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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 30th July, 2018

+ W.P.(C) 982/2017

SOUTH DELHI MUNICIPAL CORPORATION Petitioner

Through: Mr. Jagdish Sagar, Adv.

versus

SHRI IRMEET SINGH KOHLI

..... Respondent

Through: Mr. Ashish Garg, Adv.

+ W.P.(C) 6274/2017 & CM No.25985/2017

M/S AMRIT ESTATE (P) LTD

..... Petitioner

Through: Mr. Ashish Garg, Adv.

versus

SOUTH DELHI MUNICIPAL
CORPORATION AND ANR

..... Respondents

Through: Mr. Jagdish Sagar, Adv.

Ms. Eshita Baruah, Adv. on behalf of
Mr. Gaurang Kanth, Adv. for SDMC.

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

1. M/s Amrit Estate (Pvt.) Ltd., petitioner in W.P.(C) 6274/2017 is respondent in W.P.(C)982/2017. For the sake of convenience, M/s Amrit Estate (Pvt.) Ltd. is referred to as the 'petitioner' and South Delhi Municipal Corporation is referred to as 'Corporation'.

2. The petitioner is the owner of property No. E-1A, Kailash Colony, New Delhi. After the introduction of the Unit Area Method (UAM) by the Corporation, the petitioner regularly filed the self assessment format and deposited the tax within the stipulated time from the year 2004-05 to 2012-13.

3. Vide notice dated 7th September, 2012 under Section 123D of Delhi Municipal Corporation (Amendment) Act, 2003, the respondent issued a show cause notice to the petitioner to show cause why the assessment should not be re-opened. The relevant portion of the notice is reproduced hereunder:-

“M/s Amrit Estate (Pvt.) Ltd.

E-1A, Kailash Colony, New Delhi-110048.

Sub:- Assessment of Property No. E-1A Kailash Colony, New Delhi-110048.

Under Section 123D of DMC (Amendment) Act, 2003.

Whereas, as per available record, Self-Assessment Property Tax Return, as required U/s 123 & 123B of the DMC Act has not been found filed by you for the period 2004-056 to 2007-08 & 2010-11.

OR

Whereas, in the Self-Assessment Property Tax Return, filed for the year 2012-13 the following discrepancies have been found:

Use factor wrong in PTR

And, therefore, invoking the powers conferee U/s 123D of the DMC Act, you are hereby given an opportunity to appear before the undersigned in person or through your authorized representative on 13 September, 2012 at 3 p.m. and to produce the relevant evidence and documents in support of your case of property at (illegible) and as to why the assessment should not be made/revise/re-opened.

You may bring to our attention any stay/direction from any Court with regard to assessment/payment of property tax or having already, filed the correct PTR alongwith the payment of due tax, failing which it will be presumed that you have nothing to say and, thereafter, the assessment will be presumed that you have nothing to say and; thereafter, the assessment will be finalized on the basis of information available, without further communication to you, thereby precluding you from objecting to any assessment made. You also be liable for interest or/and penalty in addition to tax as per provisions of DMC Act.”

4. On 03rd October, 2012, the respondent issued a show cause notice under Section 152A of Delhi Municipal Corporation (Amendment) Act, 2003 to show cause why prosecution should not be initiated under Section 152A of Delhi Municipal Corporation (Amendment) Act, 2003.
5. On 22nd March, 2013, the Corporation passed an *ex-parte* assessment order for the years 2004-05 to 2011-12 to which the petitioner made a representation which was partly allowed vide order dated 02nd May, 2013.
6. The petitioner preferred appeals against the assessment order before the Municipal Taxation Tribunal, Delhi which were allowed by a common order dated 15th May, 2015 whereby the learned Municipal Taxation Tribunal set aside the assessment order dated 22nd March, 2012 as modified on 02nd May, 2013 and remanded the matter back to the Corporation for fresh determination.
7. The Corporation has challenged the order of the Municipal Taxation Tribunal before this Court in W.P.(C) 982/2017. Vide order dated 12th July, 2017, this Court directed the Assessing Authority to pass the fresh assessment order which shall be considered by this Court.

