

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.11.2019

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.Nos.12166 to 12168, 15277 and 12200 to 12203 of 2008  
and M.P.Nos.1, 2, 1,2,1,2, 2, 1, 2, 1, 2, 1,2,1 and 2 of 2008

W.P.No.12166 of 2008:

Mahindra Holidays & Resorts India Limited  
"Mahindra Towers", 2<sup>nd</sup> Floor,  
No.17/18 Patullos Road,  
Chennai - 600 002  
Represented by its General Manager Accounts  
Mr.A.Sridhar

... Petitioner in W.P.No.12166/2008,  
12167/2008, 12168/2008, 15277/2008

M/s.Hill Country Holiday Resorts India Limited,  
New No.22 Old No.9, Jaganathan Road,  
Nungambakkam,  
Chennai-34. .... Petitioner in W.P.No.12200 to 12203 of 2008

Vs.

1.The State of Tamil Nadu  
Rep. by its Revenue Secretary,  
Fort St. George, Chennai - 600 009.

2. The Deputy Commercial Tax Officer,  
Udhagai (North) Nilgiris District.  
... Respondents in W.P.Nos.12166, 12167,  
12168/2008, 15277 of 2008

1.The Government of Tamil Nadu,  
Rep by its Secretary to Government,  
Department of Commercial Taxes and Religion Endowments,  
Fort St. George, Chennai-600 009.

2.The Deputy Commercial Tax Officer,  
Udhagai (South), The Nilgiris.  
...Respondnets in W.P.No.12200 to  
12203 of 2003

Prayer in W.P.Nos.12166 to 12168/2008 and 15277 of 2008:

Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorarified Mandamus, calling for the records of the proceedings of the impugned demand notice TNLT No.785149/2002-03, 2003-2004, 2004-2005, 2005-2006 respectively dated 31.3.2008, 02/05/2008 issued by the second respondent and quash the same and consequently forbear the respondents from demanding luxury tax for the year 2002-03, 2003-2004, 2004-2005, 2005-2006 respectively in respect of the petitioner timeshare/membership holiday resort at Ooty.

Prayer in W.P.Nos.12200 to 12203 of 2008:

Writ Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Certiorarified Mandamus, calling for the records relating to the order passed by the 2nd Respondent in TNLT 785158/2002-2003, 2003-2004, 2004-2005, 2005-2006 respectively dated 21.3.2008 and 17/04/2008 and quash the same and forbear the Respondent from in any manner levying or recovering tax of penalty under the provisions of the Tamil Nadu Tax on Luxuries in Hotels and Lodging Houses Act 1981 (Act No.VI of 1981) in respect of the occupancy rights enjoyed by the buyers of the property time share creating ownership rights and render Justice.

For Petitioner in W.P.Nos.12166 to 12168  
and 15277 of 2008 : Mr.R.L.Ramani, S.C.  
Assisted by Mr.Balamurali  
For M/s.Shivakumar & Suresh

For Petitioner in W.P.Nos.12200 to 12203  
of 2008 : Ms.R.Gouri

For Respondents in the above W.Ps : Mr.Mohammed Shaffiq  
Special Government Pleader  
and Ms.G.Dhanamadhiri,  
Government Advocate

### COMMON ORDER

This batch of eight Writ Petitions have been filed by two assessees, Mahindra Holidays & Resorts India Ltd. (in short 'Mahindra') and Hill Country Holiday Resorts (in short 'Hill Country') engaged in the management of holiday resorts. The Writ Petitions challenge orders of assessment for the periods

2002-03, 2003-04, 2004-05 and 2005-06 in the cases of both petitioners passed in terms of the Tamil Nadu Tax on Luxuries Act, 1981 (in short 'Act'). The issue that arises for consideration is the taxability or otherwise of receipts in the hands of the petitioners from 'allotment of time share'.

2. The facts, circumstances, dates and events (as relevant) in the case of Mahindra are referred to for the sake of brevity. The conclusions arrived at by me in the case of Mahindra would apply equally so in the case of Hill Country as well, since the only variation would relate to factual particulars, that are not really relevant in deciding the legal issue.

