

(2014) 07 KL CK 0017
In the High Court Of Kerala
Case No : WP(C). No. 673 of 2012 (H)

Kenton Leisure Services Executive Hostel	APPELLANT
Vs	
The Sales Tax Officer	RESPONDENT

Date of Decision : 07-07-2014

Acts Referred:

Kerala Stamp Act, 1959 — Section 33

Citation : (2014) 3 KLT 403 : (2014) 74 VST 497

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : Anil D. Nair, J.R. Prem Navaz and Nivedita A. Kamath, Advocate for the Appellant; Sebastian Champappilly, Spl. Govt. Pleader, Advocate for the Respondent;

Final Decision : Partly Allowed

Judgement

K. Vinod Chandran, J.

1. The petitioner impugn the penalty order for the years 2001-02 to 2008-09 and April and May of 2009-10, under the Kerala Tax on Luxuries Act, 1976 [for brevity "Act of 1976"]. Penalty has been levied at double the tax, found to have been evaded, under Section 17 of the Act, for each of the years. The petitioner challenges the penalty order on the ground that the assumption of jurisdiction, based on the Act, by the Commercial Tax Officer (Luxury Tax) [for brevity "CTO (LT)"] is erroneous, since the subject activity do not come under the purview of the Act and the service offered by the petitioner cannot in any manner be deemed, to be a "luxury" under the Act.

2. The incidental facts are that, the petitioner is an incorporated company, with the main object of providing leisure and hospitality services. The petitioner is the owner of a hotel/transit quarters, providing residential accommodation to the trainees/new recruits of Tata Sons Limited, another incorporated company, acting through its division Tata Consultancy Services [for brevity "TCS"]. In addition to

the provision of accommodation, the petitioner maintains the said building, owned by the petitioner and provides amenities and facilities to those accommodated therein.

3. The penalty proceedings were commenced and continued on the basis of an inspection made by the CTO (LT) in the premises and verification of the various agreements entered into by the petitioner with the TCS. The agreements so verified, have been produced by the State in its counter affidavit. The terms of the various agreements indicate that the petitioner entered into an agreement with TCS to construct a building, initially to accommodate 300 persons in 150 rooms, later extended to 350 persons in 175 rooms. Non-interest bearing refundable amounts were passed on by TCS, on the basis of the agreements, to the petitioner, on condition of the petitioner leasing out the building for the aforesaid purpose and providing amenities and facilities to the residents therein. An agreement to lease, initially for a period of ten years from the date on which the facilities are made functional, provided for lease-rent on a monthly basis, without any reference to the number of residents being accommodated at any point of time. A separate agreement was also executed, for like payment, on a monthly basis, towards amenities and facilities provided thereon. The petitioner is revealed to have conducted a restaurant also, within the premises, the food sales of which is assessed to tax under the respective sales tax enactments for the respective periods, indicating the assessee's registration under the respective enactments.

4. The assessee had not thought it fit to register under the Act of 1976, since the services provided does not come within the ambit of "luxury" provided by the assessee and the facility does not fall within the description of a "hotel", since, according to the assessee, no separate charges are levied for each room. The lease-rent payable is of the whole building and for each month, as distinguished from "per day, per room".

5. The State, however, seeks to sustain the coverage of the petitioner on the basis of the specific definitions under Section 2 of the Act, more specifically, that of "hotel", "luxury" and "luxury provided (inter alia) in a hotel...". The action of the CTO in imposing penalty at twice the amount of tax found to have been evaded, was confirmed by the two appellate authorities, on the compelling ground that the tax evasion attempted is no legitimate tax planning and is only a subterfuge employed to evade payment, coming within the rigour of the declaration made by the Hon'ble Supreme Court as to the colourable devices employed for tax avoidance in *McDowell and Co. Ltd. Vs. Commercial Tax Officer*, .

6. The facts are not in dispute. "Hotel" has been defined as meaning a building or part of a building where residential accommodation is provided for a monetary consideration and is said to include a lodging house, as per clause (e) of Section 2. By sub-clause (ee) of Section 2, "luxury" is defined, as a commodity or service that ministers comfort or pleasure. Clause (f) of Section 2 further defines "luxury

provided (inter alia) in a hotel..."; which means accommodation for residence or use and other amenities and services provided thereon. Such definition is qualified, insofar as the same being applicable only when the amount of charges for accommodation for residence (rent) and other amenities and services provided, excluding charges for food and liquor is Rs.150/- per day or more.

