2024:KER:38797

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

TUESDAY, THE 4TH DAY OF JUNE 2024 / 14TH JYAISHTA, 1946

OP (TAX) NO. 24 OF 2016

AGAINST THE ORDER/JUDGMENT DATED 04.08.2015 IN TA NO.124 OF 2010 OF S.T.A.T.ADDITIONAL BENCH, ERNAKULAM

PETITIONER

STATE OF KERALA
REPRESENTED BY THE DEPUTY COMMISSIONER(LAW),
COMMERCIAL TAXES, ERNAKULAM
.
BY SR. GOVERNMENT PLEADER-SRI.V.K.SHAMSUDHEEN

RESPONDENT

M/S. M FAR HOTELS LTD
KUNDANNOOR, MARADU P.O., ERNAKULAM.

BY ADVS.
SRI.P.J.ANILKUMAR
SRI.A.KUMAR
SMT G.MINI1748
SRI.P.S.SREE PRASAD

—

THIS OP TAX HAVING COME UP FOR ADMISSION ON 04.06.2024, ALONG WITH OP (TAX).28/2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

2024:KER:38797

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

TUESDAY, THE 4TH DAY OF JUNE 2024 / 14TH JYAISHTA, 1946

OP (TAX) NO. 28 OF 2016

AGAINST THE ORDER/JUDGMENT DATED 04.08.2015 IN TA NO.13 OF 2013 OF S.T.A.T.ADDITIONAL BENCH, ERNAKULAM

PETITIONER

STATE OF KERALA
REPRESENTED BY THE DEPUTY COMMISSIONER (LAW),
COMMERCIAL TAXES, ERNAKULAM

BY ADV GOVERNMENT PLEADER SRI.V.K.SHAMSUDHEEN

RESPONDENT:

M/S. M FAR HOTELS LTD.
KUNDANNOOR, MARADU P.O, ERNAKULAM PIN 682 011
BY ADVS.
SRI.P.J.ANILKUMAR
SRI.JACOB JOHN TRIVANDRUM
SRI.A.KUMAR
SMTG.MINI 1748
SRI.P.S.SREE PRASAD

THIS OP TAX HAVING COME UP FOR ADMISSION ON 04.06.2024, ALONG WITH OP (TAX).24/2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J U D G M E N T

Dr. A.K.Jayasankaran Nambiar, J.

As all these Original Petitions deal with the common issues, they are taken up for consideration together and dispose of by this common judgment.

2. In O.P(Tax) No.24 of 2016, the order of the Kerala Value Added Tax Appellate Tribunal dated 4.8.2015 is impugned which deals with the assessment year 2003-04. In O.P(Tax)No.28 of 2016, the same order of the Kerala Value Added Tax Appellate Tribunal dated 4.08.2015 is impugned to the extent it disposes four appeals preferred by the Revenue in relation to the assessment years 2004-05, 2005-06, 2006-07 and 2007-08.

3. The State of Kerala is the petitioner before us in both these Original Petitions impugning the common order of the Kerala Value Added Tax Appellate Tribunal on three issues that

were decided against it by the Tribunal. Those issues are as follows:

1) Whether the charges received by the assessee from its customers out of the amounts paid to the Ayurveda Centre functioning in the premises of the hotel operated by it would attract the levy of luxury tax under the Kerala Tax on Luxuries Act?

2) Whether the charges received by the assessee from its customers out of the amounts paid to a Beauty Parlour functioning in the premises of the hotel operated by it would attract the levy of luxury tax under the Kerala Tax on Luxuries Act ?

3) Whether the charges collected by the assessee from clients/customers for the use by the latter of the Convention Centre operated by it would attract the levy of luxury tax under the Kerala Tax on Luxuries Act?

4. We find from a perusal of the orders of the Assessing Authority, First Appellate Authority and the Appellate Tribunal that the issues were decided against the assessee for all assessment years by the assessing authority at the first instance.

