IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

WTA No. 1 of 2005

Judgment reserved on:31.12.2010.

Date of decision : 6.1.2011.

Commissioner of Wealth Tax …Appellant

Versus.

M/s.H.P. Small Industries & Export Corp. …Respondent.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge .

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for Reporting ? Yes

For the Appellant : Mr. Vinay Kuthiala & Mrs.Vandana Kuthiala, Advocates

For the Respondent: Mr.Vishal Mohan, Advocate vice Mr.Pankaj Jain, Advocate.

Deepak Gupta, J.

This Wealth Tax Appeal was admitted on the following questions of law:

1. Whether on the facts and in the circumstances of the case the learned ITAT was right in holding that the land was occupied by the assessee itself, particularly when it had shown substantial amounts of rental income as derived from the leasing of sheds constructed on the land in question?
2. Whether on the facts and in the circumstances of the case the ITAT was right in deleting the addition on the ground that no wealth tax was levied in the preceding and succeeding years particularly when the principle of re judicata is not applicable to income tax proceedings?

3. Whether on the facts and in the circumstances of the case the learned ITAT was right in equating occupation of asset with ownership or holding. Though the land was owned by/belonged to the assessee, but the fact remains that it was occupied by lessees from whom rental income was received and not occupied by the assessee?"

The undisputed facts are that the assessee which is the State Small Industries and Export Corporation was allotted some land by the State. The assessee constructed sheds on this land and rented out the same to industrialists. The Assessee in its return of income included the rents received on account of the leasing out the sheds in its annual income. The Assessing Officer found that though the income from these sheds had been reflected in the income of the assessee but in its return for wealth tax the aforesaid sheds were not shown to be the 'assets' of the assessee. The Assessing Officer added the value of this property towards the wealth tax assets of the assessee. The appeal filed by the assessee was dismissed by the Commissioner, CIT (Appeals). Thereafter, the assessee approached the Income Tax Appellate Tribunal which held that the property in question could not be treated to be the assets of the assessee since the same had only been allotted to it and was actually transferred in favour of the assessee only in the year 2003. Another ground which weighed with the Tribunal was that neither in the preceding nor in the succeeding years the

property in question had been included in the net wealth of the assessee.

To understand the rival contentions of the parties, we shall have to refer to Sections 2(ea) and 4(1a) of the Wealth Tax Act, 1957, relevant portions of which as existing for the relevant year, read as follows:

> "2(ea) "assets", in relation to the assessment year commencing on the 1st day of April, 1993, or any subsequent assessment year, means:
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> [(i) any building or land appurtenant thereto (hereinafter referred to as "house"), whether used for residential or commercial purposes or for the purpose of maintaining a guest house or otherwise including a farm house situated within twenty-five kilometers from local limits of any municipality (whether known as Municipality, Municipal Corporation or by any other name) or a Cantonment Board, but does not include
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> (1) a house meant exclusively for residential purposes and which is allotted by a company to an employee or an officer or a director who is in whole-time employment, having a gross annual salary of less than five lakh rupees;
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> (2) any house for residential or commercial purposes which forms part of stock-in-trade;
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> (3) any house which the assessee may occupy for the purposes of any business or profession carried on by him;
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> (4) any residential property that has been let-out for a minimum period of three hundred days in the previous year;
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> **4. Net wealth to include certain assets.**
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> (1) In computing the net wealth
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> (a) of an individual, there shall be included, as belonging to that individual, the value of assets which on the valuation date are held
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> Explanation:- For the purposes of this section,
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> (a) the expression "transfer" includes any disposition, settlement, trust, covenant, agreement or arrangement;"

Sh.Vinay Kuthiala, learned counsel for the Revenue submits that under Section 4 of the Act the word used is 'belonging' which has a wider connotation than ownership and

it cannot by any stretch of imagination be said that the shed did not belong to the assessee. Even if title was transferred to the assessee only in the year 2003 when the property was transferred in favour of the assessee by the State, Sh.Kuthiala submits that the assessee had domain and legal control over the property and as such this property should be deemed to belong to the assessee.

