

(2017) 03 KL CK 0002
In the High Court Of Kerala
Case No : W.P(C).No.20728 of 2015

M/s Mahindra Holidays and Resorts India Ltd.

APPELLANT

Vs

The Intelligence Officer

RESPONDENT

Date of Decision : 29-03-2017

Acts Referred:

Constitution of India, 1950 — Article 226

Kerala Tax on Luxuries Act, 1976 — Section 17A, Section 2, Section 4

Citation : (2017) 2 KLT 217

Hon'ble Judges : Mr. K. Vinod Chandran, J.

Bench : Single Bench

Advocate : Sri Mohan Parasran and Sri. K. Ramakumar, Senior Advocate and Sri. P.J. Philip, Advocate, for the Petitioner; Sri. R. Venkataraman, Sr. Advocate, Sri. P. Ravidranath, Sri Ubaya Bharathi and Sri. Akhil Suresh, Spl. Government Pleader, for the Respondents 1 to 6

Final Decision : Disposed Off

Judgement

K. Vinod Chandran, J.—;Challenging two assessment orders and penalties proposed or imposed under Section 17A of the Kerala Tax on Luxuries Act, 1976 [for brevity "LT Act"], the petitioners raise the question of whether the facilities availed by the members of the unique, newly developed "Time-share arrangements" can be brought under the definition of "luxuries" and taxed under the LT Act.

2. The writ petitions are filed by three entities carrying on Resorts under timeshare arrangements; namely M/s.Mahindra Holidays and Resorts India Ltd. [for brevity "MHR"], M/s.Sterling Holiday Resorts (India) Limited ["SHR"] and The Goan Beach Resorts Pvt. Ltd ["GBR"].

3. W.P.(C) No.20728 of 2015, which was referred to by the petitioners, challenge the penalty order issued against MHR for the years 2013-14 (Exhibit P3) and 2014-15 (Exhibit P4) and the notice of demand for 2013-14 (Exhibit P9) and 2014-15 (Exhibit P10) issued with respect to their Lake View Resorts at

Chinnakkanal, Munnar. W.P.(C) No.20674 of 2015 is filed by MHR with respect to their resort at Poovar, Thiruvananthapuram; which was issued with Exhibits P4 and P5 notices, for the years 2013-14 and 2014-15, under Section 17A of the LT Act. W.P.(C) No.32579 of 2015 is against two Resorts of MHR at Kumarakom and Ashtamudi, Chavara, wherein Exhibit P12 is an assessment order for the year 2012-13 and Exhibits P21 and P23 penalty orders under the LT Act for the years 2013-14 and 2014-15; all with respect to the resort at Kumarakom. Exhibit P25 is the notice for the year 2013-14 against the Resort at Ashtamudi, Chavara. W.P.(C) No.13553 of 2016 is again against the Resort of MHR at Ashtamudi, Chavara; the challenge being to Exhibit P1 penalty order for the year 2013-14. In W.P.(C) No.13062, MHR challenge the penalty orders issued for the years 2013-14 (Exhibit P6) and 2014-15 (Exhibit P8) against their Resort at Poovar, Thiruvananthapuram. W.P.(C) Nos.25032 of 2016, 25033 of 2016 and 19615 of 2015 respectively challenge the penalty orders issued for the years 2012-13 (Exhibit P4), 2014-15 (Exhibit P6) and 2013-14 (Exhibit P6) against the "Terrace Green Munnar Resort" of SHR. W.P.(C) No. 34100 of 2016 impugn a interim order on condition passed by the Appellate Authority in an appeal against assessment for the year 2014-15 of GHR. The findings in the various orders, are more or less similar and this Court has referred to the findings from the impugned orders of assessment and penalty in W.P.(C) No. 32579 of 2015 and W.P.(C) No.20728 of 2015.

4. Learned Senior Counsel Sri.Mohan Parasaran placed compelling arguments for the petitioners and the State was ably represented by learned Senior Counsel Sri. R. Venkataraman.

5. The petitioners are registered under the LT Act and have Resorts at various tourist centers; inside the State. The petitioners were issued with notices for assessment in two instances and under Section 17A of the LT Act calling upon them to show cause as to why the accommodation provided to those persons who had taken membership under the timeshare arrangement were not disclosed in the returns or the books of accounts and why the petitioners have not paid tax for the component of "luxury" enjoyed by the said members.

6. The petitioners would contend that timeshare facility is a unique concept, by which the parent Company; which owns or rents out Resorts situated all over the country and even outside, gives membership by selling "Vacation Ownership" [Timeshare] providing holiday facilities to its members. A member can avail of "7 Nights/ 8 Days" holiday every year in a span of 33/25/10 years, depending on eligibility and availability at any of the Resorts of the assessee existing at the time of membership and acquired during the course of membership. When the members so exercise their right to enjoy a holiday in any of the Resorts for a specified period, they are not charged for the accommodation. For any other facilities enjoyed during the stay, they are charged; on which component the petitioners file returns and pay tax. The Resorts are not exclusively for members and when it is rented out to non-

members, charges for accommodation is levied, for which also luxury tax is paid. There are also other renting out for marketing purposes and in-house accommodation, for which no charges are levied.

