

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN**

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

WA.No. 1104 of 2012 () IN WP(C).14730/2008

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AGAINST THE ORDER/JUDGMENT IN WP(C) 14730/2008 of HIGH COURT OF KERALA
DATED 21.05.2012**

APPELLANT/PETITIONER :

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THE KAIRALI AYURVEDIC HEALTH RESORT PVT. LTD.
OLASSERRY P.O., KODUMBU, PALAKKAD DISTRICT.
REPRESENTED BY ITS MANAGER (OPERATIONS) SHRI.ARUN R.S.**

**BY ADVS.SRI.T.M.SREEDHARAN (SR.)
SMT.NISHA JOHN
SRI.V.P.NARAYANAN
SMT.BOBY M.SEKHAR**

RESPONDENT(S)/RESPONDENTS :

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- 1. THE INTELLIGENCE OFFICER (IB),
COMMERCIAL TAXES, PALAKKAD-678 001.**
 - 2. STATE OF KERALA,
REPRESENTED BY CHIEF SECRETARY,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001.**

R1,R2 BY SRI.SEBASTIAN CHAMPAPPILLIL, GOVERNMENT PLEADER

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 15-12-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

DG

APPENDIX

PETITIONER'S EXHIBITS:

- ANNEXURE-A:** COPY OF THE REGISTRATION CERTIFICATE DATED 16.03.2009 ISSUED BY THE COMMERCIAL TAX OFFICER (LUXURY TAX), PALAKKAD -1.
- ANNEXURE-B:** COPY OF JUDGMENT IN W.P.(C) NO.9653 OF 2009B DATED 25.03.2009 OF THIS HON'BLE COURT.
- ANNEXURE-C:** COPY OF LICENSE A2-143/03 DATED 22.11.2003 ISSUED BY THE KODUMBU GRAMA PANCHAYATH FOR CONDUCTING CANTEEN, AYURVEDIC PHARMACY, FOR THE YEAR 2003.
- ANNEXURE-D:** COPY OF LICENSE DATED 12.10.2004 ISSUED BY THE KODUMBU GRAMA PANCHAYATH FOR CONDUCTING CANTEEN, AYURVEDIC PHARMACY, FOR THE FY-2004-05.
- ANNEXURE-E:** COPY OF LICENSE DATED 31.05.2007 ISSUED BY THE KODUMBU GRAMA PANCHAYATH FOR CONDUCTING CANTEEN, AYURVEDIC PHARMACY, FOR THE FY-2007-08.
- ANNEXURE-F:** COPY OF LICENSE DATED 24.5.2008 ISSUED BY THE KODUMBU GRAMA PANCHAYATH FOR CONDUCTING CANTEEN, AYURVEDIC PHARMACY, FOR THE FY-2008-09.
- ANNEXURE-G:** COPY OF THE NOTICE DATED 2.01.2003 ISSUED BY THE COMMERCIAL TAX OFFICER (WC & LT), PALAKKAD.
- ANNEXURE-H:** COPY OF REPLY DATED 14.1.2003 SUBMITTED BY THE APPELLANT BEFORE THE CTO (WC & LT), PALAKKAD.

RESPONDENT'S EXHIBITS - NIL

//TRUE COPY//

P.A TO JUDGE

**THOTTATHIL B.RADHAKRISHNAN &
ANU SIVARAMAN, JJ.**

W.A.No.1104 of 2012

Dated this the 15th day of December, 2015

J U D G M E N T

Thottathil B.Radhakrishnan, J.

- 1.Under challenge in this writ appeal is the decision of the learned single Judge refusing to interfere with the penalty orders under the provisions of the Kerala Tax on Luxuries Act, 1976; 'Act', for short. Heard the learned senior counsel for the appellant and the learned special government pleader for the department of commercial taxes.

- 2.For the purpose of the case in hand, the relevant provisions of the Act are clauses (e) and (de) of section 2 which, respectively, define 'hotel' and 'hospital'; as also, sections 5 and 6 relating to filing of returns; assessment and collection of tax and section 17A dealing with imposition of penalties by assessing authorities. Clause (de), which was inserted in

section 2 to define the term 'hospital' for the purpose of the Act was brought into force with effect from 01.04.2008.

3.Appellant, which calls itself an Ayurvedic resort and hospital, voluntarily filed returns on and after 01.04.2008 by treating it as a hospital for the purpose of the Act. Those returns were accepted and acted upon by the assessing authorities. The intelligence officer issued notice under section 17A proposing imposition of penalty on the ground that the appellant failed to submit any return as required by the provisions of the Act for the years 2003 to 2008 and was liable to pay tax for that period. That is the period before the years for which the appellant had voluntarily filed returns on the basis of the amendment of the Act as per the Kerala Finance Act, 2008.

