

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

Reserved on: 18.01.2018
Pronounced on: 22.03.2018

+ **W.P.(C) 3946/2011**

SETH POKHARMAL EDUCATIONAL SOCIETY..... Petitioner

Through: Sh. B.B. Jain, Sh. Abhay Jain and Sh. Prashant
Sharma, Advocates.

versus

MCD AND ORS.

.... Respondents

Through: Ms. Amita Gupta, Advocate, for MCD.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner is aggrieved by an assessment order issued on 02.05.2011 by the Joint Assessor and Collector of the North Delhi Municipal Corporation (hereafter called “the Corporation”) dated 02.05.2011, levying vacant land tax with effect from 01.04.2005 for the use of its land as play field for its school, i.e. Rukmini Devi Public School at Pitampura, Delhi. The diverse claims are mentioned in the writ petition, including the validity of amendments to the Delhi Municipal Corporation Act, 1957 and the levy of vacant land tax under the enactment. However, during the hearing of petition, learned counsel confined the relief to the question of levy of vacant

land tax upon the play ground, having regard to the overall circumstances of the lease and the validity of the assessment order to the extent that it was decided on the ground that it was unenforceable as having been decided after an inordinate period of time.

2. The facts are that the petitioner is a society, which established a recognized school. The petitioner applied and was allotted a plot of land, being 8271.09 square metres by the Delhi Development Authority (DDA) on perpetual leasehold basis on 25.03.1987. The petitioner was also offered temporary lease of a plot admeasuring 5861.39 metres. This was subject matter of lease deed dated 29.11.1995. This lease was between the petitioner (lessee) and the L&B Department of the Delhi Administration (later succeeded to by the GNCTD). The relevant conditions in this temporary lease deed are extracted below:

“Provided that the land is leased for a period of one year subject to each and all of the terms and conditions of this indenture and not otherwise:-

Clause 1: The Lessee shall duly and regularly pay to the Lessor through the Housing Commissioner, Delhi Administration or such other officer as the Lessor may hereinafter appoint on this behalf a sum of Rs.1-00 per annum. The rent shall be payable annually in advance and if any portion of the rent be not paid on or before the expiry of fifteen days – from the date on which it become so payable whether it be demanded or not, it shall be deemed to be in arrears.

Clause 2: The lease shall commence on and from the 22nd day of May one thousand nine hundred and eighty nine and the rent for the first year shall be due and payable on that date. The lease is granted for a period of one year/years by if, by mutual consent for bearance, it shall be allowed to continue in force

after the expiry of the said period of one year/years, then, subject to such modification (if any) as the lessor and lease may, in writing mutually agree to, the terms and conditions of this lease shall.....to or and shall have full force and effect.

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Clause 4: In lessor and all persons acting under his order shall be at liberty at all times during the said terms to enter upon the said land for any purposes connected with the full discovery and enjoyment of all or any of the rights hereby reserved to the lessor, as well as for the purpose of enforcing compliance with each and all of the terms, conditions and requirement of this lease, and no compensation, whether by reduction or rent of otherwise, shall become due to or shall be recoverable by the lessee, by reason of anything done under the rights herein reserved for powers hereby conferred on the lessor.

Clause 5: The lessee shall not, without the previous consent in writing of the lessor, sell or mortgage or create any charge upon or sublet or otherwise transfer all or any of his rights, under this lease, and every or attempted transfer made without such consent shall be void as against the lessor.

Clause 6: The lessee will not erect upon the land any building or structures by use the land only for play grounds:

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Clause 8: The lessee shall not, without the permission in writing to be previously obtained of the Lieutenant Governor Delhi, or such officer or body as the President of India may appoint in this behalf, at any time use or cause or permit any person to use the land, for any purposes other than for the play grounds.

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Clause 12: Upon the expiry or sooner determination of the lease, it shall be lawful for the lessor to remove all materials and things from the land to restore the land to the state in which it was in when this lease was executed and to all expenses

incurred thereby or in connection therewith from the lessee in due course of law.

Provided that nothing in this clause shall be held to prevent or disentitle the lessee from himself removing any materials and things belonging to him from the land any restoring the land to its original conditions at any time prior to the determination of the lease.