7. The memberships are categorised, as per the members' requirement, into colour coded seasons of Purple, Red, White and Blue; reflecting high-peak, peak, wet and dry seasons. The categorisation is also made, on the choice of the members as to the apartment type with the option of studio, one bedroom or two bedroom apartment. The membership is said to be a combination of preferred season and type of accommodation, opted for by the member for the specified period of 33/25/10 years available for specified days (a week) once in a year. The said membership given is not a privilege for accommodation alone; but entails a bundle of rights, like exchange and splitting up of holidays, carrying forward, pre-poning and post-poning the utilisation, transfer, bequeath and succession of memberships, gifting of holidays and also provision for stay at international destinations. There are also restrictions on these rights as per the terms of membership and there is no guarantee for accommodation, unless booked and confirmed by the individual Resort. There would also be provision for alternate accommodation if a preferred location is not available and there could also be restrictions on the stay at the same place for more than once. These rights together make a membership and it cannot be equated to a simpliciter stay in a hotel. The timeshare arrangement is asserted to be a more complex arrangement going beyond a mere "per-day charge for accommodation", which is not the only right, a person obtains on getting a membership.

8. The provisions of the LT Act does not contemplate the enjoyment of a holiday, in a Resort under a timeshare arrangement and there is absolute lack authority of law to impose the tax for luxuries on the petitioners. Under Article 265 of the Constitution, as has been held in *CCE v. Orient Fabrics (P) Ltd.* [2004] 1 SCC 597], the authority of law has to be specific, explicit and express. There can be no interpretative process in applying the charging section. To further advance the argument, the provisions in Goa Tax on Luxuries Act, 1988 and the Himachal Pradesh Tax on Luxuries (in Hotels and Lodging Houses) Act, 1979 are put forth to underline the absence of similar provisions in the Kerala Act. The Kerala Act does not contemplate taxing of timeshare arrangements and the same is neither included in the charging provision or the computation provision. There can, hence, be no valid computation of the charges for accommodation attempted, to bring in timeshare arrangements, since the provisions do not at all apply to such arrangements. *CIT v. B.C. Srinivasa Setty* [(1981) 2 SCC 460], *Tata Sky Ltd. v. State of M.P.* [(2013) 4 SCC 656] and *PNB Finance Ltd. v. CIT* [(2008) 13 SCC 94] are relied upon to urge the above contention.

9. The members who stay at the Resorts do not pay any charges for accommodation and their right to enjoy a holiday at the Resort flows from the membership taken and the provision of accommodation cannot be divorced from the membership itself. A member may or may not enjoy the facility and if a

member takes a membership for 25 years and enjoys it for only a day in all these years, it cannot be said that the entire membership fee would be treated as charges for accommodation for the single day spent on vacation. The member pays a lump sum amount to acquire the bundle of rights and it cannot be dissected into years, months or days. There can be no adoption of a measure of dissection as has been held in *Vodafone International Holdings BV v. Union of India* [(2012) 6 SCC 613].

10. The LT Act contemplates levy of tax, on charges on a per-day basis, the rates varying with the increase of such charges. There is no levy on a lump sum payment sanctioned under the LT Act, as in a timeshare arrangement. The orders are challenged also on the basis of the measure employed, which is asserted to be on an artificial basis. The Assessing Officer and the Intelligence Officer have taken the room charges applicable for non-members to determine the charges for accommodation for members. There being no such machinery provision available in the LT Act, such computation would be illegal, is the argument. There are no charges for accommodation collected from the members, who stay at the Resorts free of charges, by virtue of their memberships. The classic decision in *Govind Saran Ganga Saran v. CST* [1985 Supp SCC 205] is relied upon to reiterate the components entering into the concept of taxation, being taxable event, the person on whom the levy is imposed, the rate at which the tax is imposed, the measure or value to which the rate would be applied for computing the tax liability. There is no measure available in the LT Act to apply the rates, in a time share arrangement is the compelling argument put forth. It is also contended that the Department has resorted to artificial computation of charges for accommodation, leading to estimation which is not permissible in penalty proceedings as found in *U.K.Monu Timbers v. State of Kerala* [2012 (3) KHC 111 (DB)].

