(2006) 01 KL CK 0036

In the High Court Of Kerala

Case No : W.A. No''s. 289, 423, 439 and 492 of 2005

Subhashchandrababu APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 09-01-2006

Acts Referred:
Kerala Building Tax Act, 1975 — Section 2, 30, 5, 5(5), 5A

Citation : (2006) 2 ILR (Ker) 214 : (2006) 2 KLT 189

Hon'ble Judges : K.T. Sankaran, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : R. Parameswaran Nair and C. Unnikrishnan, for the Appellant; Georgekutty Mathew, Spl. Government Pleader for Taxes, for the Respondent

Judgement

K.S. Radhakrishnan, J.—Whether the plinth area of a garage or any other erection or structure appurtenant to a residential building used for the purpose of storage of firewood or for non-residential purpose be added on to the plinth area of that building for the purpose of building tax of the luxury tax under the Kerala Building Tax Act, 1975 is the question that has come up for consideration in these cases.

2. Common question arises for consideration in all these cases and hence we are disposing of those cases by a common judgment. For disposal of these cases we may refer to the facts in W.P.C. No. 15526 of 2004 against which W.A. No. 439 of 2005 has been preferred. Writ Petition was preferred seeking a writ of certiorari to quash Ext. P3 notice assessing building tax of the petitioner''s residential building at Rs. 47,400/-treating the plinth area of the residential building as 600.93 M2. Petitioner referring to Ext. P1 approved plan stated that the area shown in the plan of the porch meant for parking area is 243.73 M2. Further it is also pointed out that as per the proviso to Sub-section (5) of Section 5 and the proviso to Section 6 of the Kerala Building Tax Act, 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 purposes shall not be taken into account

for determining the plinth area of that building. Petitioner pointed out excluding the porch meant for parking area, tax could be assessed only on an extent of 357.14 M2. Objection raised by the petitioner was rejected by the authorities and tax was assessed as per the plan approved by the Calicut Development Authority.

3. Learned Government Pleader placing reliance on a Circular dated 2.12.2003 issued by the Government stated that plinth area of the car porch appurtenant to residential building alone can be excluded as per the proviso to Sub-section (5) of Section 5 of the Kerala Building Tax Act and while calculating the plinth area of the building other than a residential building, the plinth area of a car porch cannot be excluded. Learned single Judge after considering the rival contentions as well as examining the various statutory provisions held that the exclusion provided under the provisos to both the above referred Sections is in respect of structures appurtenant to the residential building though intended for use incidental to residence are not generally used for the purpose for which it is meant for. Learned Judge took the view that in order to claim exemption it has to be proved that such buildings are used for purposes not connected with residence which includes storage of firewood. Learned Judge also held that the exemption clause does not provide for exclusion of any appurtenant structure if the same is used for more convenient or beneficial use of the residential building, such as for garage of a car.

4. Learned Judge therefore concluded that a car garage is not eligible for exemption under the provisos to Sections 5(5) and 6 of the Act if it is used for garage of car and that exception is available only when car garage is used for other purposes like storage of firewood. Non-residential purpose referred to in the provisos to both the Sections according to the learned Judge is a purpose other than for more convenient enjoyment of the building referred to in the charging Section, namely, Section 5(5) of the Act. Learned single Judge therefore concluded so long as garage being an appurtenant structure used for parking of vehicle, plinth area of such garage should be added to the plinth area of the main residential building for assessment, and exclusion applies only when the car garage is generally not used for garage of vehicle, but when used for any purpose other than anything connected with residence.

5. Sections 5 and 5A of the Building Tax Act provide for assessment of building tax and luxury tax. Section 5 of the Kerala Building Tax Act is the charging Section for building tax. Relevant portion of the same is extracted below for easy reference.

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 on 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.

xxx xxx xxx (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 a garage or any other erection or structure appurtenant to a residential building used for the purpose of storage of firewood or for any non-residential purpose shall not be added on the plinth area of that building.

(emphasis added)

Section 5(5) refers to "building" a word defined u/s 2(e) which reads as follows:

"building" means a house, out-house, garage, or any other structure, or part thereof, whether of masonry, bricks, wood, metal or other material, but does not include any portable shelter or any shed constructed principally of mud, bamboos, leaves, grass or thatch or a latrine which is not attached to the main structure.

The proviso to Sub-section (5) of Section 5 and Section 6 refers to "residential building", a word defined u/s 2(1) which reads as follows:

(1) "residential building" means a building or any other structure or part thereof built exclusively for residential purpose including out-houses or garages appurtenant to the building for the more beneficial enjoyment of the main building but does not include hotels, boarding places, lodges and the like.

