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

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Decided on: 23.03.2023

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LPA 564/2015

SOUTH DELHI MUNICIPAL CORPORATION..... Appellant

Through: Mr. Sanjeev Sabharwal, Standing Counsel
for MCD with Ms Shweta, Advocates.

versus

B N MAGON

..... Respondent

Through: Respondent in person with Mr Neeraj
Gulati, Advocate (M:9818024374)**CORAM:****HON'BLE MR. JUSTICE NAJMI WAZIRI****HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN****NAJMI WAZIRI, J (ORAL)**

The hearing has been conducted through hybrid mode (physical and virtual hearing).

1. This appeal impugns the judgment of the learned Single Judge passed on 27.01.2015 in W.P. (C) 60/2014 holding that services rendered by advocates are professional activities and cannot be classified/categorised or be subject to tax under the category of business establishment or professional establishment. The judgment has concluded as under:

“...

67. For the aforesaid reasons, this Court is of the view that if MPD 2021, DMC Act, 1957 and Bye-Laws, 2004 are read harmoniously, it would be apparent that where a professional activity is carried out by a professional belonging to a category and within the parameters mentioned in Clause 15.8 of MPD 2021, then the user of premises remains predominantly residential and the said property cannot be assessed to property tax as a 'business building'.



68. Consequently, present petition is allowed and the impugned Assessment Order under Section 123D of DMC Act, 1957 passed on 22nd November, 2013 and issued on 11th December, 2013 bearing no. TAX/A&C/ SZ/2013/1139/10860 passed by Jt. Assessor & Collector, South Zone, R.K. Puram fixing value at Rs. 60,000/- w.e.f. 1st April, 2004 as well as the demand, if any computed on the said basis along with levy for Assessment Years 2004-05 to 2012-13 in respect of property bearing no. E-403, Greater Kailash-II, New Delhi-48 are quashed. The pending application also stands disposed of.”

2. The learned Standing Counsel for the Delhi Municipal Corporation (‘MCD’) submits that clause 15.8 of MPD 2021 apropos professional activity does not in any way circumscribe the powers of the Corporation under sections 115 and 115A of the Delhi Municipal Corporation Act, 1957 (‘DMC Act’) which read as under:

“115. Exemption of vacant lands and buildings from property tax.

(1) Save as otherwise provided in this Act, property tax shall be levied on all vacant lands and buildings in Delhi except

(i) vacant lands and buildings (other than dwelling houses) exclusively used for agricultural purposes in accordance with the guidelines prescribed in the bye-laws;

(ii) any vacant land or building included in any village abadi, which is occupied for residential purpose by any original owner or his legal heir, subject to a maximum of one hundred square metres of covered space;

(iii) vacant lands or buildings or portions thereof, exclusively used for the purpose of public worship;

(iv) vacant land or buildings or portions thereof, exclusively occupied and used, with the approval of ²[³[the Corporation]], for the purpose of public charity as may be specified in the bye-laws or for the purpose of medical relief to, or education of, the poor, free of charge;

(v) vacant lands or buildings exclusively used for the purpose of public burial or as cremation ground, or any



other place used for the disposal of the dead, duly registered under this Act;

(vi) such heritage lands or buildings as are specifically notified for exemption by the Corporation as also such premises as are so specified by the Archeological Survey of India;

(vii) vacant lands and buildings owned exclusively by war widows, gallantry award winners in Defence Forces, Police and Paramilitary Forces as also civilians who have received bravery awards of the highest order from the Government including Annual Bravery Awards given by the President:

Provided that the exemption shall be subject to the condition that

(a) The premises in question is in self-occupation for residential use and no portion thereof is let out for any purpose, whatsoever;

(b) In case the person concerned has more than one property in Delhi, the exemption shall be applicable to only one property which is permanently used for self-residence;

(c) The benefit of exemption shall be limited to the life time of the person concerned, except where the award has been granted posthumously, in which case the exemption will be granted to the widow of the gallantry award winner;

(viii) vacant lands and buildings owned by, or vested in, 2[3[the Corporation]] but not leased out or rented out, and in respect of which the property tax, if levied, would, under the provisions of this Act, be leviable primarily on ²[³[the Corporation]].

[115A. Unit of assessment.—

(1) Every building and every vacant land shall be assessed as a single unit:

Provided that where portions of any building or vacant land are separately owned so as to be entirely independent and capable of separate enjoyment, notwithstanding the fact that access to such separate portions is made through a common



passage or a common stair case, as the case may be, such separately owned portions may be assessed separately.

