
(2012) 10 KL CK 0123

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 23312 of 2008 and 1390 of 2009

Ayurveda Hospital Managements Association

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 15-10-2012

Acts Referred:

Kerala Tax on Luxuries Act, 1976 — Section 4(1)(iii)

Citation : (2012) 4 KLJ 741 : (2012) 4 KLT 528 : (2012) 56 VST 327

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : V.V. Asokan, K.I. Mayankutty Mather, S. Amina, P.P. Ramachandran and E.M. Unnikrishnan Manjeri, for the Appellant; Sojan James, Spl. Government Pleader and T.K. Shaij Raj, Government Pleader, for the Respondent

Judgement

Antony Dominic

1. Issues raised in these Writ Petitions being common, these cases were heard together and are disposed of by this common judgment, treating W.P.(C) No. 1390/09 as the leading case. Petitioner states that it is an Ayurvedic Hospital, where various traditional Ayurvedic treatments are provided to patients. For this purpose, they have appointed qualified doctors and nursing staff. It is also stated that they are maintaining 26 cottages, 7 rooms and a general ward. They have obtained necessary licenses issued by the Drugs Controller and the Asst.Excise Commissioner, Palakkad. They have also obtained registration as a Private Hospital from the Chalissery Grama Panchayat and also License under the Kerala Panchayat Raj Act, 1994.

2. By Finance Act, 2008 (Act 21 of 2008), with effect from 1.4.2008, certain amendments were made to the Kerala Tax on Luxuries Act, 1976 (hereinafter referred to as the "Act" for short). By this amendment, hospitals were brought within the purview of the Act and "luxury provided in hospitals" was also made taxable. Thereupon, allegedly under compulsion, petitioner took out registration as provided u/s 4(1)(iii) of the Act and started complying with the requirements

thereunder. It is stated that, while so, the 5th respondent conducted an inspection of the petitioner's hospital and thereafter issued Ext.P3 notice calling upon them to produce their certificate of registration and other documents and the relevant part of this notice reads thus:

Documents to be produced

1. The Certificate of registration you have obtained, if any, from the Department of Commercial Taxes related with your business.
2. The details of treatment/therapy/other services/packages/activities/amenities, rendered and offered by your hospital to the inmates/tourists and also the amount collected for such activities for the period from 2003-04 to 2008-09 for each year separately along with the books of accounts.
3. It is stated that on receipt of this notice, petitioner's representative met the 5th respondent and explained that the demand in the notice is unsustainable and that the respondent threatened to make the petitioner liable for tax from 2003 onwards and levy penalty for non payment of tax due for the said period. It was there upon this Writ Petition was filed seeking mainly to declare that the amendment extending coverage of the Act to hospitals unconstitutional and also to quash Ext.P3 notice.
4. During the course of his arguments, counsel for the petitioner mainly raised two contentions. First contention was that the establishment being a hospital, the Act became applicable only by virtue of Act 21 of 2008 and with effect from 1.4.2008, and therefore, the demand contained in Ext.P3 notice for the production of the documents from 2003 is illegal. The second point raised was that the Act, to the extent it covers hospitals, is beyond the powers conferred on the State Legislature under Entry 62 of List II of the 7th Schedule to the Constitution of India.
5. Respondents have filed a detailed counter affidavit justifying the notice issued by them. In the affidavit, it is contended that having regard to the luxuries that are provided, the establishment in question is liable to be treated as a hotel and hence they were entitled to issue the notice calling for the production of documents from 2003. They also contended that under Entry 62 of List II, the State Legislature was competent to pass the legislation in question.
6. I have considered the submissions made by both sides.
7. As far as the first question whether the petitioner's establishment is a hotel or not is concerned, if it is a hotel, since hotels were already covered by the Act, respondents were justified in requiring production of documents for the period from 2003-04. On the other hand, if it is a hospital, since the Act became applicable to hospitals only by virtue of Act 21 of 2008 with effect from 1.4.2008, petitioner could not have been called upon to produce documents for the period prior to 1.4.2008.

