

(2005) 07 KL CK 0023
In the High Court Of Kerala
Case No : IT Ref. No. 136 of 1999

Smt. B. Indira Devi

APPELLANT

Vs

Commissioner of Gift Tax

RESPONDENT

Date of Decision : 28-07-2005

Acts Referred:

Evidence Act, 1872 — Section 114
Gift Tax Act, 1958 — Section 15(6)
Income Tax Act, 1961 — Section 256(1)
Wealth Tax Act, 1957 — Section 16A, 7, 7(1)
Wealth Tax Rules, 1957 — Rule 1BB(1), 1BB(2), 1BB(5), 5, 5(1)

Citation : (2005) 199 CTR 6 : (2006) 280 ITR 440

Hon'ble Judges : P.R. Raman, J;K.T. Sankaran, J

Bench : Division Bench

Advocate : P. Balachandran, for the Appellant; P.K.R. Menon and George K. George, for the Respondent

Judgement

P.R. Raman, J.—The Tribunal, Kochi Bench, has referred for the opinion of this Court, the following questions u/s 256(1) of the IT Act :

"1. Whether, on the facts and in the circumstances of the case, and having regard to the provisions of Rule 1BB(2)(a)(ii) read with the Explanation to the said rule, the Tribunal is right in law in holding that the maintainable rent should be arrived at on the basis of rent of Rs. 7,000 per month, when the actual rent received in the relevant previous year was Rs. 2,414 per month ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in valuing the property on the basis of gross maintainable rent taken at Rs. 7,000 per month in accordance with Sub-clause (i) of Rule 1BB(2)(a) ?"

2. The assessment year is 1983-84. During the previous year ending on 31st March, 1983 the assessee transferred certain properties in favour of her children as per a sale deed dt. 28th March, 1983. One of the properties so transferred by the assessee comprised of 70 cents of land with a building at Ullur. Since the

total consideration shown in the sale deeds were not adequate, the assessee herself had treated the transfer as involving gifts and accordingly, filed return of gift for the asst. yr. 1983-84. In the return the value of the property at Ullur was shown at Rs. 1,95,000: The AO referred the properties to be valued by the Departmental Valuation Officer for determining the value u/s 15(6) of the GT Act read with Section 16A of the WT Act. The Valuation Officer estimated the value as per his order dt. 9th March, 1988. The GTO had however, passed the assessment order dt. 21st March, 1988 adopting the value of the properties fixed by the Valuation Officer. The value adopted by the GTO was Rs. 16,38,400 including the properties at Ullur based on the report of the Valuation Officer. As a matter of fact, the report of the Valuation Officer was given to the assessee only on 8th April, 1988. The assessee preferred an appeal before the CIT(A). The appellate authority fixed the value of the property at Ullur at Rs. 6,50,000 as against 1,95,000 admitted in the return of gift.

3. The assessee preferred an appeal before the Tribunal questioning the value fixed by the CIT(A). It was contended by the assessee before the Tribunal that the property should have been valued in accordance with Rule 1BB of the WT Rules. It was explained that previously the building had been let out on a rent of Rs. 2,414 per month and on that basis the maintainable rent would come to Rs. 23,864. As per the working given by the assessee's counsel, the value of the property under Rule 1BB would come to Rs. 3,57,960. It was contended by the Department that the assessee had not furnished any details regarding the maintainable rent, the aggregate area, etc., and since the built-up area was 2832 sq. mtrs. in a plot of 70 cents. the case would fall outside the purview of the WT Rules.

