

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HON'BLE THE CHIEF JUSTICE DR. MANJULA CHELLUR
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 20TH DAY OF DECEMBER 2013/29TH AGRAHAYANA, 1935

WA.No. 1009 of 2013 IN WP(C).30399/2009

JUDGMENT IN WP(C) 30399/2009

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APPELLANT/PETITIONER:

M FAR HOTELS LTD., NH 47 BYE PASS,
KUNDANNUR JUNCTION, COCHIN 682304
REPRESENTED BY ITS AUTHORIZED SIGNATORY.

BY ADV. SRI.A.KUMAR

RESPONDENTS/RESPONDENTS:

1. STATE OF KERALA REP. BY THE SECRETARY TO
GOVERNMENT, TAXES DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM-695 001.
2. THE COMMISSIONER OF COMMERCIAL TAXES,
THIRUVANANTHAPURAM-695 001.
3. INTELLIGENCE OFFICER (IB), OFFICE OF THE DEPUTY
COMMISSIONER (INT.), DEPARTMENT OF COMMERCIAL
TAXES, EDAPPALLY, ERNAKULAM-682 015.
4. THE ASST.COMMISSIONER, SPL.CIRCLE III,
ERNAKULAM-682 015.
5. THE INSPECTING ASSISTANT COMMISSIONER,
COMMERCIAL TAXES, ERNAKULAM, KOCHI-682030.

BY SPL.GOV'T. PLEADER SRI.SEBASTIAN CHEMPAPILLIL

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 21-11-2013,
THE COURT ON 20-12-2013 DELIVERED THE FOLLOWING:

Manjula Chellur, C.J. & A.M.Shaffique, J.

W.A.No.1009 of 2013

Dated this the 20th day of December, 2013

JUDGMENT

Manjula Chellur, C.J.

The appellant is a company incorporated under the Companies Act, 1956, a registered dealer so far as Kerala Value Added Tax (KVAT) and Kerala Tax on Luxuries on the rolls of fourth respondent. The appellant is a V star hotel providing multi cuisine restaurants, rooms for accommodation and various amenities including conference halls, business centre, health club and spa, swimming pool, banquet halls, travel desk, auditorium, etc. The value of the food they supplied at the restaurants, according to the appellant, is on a flat rate so far as buffet system and also on an 'a la Carte' as per the tariff declared in the menu. So far as the use of banquet hall, conference hall and auditorium and other facilities available, which included various amenities like lighting systems, sound systems, screens, etc., chosen at the option of the individuals,

independent rentals are charged, which would be arrived at after negotiation between the parties. It is contended that while negotiating such rates, appellant takes in the possible rental for the banquet hall, conference hall or auditorium and also other facilities provided.

2. The accounting system maintained by the appellant provides bifurcation so far as value of food and drink and the rentals charged for the accommodation, etc. as stated above. So far as food and drinks supplied in the hotel, it is taxed under KVAT Act and supply of food and drinks at the conference hall, banquet hall and auditorium is subjected to luxury tax and service tax apart from KVAT. Hence, while declaring its turn over, it adopts a bifurcation by which 25% of the total charges collected for the services offered in the banquet hall, convention centre and auditorium is shown as rent, which is subjected to luxury tax and the rest is shown as charges for food and drinks which is subjected to KVAT.

3. When things stood as stated above, a notice of penalty under Section 67 of the KVAT Act was received by

the appellant alleging that appellant has collected a lesser tax. Ultimately, the proceedings culminated in imposition of penalty on the appellant. Appellant contended that there is no scope for levy of penalty, because appellant, as per the account, has clearly bifurcated the charge of food and drinks supplied from the rentals collected. According to the appellant, the statute under which luxury tax is collected, it permits bifurcation of value of food and drinks from the rentals and other amenities by application of Rule 3C of the Kerala Tax on Luxuries Rules. Levying of luxury tax on the value of food or drink is not known to any taxation law, therefore, when bifurcation of accounts clearly indicates the charges on which luxury tax is leviable and also sales tax so far as food and other amenities, imposition of penalty would not arise at all. There is no constitutional power on the State to collect luxury tax on the sale of food and it can collect only tax on the sale of food and drinks. Accounts of the appellant and the method of bifurcation is recognised by Rule 3C.

4. Learned single Judge interfered with the order of penalty only on the aspect of quantum and directed reconsideration refusing to interfere with inclusion of alleged luxury tax component treated as sale value, which culminated in imposition of penalty. Aggrieved by the same, appellant is before this Court contending that taxation authorities have failed to understand as to how the transaction should be taxed when a transaction comprises of several components; failed to note that every supply of service must normally be regarded as distinct and independent but failed to identify the taxable event in providing the auditorium or conference or banquet hall. Therefore, the taxation authorities have no jurisdiction to consider the entire supply as one transaction, i.e., supply of food.