8. In so far as this issue is concerned, I am of the view that there is no substance in what the respondents contend. Even in Ext.P3 notice issued, the respondents themselves have described the establishment of the petitioner as a "hospital". Once the respondents themselves have chosen to initiate proceedings on the basis that it is a hospital, they cannot turn around and contend before this Court that establishment of the petitioner is a hotel and not a hospital. Therefore, the first contention raised by the petitioner deserves acceptance. Consequently, the Act cannot have application to the petitioner's hospital for any period prior to 1.4.2008 and hence the demand for production of documents and details for any prior period is illegal.

9. The second contention regarding absence of legislative competence was argued mainly relying on the Apex Court judgment in Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others, . Before proceeding further, it is necessary to understand the principles laid down by the Apex Court in the aforesaid judgment. Godfrey Philips was a case where the appellants were either manufactures, dealers or sellers of tobacco and tobacco products. In this batch of cases, the Apex Court considered the constitutional validity of the provisions of Luxury Tax Acts of the State of Uttar Pradesh, Andhra Pradesh and West Bengal. In its judgments, the court examined the meaning and scope of Entry 62 of List II and as far as this case is concerned, the following extracts from the judgment shows that the principles laid down are:

It has been held that the word "includes" may in certain contexts be a word of limitation (South Gujarat Roofing Tiles Manufactures Assn. v. State of Gujarat). In the context of Entry 62 of List II this would not mean that the word "luxuries" would be restricted to entertainments, amusements, betting and gambling but would only emphasise the attribute which is common to the group. If luxuries is understood as meaning something which is purely for enjoyment and beyond the necessities of life, there can be no doubt that entertainments, amusements, betting and gambling would come within such understanding. Additionally, entertainments, amusements, betting and gambling are all activities. "Luxuries" is also capable of meaning an activity and has primarily and traditionally been defined as such. It is only derivatively and recently used to connote an article of luxury. One can assume that the coupling of these taxes under one entry was not fortuitous but because of these common characteristics.

(vide paragraph 74).

Hence on an application of general principles of interpretation, we would hold that the word "luxuries" in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognized as being beyond the necessary requirements of an average member of society and not articles of luxury.

(vide paragraph 83).

Given the language of Entry 62 and the legislative history we hold that Entry 62

of List II does not permit the levy of tax on goods or articles. In our judgment, the word "luxuries" in the entry refers to activities of indulgence, enjoyment or pleasure. Inasmuch as none of the impugned statutes seek to tax any activity and admittedly seek to tax goods described as luxury goods, they must be and are declared to be legislatively incompetent

(vide paragraph 93).

10. Thus, from the principles laid down by the Apex Court it is clear that Entry 62 List II, does not authorise State Legislature to levy luxury tax on goods or articles and that luxury tax can be levied only on activities of indulgence, enjoyment or pleasure.

11. Having understood the scope of the relevant legislative entry, I shall proceed to survey the important provisions of the Act, Sections 2(de) and (fb) of the Act, as amended by Act 21 of 2008, define the expressions "hospital" and "luxury provided in a hospital" thus;

2(de) -"hospital" includes a nursing home, therapy centre, rejuvenation or recuperation centre, nature care or cure centre, ayurvedic cure or care centre, sidha centre or any other treatment centre, personal care centre and beauty treatment centre, by whatever name called.

2(fb) - "luxury provided in a hospital" means accommodation for residence for use of amenities and services provided in a hospital the rate of charges of which, excluding charges of food, medicine and professional services, is one thousand rupees per day or more.

12. Section 4(1)(iii) provides that subject to the provisions of the Act, there shall be levied and collected, luxury tax in respect of any luxury provided in a hospital. Section 4(2)(e) provides thus;

Section 4(2). Luxury tax shall be levied and collected-

(e) in respect of a hospital, for charges of accommodation for residence for use of amenities and services, at the rate of ten percent per room where the gross charges, excluding charges of food, medicine and professional services, is one thousand rupees per day or more.