8. Vide order dated 12th January, 2016, the Assessing Authority passed an assessment order which has been challenged by the petitioner in W.P.(C) 6274/2017.

9. Learned counsel for the petitioner urged at the time of hearing that the Corporation had no power to re-open an assessment beyond a period of 12 months and, therefore, the show cause notice dated 07th September, 2012 and the assessment order dated 12th January, 2016 are liable to be set aside. Reliance is place on *Springdales School v. North Delhi Municipal Corporation*, (2017) 238 DLT 487 (DB) and *Seth Pokarmal Educational Society v. M.C.D.*, 2018 SCC OnLine Del 7958. Without prejudice, it is submitted that the Assessing Authority has wrongly applied the 'Use Factor' of '4' instead of '1' as the subject property is being used for a public purpose by a public charitable trust. The amount of rent received is not the criteria to determine the 'Use factor' of the property in the Unit Area Method. Self-use or tenanted/rental is dealt with occupancy factor, which is independent and different from 'Use Factor'. Rent or marketable rent is not relevant for determining the 'Use Factor'. 'Use Factor' under the Unit Area Method depends upon the 'Use' which the property is put to and it has nothing to do with the relationship or the amount of rent that owner recovers from the property. Since the property is being used for charitable purpose, the use factor '1' shall be applicable and not factor '4'. Reliance is placed on *Christian Children Fund v. M.C.D.*, 1994 (4) SCC 337.

10. Learned counsel for the Corporation urged at the time of hearing that the proceedings under Section 123B (10) are not barred by limitation. It is submitted that the use factor of the subject property is '4'. The property is a residential house which the respondents rented out to a purportedly

charitable organization which was running its office in the property. The respondents admittedly received full rent and did not themselves use the property for any public purpose. The respondents' use of the property was business and where the use is business, the use factor is '4' regardless of whether the property is self-occupied or rented. Use factor '4' specifically applies to "business Self -Occupied/Tenanted" and hence the "occupancy factor" is irrelevant. Any alleged use for public or charitable purposes by the tenant would be completely irrelevant, since property tax is assessed on the owner and not on the tenant.

11. In ***Springdales School v. North Delhi Municipal Corporation*** (*supra*), the Division Bench of this Court considered the validity of a similar show cause notice under Section 123D and the assessment order passed on its basis. The notice dated 24th January, 2013 under Section 123D of Delhi Municipal Corporation (Amendment) Act, 2003 is reproduced in para-2 of the judgment. The Division Bench of this Court observed that the notice did not specify the basic or essential ingredients for invoking under Section 123D(c). Relevant portion of paras 13 and 14 are reproduced hereunder:-

"13.....In the opinion of the Court, the notice does not specify the basic or essential ingredients which precondition the exercise of statutory power under Section 123D(c). Here it would be relevant to notice Section 123B(10) which stipulates a deemed assessment in the event the assessor/Commissioner does not examine the matter. All returns filed by the assessee are deemed to have been accepted by virtue of the said provision:

"123B. Self-assessment and submission of return -(l)
After the coming into force of the Delhi Municipal Corporation (Amendment) Act, 2003, any owner of any vacant land or covered space of building or any other person liable to pay the property tax or any occupier in

the absence of such owner or person, shall file a return of self assessment within sixty days of the coming into force of the aforesaid Act.

(2) Such owner or other person or occupier, as the case may be, shall, thereafter, file the annual return only in those cases where there is a change in the position as compared to the previous return, within three months after the end of the financial year in which the change in position has occurred.