On the other hand Sh.Vishal Mohan, learned counsel for the respondent, has made two fold submissions. He submits that in view of the law laid down by the Apex Court in **Nawab Sir Mir Osman Ali Khan vs. Commissioner of Wealth Tax Hyderabad, (1986) 162 I.T.R. 888,** an asset can be deemed to be belonging to the assessee only when he acquires legal ownership thereof. He further submits that assuming that the assets belong to the assessee then also in terms of Section 2(ea) the assessee should be deemed to be in constructive occupation of the sheds since they were rented out for the purpose of business of profession.

We may, first make reference to the judgment relied upon by the assessee i.e. **Nawab Sir Mir Osman Ali Khan vs. Commissioner of Wealth Tax Hyderabad, (1986) 162 I.T.R. 888.** It would be pertinent to mention that in this case the assessee had entered into agreements agreeing to sell some of his property in favour of certain individuals. The assessee received the entire sale consideration and handed over

possession of the property in question to the vendees. However, the sale deeds were not executed and registered. The Apex Court after discussing the entire law held as follows:

> " In Webster's Dictionary 'belonging to' is explained as meaning, inter alia to be owned by, be in possession of. The precise sense in which the words were used, therefore, must be gathered only by reading the instrument or the document as a whole. S. 53A of the Transfer of Property Act, 1882 is only a shield and not a sword.
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> In Aiyar's Law Lexicon of British India, 1940 Edition page 128, it has been said that the property belonging to a person has two meanings- (1) ownership; (2) the absolute right of the user. The same view is reiterated in Stroud's Judicial Dictionary 4th Edn. page 260. The expression: 'property belonging to' might convey absolute right of the user as well as of the ownership. A road might be said, with perfect propriety, to belong to a man who has the right to use it as of right, although the soil does not belong to him.
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> Under S. 53A of the Transfer of Property Act, 1882 where possession has been handed over to the purchasers and the purchasers are in rightful possession of the same as against the assessee and the occupation of the property in question, and secondly that the entire consideration has been paid, and thirdly the purchasers were entitled to resist eviction from the property by the assessee in whose favour the legal title vested because conveyance has riot yet been executed by him and when the purchasers were in possession had right to call upon the assessee to execute the conveyance, it cannot be said that the property legally belonged to the assessee in terms of S. 2(m) of the Act in the facts and circumstances of the case even though the statute must be read justly and equitably and with the object of the section in view. We are conscious that if a person has the user and as in the enjoyment of the property it is he who should be made liable for the property in question under the Act; yet the legal title is important and the legislature might consider the suitability of an amendment if it is so inclined."

Sh.Vishal Mohan has placed strong reliance on this judgment and submits that the Apex Court in relation to the Wealth Tax Act in this judgment has clearly held that legal title

is important and if legal title is not transferred then the person in whose name the legal title stands shall be deemed to be person to whom the property belongs. He further submits that the legislature has not amended the provisions of the Wealth Tax Act and therefore this judgment applies to his case with full force.

On the other hand Sh.Vinay Kuthiala, places reliance on a Full Bench judgment of the Andhra Pradesh High Court in **Nawab Mir Barkat Ali Khan vs. Commissioner of Wealth Tax, (1997) 226 ITR 654**. The Full Bench of Andhra Pradesh High Court considered the Judgment of the Apex Court delivered in **Nawab Sir Mir Osman Ali Khan's case** (supra) and held as follows:

> "The position is that though all statutes including the statute in question should be equitably interpreted, there is no place for equity as such in taxation laws. The concept of reality in implementing a fiscal provision is relevant and the Legislature in this case has not significantly used the expression 'owner' but used the expression 'belonging to'. The property in question legally, however, cannot be said to belong to the vendee. The vendee is in rightful possession only against the vendor. Speaking for myself, I have deliberated long on the question whether in interpreting the expression 'belonging to' in the Act, we should not import the maxim that 'equity looks upon a thing as done which ought to have been done' and though the conveyance had not been executed in favour of the vendee, and the legal title vested with the vendor, the property should be treated as belonging to the vendee and not to the assessee. I have occasion to discuss thoroughly this aspect of the matter with my learned brother and since in view of the position that legal title still vests with the assessee and the authorities, we have noted, are preponderantly in favour of the view that the property should be treated as belonging to the assessee in such circumstances, I shall not permit my doubts to prevail upon me to take the view that the property belongs to the