11. The State too relies on *Govind Saran Ganga Saran* to proclaim that all four components of taxation are very much available and that the measure employed is not an artificial one. The assessee having been issued with notice, did not produce any material to show the basis on which the accommodation is granted to the members and how the membership fees are arrived at, at the initial stage; which essentially grants a right to enjoy a holiday in one of the Resorts for specified days. Other than accommodation any facility enjoyed by a member, even according to the assessee, is charged additionally. The tax levied is not on the membership fees, but is on the luxury availed by such member when they are staying in a Resort. When a person within the State of Kerala takes a membership under a timeshare arrangement and does not at all enjoy a holiday or stay in any of the Resorts within the State of Kerala, there is no tax levied. But, wherever the membership is taken and whenever the payment for membership is made, the minute one of such members resides in one of the Resorts within the State of Kerala and enjoys a holiday, he/she is deemed to have enjoyed a luxury; which is taxable under the LT Act, when the charges for accommodation exceed the limit provided in the LT Act. The Department had, on

the basis of the books of accounts produced by the assessee, determined the charges for accommodation as disclosed from the books and as applied to non-members on their stay. The assessee themselves have offered their rent/tariff rates as applied to their guests other than members. The facility/luxury enjoyed by the members on such accommodation is the same as that enjoyed by a non-member and the membership fees paid is in lieu of the charges for accommodation, as applied to non-members by the assessee. The rate/tariff applied was the current rates when the accommodation was provided and there is no estimation made. The occupancy and the rates are actual, as supplied by the assessee.

12. The provisions applicable to the State of Goa and Himachal Pradesh were read, to contend that the inclusion is in the nature of an explanation; which, as has been found in AIR 1967 SC 389 [Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar] and Sundaram Pillai v. Pattabhiraman [(1985) 1 SCC 591], is only to ensure removal of anomalies. The States of Goa and Himachal Pradesh probably intended, as an abundant caution, to efface any such presumed anomaly; while the State of Kerala asserts that there is no anomaly in the provisions as available in its LT Act and the timeshare arrangement given in Resorts would come under the definition of "Hotels". The facilities enjoyed would be "luxury provided in a Hotel" attracting the levy under the charging section ie: Section 4. As early as in 1989, in Express Hotels Pvt. Ltd. v. State of Gujarat [(1989) 3 SCC 677], it was found that tax on luxuries includes levy on services, which fall within the concept of "luxuries". The State also relied on (2012) 54 VST 437 (Ker.) and (2012) 54 VST 442 (Ker.); both with citation Trivandrum Club v. STO (Luxury Tax).

13. The following definitions and the charging section are relevant for consideration:

Sec.2

(e) "hotel" means a building or part of a building where residential accommodation is by way of business provided for a monetary consideration and includes a lodging house.

Explanation.- A guest house run by the Government or a company or a corporation established by or under any law or any other agency shall be deemed to be a hotel within the meaning of this clause.

(ee) "luxury" means a commodity or service that ministers comfort or pleasure:

(f) "luxury provided in a hotel, house boat, hall, auditorium, kalyanamandapam or place of like nature" means accommodation for residence or use and other amenities and services provided in a hotel or a house boat or hall or auditorium or kalyanamandapam or place of like nature the rate of charges of accommodation for residence and other amenities and services provided excluding charges of food and liquor is one hundred and fifty rupees per day or

more;

xxx xxx xxx

Sec.4

4. Levy and collection of luxury tax:- (1) Subject to the provisions of this Act, there shall be levied and collected a tax, herein after called the "luxury tax", in respect of any luxury provided,

(i) in a hotel, house boat, hall, auditorium or kalyanamandapam or including those attached to hotels, clubs, kalyanamandapam and places of the like nature which are rented for accommodation for residence or used for conducting functions, whether public or private, exhibition;

xxx xxx xxx

(2) Luxury tax shall be levied and collected,-

(a) in respect of a hotel, for charges of accommodation for residence and other amenities and services provided in the hotel, excluding food and liquor,-

(i) at the rate of ten and half percent per room for hotels, in respect of rooms where the gross charges of accommodation for residence and other amenities and services provided above rupees two hundred and upto five hundred per day;

(ii) at the rate of twelve and a half percent for hotels in respect of rooms where the gross charges of accommodation for residence and other amenities and services provided above rupees five hundred or more per day;

xxx xxx xxx"

14. "Hotel" has been defined as meaning a building or part of a building where residential accommodation is provided for a monetary consideration, 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 therein. 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, are above a specified amount or more, per day.

15. The petitioners are having Resorts where residential accommodation is by way of a business and renting out of rooms is for monetary consideration. The Resorts maintained by the assessee within the State of Kerala, hence, comes within the definition of "Hotel". "Luxury" is defined as a commodity or service that ministers comfort or pleasure and that provided in a hotel is accommodation for residence or use and other amenities and services provided in a hotel. The right to enjoy a holiday, the members of a timeshare arrangement, by their membership is entitled to, is crystallized in the fundamental facility provided of

accommodation in the various Resorts. The enjoyment is relative and what a member gets assured, is the facility of accommodation; which is the luxury as per the definition. The charge is also on any luxury provided in a hotel, meaning the accommodation provided for residence and the rate varies with the charges for such an accommodation.

16. Going by Govind Saran Ganga Saran, there is absolutely no difficulty in finding the taxable event, which is the accommodation provided and availed for monetary consideration. The taxable event is not the collection of the charges, which even in a simpliciter residence in a hotel is assessed under the Act, irrespective of the mode or type of payment received. A booking made inter-State or from abroad would also be assessed if the accommodation is used, which is the luxury as per the Act. The person on whom the levy is imposed is the member or non-member who gets accommodated and thus enjoys a luxury provided in a hotel as defined under the Act. The rate is also very specific and applies to the charges of accommodation per day. Even in a simpliciter residence or stay in a hotel if it is for more than one day, it cannot be said that the levy applied on the rent for each day is an artificial levy.