Clause 13: The tree, if any standing on the plot shall remain as Government property and shall not be removed or otherwise dispossess off without obtaining prior permission of the lessor.

Clause 14: The needs of Government shall be given preference as regards the use of the land.”

3. It is submitted that the plot of land which was allotted by the DDA was used to construct a school building and that the vacant land lease executed exclusively by the GNCTD for the purpose of use as play ground was never constructed upon. Learned counsel highlighted that the intrinsic character of the land is that of an open area on which no construction has been made. It is submitted that the petitioner does not possess any property rights and is only the occupier/user. In such event, it cannot be made to pay vacant land tax in the overall circumstances. The petitioner relies upon the judgment of a Full Bench decision of this Court in *MCD v. Shashank Steel Industries (P) Ltd.* 100 (2002) DLT 66. It was argued that the said judgment was affirmed by the Supreme Court in its ruling reported as *MCD v. Shashank Steel Industries Private Limited* 2009 (2) SCC 349. It was argued that the definition of “land” in Section 2(24) as well as the provision of Section 120 which deals with *Incidence of Property Taxes* of the Act remains the same; though the definition of “owner” under Section 2(37) has

undergone a change, the amendment does not in any way impact the facts of this case because the contents of the lease in the present case is that of a temporary occupancy by the lessee whose status is in the nature of a monthly tenancy at the pleasure of the lessor or the GNCTD. In these circumstances, the levy of vacant land tax without application of mind to the effect that the lease is temporary and entirely dependent upon discretion of the lessor, and completely restrictive in that its use as a play ground is at all times subject to full control by the lessor takes it out of the purview of the Act. It is thus submitted that the calculation and levy of vacant land tax in the facts of this case are entirely unjustified.

4. It was submitted next that the Use Factor under the Unit Area Method (UAM) imposed upon the petitioner is discriminatory and also arbitrary. By adopting UAM criteria for arriving at the rateable value and the levy of tax, the respondents acted in a discriminatory manner. It is also urged that the Use Factor 3, applied in this case, is inappropriate for schools having regard to the objectives for which they are set up; instead, they should be classified in Use Factor 1.

5. It was submitted that the long delay in the finalization of assessment proceedings renders the impugned order dated 02.05.2011 unreasonable. Learned counsel relied upon a Division Bench ruling of this Court in *Springdales School v. North Delhi Municipal Corporation and Anr.* 238 (2017) ELT 487, to say that though the acts or enactments do not impose any time limit, nevertheless after applying the relevant precedents, it was held that an unreasonable delay in the finalization of an assessment order based upon a Show Cause Notice validly issued, would be arbitrary.

6. The respondent Corporation has resisted the petition. It points out that the challenge to the UAM introduced by the amendment to the Act failed as the amendments were upheld in the judgment reported as *Vinod Krishna Kaul v. Lieutenant Governor of Delhi* 192 (2012) DLT 241. Therefore, the challenge to the imposition of one or the other Use Factor has no force. On the question of vacant land tax, it is submitted that the amendment to the Act, brought into effect after the judgment of the Full Bench in *Shashank Steel (supra)* has altered the circumstances completely. In this regard, it was submitted that the reliance upon *Shashank Steel (supra)* is of no avail. The basic facts of this case are that the petitioner is lessee of the lands; it is in occupation and enjoyment of the land continuously for the last 22 years. In these given circumstances, the levy of vacant land tax, after notice was justified and proper. In the event the petitioner has any object as to the working of the right or the period of applicability, it ought to raise those grounds in a properly filed appeal instead of this writ petition. It was submitted that as far as the alleged unreasonable delay in finalization of assessment is concerned, the petitioner has not disclosed the details of its objections nor even when Show Cause Notice was issued to it. Relying upon the assessment order, it was submitted that notice under Section 123D of the Act was issued to the petitioner society on account of application of wrong factors and non-payment of vacant land tax. Those essential details are missing. The petitioner has not cared to file essential facts and the delay of six years or so in finalizing the assessment cannot be characterized as unreasonable. It is lastly urged that the proper Use Factor has been applied in this case.