7. Such qualification has undergone changes and the one noticed herein is that introduced by the Kerala Finance Act, 2006 made effective from 01.07.2006. The changes were more in the way of enhancement of the amount provided; in such qualification. From 1997 to 2002, the minimum amount, so prescribed, was Rs.75/-. A rate of 7.5% was the levy, for the rooms in which the rent and other charges ranges from Rs.75/- to Rs.500/- and 15% for rooms having rent and other charges of more than Rs.500/-. Further, the provision as it existed between 1997 and 2002 provides the rent and other charges per day "per person". In 2002, by Act 7, though the rental limits were maintained, the stipulation per person was substituted with "per room". In 2004, the rate prescribed for rooms above Rs.500/- was reduced to 10%. By Act 57/2007, the rent provided in the definition was increased to Rs.200/- with 10% levied for rooms between Rs.200/- to less than Rs.500/- and 15% levied for rooms above Rs.500/-. The amendments so made are specifically noticed, since it is the contention of the assessee that at no point of time after the assessee commenced its business with TCS, was any rent levied per day or per person or per room. This alone takes the assessee out of the coverage under the Act, is the argument.

8. Going by the definitions taken note of herein, it is very evident that the assessee comes within the definition of "hotel" and is providing "luxury" as defined therein, since the services provided come within the scope of the definition of "luxury provided (inter alia) in a hotel...". According to the latter definition, there need be no examination as to whether the service of the assessee/petitioner ministers any comfort or pleasure, since luxury provided in a hotel has been given the plain meaning of accommodation for residence or use of other amenities and services provided thereon. Levy and collection of luxury tax have been provided in Section 4, which levies the tax and mandates collection in respect of any luxury provided inter alia in a hotel. Clause (a) of sub-section (2) of Section 4 also provides for levy and collection, in respect of a hotel, for charges of accommodation and other amenities and services provided in the hotel, excluding food and liquor. Hence, the levy would be on the combined charges for accommodation and the amenities and services provided. Again such levy and collection is mandated only for rooms in which the total amount of the rent charged along with the charges for amenities and services exceed the limit as noticed before hand.

9. The issue to be pointedly considered is whether the qualification in the definition clause (f) of Section 2 , being the rent charged per room, per person or per day, would change the character of the levy. The components in the concept of taxation have been succinctly stated in Govind Saran Ganga Saran Vs.

Commissioner of Sales Tax and Others, and often followed in the later decisions. The well-known concepts were stated to be, (i) the character of the imposition known by its nature which prescribes the taxable event attracting the levy, then (ii) the clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, (iii) the rate at which the tax is imposed and the last being (iv) the measure or value to which the rate will be applied for computing the tax liability.

10. The Act of 1976 indicates the character of imposition to be on the services which could be defined as "luxury", meaning ministering comfort and pleasure and in the case of a hotel, the accommodation for residence and the amenities and services provided therein. As is clear from section 4, the levy is on the "luxury provided" and collection "from the person enjoying the luxury". By subsection (3) of Section 4, the proprietor of any establishment coming within the definition of a "hotel", is obliged to make such collection and pay it over to the Government.

11. The taxable event, hence, is the services offered and the receipt of consideration. The liability though on the resident, in the case of a hotel, as statutorily provided; the proprietor has the onus and obligation to collect it. The rate for the various years have been indicated earlier. The measure upon which such rates are applicable, is the rent per room, per day. The measure so provided cannot decide the levy; nor the person who is liable under the Act which is provided under the charging Section. In providing the measure, the Government has not exempted particular persons, services or buildings; but only rooms even within an establishment, which does not, for accommodation and the facilities provided thereon, charge rent less than the prescribed limit.

12. What has been attempted by the CTO (LT) in the instant case is, computing of the measure so as to apply the levy. The monthly rent payable along with the charges payable for the amenities and facilities, for a month was divided in between the total number of rooms to arrive at the rent payable for each of the rooms, on one day. Finding the same to be above the assessable limit, tax was found to be leviable at the rates prescribed by the Act. The mere provision for payment of rent on a monthly basis does not take away the establishment from the purview of the Act.

13. Apposite is the analogy drawn by the CTO, in which he contemplates a situation in which a Corporate entity takes on rent 10 rooms in a hotel for a month and pays the rent on a monthly basis, in which event the rent paid thus could be said to be not exigible to tax for reason of it having been paid for a whole month. In the instant case, the rooms provided are of the very same quality and standard and the facilities provided also are similar. The contention of the petitioner that the television sets and telephone facility provided are to each floor, that too on the corridors, does not at all deviate from the fact that the provision of such facility is for the residents in each rooms in that particular floor. The facilities, hence, are relatable and have a direct nexus to the accommodation

provided in the individual rooms. The other facilities are with respect to the cleaning of the rooms as also the linen provided therein. The device employed by the CTO to divide the monthly rent equally to the individual rooms to decide the levy is a simple arithmetical device, which does not call for separate machinery provisions under the statute or by way of separate rules.

