Commissioner of Wealth-Tax, New Delhi

Vs

P. N. Sikand

Civil Appeal No. 1174 of 1974

(P. N. Bhagwati, Syed M. Fazal Ali JJ)

01.04.1977

JUDGMENT

BHAGWATI J. -

This appeal raises a rather difficult but interesting question of law relating to valuation for the purpose of the Wealth- tax Act, 1957, of leasehold interest in land, when there is a covenant in the lease that the lessee shall not be entitled to assign the leasehold interest without obtaining the prior approval in writing of the lessor and the lessor shall be entitled to claim and recover from the lessee a certain specified proportion of the unearned increase in the value of the land at the time of the assignment.

The controversy in this appeal relates to the assessment year 1968-69, the relevant valuation date being December 31, 1967. The assessee is assessed top wealth-tax as an individual. His net wealth on the valuation date included a property situate on plot No.12, Block No.39, Kautilya Marg, Chanakyapuri. The property consisted of leasehold interest in the land together with a house built upon it. The land belonged to the president of India and it was leased by the President of India to one Vashesharan Devi on the terms and conditions set out in an agreement of lease dated December 30, 1954, and the leaseh old interest was acquired from Vashesharan Devi by the assessee. The premium for the grant of the lease was Rs. 24,400 and the annual rent was fixed t Rs. 610 subject to certain variations. The terms and conditions of the lease are a titled important and, so far as material, they may be reproduced as follows :

> "13. The lessee shall before any assignment or transfer of the said premises hereby demised or any part thereof obtain from the lessor or such officer or body as the lessor may authorise in this behalf approval in writing of the said assignment or transfer and all such assignees and transferees and the heirs of the lessee shall be bound by all the covenants an conditions herein contained and be answerable in all respects therefor.
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> Provided also that the lessor shall be entitled to claim and recover a portion of the unearned increase (i.e., the difference between the premium already paid and current market value) in the value of land at the time of transfer (whether such transfer is an entire site or only a part thereof), the amount not be recovered being 50 per cent. of the unearned increase.
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> The lessor shall have a pre-emptive right to the property after deducting 50 per cent. of the unearned increase as aforesaid." The assessee constructed a large building on

the land and the question arose a to how the leasehold interest of the assessee in the land together with the building should be valued. This property had been valued in the past assessment year at Rs. 6,00,000 and the assessee had accepted this valuation and not challenged it. But in the assessment for the assessment year 1968-69, the assessee valued this property in the return or net wealth at Rs. 4,52,000 on the basis of the certificate obtained from M/s. Anand Apte and Jhabvala, architects, who are approved valuers recognised by the department. The architects estimated the value of the property at Rs. 5,82,268 and from this figure, they deducted a sum of Rs. 1,30,000 representing 50 per cent. of the unearned increase in the value of the land, which under the terms and conditions of the lease belonged to the lessor, and arrived at the value of Rs. 4,52,000. The Wealth-tax Officer did not accept the estimate of the valuation made by the architects and taking annual rent of Rs. 1,30,000 fetched by the property as the basis, computed the net annual rent at Rs. 82,956 and arrived at the figure of Rs. 8,29,560 as the value of the property by applying the multiple of ten to the annual rental value of Rs. 82,956. The Wealth- tax Officer rejected the claim of the assessee to deduct from the value of the property 50 per cent. of the unearned increase in the value of the land on the ground that this claim was based "merely on hypothetical presumptions" but reduced the value of the property from Rs. 8,29,560 to Rs. 6,00,000 since that was the figure accepted by the revenue in the past assessment years. The assessee challenged the valuation made by the Wealth-tax Office in an appeal preferred before the Appellate Assistant Commissioner, but the appeal was unsuccessful as the Appellate Assistant Commissioner took the same view as the Wealth-tax Office. The Tribunal also, in further appeal, affirmed thesame view holding that "the fact that the assessee might have to pay 50 per cent. of the unearned increase to the lessor does not affect the valuation of the property under section 7 of the Wealth-tax Act" and the words used in that section "make it clear that the estimate which should be made by the Wealth-tax Officer is of the gross price" and hence no part of the unearned increase was deductible in computing the value of the property for the purpose of the Wealth- tax Act. The Tribunal also upheld the rental method of valuation of the property and finding that the valuation of Rs. 6,00,000 adopted by the Wealth-tax Officer was even less than eight times the annual rental value of Rs. 82,956 the Tribunal declined to interfere with the valuation made by the Wealth-tax Officer.