(2) All buildings, to the extent they are contiguous or are within the same cartilage or are on the same foundation and are owned by the same owner or co-owners as an undivided property, shall be treated as one unit for the purpose of assessment under this Act:

Provided that if any such building is sub-divided into separate shares which are not entirely independent and capable of separate enjoyment, the Commissioner may, on application from the owners or the co-owners, apportion the valuation and assessment of such building among the co-owners according to the value of their respective shares, treating the entire building as a single unit.

(3) Each residential unit with its percentage of the undivided interest in the common areas and facilities, constructed or purchased and owned by, or under the control of, any housing co-operative society registered under any law regulating co-operative housing for the time being in force, shall be assessed separately.

(4) Each apartment and its percentage of the undivided interest in the common areas and facilities in a building within the meaning of any law regulating apartment ownership for the time being in force, shall be assessed separately.

(5) If the ownership of any vacant land or building or any portion thereof is sub-divided into separate shares, or if more than one adjoining vacant land or building or portion thereof comes under one ownership by amalgamation, the Commissioner may, on an application from the owner or the co-owners, as the case may be, separate, or amalgamate, as the case may be, such vacant land or building or portion thereof so as to ensure conformity with the provisions of this section.

(6) Notwithstanding any assessment made in respect of any vacant lands or buildings before the commencement of the Delhi Municipal Corporation (Amendment) Act, 2003, the Commissioner may, on his own or otherwise, amalgamate, or



separate, or continue to assess, such vacant lands or buildings or portions thereof so as to ensure conformity with the provisions of this section.

(7) The Commissioner shall, upon an application made in this behalf by an owner, lessee, sub-lessee, or occupier of any vacant land or building and upon payment of such fee as may be prescribed in the byelaws, furnish to such owner, lessee, sub-lessee, or occupier, as the case may be, information regarding the apportionment of the property tax on such vacant land or building among the several occupiers of such vacant land or building for the current period of assessment or for any preceding period of assessment:

Provided that nothing in this sub-section shall prevent 2[3[the Corporation]] from recovering the arrear dues on account of property tax from any such person, jointly or severally.”

3. He further submits that the MCD has powers to levy property tax on all lands and buildings under its jurisdiction. Therefore, unless consciously excluded, there cannot be any building, property or activity which cannot be put to tax. The Corporation asserts that in terms of MPD clause 15.8 (ii) and (iii) user of professional activity would have to be in less than 50% of the sanctioned FAR, whichever is less. The Court would note that this contention is regarding the extent of use of a residential building or dwelling unit for professional activity.

4. The said MPD clause reads as under:

“15.8 PROFESSIONAL ACTIVITY

Subject to the general terms and conditions specified in para 15.4, professional activity is permissible in plotted development

and group housing under the following specific conditions:

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ii. In group housing, and plotted development with



multiple dwelling units, professional activity shall be permitted on any floor subject to maximum of 50% of the permissible or sanctioned FAR, whichever is less, of each dwelling unit.

iii. In the case of plotted development with single dwelling unit, professional activity shall be permissible on any one floor only, but restricted to less than 50% of the permissible or sanctioned FAR whichever is less on that plot.

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5. It is clear that MPD, 2021 permits professional activity in residential buildings, subject to certain conditions. However, what is to be noted is that the said provision of MPD, does not empower the Corporation to levy tax for professional activity being carried out from residential buildings. Section 115 and 115A of the DMC Act, as quoted hereinabove, empowers the MCD to levy taxes but only in terms of and to the extent specified in the statute. Categories of buildings, user-wise, have been defined under clause 9 (a) and (b) (i) and (ii) of the DMC (Property Tax) Bye-laws, 2004, as under:

“... 9. Definitions of use-wise categories of buildings. -For the purposes of clause (f) of sub-section (1) of section 116 A, the use-wise

(a) "residential building" shall mean any building used for dwelling purposes by a family/families/individual but excludes any premises for commercial use including lodging, guest house, hotel or similar purposes:

(b) "business building" shall mean any building or part thereof used for transaction of business or for keeping of accounts and records or for similar other purposes, and such buildings shall include



(i) offices (other than offices of Central Government, State Government and local bodies), banks, professional establishments, court houses, and libraries for the principal function of transaction of public business and keeping of books and records;

(ii) office buildings (premises) solely or principally used as office or for office purpose; and...”

