Tharu Vs. Tahsildar

Tharu Vs. Tahsildar

SooperKanoon Citation : sooperkanoon.com/730190

Court : Kerala

Decided On : Oct-29-2002

Reported in : 2003(1)KLT219

Judge : C.N. Ramachandran Nair, J.

Acts : Kerala Building Tax Act, 1975 - Sections 9, 9(1), 9(2), 9(3), 9(5) and 11

Appeal No. : O.P. No. 2072 of 2002

Appellant : Tharu

Respondent : Tahsildar

Advocate for Def. : Sojan James, Government Pleader

Advocate for Pet/Ap. : N. Subramanian and; M.S. Narayanan, Advs.

Disposition : Petition allowed

Judgement :

C.N. Ramachandran Nair, J.

1. The petitioner is challenging the building tax assessment issued by the first respondent in the prescribed form vide Ext. P13. The petitioner's case is that the petitioner along with his daughter and grand-daughter jointly owned 21 cents of land wherein the assessed building was constructed by a firm of Builders, namely,

Mansion Builders, with whom the petitioner and other co-owners entered into an agreement for development of the land and for construction of flats. After entering into agreement with the land owners, the Builders entered into separate agreements with various persons, developed the property, constructed and delivered possession of residential apartments to those persons who advanced amounts for the construction of flats. Thereupon proportionate undivided right in land was assigned to respective flat owner by the petitioners and with the purchase of undivided right of land, each flat owner became the absolute owner of the flat. The apartment complex consists of 12 apartments in three floors and one godown and one car parking area in the cellar floor. According to the petitioner, the petitioner is not the owner of the building as such and only owns a part of the building and the other flats are constructed by the builder under agreement with flat owners, and so much so each flat of the building has to be assessed in the name of respective owner of the flat in terms of definition contained in Explanation 2 to Section 2(e) of the Kerala Building Tax Act, hereinafter called the 'Act'. Eventhough the petitioner has sent various letters and representations and produced documents before the Tahsildar, he does not appear to have considered any of these. The assessment order itself is in Form No. V prescribed under Rule 9(1) of the Kerala Building Tax Rules. Since it is a printed form with blanks filled with relevant data, the same does not contain reasons in support of the assessment and demand of tax.

2. I heard Sri. N. Subramaniam, counsel for the petitioner, and Government Pleader for the respondents.

3. Various contentions raised in the Original Petition are serially dealt with hereunder. In the first place, the petitioner's contention is that the assessment in Form V without assigning any reasons for demand of tax is absolutely arbitrary and violative of principles of natural justice. The petitioner has also relied on the decision of this Court in The District Registrar v. Lake Paradise, reported in ILR 2001 (3) Ker. 515 and contended that from the impugned order itself, it is clear that there is no application of mind or consideration of contentions of the petitioner, and therefore the assessment is liable to be set aside on that ground alone. I am in complete agreement with the argument of counsel for the petitioner because the

assessment in Form No. V without giving reasons for the order should be only an assessment in terms of Section 9(1) of the Building Tax Act whereby the assessing authority on receipt of return finds that the return is correct in all respects and passes an order in terms of the return assessing the building and demanding the tax. It is only when an assessment is completed in terms of the return and when an adverse order is passed against the Building owner; the assessee, the assessment could be issued in Form V in terms of Section 9(1) of the Act. If the assessee; the owner of the Building does not file a return or if the return filed is found to be incorrect by the assessing officer, the assessing officer is bound to issue notice under Section 9(2) calling upon the assessee to file return; if no return is filed and if return is filed, to furnish evidence in support of it. Sub-section (3) of Section 9 provides that the assessing officer shall hear the petitioner, consider the evidence and after calling for further evidence, if necessary, and after conducting inspection, shall pass assessment order giving reasons for the same. Whether the assessing officer passes an order under Section 9(3) after hearing the petitioner, or if an assessment is to be completed under Section 9(5) as best judgment assessment on account of non-co-operation of the assessee, in either case, the assessing officer has to give reasons for his order. Since the assessee has a right of appeal under Section 11 of the Act, it is mandatory for the assessing officer to give reasons in support of his assessment so that the appellate authority can consider the appeal with reference to the reasons based on which the assessment order is issued by the assessing officer. Even though the statute does not provide for issue of pre-assessment notice, I feel if such a notice is issued by the assessing officer, the same will afford an opportunity to the assessee to file written reply objecting to the proposal for assessment so that assessment can be. completed after considering all issues raised in the matter. Therefore in order to complete the assessment in accordance with Section 9 and in a fair manner, and in compliance with rules of natural justice, the assessing officer has to comply with the following procedure.