The assessee thereupon applied to the Tribunal for making a reference to the High Court and on the application of the assessee, the following question of law was referred by the Tribunal for the opinion of the High Court :

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in taking the view that 50% of the unearned increase payable to the lessor of the land formed part of, and was not deductible out of, the valuation of the property for the purpose of the Wealth-tax Act ?"

The High Court took the view that the liability to pay 50 per cent. of the unearned increase in the value of the land to the lessor at the time of the assignment was a disadvantage attached to the leasehold interest in the land and hence it value was liable to be deducted from the value of the property in arriving at the net wealth of the assessee and, on this view, it answered the question in the negative, in favour of the assessee. This led to the filing of the present appeal by the revenue after obtaining a certificate of fitness from the High Court.

It would be convenient at the outset to refer to the relevant provisions of the Wealth-tax Act, 1957, before we address ourselves to the question which which arises for determination in the appeal. The Wealth-tax Act, 1957, was parliament in exercise of the legislative power conferred under entry 86 of List 1 of the Seventh Schedule to the Constitution and, as pointed out by Shah J. in Sudhir Chandra Nawa v. Wealth-tax Officer, Calcutta [1968] 69 ITR 897 (SC), wealth-tax "is a tax imposed on the capital value of the assets of individuals and companies on the valuation date-it is imposed on the total assets which the assessee owns" and it is levied on the value of those assets. Section 3 is the charging section and it provides that, subject to the other provision contained in the Act, there shall be charged for every assessment year commencing on and from the day of April 1 , 1957, a tax in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule. Thus, wealth-tax is a tax on the net wealth of the assessee on the valuation date. Net wealth is defined in section 2(m) to mean "the amount by which the aggregate value, computed in accordance with the provisions of this Act, of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in his net wealth as on that date under this Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date" other than debts falling within certain specified categories. The word "asset" used in section 2(m) is of the widest signification and under section 2(e), it includes property of every description, movable or immovable, barring certain exceptions which are not material for our purpose. What is, therefore, necessary for the purpose of determining the net wealth of the assessee is, first to compute the aggregate value of all assets belonging to the assessee in accordance with the provision of the Act and then to deduct from it the aggregate value of all the debts, and the resultant which is obtained would be the net wealth assessable to tax. Section 7, sub- section (1), lays down the mode of determination of the value of an asset for the purpose of the Act and it say that, subject to any rules made in this behalf, the value of any asset other than cash "shall be estimated to be the price which, in the opinion of the Wealth-tax Officer, it would fetch if sold in the open market on the valuation date". Now, plainly, one of the assets belonging to the assessee in the present case was the leasehold interest in the land together with the building upon it and for the purpose of computing the net wealth of the assessee, it was necessary to determine the value of this asset. The question which must, therefore, be asked in terms of section 7(1) is : what would be the price which this asset would fetch if sold in the open market on the valuation date ? This question cannot be satisfactorily answered, unless we first determine what is the nature of this asset : what is the interest of property, qualitative as well as quantitative, which this asset represents ?

The asset consists of leasehold interest of the assessee in the land together with the building constructed upon it. The building, of course, belongs to the assessee having been constructed by him and the determination of its value should not present any difficulty, because there are recognise methods of valuation of buildings. The difficulty, however, arises in regard to valuation of the leasehold interest in the land. The leasehold interest is held by the assessee under a lease deed executed by the Present of India and, apart from clause (13), which we have reproduced above, it is an ordinary lease deed of the usual kind. Clause (13) of the lease deed provides that the assessee shall not be entitled to assign the leasehold interest in the land without obtaining the prior approval in writing of the lessor an 50 per cent. of the unearned increase in the value of the land at the time of the assignment shall be climbable by the lessor, and, moreover, if the lessor so desires, he shall have pre-emptive right to purchase of the property after reducing 50 per cent. of the unearned increase in the value of the land. Does this covenant merely impose a personal obligation on the lessee which arise on assignment of the leasehold interest or is it a covenant running with the land ? That is a question which has direct bearing on the valuation of the leasehold interest. Now, the last