17. For the non-members the charges for accommodation are collected at the time of their residence. For the members the charges are not collected at the time of residence, but earlier collected by way of membership fees factored on the basis of the seasons allotted and the type of accommodation. The seasons and the facilities in a room are separately factored to take in the fall and rise in charges, from the high peak to the dry summer and a studio apartment to two bedroom suites. The membership fees can, by no stretch, be found to be nominal and is based on the various factors that go into determining charges for accommodation, by any hotelier. The accommodation provided hence is for monetary consideration and the taxable event and the person on whom the levy is made are clear. The rates too are available in the statute.

18. The objection as projected by the petitioner is on the measure to which the rates are to be applied. "Per-day accommodation charges" is alien to the concept of timeshare arrangement, is the specific plea put forth. The petitioners place emphasis on the bundle of rights which a member is entitled to, on the membership being granted. This Court is of the opinion that the bundle or rights does not at all affect the fundamental aspect for which the membership is granted. There is also no separate fees to facilitate one or any of those rights. In a timeshare arrangement, even according to the petitioners, they are engaged in the business of selling vacation ownership. An attempt, albeit feeble, was made to argue that the transfer is akin to that of a transfer of a right in an immovable property. The members however cannot stay in one particular Resort repeatedly and there is a restriction in staying at a Resort for more than one time. There can, hence, be found no transfer of right in any immovable property, since there is no specification of the rights with respect to availing of holidays with reference to a particular property. The other rights which have been highlighted, being of

exchange, bequeath, succession and so on and so forth, are with reference to that right to stay in a specified category of accommodation at a specified time, in an year for specified days, of not more than 7days. The timeshare arrangement does not provide for any other facility; but of accommodation in a Resort at a vacation site. There can also be no transfer of property found.

19. Membership Rules are seen from Exhibit P1 in W.P. (C) No.32579 of 2015. The membership fee includes a non-refundable admission fee and an entitlement fee towards provision of entitlements to a member; divided in the proportion of 60 to 40. [The significance of this ratio, as dealt with later, is for income-tax purposes]. In addition to the fees, the member also has to pay an annual subscription fees regardless of whether the member avails the facility in any of the Resorts or not. The entitlement of such a membership, as found in Clause 3.1, is a week of holiday every year in the apartment and season specified in the certificate of membership during the membership period. This entitlement for a week of holiday translates into accommodation in a Resort owned by the Company. An elaborate procedure is prescribed for availing of holidays by the members. Clause 3.15 provides for an alternate accommodation, if the Company is unable to provide accommodation after issuance of confirmation voucher. On default in providing alternate accommodation, the Company is liable to pay liquidated damages "equivalent to 100% of the rent/tariff that is applicable in the allotted apartment and destination, during the period for which the confirmation voucher is issued" (sic).

20. Liquidated damages has to be paid within thirty days of default. Hence, there is an admitted rent or tariff fixed for the different rooms in the different Resorts depending upon the facilities offered, on which alone the liquidated damages can be based. The liquidated damages is not determined on the membership fees or on a split up of the membership fees to the years of validity of membership. It is determined on the current rent/tariff as applicable to any guest. The various factors which go into determining the tariff/rent are the importance of the site, the time of the year in the various seasons categorised as high peak, peak, wet and dry, the type of accommodation and the facilities offered in the resort. These are the factors that go into the determination of rent/tariff in any Hotel; which markedly increase with time and on which the liquidated damages is paid. The enduring benefit to which the member is entitled can be measured by the liquidated damages existing at any time; which is the rent./tariff fixed by the assessee.

21. Shorn of all technicalities the entitlement a member gets, on being admitted into the timeshare arrangement is the accommodation at the resorts, the charges for which are not collected at the time of residence but are included in the membership fees and the annual subscription fees. The right to accommodation is also not fully left to the option of the member and is dependent upon the season opted, the type of room and the period for which the subscription is taken; which factors decide the membership fees as in the

decision of fixation of room tariffs in any hotel at any place. The annual subscription fees [Clause 5] is for the purpose of overall maintenance of all the Resorts, is charged irrespective of whether in a given year the facility was actually availed or not. This again takes in the cost of maintenance of the resorts, to keep them in readiness for the members. The components of membership fees and annual subscription fees cannot be taken as a whole, to provide a measure to tax since the levy of tax on luxury would arise only on the enjoyment of luxury; and not on mere provision of a facility which could be termed a luxury. A mere grant of membership into the "Vacation Ownership" will not sanction the levy. The enjoyment of luxury is occasioned when a person avails the accommodation in a Resort (read Hotel as defined in the Act) and the measure can only be, the per-day charges of accommodation for such residence. This was the component which was assessed and penalised, in the instances impugned.