Sub-section (5) of Section 5 states that 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 be assessed accordingly. But the proviso carves out to an exception to Sub-section (5) of Section 5 which states that the plinth area of a garage which can only be of a residential building or other structure appurtenant to a residential building used for the purpose of storage of firewood or any non-residential purpose shall not be added on the plinth area of that building. Function of a proviso has been re-stated by the apex court in its recent decision in Union of India (UOI) Vs. Sanjay Kumar Jain, , Haryana State Cooperative Land Development Bank Ltd. Vs. Haryana State Cooperative Land Development Banks Employees Union and Another, and hence requires no reiteration.

6. Determination of plinth area is dealt with in Section 6, which reads as follows:

6. Determination of plinth area.- The plinth area of a building for the purposes of this Act, shall be the plinth area of the building as specified in the plan approved by the local authority or such other authorities as may 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.

Section 6 stipulates that plinth area of the building shall be the plinth area of the building as specified in the plan approved by the local authority or such other authorities as may be specified by the Government in that behalf and verified by the assessing authority in such manner as may be prescribed. Section 5(5) and Section 6 would take in "building" as defined u/s 2(e), which takes in residential as well as non residential building while the proviso to Sub-section (5) of Section 5 as well as to Section 6 take in "residential building" as defined u/s 2(1) of the Act. Proviso added to Section 5(5) as well as to Section 6 would indicate that plinth area of a garage or any other erection or structure appurtenant to a residential building used for the purpose of storage of firewood or for any non-residential purpose shall not be added on to the plinth area of that building. Provisos therefore deal with two categories of cases which are as follows:

a) garage of a residential building

b) erection or structures appurtenant to a residential building used for the purpose of storage of firewood or for any non residential purpose.

7. In the first category of cases emphasis is not on "user", because the garage is meant for parking vehicles while in the second category, the emphasis is on "user", that is the erection or structure appurtenant to the residential building used for the purpose of storage of firewood, or for any non residential purpose. Proviso therefore gives emphasis on user in the second category of cases, a fact which could be established only by the person who claims exemption on the plea that the erection of structure is used for storage of firewood or other non residential purpose. Question as to whether structure appurtenant to a residential building is used for the purpose of storage of firewood or for any non-residential purpose is a question of fact unlike a garage which is meant for parking a motor vehicle.

8. The Government on a query raised by the Revenue Divisional Officer, Kollam issued a clarification vide letter No. 55615/96 MC 2/03/RD dated 2.12.2003 as follows:

The Revenue Divisional Officer, Kollam in the letter referred above has requested clarification on the question whether the plinth area of car porch appurtenant to a building can be exempted as provided u/s 5(5) of the KBT Act.

Having examined the case in detail, Government hereby clarify that the plinth area of a car porch appurtenant to a residential building alone can be excluded as per the proviso to Section 5(5) of the KBT Act. But while calculating the plinth area of a building other than a residential building, the plinth area of a car porch cannot be excluded.

Section 30 of the Act empowers the Government to pass orders to remove difficulties in giving effect to the provisions of the Act which are not inconsistent with the Act. Proviso to Sub-section (5) of Section 5 and the proviso to Section 6 read with the Government clarificatory letter dated 2.12.2003 purported to have been issued u/s 30 of the Act are intended to give some relief to owners of residential buildings.

8. A conjoint reading of the proviso to Section 5(5) and Section 6 along with the clarificatory letter dated 2.12.2003 would show that the plinth area of the garage of a residential building shall not be added on to the plinth area of that building, so also any other erection or structure appurtenant to a residential building used for the purpose of storage of firewood or for any non-residential purpose. The finding of the learned single Judge that garage of a residential building is not eligible for exemption under the proviso to sub-s.(5) of Section 5 and Section 6 cannot be sustained. The reasoning of the learned Judge that garage would be added on to the plinth area only when it is used for other purposes like storage of firewood cannot be sustained. Learned Judge has placed considerable emphasis on the expression "appurtenant" placing reliance on Black''s Law Dictionary, which, in our humble view, is totally misplaced. The expression "garage" used in the proviso is unconnected with the second category of cases which refers only to erection or structure used for storage of firewood or any other non residential purpose.

9. We therefore hold that the plinth area of a garage of a residential building shall not be taken into account for determining the plinth area of that building. So also the plinth area of any other erection or structure appurtenant to a residential building used for storage of firewood or any non-residential purpose shall not be taken into account for determining the plinth area of a residential building. Writ Appeals are therefore allowed and the Writ Petitions are disposed of as above. Assessing authorities would make fresh assessment u/s 5 and 5A as per the above declaration. Judgment of the learned single Judge would stand set aside.