6. The MCD contends that insofar as: i) a building or a part thereof is used for transaction of business or for keeping of books, accounts and records, it shall be considered as a “business building” and therefore subject to levy of property tax; ii) that a lawyer's services fall within the sphere of professional activity and, that part of a building which is used for professional activity, would fall within the definition of a 'business building' as per clause 9(b)(i) of the Bye-laws; iii) that clause 9(b)(ii) categorically includes office buildings premises solely or principally used as office or for office purposes; that the definition of 'business building' or 'mercantile building' contained in other statutes were extraneous to the determination of the annual value under the Unit Area System of Property Tax; iv) that the ambit of that 'business building' was wide as well as inclusive under the Delhi Municipal Corporation Act, 1957 and v) that activities being carried out by advocates/professionals are commercial and non-domestic in nature, therefore the same are subject to tax and simply because such activity is carried out from residential premises, as per permitted user under MPD 2021, the activity would not become residential.
7. The aforesaid contention is *ex facie* untenable because there is no such deeming provision in law, for taxation. As noted hereinabove taxation



powers have to be specifically mentioned and categories of taxable activity have to be defined.

8. The learned counsel for the respondent refutes the MCD's contentions and states that each argument of the appellant has been specifically dealt with in the impugned order, that the appeal is without merit and it should be dismissed.
9. The impugned order has dealt with the aforesaid issues as under:

"...7. In support of his submission, Mr. Magon relied upon the judgment of a Division Bench of the Bombay High Court in Sakharam Narayan Kherdekar v. City of Nagpur Corporation and others AIR 1964 Bombay 200 wherein it has been held that an office of an advocate is not covered under the expression 'commercial establishment' under the Bombay Shops and Establishments Act, 1948. The relevant portion of the said judgment is reproduced hereinbelow:-

"26. Thus, the very concept of any activity which can justly be called a commercial activity, must imply some investment of capital and the activity, must run the risk of profit or loss. Understood in this sense, therefore, we are inclined to hold that it is not every establishment in the sense of premises or buildings where business, trade or profession is carried on that is intended to be governed by the Act, but only those premises though carrying on one or other of these kinds of activities which are of a commercial nature..... There is no precise definition of what a profession is, but it is possible to gather what is meant by professional activities from other pronouncements... ..

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35. In our opinion, enough has been stated above to indicate how the profession of an Advocate is of a class apart, not only from other professions but also from any other commercial activity in which a person may be employed. It is possible to conceive of any commercial activities where services of a professional man like



engineer, or architect or draftsman may be utilised, but we cannot conceive of commercial venture where services of a lawyer, not for his own benefit but as a means of providing advice and legal aid to others on behalf of a corporation or an organised body may be made available as part of their commercial activity. The relations between a counsel and his client are not analogous to those of a trader and his customer. The client is not his customer; there is a certain fiduciary relation between them, when the counsel accepts a brief. The obligations do not end with the disposal of the case; they continue so far as the lawyer is concerned. He has obligations not only to the client but also to the Court, and generally to the administration of justice, in which he performs a healthy and necessary function. We therefore do not think that the profession of a lawyer is possible to be carried on as a commercial venture in any sense of the term. There is also considerable force in the argument on behalf of the petitioner that the part a lawyer plays in the administration of justice partakes to some extent, of participation in discharging sovereign or regal functions of the State. We have already quoted above the pronouncements of their Lordships of the Supreme Court that administration of justice and exercise of judicial power are a part and parcel of sovereign powers or regal powers of the State. In this task the lawyer plays a vital and important role.....We therefore find it difficult to accept the contention of the respondents that a lawyer's profession is a kind of profession which can be said to be carried on as profession of commercial nature. It is inherently improbable in the nature of things that the profession of a lawyer could be viewed as a commercial venture. In fact, the commercial character of business, which is an essential condition of a commercial activity is absent in the lawyer's profession. We fail to see how a lawyer, whether he works in his office or appears in Court, can be said to be carrying on his profession in any of these places where the activity can be said to be of a



commercial nature. It is not a commercial activity and the very nature of the work is such that it is incapable of being of a commercial nature.

8. Mr. Magon also relied upon the reference order of a Two Judge Bench of the Supreme Court in *M.P. Electricity Board and Others v. Shiv Narayan and Another* (2005) 7 SCC 283, wherein it has been held under:-

—6. The word —commercial¹ has been defined to mean: —Commercial.—Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. *Anderson v. Humble Oil & Refining Co.* [226 Ga 252 : 174 SE 2d 415, 417] Generic term for most all aspects of buying and selling. The expression —commerce or —commercial necessarily has a concept of a trading activity. Trading activity may involve any kind of activity, be it a transport or supply of goods. Generic term for almost all aspects is buying and selling. But in legal profession, there is no such kind of buying or selling nor any trading of any kind whatsoever. Therefore, to compare legal profession with that of trade and business is a far from correct approach and it will totally be misplaced.”