Analysis and Conclusions:

7. To appreciate the disputes in this case, it would be necessary to notice the essential provision of the Act. They are extracted as follows:

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

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(24) “land” includes benefits to arise out of land, things attached to the earth or permanently fastened to anything attached to the earth and rights created by law over any street;

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(37) “owner” includes a person who for the time being is receiving or is entitled to receive, the rent of any land or building whether on his own account or on account of himself and others or as an agent, trustee, guardian or receiver for any other person or who should so receive the rent or be entitled to receive it if the land or building or part thereof were let to a tenant and also includes—

(a) the custodian of evacuee property in respect of evacuee property vested in him under the Administration of Evacuee Property Act 1950 (31 of 1950); and

(b) the estate officer to the Government of India, the Secretary of the Delhi Development Authority, constituted under the Delhi Development Act, 1957 (61 of 1957); the General Manager of a railway and the head of a Government department, in respect of properties under their respective control;

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**CHAPTER VIII
TAXATION**

Levy of Taxes

120. Incidence of property taxes.—(1) *The property taxes shall be primarily leviable as follows:—*

(a) if the land or building is let, upon the lessor;

(b) if the land or building is sub-let, upon the superior lessor;

(c) if the land or building is unlet, upon the person in whom the right to let the same vests.

Provided that the property taxes in respect of land or building, being property of the Union, possession of which has been delivered in pursuance of section 20 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (44 of 1954), shall be primarily leviable upon the transferee.]”

8. The definition of land and owner has remained unchanged. However, the incidence of property tax by reason of new Section 120 has changed. It reads as follows:

“120. Incidence of property tax.-

(1)(a) The property tax on any land or building shall be primarily leviable upon the owner thereof.

(b) The liability of the several owners of any land or building constituting a single unit of assessment, which is, or purports to be, severally owned in parts including flats or rooms, for payment of property tax or any instalment thereof, payable during the period of such ownership shall be joint and several;

Provided that the Commissioner may apportion the amount of property tax on such land or building among several co-owners:

Provided further that in any case where the Commissioner is, for reasons to be recorded in writing, satisfied that the owners is not traceable, the occupier of such land or building for the time being shall be liable for payment of the property tax and shall also be entitled to the rebate, if admissible.

(c) *In the case of any land or building which is not self-occupied and where the owner is constrained by any law, order of the Government, or order of a Court from recovering the tax due, such tax shall be recovered from the occupier or occupiers, as the case may be:*

Provided that the owner shall continue to pay such amount of tax as he was liable to pay before the coming into force of the Delhi Municipal Corporation (Amendment) Act, 2003 and only the balance amount, if any, shall be recovered from the occupier.

(d) *The property tax on any land or building, which is the property of [a Corporation] and the possession of which has been delivered under any agreement or licensing arrangement, shall be leviable upon the transferee or the licensee, as the case may be.*

(e) *The property tax in respect of any land or building, being the property of the Union, the possession of which has been delivered in pursuance of section 20 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (44 of 1954), shall be leviable upon the transferee.*

(2) *If any land has been let to a tenant for a term exceeding one year and such tenant has built upon such land, the property tax assessed in respect of such land and the building erected thereon shall be payable by such tenant, whether the land and the building are in the occupation of such tenant or a sub-tenant of such tenant.*

Explanation – For the purposes of this section, “tenant” shall include any person deriving title to the land or the building erected upon such land, from the tenant, whether by operation of law or by transfer inter vivos.”

9. The Full Bench of this Court’s decision in *Shashank Steel (supra)* dealt with precisely the issue of whether a lessee of land, for the period it

was not used or any part of which was not constructed, could be held liable for vacant land tax. The Court held in the negative, observing as follows:

“35. With respect, in our opinion, the learned Single Judge failed to pose unto himself the correct question. The definition of land is a wider one and that definition is to be construed for the purpose of finding out as to whether any benefit derived out of land would also be subject to the property tax. Such a question would not arise when a deed of lease has been executed. By reason of such a deed of lease, some interests in the land are transferred and once a deed of lease is executed, the charging provision will have to be applied having regard to the status of the parties so as to fix the primary liability under the said Act. We, therefore, are unable to subscribe to the aforementioned view.