In the appeals preferred before the First Appellate Authority, while the First Appellate Authority allowed the claim of the assessee regarding non taxability of the charges received by them in connection with the operation of the Ayurveda Centre and Beauty Parlour for the various assessment years (except for 2003-04 when the charges received by the Ayurveda Centre was subjected to tax), it confirmed the levy of luxury tax in respect of the charges collected for use of the Convention Centre for the assessment years 2006-07 and 2007-08, but allowed the contention of the assessee with regard to the non taxability of the said income for the assessment years 2004-05 and 2005-06 respectively. The said findings of the First Appellate Authority were affirmed by the Appellate Tribunal in the orders that are presently impugned before us in these Original Petitions. For the sake of completion of facts, we might also note that for the assessment year 2003-04, the order of the First Appellate Authority rejecting the contention of the assessee with regard to non taxability of the income received through the Ayurveda Centre and the Beauty Parlour was reversed by the Appellate Tribunal in an appeal preferred by the assessee before it.

5. Before us, it is the submission of Sri. Shamsudheen, the learned Government Pleader appearing on behalf of the petitioner State that the charging provision of the Kerala Tax on Luxuries Act, 1976 ('the Act' for short) clearly mandates that luxury tax shall be levied and collected in respect of a hotel, for charges of accommodation, residence and other amenities and services provided in the hotel. It is his contention, therefore, that so long as there is an 'amenity' or 'service' provided in the hotel, the mere fact that the service was provided through a separate entity, would not alter the liability of the hotel, and its proprietor, to pay tax on the amounts collected for the amenity or service provided to the customer. It is his specific case that the stand of the assessee before the authorities below, that what was received by it from the provider of services in the hotel was only a rent for the space let out within the hotel premises, cannot be legally countenanced since luxury tax is a tax on the provision of luxury and, in the instant case, the luxury was provided in the hotel. As regards the levy of tax on the amounts collected by the assessee for use of the Convention Centre, it is his submission that, while for the assessment years 2006-07 and 2007-08, the amendment introduced in the Kerala Finance Act, 2006 with

effect from 01.07.2006 clearly brought the income from the Convention Centres within the ambit of the charge to luxury tax, for the prior period, covering assessment years 2004-05 and 2005-06, the said charges would have attracted the levy of luxury tax as applicable to Convention Centre on interpreting the provisions of Section 4(2)(c) of the Act in a manner that would include Convention Centres by applying of the principle of *ejusdem generis.* He places reliance on the decisions in ***Brunton Boatyard v. State of Kerala*** [2013 (4) KLT 37], ***State of Kerla v. M/s. Kumarakom Lake Resorts (P) Ltd.*** [2018/KER/45898 (W.P(C)No.9148 of 2009)] and ***New Horizons Limited and another v. Union of India*** [(1995) 1 SCC 478].

6. Per contra, it is the submission of Sri. A Kumar, the learned Senior Counsel appearing on behalf of the respondent-assessee, duly assisted by Advocate Smt.G.Mini, that the scheme of the Act has been clearly delineated by a Division Bench of this Court in the decision reported in ***Madhavaraja Club v. Commercial Tax Officer (Luxury Tax)*** [2023 (3) KLT 475]. Going by the said decision, the tax on the enjoyment of a luxury as envisaged under the Act is attracted at a point in time when

such luxury is provided by a proprietor of the hotel to another person for the latter's enjoyment. In that sense, therefore, it is only in cases where the hotel is actually providing the Ayurvedic treatment service or the Beauty Parlour service directly to a customer, without the intervention of an independent entity, and raising invoices directly to the said customers, that the service/luxury could be seen as provided by the hotel. HE points out that in the instant case, as rightly found by the Appellate Tribunal, the service/amenity in question was provided by independent third persons, who were invoicing their customers directly for the services rendered by them, although in some instances the customers made the payment for the said services, against the invoices so raised, through the asessee hotel at the time of settlement of their bills with the hotel. He points out that the mere collection by the assessee hotel, of the amounts due to the independent service providers, could not entail a tax liability on the assessee hotel when the taxable event under the Act was the provision of service by the independent third persons. As regards the liability to tax on the amounts received for the use of the Convention Centres, it is his submission that the amendment to Section 4(2)(c) of the Act having been introduced only with