22. The resorts have a fixed tariff/rent for the various types of rooms, which are admittedly rented out to non-members also when there is availability. The memberships also have definite rates based on season classification and apartment type as is seen from the "Price List" extracted in the impugned orders (page 35) in W.P. (C) 20728 of 2015). The annual subscription fees also vary with the type of accommodation chosen. Membership fees are paid either in lump sum or equated monthly instalments and discounts are granted in case of down payment. The interest liability varies with the period of instalments and the overall price structure reveals an advance collected as charges of accommodation. The member is also supposed to make advance bookings at a desired location which would be available only in the season specified in the membership certificate, for that location and type of accommodation, also specified in the certificate. There is also provision for liquidated damages if a confirmed booking is not provided. The damages, as was noticed, is also factored on the room tariff or the charges of accommodation per day for that location, of that season and the type of room at that point of time when an accommodation is not provided despite a confirmed booking. There can hence be no departure from the essential attribute of a luxury being enjoyed as provided in a hotel; which is the accommodation for residence or use, even by members inducted to a time-share arrangement; which provision is also for a monetary consideration dependent upon various factors, including the number of days.

23. The accommodation for residence in any of the resorts is offered, on the payment of membership fees and the continued recurring payment of annual subscription fees. But this is not the same for all and besides the difference of season and type of room there could also be a down payment and payment by equated monthly instalments with varied interest liability. It is also to be noticed that the actual tariff/rent gets enhanced over the years and the benefit accrued, by virtue of the membership, is to remain unaffected by the increasing tariff rates. Admittedly the tariff/rent collected from non-members have increased over the years and so has the membership fees increased manifold. The specification

of season and type being same, the privilege of residence by a member who paid a lesser amount at an earlier point of time is identical to that enjoyed by a member inducted newly to the arrangement. But the liquidated damages paid will be at the applicable rate/tariff for that type of accommodation for that season at that location; which is the "per-day charges" taken as measure for applying the rates of tax prescribed under the LT Act by the Department; which is with authority flowing from the statute and cannot be faulted.

24. There could be a measure adopted on the basis of a split up of the total of the membership fees and the annual subscription fees, which would vary from person to person even when they enjoy the very same privilege of season and type of room; but the details have to come from the assessee. The assessee admittedly paid no heed to the notice to furnish the details of the members who enjoyed the provision of luxury i.e., : accommodation for residence, in the Resorts within the State. The Officers hence took the tariff/rent collected from non-members who were provided the very same accommodation based on the fixed tariff/rates for each of the resorts referable also to the different seasons and type of rooms. The in-house accommodation of the employees of the assessee itself and those provided free of charges for marketing purposes were excluded. This is because there was no monetary consideration involved, in those two cases. The accommodation provided to the members is for a consideration paid in advance as membership fees and recurring annual subscription fees. The advance paid is in lieu of the charges for accommodation for a specific period (a week in every year) in 10/25/33 years and takes in the enhancement of rent/tariff in the spread over years. The accommodation provided for residence in the resorts hence is measurable on the existing tariff, when the person enjoys the luxury. That is the rates adopted by the assessee too in determining the liquidated damages if the same is payable to the member, on cancellation by the Resort after confirmation.

25. The learned Senior Counsel for the petitioner referred to an order of the Income Tax Appellate Tribunal, Chennai Bench, reported in 2010 SCC OnLine ITAT 4672 : [2010] ITAT 2834 [Assistant Commissioner of IT v. M/s. Mahindra Holidays and Resorts (India) Ltd.] to provide more clarity to the timeshare arrangements as carried on by MHR, who was the respondent-assessee therein also. The dynamics of timeshare industry, as laid down in paragraph 24 of the order, is in consonance with what has been stated by this Court in this judgment before hand. There the issue was with respect to accrual of income, for the purposes of levy of income tax, on the membership fees. The mercantile system of accounting adopted by the assessee was accepted by the Tribunal negating the contention of the Income Tax Department that the entire membership fees has to be treated as income in the year in which it is received. The entire membership fee received by the assessee was treated as revenue receipt; but the entire amount collected was not recognised as revenue and offered for taxation in the year of its receipt. The assessee, during the first three years of its operation, recognised 40% of the revenue as income in the year of receipt and

from the 4th year onwards recognised 60% of the receipt as income in the year of receipt. The balance amounts were equally spread over the period of membership, i.e., 25 or 33 years, since, according to the assessee, the obligation to the members remain spread over the period of membership and therefore, part of the fees are recognised as income in the subsequent years. The Tribunal accepted the assessee's contention that there is a continuing liability on the part of the assessee to provide accommodation and other incidental services attached to the accommodation (para 27). It was also held that the sale of timeshare unit is not as tangible as sale of goods and becomes tangible when the assessee fulfils its promise. It was found that recognising the entire receipt as income in the year of receipt can lead to distortion and that it was not justifiable to tax the entire income in a single year.

