2024:KER:76572

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

WEDNESDAY, THE 16TH DAY OF OCTOBER 2024 / 24TH ASWINA, 1946

WP(C) NO. 31300 OF 2024

PETITIONER:

KOTTILA VEETIL KRISHNAKUMAR,
AGED 52 YEARS, S/O. KRISHNA MARAR,
AUTOMOBILE MECHANIC, 'LAKSHMIKRISHNA', PUTHUR,
PERALAM AMSOM, P.O. ETTUKUDUKKA, KANNUR DIST.,
PIN – 670 521.

BY ADVS.
GEORGE MATHEWS
M.M.ANTO

RESPONDENTS:

1 **STATE OF KERALA,**
REPRESENTED BY CHIEF SECRETARY,
GOVT. SECRETARIAT, THIRUVANANTHAPURAM,
PIN – 695 001.

2 **THE DISTRICT COLLECTOR,**
COLLECTORATE, KANNUR DIST., PIN – 670 001.

3 **THE THAHSILDAR,**
PAYYANNUR TALUK, PAYYANNUR, PIN – 670 307.

4 **THE THAHSILDAR,**
KANNUR TALUK, KANNUR, PIN – 670 001.

5 **THE VILLAGE OFFICER,**
PERALAM VILLAGE, KOZHUMMEL P.O., KANNUR DIST.,
PIN – 670 521.

BY ADV. THUSHARA JAMES (SR.GP)

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 16.10.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'C.R'

JUDGMENT

The petitioner has approached this Court challenging the levy of luxury tax under the provisions of the Kerala Building Tax Act, 1975 (hereinafter referred to as the '1975 Act'). It is the case of the petitioner that the petitioner had initially constructed a two story residential building with a total area of 315.08 Sq.m. It is stated that the assessment was completed by Ext.P1 proceedings dated 14-08-2014 levying luxury tax on the building and the petitioner continued to pay luxury tax on the building.

2. According to the petitioner, by registered document No.1356/2018 of SRO Mathamangalam, the 1st floor of the residential building has been settled/transferred to the wife of the petitioner (One Kaniyeri Sreekala) and she is the owner of the 1st floor of the building. It is the case of the petitioner that with the transfer of the 1st floor of the building to his wife, the area of the building in occupation of the petitioner has been

reduced to 162.30 Sq.m, which is below the limit for levy of luxury tax. The petitioner is therefore before this Court seeking the following reliefs.

a) *"Issue a writ, direction or order directing the respondents to take into consideration the transfer of 1st floor of the residential building as per Ext. P2 and to uphold that the petitioner is the owner of the remaining building alone and same is not liable for payment of luxury tax.*

b) *To order the refund of luxury tax paid by the petitioner for the period after the transfer of ownership of the 1st floor".*

3. The learned counsel appearing for the petitioner refers to the provisions of the 1975 Act and submits that there can be a levy of luxury tax at the hands of the petitioner only if the petitioner is in possession of a residential building having an area equivalent to or above the limit specified in Section 5A of the 1975 Act. It is submitted that since a portion of the residential building belonging to the petitioner has been transferred/settled in favour of his wife, the area of the building has fallen below the limit specified in Section 5A of the 1975 Act, and

therefore the petitioner is no longer liable to pay luxury tax.

4. The learned Senior Government Pleader would submit that the claim of the petitioner cannot be accepted. It is submitted that after constructing a residential building having an area which is admittedly above the limit specified in Section 5A of the 1975 Act and after being subjected to the levy of luxury tax, the petitioner cannot escape from the liability by transferring a portion of the building to his near relatives. It is submitted that if such a device is permitted, every person who is liable to pay luxury tax under the provisions of Section 5A of the 1975 Act could transfer/settle a portion of their residential building in the name of their close relatives and escape from the liability to pay luxury tax.