effect from 01.07.2006, and the amendment having been of a substantive provision, it had necessarily to be seen as prospective in its operation and effect, and when so viewed, the tax liability on the charges received for use of the Convention Centre had to be confined to the assessment years subsequent to the date of the amendment. He also lays emphasis on the findings of the Appellate Tribunal that clearly spell out why the principle of *ejusdem generis* cannot be pressed into service in the instant case where a Convention Centre, by its very nature cannot be seen as similar to Halls and Kalyanamandapams that were earlier dealt with in Section 4(2)(c) of the Act. He places reliance on the following judgments;

i) ***Cochin International Airport Ltd. v. Commissioner of S.T., Cochin*** [2010(19) S.T.R.225 (Tri-Bang)

ii) ***Commissioner of Central Excise v. Cochin International Airport Ltd***. [2011(24) S.T.R. 20 (Ker)

iii) **Windsor Castle v. Commercial Tax Officer, (Works Contract) & Another** [(2012) 20 KTR 321 (Ker)],

iv) ***Brunton Boatyard v. State of Keral***a [(2013) 66 VST 533 (Ker.)]

and

v) ***Madhavaraja Club v. Commercial Tax Officer (Luxury Tax)*** [2023 (3) KLT 475].

7. We have considered the rival submissions and we find that in a judgment rendered by one of us in ***Madhavaraja Club v. Commercial Tax Officer (Luxury Tax)*** [2023 (3) KLT 475] the scheme of taxation under the Kerala Tax on Luxuries Act was delineated as follows:

> "5. When construing the provisions of any taxing statute, it is useful to keep in mind the test that is often applied by courts to determine whether the tax in question is one that is backed by the authority of law viz., that for a levy to exist in point of law four components must exist-the nature of the tax which prescribes the taxable event, the person on whom the levy is to be imposed, the rate of the tax and the measure or value to which the rate will be applied (See: Govind Saran Ganga Sarana v. CST (1985 KLT Online 1248 (SC)=AIR 1985 SC 1041). The test, when applied, provides the answers to four cardinal questions viz. (i) what is taxable event or the event that attracts the tax? (ii) who has to pay the tax? (iii) how much tax has to be paid and (iv) how does one pay the tax?. The answers to the above questions must be found in the taxing statute

concerned for, in the absence of a clear charge or machinery to levy and assess tax in the primary legislation, the imposition of tax cannot be done [(See: Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited & Anr. (2015 (3) KLT Suppl. 75 (SC) + (2016) 1 SCC 170))

6. The answer to question (i) is usually provided by the charging section of the statute concerned. It could be the earning of income as in the Income Tax Act, the manufacture of goods as in the Central Excise Act, the import of goods as in the Customs Act or the supply of goods and services as in the GST Act. Section 4 of the Kerala Tax on Luxuries Act is the charging section thereunder and it provides for the levy of a luxury tax on “luxury provided” by various entities and hence the taxable event under that Act is the “providing of luxury”. Question (ii) seeks to find the person who is made responsible under the statute concerned to pay the tax to the Government. Under the Kerala Tax on Luxuries Act, Section 4(3) identifies that person as the 'Proprietor' which term is defined under Section 2(h) therein as meaning the person who, for the time being, is in charge of the management of the hotel, house boat, hall, auditorium, home stay, hospital or kalyanamandapam or place of like nature, as the case may be. Question (iii) seeks to find the measure of the tax i. e , the value on which, and the rate at which, the tax is to be paid. Sub-sections (2), (2A), (4) and (5) of Section 4 of the Act answer the said question by providing the value and the rate of tax applicable when various kinds of luxury are provided.

The answer to question (iv) that seeks that manner in which the tax is to be paid, is contained in the various provisions of the Act that deal with the procedure for registration of the 'proprietors' who provide the luxury, the collection of tax by the said 'proprietors' from the persons who enjoy the luxury so provided, the manner of payment of the tax so collected by the 'proprietors' to the Government exchequer by filing returns, and the assessment of the 'proprietor' to determine whether the tax has been correctly paid.