4. The Tribunal dealt with the said contentions but found that Rule 1BB was applicable on the valuation, that the difference between the unbuilt area and the specified area was not in excess of 20 per cent and so, Sub-rule (5) of Rule 1BB did not apply, that the working given by the assessee's counsel on the valuation of the property was on the basis of the maintainable rent of Rs. 23,864 i.e., on a monthly rent of Rs. 2,414, which the property was fetching earlier, that immediately after the gift the property was let out on a rent of Rs. 7,000 per month to the Central Ground Water Board, that in view of the fact that the property was let out to a Government Department the rent given by the Government Department would give the correct picture of the market, rent, that considering the fact that the built-up area was nearly 7500 sq. ft. in a plot of 70 cents and that the Government had agreed to give a rent of nearly three times the rent which the property was fetching previously, the maintainable rent should be arrived at on the basis of the rent of Rs. 7,000 per month, that by applying the multiple factor as per Rule 1BB of the WT Rules the value of the property would exceed Rs. 6,50,000 as fixed by the CIT(A), but since there was no appeal by the Revenue, it is necessary to sustain the value of Rs. 6,50,000 as fixed by the CIT(A).

5. We have heard the arguments made by the learned senior counsel Sri P. Balachandran and also Sri P.K. Ravindranatha Menon, standing counsel for the IT Department.

6. The learned Counsel appearing for the assessee contended that even though at the time of gift the property was lying vacant, the maintainable rent should have been arrived at on the basis of the annual rent arrived at earlier when the property was let out and not the actual rent the property was fetching subsequently when it was let out. Since the property was lying vacant at the time of the gift, what would be the maintainable rent to be adopted in such a case, arises for consideration.

7. Following the decision of this Court in *CGT v. Mammen Mathew* (1986) 158 ITR 466 wherein it was held that in the absence of rules made under the GT Act for determining the value of gifts, the procedure prescribed in the rules under the WT Act for that purpose has to be followed, the Tribunal found that the property at Ullur should be valued in accordance with Rule 1BB of the WT Rules, Hence, the question as to what should be the maintainable rent to be adopted alone remains to be considered.

8. Rule 1BB to the extent it is relevant for the purpose of this case is extracted hereunder :

"1BB. Valuation of house.--(1) For the purposes of Sub-section (1) of Section 7, the value of a house which is wholly or mainly used for residential purposes shall be the aggregate of the following amounts, namely--

(a) the amount arrived at by multiplying the net maintainable rent in respect of the part of the house used for residential purposes by the fraction 100/8; and

(b) the amount arrived at by multiplying the net maintainable rent in respect of the remaining part of the house, if any, by the fraction 100/9.

Provided that in relation to a house which is built on leasehold land, this sub-rule shall have effect as if for the fraction 100/8 in Clause (a) or, as the case may be, the fraction 100/9 in Clause (b) the fractions 100/9 and 100/10, respectively, had been substituted.

Explanation--For the purpose of this sub-rule, a house shall be deemed to be mainly used for residential purposes, if the built-up floor area thereof used for residential purposes is not less than sixty-six and two-thirds per cent of its total built up floor area.

(2) For the purposes of this rule,--

(a) "gross maintainable rent", in relation to a house, means--

(i) the sum for which the house might reasonably be expected to let from year to year, or

(ii) where the house is let and the annual rent received or receivable by the

owner in respect thereof is in excess of the sum referred to in Sub-clause (i), the amount so received or receivable:

Provided that where the house is in the occupation of a tenant and the taxes levied by any local authority or any expenditure on repairs in respect of the house is borne wholly or partly by the tenant, the sum referred to in Sub-clause (i) or as the case may be, the annual rent referred to in Sub-clause (ii) shall be increased by the amount of the taxes or, as the case may be, the expenditure on repairs so borne by the tenant.

Explanation--For the purposes of this clause "annual rent" means--

(a) in a case where the property is let throughout the previous year, the actual rent received or receivable by the owner in respect of such year; and

(b) in any other case, the amount which bears the same proportion to the amount of the actual rent received or receivable by the owner for the period for which the property is let, as the period of twelve months bears to such period;

(b) house includes an independent residential unit;

(c) "net maintainable rent", in relation to a house, means the amount of the gross maintainable rent as reduced by--

(i) the amount of taxes levied in the previous year by any local authority in respect of the house;

(ii) a sum equal to one-sixth of the amount by which the gross maintainable rent exceeds the amount referred to in Sub-clause (i), in respect of the repairs of the house;

(iii) any sums spent during the previous year to collect the rent from the house, not exceeding six per cent of the amount by which the gross maintainable, rent exceeds the amount referred to in Sub-clause (i).

