(2008) 11 KL CK 0025

In the High Court Of Kerala

Case No : WP (C) No. 24487 of 2005

Padmanabhan K. APPELLANT

Vs

The State of Kerala and Others RESPONDENT

Date of Decision : 07-11-2008

Acts Referred:

Kerala Building tax Act, 1975 — Section 2, 5(1), 5(5), 5A, 6

Citation : (2009) 1 ILR (Ker) 342 : (2009) 1 KLJ 267 : (2009) 1 KLT 295

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

Bench : Single Bench

Advocate : Jijo Paul, for the Appellant; Tekchand, G.P., for the Respondent

Final Decision : Allowed

Judgement

C.N. Ramachandran Nair, J.—The only question arising in all these cases is whether the covered terrace of residential buildings constitute "plinth area" for building tax assessment. The case of the petitioners is that truss work and structure constructed to cover the terrace of the building, whether it be with asbestos, tile metal or fiber sheets, serve the purpose of protecting the building from heat and rain and by giving roof to the terrace, the terrace does not become residential area to assess it as part of plinth area u/s 5(5) read with Section 6 of the Kerala Building tax Act, 1975 (hereinafter called "the act"). The question whether covered terrace of concrete structure could be included as part of the plinth area of residential buildings was referred to the Government by the District Collector, Ernakulam at the request of very many buildings owners and the Government vide Circular No. 47999/2003 dated 5.12.2003 clarified that there is no provision to exclude has to be assessed by including the plinth area of covered terrace. In fact, in many cases but for the inclusion of plinth area of covered terrace, the buildings would be attract luxury tax payable u/s 5A as the plinth areas excluding the covered terrace is below the limit of 278.7 sq. meters attracting luxury tax. I heard counsel appearing for the petitioners and Government Pleader appearing for the respondents and Advocate Sri. George

Thomas who assisted the court.

2. In support of their contention petitioners have relied on the decision of this Court in Subhashchandrababu Vs. State of Kerala, wherein this could held that the plinth area of garage or any other structure appurtenant to residential building such as used for storage of fiber-wood or other non-residential purpose, should not be taken into account while assessing the building for tax under the act. The Government Pleader on the other hand relied on decision of this Court in All Kerala Federation of Petroleum Traders Vs. State of Kerala, and contended that rood top structure whether it is made with metal, fiber or tile, will constitute ''building" within the meaning of that term contained in Section 2(e) of the Act. According to him, roof top with truss work constructed above terrace, whether it be with metal, wood, fibre or tile, is a structure and being appurtenant to the building, by virtue of Section 5(5), its plinth area should be added to the plinth area of the building.

3. In order to consider the issue, this Court has to necessarily consider the relevant charging provisions contained in the stature and for easy reference, Section 5(1), Section 5(5) and Section 6 are extracted hereunder:

Section 5 Charge of building tax: -

(1) Subject to the other provisions contained in this Act, there shall be charged a tax (hereinafter referred to as "building tax") based the plinth area at the rate specified in the schedule on every building the construction of which is completed on or after the appointed day.

(5) Where there are out-houses, garages or other structures appurtenant to the building for the more convenient enjoyment of the building, the plinth area of such structure shall be added on the plinth area of the main building and the building tax assessed accordingly.

Provided that the plinth area of garage or any other erection or structure appurtenant to a residential purpose shall not be added on the plinth area of the building.

Section 6 Determination of plinth area:- The plinth area of a building for the purposes of this act, shall be plinth area of the building as specified in the plan approved by the local authority or such other authorities as ay be specified by government in this behalf and verified by the assessing authority in such manner as may be prescribed.

Provided that the plinth area of a garage or any other erection or structure appurtenant to a residential building used for storage of firewood or for any non-residential purpose shall not be taken into account for determining the plinth area of that building.

4. There is no doubt that the structure constructed above roof top or terrace of the building is a structure in itself answering the definition of'' "building''''.

However, the question to be considered is whether the roof top cover given to the building makes the terrace beneath it also plinth area of the building and if so, whether such plinth area has to be reckoned for the purpose of assessment of building tax for the residential building u/s 5(5) read with Section 6 of the Act. After providing for inclusion of plinth area of outhouses and structures appurtenant to the building constructed for the more convenient enjoyment of the building along with the plinth area of a garage or any other structure or erection appurtenant tot the residential building used for the purpose of storage of firewood or for any non-residential purpose, should not be added to the plinth area of the main building. Section 6 defines plinth area with reference to the provisions of the Building Rules which do not require any permission to be obtained to give protective cover to terrace which is not enclosed. Further, the same proviso to Section 5(5) is given to Section 6 which provides for determination of plinth area of a building. What is clear from above provisions is that the entire plinth area of appurtenant structures should not be added to the plinth area of the residential building for assessment. Only the plinth area of such of the appurtenant or other structures which are used for "residential purpose" only can be added to the plinth area of the residential building. Therefore, the question to be considered is whether the terrace over the roof top when covered with roof becomes residential area. In fact, cover is given even to buildings with slanting roof, with the result it serves only as a protection to the building as there is no terrace that could be used. However, when roof is given to flat terrace building, the covered terrace portion becomes plinth area of the building.

5. The essence of a residential building is privacy which requires enclosures, whether it be with brick, grill or shutters. In other words, an open area with roof cannot be treated as part of the residential building as it is unfit for residential purpose. Even though the terrace covered with roof may be used for several purposes such as drying of clothes, for recreational purposes, etc., such use cannot be treated as use for residential purpose. Therefore, open terrace even after giving roof to it does not become part of plinth area used for residential purpose. The main purpose of such a structure is to protect the building from heat and rain. Of late lot of people are giving cover to their building to harvest rainwater which is stored either on the top of the building or downstairs in tanks or by allowing such collected water to percolate in pits which increases availability of water in the well. A roof cover prevents absorption of heat by the building and therefore, unnecessary air conditioning is avoided. Similarly when the building is protected from heat and rain, maintenance cost is reduced and it''s life is also extended. In fact, concrete buildings absorbing heat in the day time and radiating the heat to the atmosphere in the night causes in atmosphere temperature even in the night causes increase in atmosphere temperature even in the night causing discomfort not only to the occupants but to the neighbors. In fact, concrete buildings absorbing heat in the day time and radiating the heat to the atmosphere in the night causes increase in atmosphere temperature even in

the night causing discomfort not only to the occupants but to the neighbors. In fact, on account of the increased shortage of drinking water, the Government has issued Circular and in the case of some buildings, provision for collection of rain water is made mandatory. A roof cover on top of the terrace, whether it be made of metal, fibre, or tile, makes collection of clean water easy.

6. Therefore, in public interest, construction of roof cover over concrete buildings is something which should be encourages by providing all incentives by the Government. However, I make it clear that if such terrace in full or part is enclosed with bricks, walls, grills, wood or the like, such enclosed area will become part of the residential area of the building for the purpose of assessment of building tax and luxury tax under the Act. The Government Circular referred above giving contrary interpretation is declared invalid. The W.P. (C)s. are allowed directing the Tahsildar to exclude the plinth area of unenclosed terrace, whether it be covered by roof or not. Since dispute is raised with regard to other plinth area also in some cases, there will be direction to the Tahsildar to inspect the building, measure the plinth area and exclude the covered roof top which does not have walls or enclosures with grills or the like and make fresh assessment. The excess tax, if any, collected should be refunded without any delay.

7. In order to avoid unnecessary litigation, there will be direction to the Government to issue fresh Circular in terms of this judgment for guidance to the statutory Authorities.