26. What comes out from the above is that the assessee itself has been treating the membership, resulting in an obligation, continued over the years in which the timeshare arrangement or membership remains valid. The promise to be fulfilled by and the obligation of, the assessee is to provide accommodation to the member who books his holiday in any one of the resorts of the assessee. The splitting up of income in the various years is on the premise that the membership charges are for the purpose of providing accommodation in the years in which the membership is valid and the income accrues only in the years in which a member avails the privilege of being accommodated, to enjoy the vacation. This leads to the conclusion that the accommodation provided by the assessee is for monetary consideration. In this context, it cannot be said that there is no accrual of income if a member does not use the facility. Under the Income-tax Act, the accrual of income is without reference to the enjoyment of the privilege for which payment was made. Likewise under the LT Act, the taxable event is the residence in an accommodation provided by the assessee; the per-day charges of which is taxed.

27. The assessee also has a contention that the Kerala Act, as distinguished from the Goa and Himachal Pradesh Acts, cannot seek to levy the timeshare arrangement as a luxury provided in a hotel. The argument that there is no measure available to tax, is based on the Explanation to the definition of a "Hotel" in the Goa and Himachal Pradesh Acts. As has been rightly pointed out by the learned Senior Counsel for the State, BCDC Marketing Union Ltd. and S.Sundaram Pillai provide sufficient illumination insofar as the tool of Explanation employed in a statute. The aforesaid decisions held that "Explanation" cannot enlarge the scope of a Section and it can only explain the meaning and intention of the statute, in the event of any obscurity or vagueness, so as to clarify or provide an additional support to the dominant object. It cannot interfere with or change the enactment or any part thereof. It can only fill gaps so as to suppress the mischief and advance the object of the act. Neither is it to set at naught the working of an act nor take away the statutory right much less cause hindrance in the interpretation of the statute. The Goa and Himachal Pradesh Legislatures thought it fit to add an Explanation, since in their wisdom the definition of "Hotel"

may not be sufficient for including a timeshare arrangement. That alone cannot lead to a conclusion that without such an Explanation, the Kerala Act also could not include the timeshare arrangements in the definition of "Hotel". The Explanation neither defines nor control the charge to tax.

28. At the risk of repetition, the petitioner does not have a contention that the Resort owned by the petitioner does not come under the definition of "Hotel". The Resorts are assessed under the LT Act and have also been remitting such tax as collected from the non-members who are residing in their facility and for any facility other than accommodation enjoyed by the members too. The definition also, as seen above, takes in all residential accommodation by way of business provided for a consideration. The definition itself would amply include the petitioner. As to the luxury provided in a hotel, it is the accommodation for residence or use and the other amenities and services. It has been found that the timeshare arrangement fundamentally and essentially provides for the residence of the members for specified days, on specified seasons, in specified types of rooms. The rates are also clear from Section 4, which depend upon the charges for accommodation and has to be applied on such charges for accommodation on a per-day basis.

29. The members when they book a holiday in a facility which has fixed rent or tariff, subject to availability are allowed the accommodation by virtue of the membership which has been obtained by passing of monetary consideration. The provision for using the accommodation for residence, can only be within the period of validity of the agreement between the parties, i.e., the holiday provider and the member. The assessee admits that rent or tariff for various types of accommodation, depending upon the seasons and also the importance of the location, varies and it has increased over the years. The increase in rent/tariff does not affect a member, since accommodation is promised on the membership being granted, which is also on the basis of fees which factors all the above elements which go into determining the rent/tariff. However, when a member who had taken a membership years back enjoys facility far later, within the validity period, what he enjoys is the facility that the Resort offers to any one in that particular season in that particular type of room; for which a rate/tariff is fixed by the Resort itself. When a non-member is provided accommodation for residence or use, the said fixed rate or tariff is collected. When a member takes up residence, it is offered in lieu of the amounts collected in advance; the measure of which is clearly decipherable from the fixed rate or tariff at that point of time when the residence or use of accommodation is enjoyed. This is the value taken by the assessee too, to determine liquidated charges when due. The value of the facility offered has to be determined on the basis of the value as assessable when the facility is enjoyed. The value so fixed by the assessee themselves, are the charges on which the rates are to be applied. The rate to be applied as per the LT Act, is on such value, which in the case of accommodation in a hotel is the charges per room per day at the time the taxable event occurs.

30. On the above interpretation, there can be no confusion in finding the measure. It is also pertinent that the assessee has not offered details of the amounts received from each of the members, to compute the charges for accommodation for the period in which they enjoyed the stay within the State of Kerala. In such circumstances, there can be no fault found in adopting the fixed room rent or tariff per day for the purpose of levying the tax. In this context, it is also to be noticed that the tax applied under the LT Act is one on the person who enjoys the accommodation and the assessee could collect such tax from the members.

31. The mere fact that advance payment was taken as membership fee cannot lead to a conclusion that the accommodation provided/offered to the member is free of cost. The assessee itself, as contended before the IT Appellate Tribunal, splits up the membership fees to the subsequent years to cover the obligation of providing for an accommodation for residence or use. U.K.Monu Timbers has no application, since it only dealt with the question of best judgment assessment that could be made in a penalty proceeding. There is no estimation made in the present case and the penalty is imposed on the actual occupation of the rooms, and the per-day charges of such rooms; as supplied by the assessee.