portion of the first paragraph of clause (13) provides that "all such assignees and transferees shall be bound by all the covenant Supreme Court and conditions herein contained and be answerable in respect therefore". This means whenever an assignment of the leasehold interest is made by the lessee, the assignee would be bound by all the covenants contained in the lease deed an these would indisputably include the covenant in clause (13). Clause (13) would equally bind the assignee and if the assignee in his turn want to assign his leasehold interest in the land, he would have to obtain the prior approval in writing of the lessor to such assignment and the lessor would be entitled to claim 50 per cent. of the unearned increase in the value of the land. This indeed was not disputed on behalf of the revenue. The covenant in clause (13) is, therefore, clearly a covenant running with the land and it would bind whosoever is the holder of the leasehold interest of the time being. It is a constituent part of the rights and liabilities and advantages and disadvantages which go to make up the leasehold interest and it is an incident which is in the nature of burden on the leasehold interest. Plainly and indisputably it has the effect of depressing the value which the leasehold interest would fetch if it were free from this burden or disadvantage. Therefore, when the leasehold interest in the land has to be valued, this burden or disadvantage attaching to the leasehold interest must be duly discounted in estimating the price which the leasehold interest would fetch. The value the leasehold interest on the basis that this burden or disadvantage were to be ignored would be to value an asset different in content and quality from that actually owned by the assessee. This was the principle applied by the Judicial Committee in Corrie v. MacDermott [1914] AC 1056 (PC), an appeal from Australia, where the question arose as to how certain land granted by the Government of Queensland to the trustees of that Acclimatisation Society of Queensland to be used only for the purpose of the society should be valued on resumption by the Government. The trustees had not general power of sale but they were by statute authorised to sell any part of the land to the local authority and to the National Agricultural and Industrial Association. It was held by the Judicial Committee that in view of this restriction on the nature of the interest of the trustees in the land, the trustees were not entitled, upon resumption of the land by the Government, to be paid unrestricted freehold value of the land but only the value of the land to the trustees under the conditions upon which they held it. The Judicial Committee pointed out that if the owner holds the property subject to restrictions, "it is a necessary point of enquiry how far these restrictions affect the value" and the property cannot be valued as if it were "unrestricted in any way". The burden or limitation attaching to the leasehold interest in the present case must, therefore, be taken into account in arriving at the value of the leasehold interest and it cannot be valued ignoring the burden or limitation.

This problem can also be looked at from a slightly different angle and this approach too would throw some light on the true nature of the leasehold interest required to be valued. Let us approach the question from the point of view of the lessor. What is the nature of the lessor's interest in the land ? The lessor has undoubtedly the reversion, but coupled with it is also the right to 50 per cent. of the unearned increase in the value of the land at the time of assignment of the leasehold interest by the lessee as also the pre- emptive right to the land after deducting 50 per cent. of the unearned increase from the price obtainable by the lessee. This is the asset of the lessor which would have to be valued when the lessor is sought to be assessed to wealth-tax. The right to 50 per cent. of the unearned increased on assignment of the leasehold interest would certainly add to the value which the reversion would otherwise fetch in the open market. Now, once it is granted that under the lease deed the lessor has a bundle of rights, which includes "something" more than the reversion, that "something" would necessarily be subtracted from the interest of the lessee and, to the extent, the interest of the lessee would stand reduced. The interest of the lessee would be the leasehold interest minus that "something". What goes to augment the interest of the lessor would correspondingly reduce the interest of the lessee and it cannot be taxed as the wealth of both the lessor and the lessee.

It would be includible in the net wealth of the lessor and hence it cannot at the same time form part of the wealth of the lessee and must be subtracted in determining the nature and extent of the interest of the lessee.

That takes us to the question as to how the leasehold interest of the assessee with the burden or limitation attaching under clause (13) of the lease deed should be valued. It is clear from the language of section 7, sub-section (1), that what the revenue is required to do for the purpose of determining the value of an asset is to assume that the asset which is to be value is being sold in the open market and to fix its value for the purpose of wealth-tax upon that hypothesis. Now, whenever the value of an asset had to be determined on the basis of a hypothetical sale, the court has necessarily to embark upon speculations which may be quite difficult and, in some cases, even artificial. Here the asset to be valued is the leasehold interest in the land with the burden or restriction contained in clause (13) of the lease deed and the inquiry has, therefore, to be directed to the question s to what is the price which this asset would fetch if sold in the open market. What would be the realisable value of this asset ? It would indeed be difficult to speculate as to what the leasehold interest in the land would fetch in the open market when it is affected by the burden or restriction contained in clause (13) of the lease deed. If the leasehold interest were free from this burden or restriction, it would be comparatively easy to determine its market value, for there are recognised methods of valuation of leasehold interest, but where the leasehold interest is cut down by this burden or restriction and some right or interest is abstracted from it, the problem of valuation becomes a difficult one and some method has to be evolved for resolving it. The only way it can be done in a case of this kind is by taking the market value of the leasehold interest as if it were unencumbered or unaffected by the burden or restriction of clause (13) and deducting from it, 50 per cent. of the unearned increase in the value of the land on the basis of the hypothetical sale, as representing the value of such burden or restriction.