13. Section 4E providing for registration of hospitals read as under;

4E. Registration of Hospitals:- Every hospital having not less than five rooms to be rented for accommodation of patients for treatment or otherwise for which gross charges excluding charges for food, medicine and professional services is one thousand rupees or more per room, shall get itself registered with such authority and in such manner as may be prescribed, and the application for registration shall be accompanied by a registration fee of rupees one thousand. The registration shall be for a period of one year and shall be renewed annually.

14. The aforesaid being the relevant provisions of the Act, these can be

summarized thus;

- 1) that levy of luxury tax is for accommodation for residence and use of the amenities and services provided in a hospital.
- 2) that the gross charges levied by the hospitals shall be rupees one thousand or more.
- 3) that in calculating the gross charges levied, the charges of food, medicine and professional services are excluded.
- 4) that the rate of luxury tax shall be ten per cent of the gross charges levied.

15. These provisions of the Act make it clear that luxury tax is not levied on hospitals as such, instead, the levy is for enjoying the accommodation for residence and the amenities and services for hospitably, such of those hospitals, which, exclusive of what it charges for food, medicine and professional services, charges rupees one thousand or more per day from the patients who enjoy the accommodation for residence and the amenities and services. Once it is found that the levy is not on goods or articles and that it is for using the accommodation provided for residence and for enjoying the amenities and services provided in hospitals, the first requirement of Entry 62 List II is satisfied.

16. Then the further issue to be considered is whether the amenities and services provided in a hospital can be defined to be an activity of indulgence, enjoyment or pleasure to be within the legislative competence of the State Legislature under Entry 62 List II. Petitioner contended that their hospital is providing Ayurvedic treatment to both inpatients and outpatients and that the amenities enjoyed or services provided to the patients are incidental to their treatment for various ailments and therefore is not an indulgence, enjoyment or pleasure or beyond the requirement of an average member of the society, to be taxed as a luxury under the Act. This again, in my view, is an untenable contention.

17. Competence of the Legislature under Entry 62 List II to levy tax on luxuries cannot be and was not disputed. It is trite that in deciding the question of legislative competence, the legislative entries in the relevant list should not be narrowly interpreted and that the interpretation should be broad and liberal. Subject to the limitations provided in the Constitution itself, Legislature is supreme in its own sphere under the Constitution and it is for the Legislature to decide as to when and in what respect and on what subject matter laws are to be made and also regarding the nature of operation of the statutes. Thus, within the constitutional limitations, Legislature is free to choose the subject and the persons to be taxed. Once this legislative freedom is recognised, it should be accepted that the Legislature is always within its rights to specify the items of luxury. It is accordingly that for using the accommodation for residence and the amenities and services provided in hospitals, which levy gross charges of rupees one thousand or more per day have been defined as "luxury provided in

hospitals" for the purpose of the Act and in determining the gross charges, what is charged for food, medicine and professional services is excluded. By this process, the Legislature has kept out of the purview of the Act, hospitals which charge less than rupees one thousand per day. In other words, for the purposes of the Act, the legislature has differentiated the hospitals on the basis of the charges levied for the amenities and services provided to the patients. Similar definitions have been given to the expressions luxury provided in hotels, luxury provided in house boats and luxury provided in a home stay etc. Such provisions of the Act, are within the legislative competence of the State and consequently, there is no basis for the contention that, the Act to the extent it covers hospitals, is ultra vires the Constitution. Therefore, the second contention raised by the petitioners is rejected.

For the aforesaid reasons, the Writ Petitions are disposed of as follows;

- 1) The provisions of the Act, levying tax on luxury provided in hospitals are upheld.
- 2) Ext.P3 notice is quashed.
- 3) No costs.