5. On perusal of records, it is discernible that third respondent authority called for the books of account of the appellant to ascertain the liability under the Kerala Tax on Luxuries Act and KVAT Act so far as banquet halls are concerned. The dealer seems to have collected altogether

13.22% of the total collection as total tax both under the KTL Act and KVAT Act, i.e., tax at 12.5% on the turn over of ₹ 8,80, 09, 258/- so far as food and beverages served at the banquet hall and cess at 1% on VAT. Though the dealer collected tax at 13.22% including luxury tax which amounted to ₹ 1,16,34,823/-, only 75% was apportioned and showed against the liability under the KVAT Act. The remittance was ₹ 87,26,117/- and ₹ 23,85,052/- was the balance to be paid.

6. The Revenue ultimately opined that dealer wilfully evaded the tax legitimately due to them by adopting method of collecting 13.22%, keeping incorrect account and filing untrue returns. A show cause notice was issued proposing to impose penalty of ₹ 47,70,100/-, not exceeding twice the amount of tax sought to be evaded. The Intelligence Officer meticulously analysed the entire facts and figures shown in the explanation of the appellant to the show cause notice and opined that provisions of KVAT Act or Rules do not provide for any bifurcation of the amount as per the method adopted by the appellant/assessee, that too, when appellant

admitted that entire amount charged by it was for the food supplied in the banquet hall and no separate rent was shown in the bills. Admittedly, no revised return came to be filed even after pointing out the mistake. Therefore, maximum penalty came to be imposed. A notice was issued under the Kerala Revenue Recovery Act and at that point of time, appellant approached this court by filing the writ petition.

7. Appellant places reliance on **Tamil Nadu Kalyana Mandapam Assn. v. Union of India and others** ((2004) 135 STC 480) to contend that there is no overlapping in law so far as tax on luxury and service tax are concerned. According to him, providing food or articles for human consumption, though deemed to be sale of goods, does not cover the element of service. Therefore, in order to impose tax on sale of goods, it must amount to sale according to the established concept of a sale in the law of contract or more precisely, the Sale of Goods Act of 1930. The Legislature cannot enlarge the definition of sale so as to bring it within the ambit of taxation, transactions which

could not be a sale in law.

8. He places reliance on **K.Damodarasamy Naidu & Bros. v. State of Tamil Nadu and another** ((2000) 117 STC 13) to contend that the expanded definition of tax on sale or purchase of goods introduced in Constitution with respect to the amendments in State Acts on the definition of dealer and sale, no distinction is made between sale and service by holding the transaction as deemed sale, therefore, tax is leviable on entire charges for supply. There is no splitting up between the charge for food and charge for services. Determination should not be left to the assessing authority and Government must make rules.

9. He further places reliance on **Bharat Sanchar Nigam Ltd. and another v. Union of India and others** ((2006) 145 STC 91) pressing on the word 'deemed sale' as defined in Constitution and whether splitting up of sale element and service element is permissible and if permissible, in which all cases such permissible splitting up is provided. According to the learned counsel, it is permissible in the catering services, therefore, the goods do

not include electromagnetic waves or radio frequencies as held in BSNL case, therefore, sale of goods here does not include service rendered in the banquet hall and other accommodation.

10. He relies upon **Hindustan Steel Ltd. v. The State of Orissa** ((1970) 25 STC 211) to contend that imposition of penalty calls for only when there is failure to perform statutory obligations and it is a matter of discretion of the authority to be exercised judicially and on consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

11. With the above decisions to support his contentions, learned counsel for the appellant contends that the prayers sought in the writ petition ought to have been allowed as it is a clear case where the practice adopted by

the appellant in maintaining the accounts correctly indicates the actual turn over of the business, tax collected towards KVAT and Luxury Tax. Hence, the assessing authority was not justified in imposing penalty and the learned single Judge ought not have remanded the matter to the assessing authority.

12. While considering the prayers sought in the writ petition, learned single Judge independently dealt with the prayers at A and D.

13. So far as the declaration sought at Prayer A, it is with regard to the jurisdictional authority of the State/ authorities under KVAT Act to levy or collect VAT on any real value for the use of amenities provided by the appellant such as banquet hall, auditorium, conference hall, etc. As per the reply statement given to the show cause notice and also the averments in the writ petition, even according to the appellant, they are not charging separately any rent for the banquet hall and other amenities. On the other hand, they contend that entire bills are raised towards food charges. Under Rule 3C of the KTL Rules, by fiction of law,

25% of the amounts in the return could be segregated towards rent only to work out the amount of tax payable under KTL Act. According to the appellant, remaining 75% has been taken for computing the tax under KVAT Act.

14. In the absence of raising any separate charges for the banquet hall, when the appellant admittedly collected the entire amount towards cost of food and other beverages, we fail to understand how question of taxation on rental charges would arise in such situation. This is an admitted fact. Therefore, learned single Judge was justified in holding prayer A against the appellant.