36. In terms of the said perpetual lease, the lessee has no right to sell, transfer or otherwise part with possession of any part or whole of the industrial plot in any form or manner, benami or otherwise to any person whomsoever, without the permission of the Lesser who is entitled to refuse to grant such permission, if sought for in its absolute discretion as per Clause 6(b) of the lease deed.

37. The submission of Mr. Nandrajog to the effect that the lessee is liable to pay the tax in equity having regard to the stipulation made in the conveyance deed in this behalf in Clause 10 thereof, cannot also be accepted.

38. A bare perusal of the aforementioned provisions would clearly show that the covenant for payment of tax on the part of the sub-lessee would not make any material difference inasmuch as thereby only the Lesser has been assured to be indemnified and thus the petitioner cannot take any benefit there under.

39. Mr. Nandrajog has relied upon an unreported decision of this Court in C.W.P. No. 633 of 1980 in Nehru Place Hotels Ltd

& Anr. v Municipal Corporation of Delhi & Anr disposed of on 30.09.1980. In the said decision, with utmost respect, the learned Judge although held that the Lesser is primarily liable, but erroneously proceeded to observe that the same would not mean that the liability cannot be a subject matter of covenant between the Lesser and the lessee. The said claim is as under:-

"The lessee shall from time to time and at all times pay and discharge all rates taxes, charges and assessments of every description which are assessed or may at any time hereafter during the continuance of this lease be assessed, charged or imposed upon the plot hereby demised or on any buildings to be erected thereupon or on the landlord or tenant in respect thereof."

40. By reason of a covenant, the person, who is not liable to pay tax, under a legislative enactment cannot be made liable therefore, particularly when the Corporation in relation to the sub-lessee is a third party and cannot in law be permitted to derive any benefit there from. The said finding also must be held to be contrary to the scope and purport of Section 120(1) of the DMC Act. We, therefore, are of the opinion that in a case where no building has been constructed, the sub-lessee would not be liable to pay the property tax."

10. The Full Bench ruling was affirmed by the Supreme Court, which held as follows:

"16. Coming to the interpretation of the provisions of Section 120 (1) of the said 1957 Act, at the outset we may state that the language of the said section suggests that the intention of the Legislature in fixing primary liability of property tax upon the owner of the land is to facilitate the collection of property tax. It is not unreasonable for the Legislature to impose the primary liability upon the lessor and to give him the right of recoupment. In this case, we are concerned only with the question as to whether the Corporation was right in imposing primary liability to pay property tax on the sub-lessee

under Section 120 (1) (c) of the said 1957 Act. Whether the liability was on Mohan Co- operative Industrial Estate Ltd., is not required to be gone into by us because that is not the case of the Corporation and also because the lease between the President of India and Mohan Co-operative Industrial Estate Ltd. dated 20.3.80 was not produced before us. We also do not know the basis on which premium was payable by the lessee to the lessor.

17. On a bare reading of Section 120 (1) (c), in the context of the Deed dated 20.2.81, we find that the said Deed did not operate as a conveyance and that the industrial plot was let out to M/s. Shashnak Steel Industries Pvt. Ltd. Since there was letting in favour of the said company, Section 120 (1) (c) of the said 1957 Act did not apply.

18. For the aforesated reasons, we see no infirmity in the impugned judgment of the Delhi High Court”

11. The lease in the present case is for a one year tenure; the lease rent is a token one rupee per annum. There are severe restrictions about what use the property can be put to: the lessee is bound to at all times, keep it as a playground; the lessor is entitled to enter the premises at any time. There cannot be any mortgage or encumbrance on the playground; its intrinsic character as such is to be maintained at all times. Given these terms, this Court holds that the vacant land tax (for which annual value is fixed @ ₹ 5,63,436/-) by the impugned order, is untenable and without authority of law.