5. Having heard the learned counsel for the petitioner and the learned Senior Government Pleader, I am of the view that the petitioner has not made out any case for grant of relief. It is not disputed before me that

the residential building of the petitioner as it originally stood had an area in excess of the limits specified in Section 5A of the 1975 Act, and thus it was liable to the levy of luxury tax under that provision. The building was also duly assessed to luxury tax. According to the petitioner, the petitioner has also discharged the liability towards luxury tax, and in the year 2018 he transferred/settled a portion of the building in favour of his wife, therefore, the petitioner is no longer liable to pay luxury tax. This contention of the petitioner cannot be accepted. As rightly pointed out by the learned Senior Government Pleader, if the contention of the learned counsel for the petitioner is accepted, any person who is liable to pay luxury tax under the provisions of Section 5A of the 1975 Act could escape from the liability by transferring a portion of the building to his/her spouse or a near relative. The fact remains that the entire building continues to be in the occupation and enjoyment of the petitioner, and such a device would amount to evasion of

tax as distinguished from tax planning. While tax planning is permissible in law, evasion of tax is not permissible in law. For a detailed analysis of the law on the point one may usefully refer to the concurring judgment of ***CHINNAPPA REDDY, J.*** in ***M/s McDowell and Company Limited V. Commercial Tax Officer; (1985) 3 SCC 230*** where after an exhaustive analysis of the law on the point the learned judge held:-

> *"**17.** We think that time has come for us to depart from the Westminster [1936 AC 1 : 1935 All ER Rep 259] principle as emphatically as the British Courts have done and to dissociate ourselves from the observations of Shah, J. and similar observations made elsewhere. The evil consequences of tax avoidance are manifold. First there is substantial loss of much needed public revenue, particularly in a Welfare State like ours. Next there is the serious disturbance caused to the economy of the country by the piling up of mountains of black-money, directly causing inflation. Then there is "the large hidden loss" to the community (as pointed out by Master Wheatcroft [18 Modern Law Review 209]) by some of the best brains in the country being invloved in the perpetual war waged between*

the tax-avoider and his expert team of advisers, lawyers, and accountants on one side and the tax-gatherer and his perhaps not so skilful, advisers on the other side. Then again there is the "sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it". Last but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guideless, good citizens from those of the "artful dodgers". It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr Justice Holmes, who said, "Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization". But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax avoidance. We now live in a Welfare State whose financial needs, if backed by the law, have to be respected and met. We must recognise that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is a pretence to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not

> *prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai, J. in Wood Polymer Ltd. and Bengal Hotels Limited, In re [47 Com Cas 597 (Guj HC)] where the learned Judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax.*
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> ***18.*** *It is neither fair nor desirable to expect the Legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of "emerging" techniques of interpretation (sic as) was done in Ramsay [1982 AC 300 : (1981) 1 All ER 865] , Burmah Oil [1982 STC 30] and Dawson [(1984) 1 All ER 530] , to expose the devices for what they really are and to refuse to give judicial benediction."*

In the very same case, the judgment for the majority was delivered by ***RANGANATH MISRA, J.*** The concluding paragraphs of the judgment (for the majority) read thus:-

> *"**44.** We may also recall the observations of*

Viscount Simon in Latilla v. I.R. [25 TC 107] :

"Of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income, without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are 'entitled' to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary one result of such methods, if they succeed, is of course to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres. Another consequence is that the Legislature has made amendments to our Income Tax Code which aim at nullifying the effectiveness of such schemes."

45. *Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief*

> *that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."*

The device adopted by the petitioner was not an effort at tax planning; it was clearly an attempt to evade tax. Therefore, I am of the view that the petitioner is not entitled to the reliefs sought in the writ petition. The writ petition fails, and it is accordingly dismissed.

Sd/-
GOPINATH P.
JUDGE

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APPENDIX OF WP(C) 31300/2024

PETITIONER'S EXHIBITS

Exhibit P1	**TRUE COPY OF THE ORDER OF ASSESSMENT IN FORM-V DATED 14.08.2014**
Exhibit P2	**TRUE COPY OF THE DOCUMENT NO.1356/2018 OF THE SRO, MATHAMANGALAM DATED 05.09.2018**
Exhibit P3	**TRUE COPY OF THE RECEIPT FOR THE PAYMENT LUXURY TAX DATED 13.06.2023**
Exhibit P4	**TRUE COPY OF THE RECEIPT DATED 13.06.2023 FOR THE PAYMENT OF PROPERTY TAX ETC. FOR THE 1° AND 27 HALF OF THE YEAR 2023-2024 DATED 13.06.2023**