There is also one other consideration which reinforce the adoption of this method of valuation. When, for the purpose of valuation of the leasehold interest, it is assumed that the leasehold interest is sold in the open market, the price received does not in its entirety belong to the assessee. Fifty per cent. of the unearned increase in the value of the land is diverted to the lessor by virtue of the paramount title contained din clause (13) and when received by the assessee, it belongs to the lessor. What is received by the assessee on his own account is only the price, less 50 per cent. of the unearned increase in the value of the land and that represents the net realisable worth of that set in the hands of the assessee. The revenue contend that payment of 50 per cent. of the unearned increase in the value of the land to the lessor is really an instance of application of the price received by the assessee and not diversion of a part of the price by paramount title and hence the whole of the price must be taken as the measure of the wealth of the assessee. But this contention is, in our opinion, not well-founded and cannot be sustained. The true test for determining whether a payment made by an assessee out of an amount received by him is an application of part of the amount which belongs to him or it is payment of an amount which is diverted before it reaches the assessee so that at the time of receipt, it belongs to the payee and not to the assessee, has been explained by Hidayatullah J. in Commissioner of Income-tax v. Sitaldas Tirathdas [1961] 41 ITR 367, 374(SC) in the following words :

> "In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no decided onubt, there re in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the

income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who, even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and children of the assessee who contend to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case in which by an overriding charge the assessee became only a collector of another's income.

It is clear on the application of this test that in the present case, 50 per cent. of the unearned increase in the value of the land would be diverted to the lessor before it reaches the hands of the assessee as part of the price. The assessee holds the leasehold interest on condition that if he assigns it, 50 per cent. of the unearned increase in the value of the land will be payable to the lessor. That is the condition on which he has acquired the leasehold interest an hence 50 per cent. of the unearned increase in the value of the land must be held to belong to the lessor at the time when it is received by the assessee and it would not be part of the net realisable worth of the leasehold interest in the hands of the assessee. If a question is asked as to what is the real wealth of the assessee in terms of money so far as the leasehold interest is concerned, the answer would inevitably be that it is the price less 50 per cent. of the unearned increase in the value of the land. It is difficult to see how 50 per cent. of the unearned increase in the value of the land which belongs to the lessor can be regarded a part of the wealth of the assessee. The position would undoubtedly be different where a payment is made by an assessee which is an application of part of the price received by him. Where such is the case, the whole of the price would represent the net realisable worth of the asset in the hands of the assessee and what is paid out by the assessee would be merely a disbursement made after the price reaches the assessee as his own property. That was the position in Pandit Lakshmi Kant Jha v. Commissioner of Wealth-tax [1973] 90 ITR 97 (SC), where the question arose whether the expenditure in connection with brokerage, commission or other expenses which would be liable to be incurred by the assessee in effectuating a sale would be deductible from the market value of the shares in determining their value for the purpose of assessment to wealth-tax. This court held that in computing the value of the shares, the assessee is not entitled to deduction of brokerage and commission from the valuation of the shares as given in the stock exchange quotation or quotations furnished by well-known brokers. It was pointed out by this court that (page 103) :

"It is not..... the amount which the vendor would receive after deduction of those expenses, but the price which the asset would fetch when sold in the open market which would constitute the value of the asset for the purposes of section 7(1) of the Act."

Obviously, this view was taken because the entire price, when receive would belong to the assessee

and payment of brokerage and commission would be merely application of part of the price in meeting expenditure necessary for effectuating the sale and hence it would not be deductible in ascertaining the net realisable worth of the shares in the hands of the assessee.

We are, therefore, of the view that the question referred by the Tribunal must be answered in the negative and it must be held that in determining the value of the leasehold interest of the assessee in the land for the purpose of assessment to wealth-tax, the price which the leasehold interest would fetch in the open market were it not encumbered or affected by the burden or restriction contained in clause(13) of the lease deed, would have to be reduced by 50 per cent. of the unearned increase in the value of the land on the basis of the hypothetical sale on the valuation date. The appeal, accordingly, fails and must be dismissed with costs.

Appeal dismissed.

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