(emphasis supplied)

10. The Supreme Court has held that the “power to tax must be express, else no power to tax”¹. Under the DMC Act there is no power to tax “professional activities” carried out from residential buildings. Professional activities are permitted under MPD 2010, under certain conditions. The Master Plan has force of law². The language of section 116 A (1) of the DMC Act, 1957 does not include tax on professional

¹ *State of West Bengal vs. Kesoram Industries Ltd. and others*, (2004) 10 SCC 201

² *R.K. Mittal & Ors. vs. State of Uttar Pradesh & Ors.* (2012) 2 SCC 232; *Manushi Sangathan vs. Government of Delhi & Ors.* 168 (2010) DLT 168



activities. Interestingly, clause 9 (b) (i) and (ii) of the Bye-laws refer only to ‘professional establishment’ but does not define the expressions ‘professional’ or ‘establishment’.

11. The impugned order has observed as under:

“42. Recently, the Supreme Court in The Bangalore Turf Club Ltd. Vs. Regional Director, Employees State Insurance Corporation (2014) 9 SCC 657 while holding that a ‘race-club’ is an establishment for the purposes of ESI Act referred to words and phrases as well as Corpus Juris Secundum and Dictionary meaning of the word ‘Establishment’. The relevant portion of the said judgment is reproduced hereinbelow:

“ 34.1. According to Black's Law Dictionary, 7th Edn. (1999), the term —establishment means, inter alia:

”establishment.— n. ... (2) An institution or place of business.”

34.2. According to Words and Phrases, Permanent Edn., Vol. 15, the term —establishment has been held to mean, inter alia, the following:

“An establishment means a permanent commercial organisation or a manufacturing establishment. Spielman v. Industrial Commission [295 NW 1 : 236 Wis 240 (1940)] , NW p. 4.”

“An establishment is the place where one is permanently fixed for residence or business such as an office or place of business with its fixtures. Lorenzetti v. American Trust Co. [45 F Supp 128 (ND Cal 1942)] , F Supp p. 139.”

34.3. According to Corpus Juris Secundum, Vol. LXXX, the term ‘establishment’ has been explained as follows:

“Establishment— ... More specifically, a fixed place where business is conducted, or a place where the public is invited to come and have its work done; an institution or place of business with its fixtures and organised staff; any office or place of business, with its fixtures, the place in which one is permanently fixed for residence or business; a permanent commercial



organisation, as a manufacturing establishment; the place of business or residence with grounds, fixtures, equipage, etc., with which one is fitted out; also that which serves for the carrying on of a business....”

35. Therefore, it can be simply stated that an “establishment” is a term which can have a wide meaning. It would be any place where business is conducted, or in other words, it would be any place of business.....”

43. Consequently, the expression ‘establishment’ refers to those buildings which have a separate identifiable existence and where business is conducted.

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49. The Allahabad High Court in Satya Prakash Singh and Anr. vs. State of U.P. & Ors. Writ Petition No.16843/2011 dated 29th May, 2012 also set aside the assessment of the ground floor portion as commercial despite the fact that a Doctor was running a clinic therein. The Allahabad High Court held that the work of a Doctor, Chartered Accountant or a Lawyer or any Consultant, is a profession which is distinct from any trade or business. The Allahabad High Court further held that running a clinic/dispensary/laboratory from a residential area would not be covered by the expression ‘commercial establishment’ or a ‘shop’ within the meaning of Sub-section (4) and 16 of Section 2 of the Adhiniyam and its market value was not determinable as a commercial building as provided under Rule 2(d) of the Rules.

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*51. In fact, in **K. Kanagasabai vs. The Superintending Engineer, W.P.(C) 21731/2003 dated 23rd December, 2010**, the Madras High Court made a distinction between the office of a lawyer in a residence and an office of a lawyer in a commercial place.*

52. The distinction between ‘professional activity and ‘professional establishment’ can be illustrated by the following example. A ‘professional’s office’ would be a ‘professional



establishment’ when the usage of the office space is in excess of the conditions stipulated in Clause 15.8 of the MPD 2021 or if the said office is situated in a building designated as commercial or business in the MPD 2021 and Zonal Plan. In the opinion of this Court, a premise would not become business premise just because a lawyer read his office file or did some official work at his residence.

53. ‘Professional activity’ as defined and permitted by the MPD 2021 has not been diluted or subject to tax by Bye-law 9(b). After all, the intent the authorities could not have been to take back the concession given by the MPD 2021 in Clause 15.8 in the form of permissible activity by levying property tax!’