7. A reading of the provisions of the KTL Act therefore clearly reveals that it is a tax on the enjoyment of a luxury, that is attracted at a point in time when such luxury is provided by a 'proprietor' to another person for the latter's enjoyment. The incidence and levy of the tax is on the 'proprietor" although the ultimate impact of the tax may be on the persons who enjoys the luxury that is provided. The 'proprietor' is also the person who is made responsible under the Act to register himself, collect the tax from the person who enjoys the luxury, pay the applicable tax to the Government exchequer along with the filing of his returns and subject himself to an assessment under the Act."

8. When we consider the issues raised in these Original Petitions in the backdrop of the scheme of the Act as enunciated above, we find that in relation to the Ayurveda Centre and the Beauty Parlour, that are functioning in the premises of the

assessee hotel, the documents perused by the authorities below clearly showed that the provision of the luxury was by the independent third persons and not directly by the assessee hotel. The invoices raised on the customers, for the services provided by the independent third persons, also show that the services were provided by them and not by the assessee hotel. No doubt, the petitioner has a case that there was an agreement between the assessee hotel and the independent third persons who were providing the service to customers, for sharing of the revenue earned by the latter. This, in our view, would not affect the levy of tax under the Act. As rightly found by the Appellate Tribunal, the revenue sharing arrangement, between the assessee on the one hand and the independent third persons on the other, had to be seen as an arrangement providing for the receipt of rent by the assessee for letting out space within its hotel premises for the business activities of the independent third persons. At any rate, through the said arrangement, it could not be said that the assessee hotel was providing those services directly to its clients for the purpose of attracting the levy of luxury tax. We therefore find against the petitioner on the said issues by confirming the impugned order of the Tribunal.

9. As regards the levy of luxury tax on the amounts received by the assessee for the use of the Convention Centre, we find force in the submission of the learned Senior Counsel for the assesee that prior to the amendment of Section 4(2)(c) of the Act, there was no levy envisaged for charges collected in connection with the use of a Convention Centre. The levy was introduced for the first time only through the amendment brought in through the Kerala Finance Act, 2006 with effect from 01.07.2006. Being an amendment to a substantive provision that introduced a new levy, the levy can operate only prospectively and not retrospectively. We therefore find against the petitioner-State on the issue of levy of luxury tax on the amounts received for use of the Convention Centre in the assessment years 2004-05 and 2005-06.

10. Resultantly, we see no reason to interfere with the orders of the Appellate Tribunal that are impugned in these Original Petitions.

The Original Petitions fail and are accordingly dismissed.

Sd/-

DR. A.K.JAYASANKARAN NAMBIAR

JUDGE

Sd/-

SYAM KUMAR V.M.
JUDGE

smm

APPENDIX OF OP (TAX) 24/2016

PETITIONER EXHIBITS

EXHIBIT P1	**A COPY OF THE ASSESSMENT ORDER DTD.20.2.2009.**
EXHIBIT P2	**A COPY OF THE ORDER IN STA NO.93/09.**
EXHIBIT P3	**A CERTIFIED COPY OF THE ORDER OF THE SALES TAX APPELLATE TRIBUNAL, ADDITIONAL BENCH, ERNAKULAM IN TA NO.124/10 & TA NO.13/13 TO 15/13, 37/13 & 56/13.**
EXHIBIT P3(A)	**A COPY OF EXT.P3.**

APPENDIX OF OP (TAX) 28/2016

PETITIONER EXHIBITS

EXHIBIT P1	**TRUE COPY OF THE ASSESSMENT ORDER OF THE YEAR 2004-2005**
EXHIBIT P2	**TRUE COPY OF THE ASSESSMENT ORDER OF THE YEAR 2005-2006**
EXHIBIT P3	**TRUE COPY OF THE ASSESSMENT ORDER OF THE YEAR 2005-2006 (REVISED)**
EXHIBIT P4	**TRUE COPY OF THE ASSESSMENT ORDER OF THE YEAR 2006-2007**
EXHIBIT P5	**TRUE COPY OF THE ASSESSMENT ORDER OF THE YEAR 2007-2008**
EXHIBIT P6	**TRUE COPY OF THE ORDER OF THE 1ST APPELLATE AUTHORITY FOR THE ASSESSMENT YEARS 2004-2005 TO 2007-08**
EXHIBIT P7	**A TRUE COPY OF THE ORDER OF THE TRIBUNAL DATED 04-08-2015**