12. As regards the other contention that the assessment order impugned should be quashed because it was finalized after an inordinate delay, this Court notices that no facts or figures are forthcoming; the petitioner appears to have rushed to this Court straightaway with an omnibus challenge. The

pleadings in the writ petition suggest that self-assessment was resorted to; there are no particulars as to what was the declaration of annual value made from time to time by the petitioner. The writ petition also states that the society's representative was asked to respond to queries on 23.02.2011 after which the impugned assessment order was issued. At the same time the MCD does not dispute the essential fact that self-assessment returns were filed and apparently accepted for the past periods. Such being the case, whole-sale revision of annual value, in respect of the constructed portions could not have been resorted to for past periods, to the extent of casting additional liability for 7 years.

13. In *Springdales* (supra), this Court had considered the provisions of the Act, after amendments were made in 2004, especially on two aspects: first, the power to re-open settled assessments in the context of period of limitation (since the statute imposes none) and two, the mandatory requirement of pre-deposit of amounts, as a precondition for hearing the appeal. The Court held *inter alia*, as follows:

“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."

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 & Ors v Bhatinda District Co-op Milk P. Union Ltd 2007 (11) SCC 363 the limitations to exercise of such power.

18. In the context of Section 21 (dealing with revisional powers) which armed the Commissioner with untrammelled power to revise orders suo motu the Court held that the statutory grant cannot be given its full effect. The provision concerned with Section 21 of the Punjab General Sales Tax Act, 1948. The Court observed as follows:

"5. In respect of the assessment for the year ending 31.3.2000, the assessment proceedings were completed relying on the return filed by the appellant on 20.3.2001. Indisputably, in terms of Section 11 of the 1948 Act, a period of three years has been prescribed as a period of limitation as contained under sub-section (3) of Section 11 for completing assessment from the last date for filing of return. Sub-section (6) of Section 11 reads as under :

_If upon information which has come into his possession, the Assessing Authority is satisfied that any dealer has been liable to pay tax under this Act in respect of any period but has failed to apply for registration, the Assessing Authority shall, within five years after the expiry of such period, after giving the dealer a reasonable opportunity of being heard, proceed to assess to the best of his judgment, the amount of tax, if any, due from the dealer in respect of such period and all subsequent periods and in case where such dealer has willfully failed to apply for registration, the Assessing Authority may direct that the dealer shall pay by way of penalty, in addition to the amount so assessed, a sum not exceeding one and a half times that amount. Section 21 of the said Act provides for revision. Section 21 of the Act with which we are concerned herein reads as under: _

21. Revision-(1) The Commissioner may of his own motion call for the record of any proceedings which are pending before, or have been disposed of by any authority subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein and may pass such order in relation thereto as he may think fit.

(2) The State Government may by notification confer on any Officer the powers of the Commissioner under sub-section (1) to be exercised subject to such conditions and in respect

of such areas as may be specified in the notification.

(3) A Tribunal, on application made to it against an order of the Commissioner under sub-section (1) within ninety days from the date of communication of the order, may call for and examine the record of any such case and pass such orders thereon as it thinks just and proper.

(4) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of being heard."

19. The court held that such power, even though widely couched, has to be exercised within reasonable period:

"15. Sub-section (1) of Section 11 empowers the Commissioner to extend the period of three years for passing the order of assessment wherefor reasons are required to be recorded in writing subject, however, to the maximum period of five years. Ordinarily, therefore, a period of three years has been prescribed for completion of the assessment in terms of the provisions of the Act. We may also notice that in cases where an assessment order is to be reviewed, the same should be done within a period of one year.

16. A bare reading of Section 21 of the Act would reveal that although no period of limitation has been prescribed therefor, the same would not mean that the suo moto power can be exercised at any time.

17. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors.

18. *Revisional jurisdiction, in our opinion, should ordinarily be exercised within a period of three years having regard to the purport in terms of the said Act. In any event, the same should not exceed the period of five years. The view of the High Court, thus, cannot be said to be unreasonable. Reasonable period, keeping in view the discussions made hereinbefore, must be found out from the statutory scheme. As indicated hereinbefore, maximum period of limitation provided for in sub-section (6) of Section 11 of the Act is five years."*

20. *The above decision has been noticed and followed subsequently in DDA v Ram Prakash AIR 2011 SC 1399.*