12. As regards the professional activity and professional services rendered by advocates, a Division Bench of the Bombay High Court has in *Sakharam Narayan Kherdekar v. City of Nagpur Corporation & Ors.*, AIR 1964 Bombay 200, has held that the discharge of professional activities by advocates would not be covered under the expression “business” nor would it be professional establishment because the word “establishment” would only refer to as ‘shops’ as defined in the Bombay Shops and Establishment Act, 1948.
13. The result of the aforesaid discussion is that no tax can be levied in the absence of a statutory empowerment. The MCD’s powers to levy property tax are embodied in Section 115 and 115-A of the DMC Act. The Bye-laws have been enacted under Sections 481 and 483 of the Act. Clause 9 of the Bye-laws, as noted hereinabove, defines the categories under which property tax can be levied. Rate of taxation is another issue but for taxation to extend to a class of activity, such activity must be specified, defined and included in that class/category. Neither the Act nor the Bye-laws define “professional activity” carried out by advocates, architects



and doctors, etc.

14. A Constitution Bench of the Supreme Court in *Commissioner of Customs and Others vs. Dilip Kumar and Company and others* (2018) 9 SCC 1, has held that: i) when the language of the statute is plain and unambiguous, court has to seal and understand the plain language as such, and there is no scope of interpretation, ii) all cases of literal interpretation would involve strict rule of interpretation, but strict rule may not necessarily involve the former, especially in the area of taxation, thus, strict interpretation does not encompass strict literalism into its fold; iii) every taxing statute including charging, computation and exemption clause (at the threshold stage) should be interpreted strictly; iv) in a taxation statute there is no room for any intendment; v) in taxation statutes contextual or purposive interpretation cannot be applied, nor can any resort be made to look to other supporting material. Equity has no place in interpreting a tax statute.

15. That being the law regarding interpretation of taxing statutes, what needs to be seen is whether “professional activity” by lawyers would be classified under clause 9 (a) (b) (i) and (ii) of the Delhi Municipal Corporation (Property Taxes) Bye-laws, 2004. The DMC Act does not define “professional activity”. What it defines has been discussed hereinabove. Also in *V. Sasidharan v. M/s. Peter and Karunakar and others* AIR 1984 SC 1700 the Supreme Court has held that “professional activity” of lawyers does not fall within the category of ‘commercial establishment’ or ‘business activity’ and the firm of lawyers is not a ‘commercial establishment’. Relevant portion of the said judgment is reproduced as under:



“10. Learned counsel for the appellant argues that a lawyer's office is a commercial establishment because, persons who are employed in that office are mainly engaged in office work. This argument overlooks that, under the second clause of the definition in Section 2(4), ‘commercial establishment’ means “an establishment or administrative service in which the persons employed are mainly engaged in office work”. Partly, we go back to the same question as to whether a lawyer's office is an ‘establishment’ within the meaning of the Act. The other aspect which this argument fails to take note of is that a lawyer's office is not an ‘administrative service’. It seems to us doing violence to the language of the second clause of Section 2(4) to hold that a lawyer's office is an ‘administrative service’. This argument has therefore to be rejected.

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12. For these reasons, we are of the opinion that the office of a lawyer or of a firm of lawyers is not a ‘commercial establishment’ within the meaning of the Act. This conclusion is strengthened by the other provisions of the Act.....If the current trends are any indication and if old memories fail not, the earnings of lawyers' clerks cannot, in reality, bear reasonable comparison with the earnings of employees of commercial establishments, properly so called. They, undoubtedly, work hard but they do not go without their reward. They come early in the morning and go late at night, but that is implicit in the very nature of the duties which they are required to perform and the time they spend is not a profitless pastime.

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15.We agree with their reasoning and hold that the office of a lawyer or of a firm of lawyers is not a ‘commercial establishment’ within the meaning of Section 2(4) of the Act.”

16. The rule of strict interpretation of taxation statute has to be applied. There is no scope of reading any derivative meaning or of reading any



intentment of the statute. Insofar as the statute has not included “professional activity” of lawyers as “commercial activity” the former cannot be put to tax. The aforesaid Bye-laws cannot seek to over-reach the statute itself. The assessment order issued by the MCD under section 123D of the DMC Act, 1957 alongwith any demand, were rightly quashed.

17. We see no reason to interfere with the impugned judgement. The appeal is without merit and is accordingly dismissed.

NAJMI WAZIRI, J

SUDHIR KUMAR JAIN, J

MARCH 23, 2023/rd

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