XXXXXX XXXXXX XXXXX

(9) If after the assessment of the annual value of any land or covered space of building finally made under this Act, the payment on self-assessment under this section is found to be less than of the amount payable by the assessee, the assessee shall pay the difference within two months from the date of final assessment, failing which recovery shall be made in accordance with the provisions of this Act, but, after the final assessment, if it is found that the assessee has paid excess amount, such excess amount shall be refunded:

Provided that in any case where the amount of tax determined in the final assessment is more than the amount of tax paid under self-assessment, and the difference in the amount of tax is, in the opinion of the Commissioner, the result of wilful suppression of facts as defined in the bye-laws, the Commissioner may levy a penalty not exceeding thirty per cent of such difference in the tax besides the interest thereon:

Provided further that the levy of such penalty shall be in addition to any other punishment provided for under this Act:

Provided also that the procedure for sending of notice, hearing of objection and determination of tax and penalties shall be such as may be specified in the bye-laws.

(10) Where no notice is sent by the Commissioner under section 123C within twelve months after the year to

which such self- assessment relates, such self assessment shall be regarded as assessment made under this Act:

Provided that in any case, where there has been wilful suppression of facts, penalty up to thirty per cent of the tax due may be imposed: Provided further that the procedure for sending of notice, hearing of objection and determination of tax and penalties shall be such as may be specified in the bye- laws."

14. Section 123D constitutes an exception insofar as it arms the Commissioner with the power to reopen completed assessments. It reads as follows:

"123D. Power of Commissioner regarding assessment.- The Commissioner may, at any time-

(a) make suo-motu, an assessment in any case where a return on the basis of self-assessment has not been filed;

(b) revise any assessment where the information furnished in the return of self-assessment is found to be incorrect;

(c) reopen any assessment even after the period of one year in any case where it has been detected that there is wilful suppression of information; and

(d) impose a penalty not exceeding thirty per cent of the difference in tax arising from non-filing of a return in time, giving wrong information or wilful suppression of facts."

(Emphasis Supplied)

12. The Division Bench held the notice under Section 123D of the Delhi Municipal Corporation (Amendment) Act, 2003 to be vague. The relevant portion of the findings of Division Bench are reproduced hereunder:-

"15. In the present case, not only is the impugned notice (dated 23.01.2013) silent as to which period it relates to or for which assessment year the Commissioner proposes to revisit completed assessments [i.e. completed in respect of 123B(10)] but also is utterly vague as to how there was any "wilful suppression" practiced by the assessee. This Court,

in K.L. Rathee v. Municipal Corporation of Delhi AIR 1995 Del 226 and Savitri Devi v.MCD 1994 (55) DLT 391, while considering the pre-amended proviso to Section 126 which contained an obligation on the part of the Commissioner to indicate reasons for proposing change in the rateable value, has held that the notice should be effective.

16. The expression "willful suppression" of information has to necessarily relate to rateable or conscious omission on the part of the assessee. In case where the Commissioner proposes to proceed under Section 123D(b) and (c), as a precondition the notice has to necessarily specify what is the incorrect information provided as well as the barest reasons for such opinion and specific grounds for stating "willful suppression" of information The use of the expression "willful suppression", in our opinion, raises the bar and discloses a primary intention to give effective notice as to what is to be answered by the assessee. It is not mere omission or mistake that attracts issuance of a notice under Section 123D which confers exceptional and even draconian powers. The lack of any particulars of the kind enshrined in either 123D(b) or 123D(c) in the facts itself vitiates the notice. On similar lines, while interpreting the words "wilful" and "suppression" in Section 11A of the Central Excise Act, 1994, the Supreme Court in Continental Foundation Joint Venture Holding v. Commissioner of Central Excise, Chandigarh-I 2007 (10) SCC 337, held:

"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as "fraud" or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be

equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

17. More fundamentally, the power under Section 123D is unconstrained at any point of time when recourse is made, such as in the present case, seeking to go back almost a decade, which subjects the assessee/property owner to unrealistic burdens. In a previous instance where such open ended power was conferred upon a statutory authority, i.e. a sales tax authority official in Punjab, the Supreme Court had outlined in State of Punjab and Ors. V. Bhatinda District Co-op Milk P. Union Ltd. 2007 (11) SCC 363 the limitations to exercise of such power."