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 123D (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). There is, furthermore, a need to clarify that in the event of exercise of the suo motu powers under Section 123D, by the Commissioner, which leads to any reassessment for the permissible years (say 2-3 previous years), it would be sufficient compliance with Section 170(b) if the assessee deposits the demand relatable to one year, in the light of the changed circumstances, because that will operate less onerously, and facilitate meaningful exercise of the right of appeal available. This logic had prevailed and persuaded the Court to hold that the "base year" rateable value related tax alone could be deposited in compliance with the pre-deposit*

condition in Sunil Raj (supra) although that is per se not the mandate of Section 170(b). As far as the issue of use factor is concerned, this Court notices that the question is covered by V.K. Kaul v Union of India 192 (2012) DLT 241 (DB). In that judgment, the Court had held that the basis for determining the rateable value by deploying Use Factor 3, i.e. the nature of fees charged by the institution, is untenable. The court in V.K. Kaul (supra) stated as follows:

"59. While we have no difficulty in agreeing with the respondents that there exists an intelligible differentia between government / government-aided schools on the one hand and private un-aided schools on the other, the question that needs examination is whether this differentia has a nexus with the object of such classification. The apparent and ostensible object is that schools which are not running as profit earning businesses ought to be treated at par with government / government-aided schools. That is apparent from the fact that government / government aided schools have a use factor of 1 and so do private unaided schools, which charge fees upto Rs. 600/- per month. The foundation on which the Use Factors of 2 and 3 are assigned to schools charging fees between Rs.601/- and Rs.1200/- per month and those charging fees in excess of Rs. 1200/- per month, respectively, appears to be the reasoning or, shall we say, assumption that these schools are profit making enterprises. But, what if that were not true? What if the schools charging higher fees were imparting a better quality of education with a better infrastructure without any individual or group of individuals profiteering from the enterprise? In such a situation, the nexus between the intelligible differentia and the object would disappear rendering the classification to be violative of Article 14 of the Constitution. Therefore, a classification based merely on the fee structure would not be a satisfactory means of achieving the object. Perhaps, one Use Factor could be assigned to all schools which are not profit making bodies / entities, irrespective of the fee structure. And, a

higher Use Factor could be assigned to schools which are being run on a profit-making basis. We have no means to ascertain as to whether the petitioners before us fall into one or the other category. While we agree with the petitioners that the fee structure cannot be the sole determinative factor for ascribing a particular Use Factor, we are also clear that it is not for us to do this exercise. Consequently, we direct that this grievance of the petitioners with regard to the Use Factor assigned to school buildings be considered by the Corporation and the MVC in the light of observations made above. In the meanwhile, however, as we have found the classification based on fee structure alone to be violative of Article 14 of the Constitution and beyond the mandate of the amended Act of 1957, all schools, irrespective of the fee structure, would have to be assigned a single Use Factor. And, since government / government aided schools have been assigned a UF of one (1), that would be applicable for all schools till the exercise is completed by the MVC and the Corporation in the light of the discussion above."

14. As regards the Use Factor (3) applied in this case, this Court notices that the issue has been concluded by the judgment in *V.K. Kaul v Union of India* 192 (2012) DLT 241 (DB). In that judgment, the Court had held that the basis for determining the rateable value by deploying Use Factor 3, i.e. the nature of fees charged by the institution, is untenable.

15. In the light of the above decision, it is held that the assessing officer could not have invoked the power to revise the rateable value, in respect of the constructed portion of the petitioner's school, with effect from 2004, in 2011. In the circumstances, the rateable value fixed and the demand made cannot be sustained. They are hereby quashed. It is, however, open to the respondent's assessing officers to re-examine the issue, and issue fresh

demands, if necessary, for the 3 years preceding 2011. The three-year period would be worked out, having regard to the date on which the show cause notice was issued, leading to the impugned demand; the relevant Use Factor to be applied would be Use Factor 1. In case of any further grievance on the petitioner's part, it is open to it to seek recourse to the appellate procedure. Furthermore, the demand for vacant land tax, for 5861.39 square metres of playground, is unsustainable. It is hereby quashed. The writ petition is allowed in these terms; there shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

MARCH 22, 2018

न्यायमेव जयते