(a) if the assessee has filed a return, the assessing authority shall first scrutinise the return filed by the assessee and if he finds the return is correct in all respects; he shall complete the assessment and issue assessment order and demand notice in Form No. V and Form No. VI respectively. If no return is filed, the

Tahsildar shall call for return, scrutinise such return filed, and if the same is found full and correct; he shall complete the assessment based on the return filed by the assessee, the return should be correct and complete in all respects such as plinth area, classification of the building, rate of tax, etc.

(b) If the assessing officer is not satisfied about the correctness or completeness of the return furnished, he shall call for evidence and documents which the assessee may rely on in support of the return and on scrutiny of such documents and evidence produced by the assessee, if the assessing officer is convinced of the correctness of the return, then also he has to complete the assessment as above by issuing assessment in Form V and demand notice in Form VI. If on scrutiny and after verifying the documents and evidence produced by the assessee in support of the return, and on hearing the assessee, the assessing officer is not convinced about the correctness of the return, he shall issue notice in writing to the assessee, giving proposal for assessment and the reasons based on which he proposes to make the assessment, which should invariably cover the objections raised by him on the return filed, particularly with reference to plinth area of the building, classification of the building and the rate of tax applied, and such other aspects, which he considers relevant. While issuing notice, the assessing officer should give sufficient time to the assessee to file written reply and evidence in support thereof. On receipt of reply from the assessee to the proposal for assessment issued by the assessing authority and after hearing the assessee or his representative, the assessing authority shall issue a speaking order considering the contentions raised by the petitioner on issues pertaining to assessment, such as plinth area, classification of the building, the rate of tax applied, etc. and giving reasons in support of the assessment.

(c) If the assessee does not file return even after service of notice or after filing the return the assessee does not co-operate with the assessing officer with regard to furnishing of evidence in support of his return, the assessing officer has to necessarily pass a best judgment assessment in terms of Section 9(5) of the Act. In such cases, he has to collect data, inspect the building and make enquiries with regard to relevant aspects and has to pass a speaking order giving reasons for the assessment, and serve a copy of the same on the assessee.

(d) A dispute common in many cases is the controversy on the plinth area of the Building to be assessed. Plinth area has to be measured keeping in view of it's definition contained in Section 2(k) of the Act and the additions to be made in terms of Section 5(5) of the Act. Since it is to some extent technical, the assessing authority should, in the event of controversy, take the assistance of the local PWD Engineer who will measure the building in the presence of the assessee and the assessing officer and give a report to the assessing officer giving details of the measurements taken and the plinth area computed. Assessment should be made based on such report after giving copy of such report to the assessee and after giving opportunity to the assessee.

4. While the above is the mandatory procedure contemplated for assessment under Section 9 of the Act for completion of the assessment, the impugned orders are issued in flagrant violation of the said procedure. Since the order issued is not a speaking order, it is not possible to know as to whether the petitioner's contentions were considered and if considered why the same were overruled. Further, the basis of the order is also not known. A demand of tax should be the result of adjudication which is the process of assessment and a non-speaking order is no assessment at all, except when it is issued in terms of return under Section 9(1) of the Act. The impugned order is therefore liable to be set aside on that ground alone.

5. The next contention raised by the petitioner is against the assessment of building as a single unit in the name of one of the land owners. Of course some residential flats and part of the building constructed for commercial purposes are retained by the land owners which according to the petitioner was the consideration for giving the land to the Builders for development and for sale of the proportionate right in land to other Buyers. It is evident from the documents produced that the Builders, namely, Mansion Builders, has constructed the building under agreement with flat owners who advanced amounts for the construction of the Building. Explanation. 2 to Section 2(e) makes it clear that if the building comprises of different apartments or flats constructed by sharing cost of construction by the owners jointly, then each such apartment or flat has to be treated as a separate unit. The Section is as follows:

2. Definitions:- In this Act, unless the context otherwise requires:-

(e) 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.

Explanation 1:.....