(Emphasis Supplied)

13. The Division Bench held that the power under Section 123D of Delhi Municipal Corporation (Amendment) Act, 2003 can be exercised within one year after lapse of the period indicated in Section 123(B)(10). The findings of the Division Bench are as under:-

21. Following Bhatinda (supra) in the present case, Section 123B(10) statutorily finalizes, as it were, the assessment unless the return is scrutinized and notice issued for the purposes of proceedings by the Commissioner one year after the completion of the concerned assessment year. Section 123D constitutes an exception to Section 123B(1) inasmuch as it empowers the Commissioner to revisit the issue even after the expiry of period stipulated under Section 123(D)(b). Exercise of Section 123D per se is not conditioned or constrained by any time limit. Following the logic in Bhatinda (supra) and DDA (supra), the Court is of the opinion that a harmonious construction of the two provisions would mean that even the power under Section 123D is to be exercised for a maximum period of one year after the lapse of the period indicated in Section 123B(10).

(Emphasis Supplied)

14. The Division Bench quashed the show cause notice issued by the Corporation under Section 123D of Delhi Municipal Corporation (Amendment) Act, 2003 as well as assessment order passed by the Delhi Municipal Corporation as barred by the limitation. The conclusion of the Division Bench is reproduced hereunder:-

“22. We hereby record our conclusions:

1. The Show Cause Notice under Section 123D has to contain specific and pointed particulars as to whether, and if so, what are the wilful and deliberate omissions or facts suppressed by the assessee and in relation to which assessment year/period concerned so as to enable it to effectively answer to the proceedings/assessments, if validly taken up;

2. The power under Section 123D cannot be exercised beyond the period of one year after expiry of the period mentioned in Section 123B(10) in the light of the discussion in Bhatinda (supra).

3. In compliance with Section 170(b) it would be sufficient if an assessee deposits one years' tax demand, wherever the corporation's assessments for multiple years are in issue. The appellate authority in such case should decide the appeal for all years, treating such deposit as sufficient compliance with Section 170(b). This Court, therefore, holds that the use factor applicable in the present case is 1 and not 3.

4. The Show Cause Notice issued to the petitioner in the present case on 24.01.2013 leading to the assessment order dated 19.06.2015 cannot be sustained; it is hereby quashed.

5. It is hereby declared that the Use Factor applicable to the petitioner school is 1 and not 3, as held by the impugned assessment order.

6. In the light of the above conclusions, the respondents are hereby directed to work out the refund together with interest @ 8% per annum for the amounts deposited by it. The said amounts together with interest shall be paid to the petitioner within eight weeks from today.

7. The Commissioner, in addition to indicating the reasons and disclosing them to the assessee in the notice to be issued shall also record specifically the materials or the reasons that led to the invocation of Section 123D of the Act. The writ petition is allowed in the above terms.”

(Emphasis Supplied)

15. This case is squarely covered by the Division Bench judgment of this Court in ***Springdales School v. North Delhi Municipal Corporation*** (*supra*) as Corporation issued notice under Section 123D of Delhi Municipal Corporation (Amendment) Act, 2003 after the expiry of the period of one year mentioned in Section 123B (10) of Delhi Municipal Corporation (Amendment) Act, 2003. That apart, the notice dated 07th September, 2012 does not satisfy the requirements of Section 123D of Delhi Municipal Corporation (Amendment) Act, 2003 as mentioned in para-22 (1) of the judgment of the Division Bench. The Assessing Authority has not dealt with this aspect.

16. Applying the principles laid down by the Division Bench in ***Springdales School v. North Delhi Municipal Corporation*** (*supra*), the show cause notice dated 07th September, 2012 and the assessment order dated 12th January, 2016 are quashed. The adjudication of the issue with respect to the use factor is not necessary in view of the above finding and is, therefore, left open.

17. The Corporation is directed to refund the access amount paid by the petitioner along with interest @ 8% per annum within eight weeks from today.

18. W.P.(C) 6274/2017 is allowed in the above terms. W.P.(C) 982/2017 is dismissed.

19. Pending application is disposed of.

JULY 30, 2018
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J.R. MIDHA
(JUDGE)