4.The impugned proposal to impose penalty was challenged pleading that the appellant is not a hotel and hospitals were not covered by the Act until 01.04.2008. The department attempted to bring the appellant under the term 'hotel' as defined under section 2(e) of the Act. Penalty proceedings

concluded against the appellant. They were challenged through the writ petition. The learned single Judge held that the term 'hotel' could include the activities of the appellant. Hence, this appeal.

5. There is one important feature of this case which looms large at the very inception. As from 01.04.2008, the assessing authority had accepted the returns of the appellant as if it is a 'hospital' as defined in section 2(de) of the Act. There was no crystallized penalty proceedings on the mere ground referable to the definition of 'hotel' under section 2(e) before the amendment of 01.04.2008. The assessing authority concluded the assessment proceedings after 01.04.2008 without taking recourse to the power to impose penalty under section 17A, which was also with the assessing authority. On the face of such concluded statutory scenario, the intelligence officer issued notice for penalty proceedings, treating the appellant as a 'hospital' even before 01.04.2008. The primary ingredients of its activities had been accepted by the department as falling within those different elements which fall within the inclusive

definition of the term 'hospital' under section 2(de) of the Act. So much so, though the learned special government pleader for the department of commercial taxes attempted to point out that the concept of hospital is not the nature of activities which are carried out by the appellant, it needs to be understood that the department had accepted the appellant as a hospital as defined in section 2(de) of the Act after the introduction of that definition clause with effect from 01.04.2008. With that in mind, looking at the definition of hotel in clause (e) of section 2, we are unable to hold that the appellant would fall within that definition of hotel independent of the definition of the word 'hospital' though the definition of 'hospital' was brought in through a later amendment with effect from 01.04.2008. Section 2(e) defines hotel as 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. The yardsticks which put different institutions within the inclusive definition of hospital under Section 2(de) of the Act indicate the fact that those institutions stand as a class by themselves to be treated as hospitals for the purpose

of the Act. It is that legislative wisdom which has to be obviously treated as the intention of the legislature in providing separate definition for 'hospital', to run contemporaneous with the definition of 'hotel' which was already available in the Act. Such provision clearly indicates that a centre where therapy, rejuvenation, recuperation and ayurvedic care etc. are extended could be brought under the term hotel, at the relevant time, though the transaction between the customer and the proprietor may include the payment for accommodation charges, food etc.

6. The learned special government pleader for the department of commercial taxes made reference to the Clinical Establishments (Registration and Regulation) Act, 2010 which is the Central Act and Kerala Clinical Establishments (Registration and Regulation) Rules, 2012 framed under that Central Act to point out that the appellant's concern is not a hospital under that Act. We have also seen the Kerala Ayurveda Health Centres (Issue of License and Control) Act, 2007 which was not brought into force. We have recorded this

only to enable appropriate consideration of the matter by the government in future cases. But the fact of the matter remains that what we are concerned of in this writ appeal is as to whether it was within the format of law for the intelligence officer to have treated the appellant as the proprietor of a hotel as defined under section 2(e) of the Kerala Tax on Luxuries Act, 1976. We may also indicate that in so far as the Tax on Luxuries Act is concerned, the legislature has drafted for it a definition for the term 'hospital'. Therefore, reference to the other legislations governing the field of clinical establishments may not have a bearing to decide this matter which arises entirely within the domain of the Kerala Tax on Luxuries Act, 1976.

7. For the aforesaid reasons, we are of the view that the proceedings challenged before the learned single Judge were without jurisdiction and before 01.04.2008, the appellant could not have been treated as a hotel for being brought under the cover of the Kerala Tax on Luxuries Act, 1976. At any rate, there could have been no penalty proceedings under section

17A, having also particular regard to the clear distinction between the power to assess on the basis of best of judgment and the power to impose a penalty in terms of section 17A.

In the result, the appeal is allowed vacating the impugned judgment and Exhibits P10 to P14 penalty orders imposing penalty on the writ petitioner/writ appellant for the years 2003-2004 to 2007-2008 under section 17A of the Kerala Tax on Luxuries Act, 1976 are quashed. The parties will bear their respective costs.

Sd/-
(THOTTATHIL B.RADHAKRISHNAN, JUDGE)

Sd/-
(ANU SIVARAMAN, JUDGE)

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P.A TO JUDGE

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