Explanation 2: Where a building consists of different apartments or flats owned by different persons and the cost of construction of the building was met by all such persons jointly each such apartment or flat shall be deemed to be a separate building.

When the flat is constructed by the Builder under contract with the owner, the cost borne by the owner or the consideration paid by him to the Builder is the cost of construction of such flat. Therefore when a building is constructed under agreement with different flat owners, the total consideration paid by all the owners constitutes the cost of construction of the building. What costs to the owners is the cost of construction and not what is spent by the Builder. Ultimately, when the construction is completed and the flats are handed over by the Builder to the owners, it has to be necessarily found that the cost of construction is met by all the owners jointly as the amounts collected by the Builder constitute the cost of construction. It is immaterial whether some of the flats are retained by the land owners or the Builders because there is valuable consideration in such cases also and so much so there is sharing of cost by them as well. So far as the cost of construction is met by all the flat owners, then each apartment or flat has to be separately assessed. Therefore, in the present case each flat calls for separate assessment in the name of the owner, treating such flat or apartment as a separate building. This is the proposition consistently laid down by this court in a large number of cases starting from S. Babu v. State of Kerala, (1994) K.L.J. (TC) 278. The Tahsildar has to necessarily identify the building with reference to its use. This Court has held in the decision reported in Sukumaran v. Tahsildar, 1992 (2) KLT 373 and Lizzy Lijju v. Tahsildar 2000 (3) KLT 497 (DB) and in MA. Pioneer Shopping Complex (P) Ltd. v. Tahsildar, W.A. 1786 of 1998 that where the

building includes both commercial as well as residential apartments, the same has to be separately assessed at different rates in proportion to the area used for residential and commercial purposes. The building in question is constructed with a godown for commercial purpose and flats for residential purposes. Therefore the respective area has to be identified with reference to it's use or purpose, measured and assessed separately in the name of the respective owner.

6. An aspect which has not been so far considered in the case of assessment of flats or apartments is the method of assessment of common areas which also constitute part of the building. The Act and the Rules are silent on this aspect. The common areas in a flat are used by co-owners and no part of it is exclusively owned by any of the owners. Moreover, all the owners together are joint owners of the common areas because without such common areas, the flat cannot be used. Therefore the common areas such as corridors, pathways, stair cases, security rooms, or any other area used by flat owners commonly have to be assessed along with the building. Even though part of a building also constitutes a building within the definition of the term contained in Section 2(e) of the Act, there is no scope for assessment of building in parts. Therefore the common areas cannot be assessed independently and have to be necessarily assessed along with other portions of the building. Since the Act provides for assessment of each flat separately, the common areas have to be apportioned among the flats in proportion to the area of the flats. Therefore the assessing authority has to necessarily take the total plinth area of the common areas such as corridors, stair cases, lift areas, security rooms, generator room, and other areas commonly used by the flat owners, appoint on the same in proportion to the plinth area of each flat, and the same should be added to the plinth area of each flat. Of course dedicated constructions such as car sheds, balconies etc. attached to various flats have to be separately added to the plinth area of the respective flat and should not be treated as common area. The assessing authority has to make assessment in such a manner that no constructed area in a building complex should be left out from assessment, for the reason that the same is not exclusively owned by anyone, but is commonly used by owners of the building.

7. So far as rate of tax is concerned, it is settled law that the rate prevalent as on the date of completion of construction is the rate to be applied. Moreover, the tax applicable to flats or for that matter any building assessed under Explanation to Section 2 (e) concerned, such tax is increased by 15 as provided under the Schedule to the Act.

8. In the result, Exts. P13 assessment and P12 schedule of payment are set aside and the Tahsildar is directed to complete the assessment after issuing notice to the all the flat owners. Of course, the petitioner will co-ordinate with the Tahsildar for serving notice on the flat owners, if possible through the association which manages the building complex which can represent the owners of the building. The Tahsildar shall complete the assessment within a period of three months from the date of receipt of a copy of this judgment, which will be produced by the petitioner.

The Registry will forward a copy of this judgment to the Secretary to Government of Kerala, Revenue Department for circulation among Tahsildars so that proper procedure and norms for assessment are followed by them to avoid unnecessary litigation and for timely collection of tax. The Government is also free to prepare guidelines for assessment; particularly for apartment-buildings in the light of the above observations and circulate among the Tahsildars.

The O.P. is allowed as above.