(iv) the amount of any premium paid during the previous year to insure the house against risk of damage or destruction;

(v) the amount of ground rent payable during the previous year, where the property is subject to ground rent; and

(vi) any sum paid in the previous year on account of land revenue or any other tax levied in the previous year by the State Government in respect of the house.

(d) "previous year" means the period which would be the previous year if an assessment of the income from the house were to be made under the IT Act, 1961 (43 of 1961) for the assessment year."

9. On a combined reading of Sub-rule (2)(a)(i) and (ii) it is clear that the gross maintainable rent has to be the sum for which the house might reasonably be expected to get from year to year and only in the case of a house which is let out

and where the annual rent received or receivable by the owner is found to be in excess of the sum which the house must reasonably be expected to get from year to year, that the let out annual rental received will be treated as the gross maintainable rent. Learned Counsel for the assessee would contend that for the purpose of valuing the property, maintainable rent should be taken as Rs. 23,864 based on a working of a monthly rent of Rs. 2,414 which was the rent the property was fetching earlier.

10. Learned standing counsel appearing for the IT Department Sri P.K. Ravindranatha Menon, on the other hand, contented that the rent at Rs. 2,414 was the rent the property fetched long back and the building was let out some time in the year 1977 and admittedly, the property was lying vacant at the time of execution of the gift. Therefore, according to him, the rental value which fetched earlier, long prior to the gift deed in question especially when the property was lying vacant as on the date of the gift, the maintainable rent cannot be taken as the rental value of the property fetched long prior to the gift in question. According to him, immediately after the gift deed in question/the property was let out to a Government Department and the assessee received a rent of Rs. 7,000 per month. Hence the reasonable accepted let out value from year to year has to be calculated on a monthly rent of Rs. 7,000 per month.

11. As per Sub-rule (1) of Rule 1BB of the WT Rules, for the purpose of Section 7(1) the value of a house which is wholly or mainly used for residential purposes shall be the aggregate of the amounts specified in Clauses (a) and (b) thereunder. As per Clause (a) the amount arrived at by multiplying the net maintainable rent in respect of the part of the house used for residential purposes by the fraction $100/8$ and as per Clause (b) the amount arrived at by multiplying the net maintainable rent in respect of the remaining part of the house, if any, by the fraction $100/9$. As per Sub-rule (2) the gross maintainable rent in relation to a house means the sum for which the house might reasonably be expected to let from year to year. Therefore it is necessary to consider the actual let out value for the purpose of finding out whether such actual let out value is more than the reasonable expected let out value as determined in Sub-rule (2)(a)(i). In the present case, the assessee has not adduced any materials to show as to what is the reasonably expected rent of similar buildings in the locality. Admittedly, the house was let out long prior to the gift in question and it was lying vacant at the time of gift. There is no dispute that the property was let out for Rs. 7,000 immediately after the gift in question. In such circumstances, even the future let out value can be taken as a piece of evidence to find out as to what is the reasonable expected rent. In *Ambika Prasad v. Ram Ekbal Rai* (1966) SCC 605, the apex Court considered the scope of Section 114 of the Evidence Act and whether it is open to presume continuance backward. It was held as follows :

"If a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backwards may sometimes be drawn. The presumption, of future continuance is noticed in

illustration (d) to Section 114. In appropriate cases, an inference of the continuity of a thing or state of things backwards may be drawn under the section, though on this point the section does not give a separate illustration. The rule that the presumption of continuance may operate retrospectively has been recognised both in India. This is rule of evidence by which one can presume the continuity of things backwards. The presumption of continuity weakens with the passage of time. How far the presumption may be drawn both backwards and forwards depends upon the nature of the thing and the surrounding circumstances."