32. The observations in the penalty order that there is no legislation prevailing in India governing and regulating vacation ownership of timeshare and that the activities are ultra vires the LT Act are not correct; but the final conclusion arrived does not rest on such observations. The Intelligence Officer, in the impugned order in W.P.(C) No.20728 of 2015, has specifically referred to the contention of the assessee that payment for availing the entire benefits of the scheme is paid by a customer, that too many years back, irrespective of the fact that he makes use of the privileges extended in Kerala or in any other place (page 12 of Exhibit P3 in W.P.(C) No.20728 of 2015). The assessee's argument was also that for reason only of the Resorts belonging to the Company being situated in Kerala and some members are also from the State; no assessment can be made under the Kerala Act. Here it has to be pointedly stated that the residents of the State of Kerala who subscribe to the membership are not taxed for the fact of such membership having been obtained. Nor are the members from outside the State of Kerala taxed on the basis of their membership merely for reason of certain Resorts which the members could use or reside in, are situated within the State of Kerala. The tax is levied only when a member enjoys a luxury, i.e., the residence in a hotel [in the case of the assessee a Resort] within the State of Kerala.

33. The membership fees or the annual subscription fees are not taxed and the charges per day is computed from the fixed rates/tariff for each type of room in a particular season. It has already been found that the said charges as existing at the time of enjoyment of the privilege, is reckoned even by the assessee, in calculating liquidated damages payable to a member who is unable to be accommodated after confirmation of a valid booking. It has been specifically

noticed in the above referred impugned order that "the Tariff is collected on the basis of rates as per the statement which is fixed on seasonal basis, as furnished by you" (sic - page 10 of Exhibit P3 in W.P.(C) No. 20728 of 2015). The reference to Godfrey Phillips India Ltd. v. State of U.P., [(2005) 2 SCC 515] supports the stand of the Department, since what is taxed herein is an activity which, the Hon"ble Supreme Court held, comes within the definition of luxury, The definition of "luxury" in the Kerala Act takes in accommodation for residence or use in a hotel.

34. The taxable event, the person on whom the tax is levied, the rate and the measure are evidently clear even in the timeshare arrangements. The assessee definitely had a right to collect such tax from the residents/members, and ought to have collected the same, for paying it up to the Department. The agreement between the assessee and the member to provide the privileges without reference to the increase in rates can apply only to the rates/tariff for the room and cannot apply in the case of a statutory levy. The collection of tax levied on luxury, taking the measure as the room tariff/rent, would not also lead to any violation of the terms of the agreement between the assessee and the member. The impugned order in W.P. (C) 34100 of 2016 also refers to the web-site of that assessee; wherein a caution is provided as to the liability of members to taxes. Even without such caution the statutory liability could be levied and collected by the assessee, to be paid over to the State. It is also admitted by the assessee that only room rent/tariff is not collected from the members at the time of residence and all other privileges which a member enjoys have a price and luxury tax too is collected. The measure employed by the assessee in determining liquidated damages to a member, in the event of cancellation after confirmation is also the present rate/tariff as fixed by the assessee in a particular resort and that is the charges on which tax is to be collected if the residence is enjoyed.

35. Having considered and negated the contentions of the petitioners aimed at absolving their liability under LT Act, the question now to be considered is on the penalty imposed. There are two cases in which assessment itself has been completed and challenged i.e., : in W.P (C) No.32579 of 2015 and 34100 of 2016. All other cases are penalty orders which, as noticed above, proceeded on the same lines on the premise that there has been incorrect returns filed. In this context, Section 17A of the LT Act is relevant and is extracted hereunder:

"17A. Imposition of penalties by assessing authority:- If an assessing authority is satisfied that any person -

(a) liable to pay tax under this Act,-

(i) has failed to keep true and complete accounts;

or

(ii) has failed to submit any return as required by provisions of this act or the

rules made thereunder or has submitted an untrue or incorrect return; or

(b) has failed to comply with all or any of the terms of any notice issued to him by or under the provisions of this act or the rule made thereunder or

(c) has prevented or obstructed inspection, entry, search or seizure by any officer; or

(d) has acted in contravention of the provisions of this act or any rule made thereunder, for the contravention of which no express provision or payment of penalty or punishment is made by this act; such authority may direct that such person shall pay, by way of penalty an amount not exceeding twice the amount of luxury tax or other amount sought to be evaded where it is practicable to qualify such evasion, or, an amount not exceeding five thousand rupees in any other case.

Explanation—The burden of proving that any person is not liable to the penalty under the section shall be on such person".