14. The levy being on the service provided and in the case of a hotel being on the accommodation and the amenities and facilities, the combined charges have to be apportioned to each room per day to decide the levy. This would also enure to the benefit of the assessee in cases where such levy per room per day does not go above the limit prescribed or in instances where any room/rooms provided are of different standards or quality, attracting a lesser charge for accommodation and facilities.

15. The further contention made by the learned counsel for the assessee is that, if the charges for accommodation being lease-rent and the charges for amenities and facilities are treated separately, then the petitioner would be saved from the rigour of the enactment. As a matter of fact, the assessee, being an incorporated company, leases out such building to another incorporated company and also provides facilities and amenities in the building, for the residents housed therein. Though separate agreements provide for lease-rent and charges for amenities, the levy as per the Act of 1976 provides for combining the same to decide the coverage under the Act.

16. The learned counsel also would submit that the situation would have been different if one entity had been the lessor and another entity the provider of amenities and facilities. Then there would arise a question as to whether these could be combined or each levy should go beyond the assessable limit or alternatively the levy be apportioned to the lessor and the provider, if the combined charges go above the exempted limit. This Court would be inclined to lean in favour of the latter view, since the levy is on the person who enjoys the luxury (accommodation and amenities) and the entity who provides the same only has the duty to collect it. But, that question does not arise herein, since it is the very same entity who is the lessor and the provider of the facilities. The said question could be left open to be considered in an appropriate case.

17. One another aspect, which is to be noticed, in this context, is that, despite the assertion to the contrary, the lease of premises and providing amenities and facilities, though under separate agreements, come under the very same transaction as evident from the agreement of construction produced as Exhibit R1 (a). By Clause-6 of the said agreement, the promoter, who is the petitioner herein, agreed and undertook to give on lease the hostel facilities in the building constructed and provide and maintain, in the hostel, the amenities and facilities set out in the agreement to that end. Hence, the composite transaction of lease and provision of amenities cannot be separated only for reason of the existence of two separate agreements, where two separate considerations are provided. This is especially so when the Act mandates the accommodation and

the facilities provided thereon to be the combined service on which the tax is levied.

18. The petitioner's transaction having been found to be one under the Act of 1976, the next question is with respect to the sustainability of the levy of penalty. The authorities below as also the Tribunal impute contumacious act on the part of the assessee in not obtaining registration, collecting tax from the users, herein the lessee, and paying it to the State. The petitioner, however, asserts a bona fide belief that the transaction, as it is disclosed from the agreements, being not covered under the Act of 1976. It cannot be said that the non-registration of the assessee under the Act of 1976 was bona fide, coming within the legal frame-work of the statute, taking the petitioner out of the coverage under the statute. This Court is of the opinion that the mere fact of existence of two agreements, for the lease and for provision of amenities, cannot by itself take away the petitioner's coverage under the Act. Those agreements were also the result of a composite transaction as revealed from the construction agreement, providing for lease for the purpose of accommodation of trainees and provision for amenities and facilities to such inmates. The fact is that the assessee did not obtain registration despite the transaction being clearly covered under the Act of 1976. This is a contumacious conduct, which attracts penalty under Section 17 of the Act.

19. However, this Court is also of the opinion that the penalty levied at the maximum rate of double the tax evaded, may not be proper in the facts and circumstances of the case. Hence, the penalty imposed for the respective years and the two months in the last year are modified and confined to the extent of the tax liability. There is also considerable force in the argument of the learned counsel for the petitioner that between 1997 and 2002, the measure on which the rate applied is to be decided, per person per day. Hence, the CTO is directed to re-do the assessment for the period upto 31.03.2002, computing the rental charges per person per day, since all the rooms provided in the petitioner's building is of double occupancy. The quantum of penalty levied would have to be as per the directions herein above, if the rent per day per person is above the assessable limit and not at all if found otherwise.

20. One incidental aspect, which cannot but be noticed by this Court is with respect to the finding of the CTO (LT) that the agreements executed by the petitioner are sham documents for reason of their being undervalued. That cannot be so. The officer, the appellate authorities as also this Court has looked into the terms of the said agreements to discern the exact nature of the transactions to decide upon the coverage under the Act of 1976. The consequences of undervaluation, as evident from the Kerala Stamp Act, 1959, more specifically Section 33, is the impounding of such instrument. The reliance placed on the terms is only for a collateral purpose, which need not restrain the CTO (LT) from complying with the statutory mandate under the Stamp Act. The officer may examine this aspect and after affording an opportunity to the

petitioner, decide on the issue, in accordance with law.

The writ petition, hence, is partly allowed, with the modification on the quantum of penalty; but, however, confirming the coverage under the Act and the liability of the petitioner under the Act of 1976. Parties are left to suffer their respective costs.