
(2014) 10 KL CK 0042
In the High Court Of Kerala
Case No : WP(C). No. 11992 of 2008 (C)

Namboorikandi Ahammed

APPELLANT

Vs

The District Collector

RESPONDENT

Date of Decision : 01-10-2014

Acts Referred:

Constitution of India, 1950 — Article 265
Kerala Building Tax Act, 1975 — Section 5A

Citation : (2014) 4 ILR 499 : (2014) 4 KHC 608 : (2014) 4 KLJ 307 : (2014) 4 KLT 272

Hon'ble Judges : A.K. Jayasankaran Nambiar, J

Bench : Single Bench

Advocate : V.V. Asokan, P. Arun Kumar and S. Amina, Advocate for the Appellant; Lilly K.T., Government Pleader, Advocate for the Respondent

Judgement

A.K. Jayasankaran Nambiar, J.—The petitioner impugns Ext. P6 revenue recovery notice issued against him in connection with recovery of luxury tax dues for the years 2005-06 to 2007-08. It is the case of the petitioner that he had constructed a building in the year 2000 with a plinth area of 259.37 sq. meters. The said building also had a car porch which had a plinth area of 12.60 sq. metres and thereby the total area of the building with the car porch was only 271.97 sq. metres. It is pointed out that by Ext. P2 assessment order, the 2nd respondent assessed the building to building tax by erroneously taking the plinth area as 282.24 sq. metres. It is the case of the petitioner that this assessment was done behind the back of the petitioner insofar as the measurement of plinth area was done without giving any notice to the petitioner and when the petitioner was out of the country and only his wife was residing in the building, and she did not have any knowledge in legal matters. It is contended that in view of his wife's ignorance, no formal appeal was preferred against Ext. P2 assessment order and hence the said order attained finality. It is also pointed out that, pursuant to Ext. P2 assessment order, the petitioner's wife remitted the building tax assessed and also paid luxury tax for the assessment year 2004-05. It is

much thereafter that an intimation was received with regard to the luxury tax dues for the assessment year 2005-06. On receipt of the said intimation, the petitioner approached the 3rd respondent with a representation pointing out that the plinth area of the building had been wrongly taken as 282.24 sq. metres, whereas in actual fact, the area was only 259.37 sq. metres. By Ext. P4 order, the 3rd respondent rejected the representation of the petitioner. A further representation before the 1st respondent also did not yield any positive response and by Ext. P5 order, the 1st respondent rejected the request of the petitioner as time barred. It was thereafter that Ext. P6 notice under the Revenue Recovery Act was served on the petitioner, which the petitioner has impugned in the present writ petition.

2. I have heard Sri. P. Arun Kumar, learned counsel appearing on behalf of the petitioner as also Smt. Lilly. K.T., learned Government Pleader appearing on behalf of the respondents.

3. On a consideration of the facts and circumstances of the case as also the submissions made across the Bar, I find that both in Exts. P4 and P5 orders passed by the 3rd and 1st respondents respectively, the said respondents appear to have considered the representations, preferred by the petitioner against the imposition of luxury tax, as appeals preferred against the levy of building tax. It is in that context that they have indicated, in the said orders, that the representations filed by the petitioner were belated. In the context of levy of luxury tax, the provisions of Section 5A of the Kerala Building Tax Act, 1975, are very clear when it states that there shall be a charge of luxury tax of Rs. 2,000/- annually on all residential buildings having a plinth area of 278.7 sq. metres or more and completed on or after the first day of April, 1999. It is seen, therefore, that the assessment of any building to luxury tax must be conducted on a yearly basis. Going by the scheme of the Kerala Building Tax Act, 1975, where a building tax is levied, as a one time tax on buildings that have been constructed after the appointed day, the plinth area that is taken for the purposes of levy of building tax is also taken into consideration while determining the applicability of the levy of luxury tax. It is, therefore, that there is no separate assessment done annually for levy of luxury tax and the said tax, when once determined based on the plinth area that has been adopted for the purposes of building tax, is charged annually from the assessee on the basis of the plinth area determined for the purposes of building tax. In this connection, it is relevant to note the decision of this Court in Mohamad Sadik Vs. Tahsildar, wherein, it was held that even if the levy of luxury tax under Section 5A of the Kerala Building Tax Act was unchallenged for a previous year, an assessee can challenge the levy of luxury tax for the subsequent years based on the premise that the principles of res judicata will not apply in taxation matters. Taking cue from the said decision therefore, I feel the levy of luxury tax on the petitioner, in respect of a building that was constructed by him and which was subjected to building tax by Ext. P2 order, must necessarily be based on the plinth area of the building during the year for which the luxury tax is charged. This is because the charge of luxury tax

is on a year to year basis. If in any year, there is reduction in the plinth area of the building, then, while such reduction cannot have any bearing on the building tax already assessed in respect of the building, the same would necessarily be a relevant factor for the purposes of determining the luxury tax liability of the assessee, in respect of the building, for the year in question. An erroneous determination of plinth area for the purposes of building tax, that has already been completed on an assessee, cannot be the sole basis for the levy of luxury tax for all time to come in the future. It is based on this premise that the decision of this Court referred to above clearly held that it was open to an assessee to question the determination of plinth area even at a subsequent stage when faced with a demand of luxury tax based on the plinth area of the building in question.

4. There is yet another aspect of the matter. The provisions of Article 265 of the Constitution of India clearly mandate that there shall be no levy or collection of tax save by the authority of law. The constitutional protection against an illegal tax is guaranteed to a person both at the stage of levy as also at the stage of collection. In the instant case, if, as a matter of fact, it is found that the plinth area of the building is less than 278.7 sq. metres in any given assessment year, then the levy of luxury tax on such a building during that assessment year would be clearly illegal, going by the express provisions of Section 5A of the Kerala Building Tax Act. In that event, notwithstanding the fact that an assessee has not challenged the levy in an appeal under the Kerala Building Tax Act, I am of the view that it would be open to the assessee to challenge the collection of such an illegal tax by invoking his rights under Article 265 of the Constitution of India. The illegality of the tax can be set up as a defence even in recovery proceedings. The decision of the Madras High Court in *Rayalseema Constructions Vs. Deputy Commercial Tax Officer, Mannady Division, Madras 1 and Others*, as affirmed by the Supreme Court in *Deputy Commercial Tax Officer, Madras v. Rayalseema Constructions*-[1966 (17) STC 505 (SC)] and noted by a Full bench of this Court in *Manattillath Krishnan Thangal and Others Vs. The State of Kerala and Others*, , fortify the view that I have taken.

5. Thus, in any view of the matter, Ext. P6 demand of luxury tax for the assessment years 2005-06 to 2007-08 cannot be legally sustained. Resultantly, I quash Ext. P6 revenue recovery notice. The 2nd respondent shall carry out the physical verification of the building owned by the petitioner with a view to determining the actual plinth area of the building. This shall be done after giving due notice to the petitioner. The liability of the petitioner to luxury tax in terms of Section 5A of the Kerala Building Tax Act and Rules shall be determined based on the findings of the 2nd respondent as regards the plinth area of the building in question. The 2nd respondent shall take a final decision in the matter within a period of three months from the date of receipt of a copy of this judgment. The determination by the 2nd respondent will govern the luxury tax liability of the petitioner, if any, for the periods from 2005-06 onwards, till such time as changed circumstances warrant a fresh assessment.

The writ petition is disposed as above.