15. So far as prayer D, it is with regard to the direction not to realise tax in respect of rent or other charges realised for the banquet hall pursuant to Exhibit P3 and future assessment orders. Apparently, appellant is not challenging their liability under KTL Act. So far as Section 4 of the KTL Act, as tax is to be imposed in respect of the amenities/services which amounts to luxury being provided by the assessee, it is admitted by the appellant that they are liable to pay luxury tax. It is also admitted by the appellant

that entire amounts collected by them is only for the supply of food and other beverages and not rent towards accommodation or other amenities provided in the banquet hall, etc. So far as Section 4(2)(c) of KTL Act read with Rule 3C of the KTL Rules, it clearly indicates, in the absence of separate bill or accounts maintained by the dealer and so far as rental charges are concerned, 25% of the total charges could be treated as rent and other charges as contemplated under Section 4 of the Act. Appellant dealer admits, they have not collected any amount separately towards rent of the banquet hall. By the deeming provision under KTL Act, 25% of the total taxable turn over towards rent and other charges is justifiable. In the absence of similar provision under KVAT Act and Rules, there is no deeming provision segregating 75% of the total bill collected as the amount towards supply of food and other beverages. Both enactments operate in different fields. Though appellant said to have maintained accounts segregating the amount towards food and amenities provided in the banquet hall, none of the bills reflect such

segregation. Admittedly, the bills are raised as charges towards food and supply of beverages only.

16. Learned Government Pleader specifically pointed out that percentage of tax said to have been charged, collected and paid by the appellant dealer at 13.22% in fact does not reflect segregation of tax, i.e., 75% towards supply of food and beverages and 25% towards rent and other amenities. Therefore, prayer D was also properly answered by the learned single by opining that relevant provisions of the statute are not under challenge.

17. With reference to Exhibit P3 order imposing penalty and issuance of demand notice Exhibit P4 for recovery of tax under Kerala Revenue Recovery Act, it is seen, third respondent Intelligence Officer has, in detail, discussed each and every point raised by the appellant including the citations while considering the order. It is a well reasoned order. In order to impose penalty, no doubt, one has to see whether there is conscious exercise on the part of the dealer to evade the actual tax liability which could be termed as mens rea resulting in imposition of

penalty. Section 4(2) of KTL Act read with Rule 3C of KTL Rules, clearly contemplates a situation when the rental value becomes the basis for collection of tax as mentioned in charging Section 4(2). In the absence of appellant collecting any separate rental charges for banquet hall and admittedly all the bills raised are only for food and beverages supplied in the banquet hall, so far as luxury tax for the services rendered and also the rent, Rule 3C, by fiction of law, takes care of the situation enabling the authorities to collect 25% of the total amount charged by the dealer towards luxury tax. There is no dispute regarding taxable turn over and so also by fiction of law under KTL Act and the Rules, liability to pay luxury tax at 25% of the total turn over. There is no such similar provision provided under the KVAT Act to segregate 75% of the amount charged for the purpose of taxation towards food items, etc. When consciously appellant has collected entire amount towards supply of food and beverages, we fail to understand the logic of confining the taxable turn over only to an extent of 75% of the total bill. The dealer specifically admits that

entire amount is charged towards supply of food and beverages, therefore, there is no justification on the part of the dealer to ask for segregation of the amount from this total turn over at 75% towards food items etc. The relief of set off claimed by the appellant dealer is not possible as it is not provided under KVAT Act. Segregation by operation of law is possible only for fixation of tax under KTL Act and not under KVAT Act.

18. The dealer, instead of circuitous method of showing 13.22% of tax under the bills, could have separately shown the actual charges towards food and beverages, rental and other charges of the banquet hall. Appellant cannot dictate now to presume that actual food charges was less than shown in the bills or given in figures. Why they have adopted such a course is for the best reasons known to the appellant dealer alone. Learned single Judge was justified in saying ignorance of law is not an excuse.

19. Learned single Judge was also justified in saying that there was opportunity for the appellant to rectify the mistake when it was pointed out by the authorities. On the

other hand, stand of the dealer was that there has to be a deeming provision similar to Rule 3C of KTL Rules. The course adopted by the dealer consciously would clearly indicate it was with an intention to save tax which otherwise they were liable to satisfy the Government. The entire exercise, no doubt, clearly indicates mens rea involved. The argument that the figures shown in the returns or accounts were never doubted by the authorities or that there was no suppression of any amount collected does not mitigate the circumstances. As rightly pointed out by the learned single Judge, so far as the conscious effort made by the appellant to decrease the tax burden on them avoiding payment of tax to the State, it definitely amounts to an offence punishable under Section 67(1) of the KVAT Act. The reasoning of the third respondent, confirmed by the learned single Judge, does not definitely warrant any interference.

So far as question of quantum, learned single Judge, referring to imposition of penalty twice the amount of tax to be evaded, has rightly observed, at the most quantum of penalty only deserves to be intercepted after hearing the

appellant dealer. In the above circumstances, we are of the opinion, appellant failed to make out any case for interference. Accordingly, the appeal is dismissed.

Manjula Chellur,
Chief Justice

A.M.Shaffique,
Judge

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