vendee and not to the assessee. I am conscious that it will work some amount of injustice in such a situation because the assessees would be made liable to bear the tax burden in such situations without having the enjoyment of the property in question. But times perhaps are yet not ripe to transmute equity on this aspect in the interpretation of law- much as I would have personally liked to do that. As Benjamin Cardozo has said, 'The judge, even when he be free, is not wholly free'. The judge cannot innovate at pleasure."

Thereafter, on consideration of the various judgments of the Supreme Court the Full Bench held as follows:

"A close reading of section 4, the Explanation thereto and section 2(m) of the Act makes the intention of Parliament evident as to what should be treated as belonging to the individual for the purposes of computing the net wealth. It appears to us that a property which has been transferred by the individual in favour of another under any disposition, settlement, trust, covenant, even an agreement or arrangement will cease to belong to him and cannot be brought within the fold of "belonging to" under section 2(m) OF THE Act and it is for that purpose that section 4 of the Act specifically provides that the properties held by persons enumerated in clause (a) of sub-section (1) under such inchoate transfer shall be included as belonging to that individual. Therefore, it follows that in the case of a transfer as defined in the Explanation to section 4 by the individual, the property cannot be said to belong to the individual unless it is within the clutches of section 4 of the Act, notwithstanding the fact that the transfer had not been effected as contemplated under section 54 of the Transfer of Property Act or under the Registration Act.

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It is worth noticing here that the provisions of section 4 of the act were not brought to the notice of the Supreme Court and were not considered in Nawab Sir Mir Osman Ali Khan v. CWT [1986] 162 ITR 888 (SC). There was, however, no occasion for consideration of those provisions in the other cases referred to above. For the purpose of construing the expression "belonging to" in section 2(m) of the Act and in view of the judgment of the Supreme Court in Nawab Sir Mir Osman Ali Khan's case [1986] 162 ITR 888, the judgments of our High Court in CIT v. Nawab Mir Barkat Ali Khan [1974] Tax LR 90, Nawab Mir Barkat Ali Khan v. CIT [1988] 171 ITR 541 and CIT v. Sahney Steel and Press Works (P.) Ltd. [1987] 168 ITR 811,

> will not be of much assistance much less will they be binding authorities on the interpretation of the expression "belonging to" in section 2(m) of the Act for the term considered in those income tax cases was "owner" within the meaning of section 9 of the 1922 Indian Income-tax Act (section 22 of the 1961 Income-tax Act).
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> For the aforementioned reasons, in our considered view, the expression "belonging to" in section 2(m) of the Act will have to be understood as interpreted above in answering the first question."

The Full Bench of the Andhra Pradesh High Court virtually held that the judgment of the Apex Court in **Nawab Sir Mir Osman Ali Khan's** case (supra) could not be held to be a binding precedent on the interpretation of the expression 'belonging to" for the reason that the Apex Court did not consider the provisions of Section 4 of the Act.

Sh.Kuthiala also placed reliance upon another judgment of the Apex Court in **Commissioner of Income-Tax vs. Podar Cement Pvt. Ltd. and others, (1997)226 ITR 625.** In this case the Apex Court was concerned with the interpretation of the word 'owner' occurring in Section 22 of the Income Tax Act, 1922. The judgment in **Nawab Sir Mir Osman Ali Khan's case** (supra) was brought to the notice of the Apex Court and the Apex Court has specifically distinguished this judgment. The concept of 'ownership' was considered by the Apex Court and it held as follows:

> "In the meantime, it would not be irrelevant to go into the concept of "ownership". What is ownership after all? Read from the Roman Law up to the English Law at the present stage, medieval stage having been interspersed with different formulae, the position that now juristically emerges is this. The full rights of an owner as now recognized are :

"(a) The power of enjoyment (e.g., the determination of the use to which the res is to be put, the power to deal with produce as he pleases, the power to destroy);
(b) Possession which includes the right to exclude others ;
(c) Power to alienate inter vivos, or to charge as security;
(d) Power to leave the res by will.
One of the most important of these powers is the right to exclude others. The property right is essentially a guarantee of the exclusion of other persons from the use or handling of the thing . . . . . But every owner does not possess all the rights set out above ? - a particular owner's powers may be restricted by law or by an agreement he has made with another." (refer to G. W. Paton on Jurisprudence, 4th Edn., pp. 517-18)."