3. The submissions of Mr. Ramani, learned Senior Counsel for learned counsel for Mahindra are as follows:

i) The concept of a time share is an alternative for a conventional holiday home or stay in luxury hotel.

ii) Time share indicates a hybrid concept of owning the membership of a resort for a stipulated period with a restriction imposed on the period of such ownership as opposed to traditional ownership where the asset is owned and enjoyed without any restriction in time.

iii) The resorts claim to be providing an alternate ideal situation for middle class vacation goers who can enjoy the luxury of a resort stay on a budget.

iv) Mahindra has two resorts in Ooty.

v) As per the time share concept, an upfront fee is collected for a membership in club Mahindra for a period of 25 years. This is in addition to an annual subscription that enures towards maintenance and which is collected irrespective of availment of the holiday facility during any particular year.

vi) The membership entitles the member to enjoy a stay of one week in specified apartments in specified resorts in India. By virtue of a tie-up with Resorts Condominiums International (RCI), this facility is extended to resorts overseas as well, though such assets abroad are not owned by Mahindra.

vii) One of the resorts of Mahindra in Ooty was subject to inspection by the Commercial taxes Department on 23.12.2004, pursuant to which a notice was received on 09.01.2005 for the periods 2002-03, 2003-04 and 2004-05 proposing the levy of luxury tax.

viii) Notwithstanding detailed objections, assessments of luxury tax were completed substantially along the lines of the proposals.

ix) Appeals were filed before the Appellate Authority who remanded the matter to the Officer for decision afresh. Action was also initiated for recovery of the disputed demands.

x) The assessments were redone as against which also further appeals have been filed before the appellate authority.

xi) Since the petitioner challenges the very assumption of jurisdiction by the respondents, these Writ Petitions have been filed contending that the same are maintainable.

4. According to the petitioners, the levy and collection of tax is wholly improper and contrary to law and reliance, in this regard, is placed on the following judgments:

- i) Sri Palani Dhandayathabani Devasthanam V. Commercial Tax Officer, Palani Circle II, Palani (553 STC 2001)
- ii) Coonoor Club and others V. Commercial Tax Officer, Coonoor Asst. Circle, Coonoor and others (22 VST 59)
- iii) Bangalore Golf Club V. Asst. Commissioner of Luxury Taxes (115 STC 338)
- iv) Orissa State Warehousing Corporation V. Commissioner of Income Tax (237 ITR 589)

5. Ms. Gouri, learned counsel for Hill Country adopts the submissions of Mr. Ramani, learned Senior Counsel.

6. The submissions of Mr. Mohammed Shaffiq, learned Special Government Pleader in support of the impugned orders of assessment revolve around the interpretation of the relevant provisions of the Luxury Tax Act, in specific, the definition of 'hotel' under Section 2(f). No specific objection has been raised to the maintainability of these writ petitions though the counter affidavit urges generally that the petitioner be relegated to appeal. In any event, since the issues raised by the petitioner involve the question of assumption of jurisdiction by the assessing officer, thus going to the root of the matter, I hold that the writ petitions are maintainable. On merits, the revenue places reliance on the following decisions:

- i) Godfrey Philips India Ltd. And another V. State of U.P. (139 STC 537)
- ii) A.B. Abdul Kadir & Ors etc. V. State of Kerala (1976 AIR 182)
- iii) Tvl. Kalyana Mandapam Assn. V. Union of India and others ((2004) 5 SCC 632)
- iv) Mahindra Holidays and Resorts India Ltd. V. Intelligence Officer, Squad VI, Idukki at Kumily and others (104 VST 121)

7. Heard learned counsel and perused the pleadings as well as case law cited.

8. Since the documentation inter se the petitioners and their customers was only partially placed before the Court, the complete agreement, terms and conditions were sought for as in my view, it is relevant that the Court appreciates the arrangement that the petitioner has with its customers, more importantly the consequence that flows from such an arrangement. I hasten to add at this juncture that I have not, under any circumstances, embarked upon a fact-finding exercise, but had only sought the complete and relevant documents that were already and admittedly on record before the authorities, solely to ascertain whether, on admitted facts, the transaction would fall within the sweep of the Act.