36. The assessee relies on a decision of this Court, reported in Chakkiath Brothers (M/s.) v. Assistant Commissioner, Commercial Taxes, Ernakulam [2014 (3) KHC 55 = 2014 (3) KLT 222], to contend that in any event there could be no penalty imposed. In the above case, the issue was with respect to the misclassification of a particular goods on which the assessee claimed exemption. The Assessing Officer found it to be exigible at the rate of 4% and the impugned proceedings sought to assess the same at the rate of 12.5%. This Court found that the turnover having been disclosed and there being a bona fide debatable issue, there could not have been an imposition of penalty. This Court relied on Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax [(1980) 1 SCC 71], E.I.D. Parry (I) Ltd. v. Assistant Commissioner of Commercial Taxes [(2000) 2 SCC 321] and Sree Krishna Electricals v. State of Tamil Nadu and Another [(2009) 11 SCC 687] to find that no penalty proceedings can be initiated in the said case on the basis of a mere dispute in classification; which, according to the assessee, the Assessing Officer and Intelligence Officer fall under three different entries. A debatable issue of that nature could not lead to a presumption of any contumacious conduct on the part of the assessee or a finding of attempt to evade tax. This was specifically based on Section 67 of the Kerala Value Added Tax Act, 2003 [for brevity "KVAT Act"].

37. The learned Senior Counsel appearing for the State would specifically refer to imposition of penalties under section 17A of the LT Act to contend that it could be imposed even if there is a failure to keep true and complete accounts and submission of untrue and incorrect returns and, hence, the mere submission of untrue or incorrect return could invite imposition of penalty. It has to be noticed that Section 67 of the KVAT Act also contains the above provisions in clauses (b) and (d) of sub-section (1). The Hon'ble Supreme Court in Cement Marketing Co. of India Ltd. held that "imposition of penalty is penal in character and unless the filling of an inaccurate return is accompanied by a guilty mind, the Section

cannot be invoked for imposing penalty" (sic). This principle was reiterated in E.I.D. Parry (I) Ltd. It was also held by the Hon"ble Supreme Court in Sree Krishna Electricals that when certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authority includes these items in the dealer's turnover disallowing the exemption; penalty cannot be imposed. Hence, what is to be specifically looked into is, as to any guilty mind or a deliberate suppression having been practised with contumacious intent.

38. The impugned penalty order in W.P.(C) No.20728 of 2015 indicate that the Intelligence Squad initiated the proceedings on a comparison of the luxury tax being paid by the petitioners and other Resorts in the very same area. The assessee, who are the petitioners herein, were found to have remitted only a meagre amount as luxury tax when the other Resorts, with lesser facilities and lesser number of rooms, had remitted much more. It is also found that 1/10th of their income of business providing luxuries was alone returned as taxable setting apart "a lion portion as "not taxable"" (sic). On inspection it was found that the registers maintained by the assessee itself classified the guests into four categories; being "Long Term Holders", "Marketing", "House use" and "Others". The assessee had been remitting luxury tax only with respect to "Others". Marketing, House use and Long Term Holders were shown as non-taxable for reason of no collection of rent being effected. The facilities offered to the Long Term Holders other than accommodation was taxed and the turnover declared in the returns as taxable. It is the anomaly, as revealed from the books of accounts itself, that led to the Intelligence Squad to initiate proceedings. There cannot be found any contumacious conduct and the assessee bona fide believed that in respect of members, the Long Term Holders, there was no collection of rent at the Resort and, hence, there was no tax payable. There was no suppression of the other facilities offered to them on which payment was received and collection of luxury tax was also made. Going by the above precedents, it cannot be held that there was a contumacious conduct, warranting imposition of penalty.

39. This Court has answered the issue of coverage under the L T Act against the assessee; but on the imposition of penalty it is answered against the Department. Two writ petitions impugn assessments in W.P.(C) No.32579 of 2015 [Exhibit P12] and W.P.(C) No.34100 of 2016 [Exhibit P1]. Accordingly, W.P.(C) No.32579 of 2015 would be partly allowed, setting aside Exhibits P21 and P23 penalty orders and Exhibits P22 and P24 demands. The notices issued under Section 17A, being Exhibits P20 and P25, will also not be proceeded with, since there is no warrant for penalty under Section 17A. Exhibits P12 and P13 are respectively the assessment order and demand notice for the year 2012-13 of Kumarakom Resort. Exhibits P12 and P13 would stand sustained. W.P.(C) Nos.20728 of 2015, 19615 of 2015, 20674 of 2015, 13553 of 2016, 13062 of 2016, 25032 of 2016 and 25033 of 2016 would stand allowed, setting aside the penalty orders on the solitary ground as stated above, of there being no contumacious deliberate attempt warranting imposition of penalty. The

Department could proceed with the assessment. W.P.(C) No. 34100 of 2016, challenge the interim order staying the demand conditionally on deposit of 30% in a statutory appeal filed before the First Appellate Authority. There was a stay of that order by this Court all this while. The appeal would be considered in accordance with the findings herein above and there would be a stay till the appeal is disposed of. The assessment is upheld insofar as the coverage under the LT Act being found valid.

40. Ordered accordingly. Parties are left to suffer their respective costs.