Thereafter, the Apex Court further went on to hold as follows:

"Thus the juristic principle from the view point of each one is to determine the true connotation of the term "owner" within the meaning of S. 22 of the Act in its practical sense, leaving the husk of the legal title beyond the domain of ownership for the purpose of this statutory provision. The reason is obvious. After all, who is to be taxed or assessed to be taxed more accurately - a person in receipt of money having actual control over the property with no person having better right to defeat his claim of possession or a person in legal parlance who may remain a remainder man, say, at the end or extinction of the period of occupation after, again say, a thousand years? The answer to this question in favour of the assessee would not merely be doing palpable injustice but would cause absurd inconvenience and would make the Legislature to be dubbed as being a party to a nonsensical legislation. One cannot reasonably and logically visualise as to when a person in actual physical control of the property realizing the entire income and usufructs of the property for his own use and not for the use of any other person, having the absolute power of disposal of the income so received, should be held not liable to tax merely because a vestige of legal ownership or a husk of title in the long run may yet clothe another person with the power of a residual ownership when such contingency arises which is not a case even here. A plain reading of clause 4 of the agreement, as extracted above, clearly goes to show that the physical possession of the properties has passed on or is deemed to have passed on to the assessee to have and to hold for ever and absolutely with the power to use the same in whatsoever manner it thinks best and the assessee shall derive all income and benefits together with full power

> of disposal of the properties as well as the income thereof. Can it then be said that the recipient of the income being the assessee only having an absolute and exclusive control over the property without any let or hindrance on the part of the so-called vendor which, indeed, under law it was not entitled to do, as we shall presently show, shall be immune from the taxing provision in Section 22 of the Act? The answer in our view is clearly in the negative…."

Though the language of the Wealth Tax Act and the Income Tax Act may be different inasmuch as the words used in the Wealth Tax Act are 'belonging to' and in the Income Tax Act the words used are 'owner', there can be no dispute that 'belonging to' has to be given a much wider connotation than 'owner'. The judgment in **Podar Cement's** case (supra) is by a Bench of three Judges and in this case the judgment of the Apex court in **Nawab Sir Mir Osman Ali Khan's** case has been specifically noticed and distinguished. Therefore, we are bound to follow the judgment in **Podar Cement's** case.

Furthermore, we are also in agreement with the Full Bench judgment of the Andhra Pradesh High court that the words 'belonging to' have to be read along with the explanation of Section 4 and under this explanation the expression of 'transfer' includes any agreement or arrangement. The assessee, in the present case, was allotted the land by the State Government. It constructed shops thereupon and rented out the same and derived income therefrom. The sheds were therefore under the domain and control of the assessee. Even if legal ownership had not passed to the assessee the property in question belonged to it.

The assessee was deriving rental income and collecting the same which itself shows that it was the assessee to whom the property belonged.

We are therefore of the considered view that the assets in question should be deemed to belong to the assessee and these assets are liable to be included in the assets by the assessee.

It was lastly contended by Sh.Vishal Mohan that since the property was in occupation of the assessee through the tenants the same is not to be included in the assets. This point was never raised before any of the authorities below and further more we are of the view that the words of clause (iii) of Section 2(ea) indicate that the house to be exempt must be in the occupation of the assessee for the purpose of any business or profession carried on by him. Keeping in view the language of the Section it cannot be said that the assessee was in possession through the tenants.

In view of the above discussion, the questions are answered in favour of the Revenue and against the Assessee. The order of the Tribunal is set-aside and the order of the Assessing Officer as confirmed by the Commissioner (Appeal) is restored. No costs.

(Deepak Gupta), J.

January 6, 2011. (Kuldip Singh) J.
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