9. I have perused the sample time share agreement supplied by Mahindra that operates under the title 'Club Mahindra'. The Membership Rules that govern the arrangement inter se the parties contain definitions of the various terms used as well as the Membership Admission Rules and the entitlements of an individual notified as a 'member' of a resort. The entitlement as set out under clause 3.1 is as follows:

'3.1 A Member is entitled to a Week of holiday every year in the apartment and season specified in the certificate of membership in any of the CMNR during the Membership Usage Period, provided the Member is not in breach of any of his obligations set out in the Rules. Members agrees to comply with the Rules governing CMNR in which Member may choose to avail holiday.'

10. The 'Scheme of Holidays' at clause 4 and 'Privileges' offered to a member, at clause 6, are both extracted below to the extent they are relevant to decide this matter:

**'4. Scheme of Holidays**

4.1 A calendar year is divided into 4 seasons namely (a) purple, (b) red, (c) white and (d) blue with purple season signifying super premium season

4.2 A Member who has purchased holidays in purple, red, white or blue seasons may opt for exchange of season (both upgrade and downgrade) as given in Clause 6 below.

A Member is entitled to enjoy a minimum of 3 Days (3 Nights and 4 Days) and a maximum of 14 Days (14 Nights and 15 Days) in the season and apartment purchased during one holiday in a Year. Holidays less than the minimum of 3 Days will be debited as 3 Days.

**6. Privileges**

6.1 Exchanges: A Member is entitled to two types of exchanges i.e. CMHM Exchanges and RCI Exchanges.

6.2 CMHM Exchanges: A Member is entitled to exchange his/her/its entitlement to a different season/apartment in the ratio prevailing at the time of request subject to the following conditions:

The exchange may amount to an up-gradation, being the exchange to a higher season or larger apartment or down gradation, being the exchange to a lower season or a smaller apartment. For example, an exchange of blue season entitlement to any other season shall amount to up gradation. Similarly, an exchange of Purple season entitlement to any other season shall amount to down gradation. Similarly, a Member who has purchased a two bedroom apartment opting for a studio shall be treated as down gradation. The number of days of the Member's holiday consumed would vary with whether there has been an upgrade or downgrade and the rate of such consumption is the "Burn Rate". If you use your holidays according to mentioned on your certificate, without exchanging. You would have consumed the standard Week that you are entitled to. The Burn Rate for such use would be eight (8) Days and seven (7) Nights. The holiday Burn Rate will be higher for upgrades and lower for downgrades. The holiday Burn Rate will also vary if alternate accommodation types to the ones mentioned in your certificate of membership are availed depending on whether the change in accommodation type amounts to an upgrade or a downgrade.

Please note:

- (i) A Blue Season entitlement may be exchanged only for a White Season entitlement in the same/different apartment.
- (ii) A White Season entitlement may be exchanged only for Blue Season (downgradation) and Red Season (upgradation) entitlement in the same/different apartment.
- (iii) A Red/Purple Season entitlement may be exchanged for any other season entitlement in the same/different apartment. Purple signifying the super-premium entitlement, upgradation of the Apartment Type alone is possible. Request for exchange in higher season would be accepted only from 15 days upto 1 day prior to the start date of the holiday.....'

11. The basis of the arrangement is thus, the entitlement granted to a member, to an apartment, categorised by colour, depending on the plan availed by such member. The sum, substance and purpose of the arrangement is admittedly to entitle the customer to a weeks' stay in a notified resort depending on the category of the plan availed.

12. This is no different from stay in a select category of a hotel room. The definition of 'hotel' in Section 2(f) expressly includes a building or a part of a building where residential accommodation with or without food is, by way of business, provided for monetary consideration, as seen from the definition extracted below:

13. Section 2(f) defines 'hotel' and reads as follows:

(f) "Hotel" means a building or part of a building where residential accommodation with or without board is by way of business provided for a monetary consideration and includes a lodging house.'

