

(2010) 03 SHI CK 0059
In the High Court Of Himachal Pradesh
Case No : CWP No. 442 of 2007

Hotel Sterling Holiday Resort	Vs	APPELLANT
The State of H.P. and Others		RESPONDENT

Date of Decision : 20-03-2010

Acts Referred:

Himachal Pradesh Tax on Luxuries (In Hotels and Lodging Houses) Act, 1979 —
Section 2

Citation : (2010) 03 SHI CK 0059

Hon'ble Judges : Kuldip Singh, J; Dev Darshan Sood, J

Bench : Division Bench

Judgement

Dev Darshan Sud, J.—All these Writ Petitions are being disposed of by this order as the question of law involved is the same.

2. The Petitioners (hereinafter referred to as "the Assessee") herein are aggrieved by the directions issued by the Excise and Taxation Commissioner in Revision Petition No. 153/2006 directing the Assessing Authority to compute/assess tax in accordance with law as per Section 2 (e) of the H.P. Tax on Luxuries (In Hotels and Lodging Houses) Act, 1979 (hereinafter referred to as "the Act"). Prior to the amendment carried out in the Act, luxury was defined as:

2(e) "luxury provided in a hotel" means accommodation for residence provided in a hotel, rate of charges for which (including charges for air-conditioning, telephone, television, radio, music, sports, extra beds and other amenities provided in a hotel) is [twenty-five] rupees per person per day or more;].

3. Thereafter, explanation was added to Clause (e) by Act No. 3 of 2005 w.e.f. 3.11.2004. The amended provision provides:

[Explanation: For the purpose of Clause (e) wherever accommodation provided is under timeshare agreement or under a package deal agreement or under any such other system wherein only maintenance charges, by whatever name called, are collected periodically; over and above any lump-sum payment made, the

charges for luxury provided shall be determined as under, namely:

(a) Where a hotel is having any of the following facilities, Rs. 500/- per person per day for the accommodation facility actually availed:

(i) swimming pool,

(ii) health club,

(iii) tennis court,

(iv) golf course,

(v) shopping arcade; and

(b) In all other cases, the charges for luxury shall be worked out at the rate of Rs. 300/- per person per day for the accommodation facility actually availed.]

4. A plain reading of the explanation would show that it is applicable only on and w.e.f. 3.11.2004 and is not retrospective. In other words, the explanation can be used for the purpose of assessment of transactions starting from and subsequent to 3.11.2004. The order of the Commissioner which has been interpreted by the Assessing Authority by accepting this explanation even for the assessment years prior to 3.11.2004 can not be accepted.

5. The second grievance of the Petitioner herein is that according to Section 2 (i), turnover of receipts has been defined:

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(i) "turnover of receipts" means aggregate of the amounts of receipt during any period of a financial year.

6. This clause was added by Act No. 14 of 2000. The charging Section in the Act is Section 4. Prior to its amendment in 2000, the Section provides:

4. (1) Subject to the provisions of this Act, there shall be levied and paid a tax in respect of any luxury provided in a hotel (hereinafter called the "luxury tax") on the amount of charges payable for the luxury.

7. In its amended form, the Section words "turnover of receipts of" were substituted for the words "amount of charges payable for". The Section as it exists today reads:

4 [Levy and collection of tax.- (1) Subject to the provisions of this Act, there shall be levied and paid a tax in respect of any luxury provided in a hotel (hereinafter called the "luxury tax") on the [turnover of receipts of] the luxury.

[Provided that where the charges for luxury provided in a hotel are payable otherwise than on daily basis, then the turnover of receipts for the total period of occupation of accommodation shall be computed proportionately for a day and luxury tax paid accordingly.]

8. Learned Counsel for the Petitioner submits that the total turnover of receipts can not be used for the purpose of levying tax. He submits that the power to legislate for tax on income other than agricultural income is vested with the Union Government in terms of List-I, Entry 82, which provides:

Taxes on income other than agricultural income.

9. He submits that the Act can not be interpreted to mean that the State can charge tax on the total/gross turnover of the receipts, but it is only the component of luxury which can be brought to tax. He submits that any other interpretation placed on the Act would be ultra virus the Constitution and would violate Article 246 which gives power to Union Government to legislate and State to enact law and Article 265 which provides that no tax can be levied except by authority of law.

10. A reading of Section 4 of the Act leaves no doubt in our minds that it is the luxury which has to be taxed and not the entire turnover of the receipts.

11. Luxury has been defined in Clause (e) to mean:

(e)"luxury provided in a hotel" means accommodation for residence provided in a hotel, rate of charges for which (including charges for air-conditioning, telephone, television, radio, music, sports, extra beds and other amenities provided in a hotel) is [fifty] rupees per person per day or more:] [Explanation: For the purpose of Clause (e) wherever accommodation provided is under timeshare agreement or under a package deal agreement or under any such other system wherein only maintenance charges, by whatever name called, are collected periodically; over and above any lump-sum payment made, the charges for luxury provided shall be determined as under, namely:

(a) Where a hotel is having any of the following facilities, Rs. 500/- per person per day for the accommodation facility actually availed:

(i) swimming pool,

(ii) health club,

(iii) tennis court,

(iv) golf course,

(v) shopping arcade; and

(b) In all other cases, the charges for luxury shall be worked out at the rate of Rs. 300/- per person per day for the accommodation facility actually availed.]

12. In these circumstances, we hold that the aggregate of receipts as provided for by Section 2 (i) would have to be confined to the receipts for the luxury provided and not to the total turnover. Any other interpretation would lead to granting power to the State to tax that which is not within its legislative competence.

13. Another argument advanced by the learned Counsel for the Petitioners is that in case of timeshare holders, no tax can be levied, as the ownership is transferred to the resident for temporary period. This question requires determination on facts and can not be gone into in this Writ Petition. We, therefore, accordingly direct that the amended provision of 2004 can not be used for assessment years prior to that amendment. Tax can only be levied on the luxuries as provided by Section 4 and 2 (e) and not on the entire turnover. So far as the question of transfer of ownership is concerned, this question can be raised and determined by the Assessing Authority on the facts as pleaded before it. We accordingly modify the order of the Commissioner. The Assessing Authority will re-assess the tax afresh in accordance with law on the material placed before it. These Writ Petitions are disposed of accordingly. There shall be no order as to costs. All pending applications shall stand disposed of.