any event, there is no dispute as there is no fault on the part of the petitioner in filing the return. Here petitioner filed the return in time in 1993. But first assessment order was passed after 4 years in 1997. To

say that, due to the delay of the assessing authority assessee has to be penalised by compelling him to pay higher rate of tax is unnecessary, absurd and arbitrary. Revenue cannot take advantage of its own fault. Such an attitude will create injustice. An interpretation which is absurd and create injustice has to be avoided, even if such an interpretation may be possible.

4. Interpretation now put forward by the learned Government Pleader will only cause uncertainty as no time limit is fixed for making assessment in the statute. Consider the following example, "X" is assessed by the assessing authority on the basis that plinth area of the building constructed by "X" is 100 sq.mtrs. "X" filed appeal. When it was rejected he filed a revision application. Revisional authority finds on material that plinth area is only 78 square metres. Petitioner's revision was allowed, and directed the assessing authority to reassess the building on the basis of the plinth area of 75 square metres as mentioned in the return filed by the assessee. The process took indefinite time-lag and assessment was completed after about 10 years of original assessment. By the time if the rate of tax is doubled and if the interpretation given by the revenue is accepted, assessee will have to pay more money merely because of the fact that his revision petition was allowed and authorities accepted the correctness of his return after a time-lag. An unreasonable and unjust result is obtained by the assessee who filed true and correct return and who persuaded to see that correctness of his return is accepted. If appeal and revisional proceedings are resorted to, time also cannot be predicted and finally tax rate will be changing uncertainly. An interpretation which will avoid unreasonable result causing injustice and uncertainty has to be adopted, even if such a provision has to be read down. An interpretation to produce unreasonable result or uncertainty cannot be imputed to a statute if some other interpretation which is reasonable is possible.

5. It is settled law that Taxation Statute, imposing pecuniary burdens on the subject, are construed strictly in favour of those on whom the burden is sought to be imposed. If there is ambiguity with regard to subject of tax a favourable construction to the assessee should be adopted. Supreme Court reiterated the law in *M/s Mysore Minerals Limited, M.G. Road, Bangalore Vs. The Commissioners of Income Tax, Karnataka, Bangalore*, as follows:

It is also well-settled that where there are two possible interpretations of a taxing provision the one which is favourable to the assessee should be preferred.

In *Mathuram Agrawal Vs. State of Madhya Pradesh*, , it was observed by the Supreme Court as follows;

The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter.

Merely by delaying the assessment, the Department cannot say that petitioner has to pay higher tax as the schedule was revised even when there is no fault on the part of the petitioner. It is not a case where the assessee did not file the return intentionally or there is fraud or suppression. There is no such finding in this case.

6. If the view adopted by the revenue is accepted, it will impair the right or obligation of the assessee already accrued as per the statute on the date of taxable event as per charging section. "Rate of tax" is a substantive matter and not merely procedural and it will amount to retrospective taxation, without express language creating retrospectivity and presumption against retrospectivity will apply. It is a fundamental rule that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the term of the Act, especially when it deals with a substantive right. In *Re Athlumney* (1898) 2 Q.B 551 Lord Wright observed a century ago as follows:

Perhaps no rule of construction is more firmly established than this that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

The principle is accepted even now in all countries where anglo saxon jurisprudence is adopted

In this connection I also refer a decision of this court reported in *Ummerkutty v. State of Kerala* (1994 (1) KLT 781), in which this court observed as follows:

The taxable event under the Act is the construction of the building. It is the completion of the construction that gives rise to the liability under the Act. The liability is cast the moment the construction of the building is complete".

Since the petitioner has completed the building on 1.2.93 rate of tax should be based only on the Schedule existing on the date of completion of the building the taxable event. If petitioner has paid the amount as per that schedule no further amount can be demanded from the petitioner. However, on the basis of the undisputed plinth area now fixed, if any further amount is payable by the petitioner on the basis of the Schedule based on the prevailing Schedule on the date of completion of the building, respondents will be free to raise further demand. Exhibits P3 to P6 are set aside.

The Original petition is disposed of accordingly.