12. Applying the above principle, when admittedly the building was let out immediately after the gift in question to the Government Department for a monthly rent of Rs. 7,000, it is quite reasonable to presume, in the absence of any other evidence that the let out value of the building is Rs. 7,000 per month.

13. Learned Counsel appearing for the assessee placed reliance on the decision of the apex Court in *CGT v. Executors and Trustees of the Estate of the Late Shri Ambalal Sarabhai*, (1988) 170 ITR 144 (SC) and contended for the position that valuation has to be done as on the date of the gift and the rental value existed prior thereto alone is relevant. We are unable to accept this contention. In the abovesaid decision, the question arose for consideration was as to whether the value should be ascertained on the basis of the balance sheet of the company as on 31st March, 1963, being a document of published information in preference to the average break-up value indicated by the balance sheet of the company as on 31st March, 1964 and 31st March, 1965. The apex Court referred to the earlier decision reported in *Commissioner of Wealth Tax Vs. Mahadeo Jalan and Mahabir Prasad Jalan and Others etc.*, which upheld the decision in *McCathie v. Federal Commissioners of Taxation* 69 CLR 1 wherein it was held that "the real value of the share will depend more on the profits which the company was making and should be capable of making, having regard to the nature of its business, than upon the amounts which the shares would be likely to realise upon liquidation." Reference was also made to the decision in *Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia*, wherein the apex Court held that where the shares in a public limited company are not quoted on the stock exchange or the shares are in a private limited company, the proper method of valuation to be adopted would be the profit-earning method. The apex Court held that "for the purpose of valuation, the taxing authority is not bound by the figure of profits shown in the P&L a/c because it is possible the amount of profits may have suffered diminution on account of unreasonable expenditure or the directors having chosen to take away a part of the profits in the form of remuneration rather than dividends". We do not find that for the purpose of determining the valuation of a house property under Rule 1BB the method of valuation of the share of a company may have any relevance. Further, even in the said decision, the apex Court held that even for the purpose of such valuation, the taxing authority is not bound by the figure shown in the P&L a/c. On the other hand, a Division Bench of this Court in *T.A. Abdul Khader v. CWT* (IT Ref. No. 270/1999)

has considered the question of valuation, of the building u/s 5(1) of the WT Act itself and it was held that "the value of the assets for the purpose of WT Act has to be determined u/s 7 of the WT Act, 1957 which in turn says that the value of any asset other than cash for the purpose of the Act shall be its value as on the valuation date determined, in the manner laid down in Schedule III. Schedule III deals with rules for determining the value of assets." After referring to Rule 5, dealing with "gross maintainable rent how to be computed" it was held as follows :

"Rule 5(1) states that where the property is let, the amount received or receivable or the annual value assessed by the local authority is the gross maintainable rent, but the assessing authority has to adopt the rent, whichever is higher. In a case where the property is not let, the amount of annual rent assessed by the local authority for the purpose of levy of property tax would be the gross maintainable rent. For the building let out, there is no compulsion that the authority should adopt the rent for which it is let out. The authority can assess the rent which is receivable and also the annual rental value assessed by the municipality. The legislature has advisedly used the expression whichever is higher, which gives an option to the assessing authority. In a given case if the assessing authority finds that rent which is claimed by the owner is not the rent receivable, the authority can always assess the rent which is receivable, or in a given case can go for the municipal assessment."

14. From the foregoing discussions, it has to be held that for the purpose of determining the gross maintainable rent of a residential building which was lying vacant as on the date of the gift, if it is found, that the building was let out immediately after the gift in question, drawing a presumption backwards as permitted u/s 114 of the Evidence Act and fixing the gross maintainable rental value based on such actual rental received cannot be said to be wrong or unreasonable or contrary to Rule 1BB of the WT Rules, especially in the absence of any other materials on record to show otherwise. Accordingly, we answer the questions referred to us in the affirmative, i.e., in favour of the Revenue and against the assessee.