14. On the basis of the arrangement as seen from the documentation and the definition of a 'hotel' there is no ambiguity on the position that the petitioner resorts are run as commercial propositions and are in the business of providing holiday accommodation. Thus the condition that the residential accommodation offered to the guests be by way of 'business' is met. There is also no dispute on the position that the accommodation provided is 'residential' and for the purposes of vacation. Thus, the resorts constitute 'hotels' for the purposes of levy of luxury tax.

15. A comparison has been drawn by the petitioners to the provisions of this enactment and the provisions of the Luxury Tax statutes of other States in India where receipts from time share are specifically included within the ambit of tax. For instance, the Himachal Pradesh Tax on Luxuries (in Hotels and Lodging Houses) Act, 1979 contains the following Explanation to Section 2(d) thereof that defines the term 'hotel' as meaning any premises or part of premises including a house-boat, restaurant, bar or a tent where lodging with or without board or any kind of eatables or beverages or other services are provided by way of business, for monetary consideration and includes premises given on rent during any period of a financial year:

Explanation.- For the purpose of clause (d) wherever any accommodation in a hotel is provided under timeshare agreement or under package deal agreement or under any such other system wherein the facility of availing accommodation during a given period in a year is allowed under a lump-sum payment, shall also be deemed to be a 'hotel'.;

16. Then again, Section 2(e) of the above enactment defines the phrase 'luxury provided in a hotel' to mean accommodation for residence provided in a hotel along with amenities such as air conditioning, telephone, radio, music, sports, extra beds and the like, and stipulates the charges therefor. The Explanation to Section 2(e) sets out the methodology for

computation of charges specifically in the cases of time share, package deal and other arrangements where only maintenance charges, by whatever name are collected, in the following terms:

Explanation:- For the purpose of clause(e) wherever accommodation provided is under timeshare agreement or under a package deal agreement or under any such other system wherein only maintenance charges, by whatever name called, are collected periodically' over and above any lump-sum payment made, the charges for luxury provided shall be determined as under, namely:-

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

- (i) Swimming pool,
- (ii) health club,
- (iii) tennis court,
- (iv) golf course,
- (v) shopping arcade; and

(b) In all other cases, the charges for luxury shall be worked out at the rate of Rs. 30/- per person per day for the accommodation facility actually availed.];

17. The Goa Tax on Luxuries Act, 1988 contains the following Explanation to Section 2(d) thereof that defines the terms 'hotel' widely, so as to include residential accommodation, a lodging house, an inn, a public house or a building or part thereof, a club, boat, vessel or any place that provides residential accommodation by way of business:

"Explanation- A residential accommodation provided under Timeshare Agreement or under Package Deal Agreement or under any such system wherein the facility of availing residential accommodation during a given period in a year is allowed upon a lumpsum payment shall be deemed to be a "hotel" for the purposes of this Act.;

18. Section 5(2) of the above enactment sets out the methodology for computation of the charges as below:

#### 5. INCIDENCE AND LEVY OF TAX.

(1) Subject to the provisions of this Act and the rules made thereunder, there shall be levied a tax on the turnover of receipts of a hotelier.

(2) There shall be levied a tax on the turnover of receipts at the following rates, namely:-

NOTE: Where the luxuries provided in a hotel are under Timeshare Agreement or under Package Deal Agreement or under any such system, the rate of tax for the charge of the luxuries provided shall be in accordance with clause (c) above provided that where the charges are levied otherwise than on daily basis, then the charges for determining the tax liability under this section shall be computed proportionately for a day and based on the total period of occupation of the accommodation for which the charges are made.

(3) Where in addition to the charges for luxury provided in a hotel, service charges are levied and appropriated by the hotelier and not paid to the staff, then such charges shall be deemed to be part of the charges for luxury provided in the hotel.

(4) Where luxury provided in a hotel to any person (not being an employee of the hotel) is not charged at all, nevertheless there shall be levied and collected a tax on such luxury at one-fourth of the rates specified in sub-section (2), as if full charges for such luxury were paid to the hotelier.

19. Thus, both the Himachal and Goa Luxury tax enactments provide specifically for the inclusion of time share arrangements within their charge as well as provide separately for the methodology of the charge itself in percentage terms.

20. By comparison, there is no provision under the Tamil Nadu Luxury Taxes Act that names and specifically encompasses within its ambit receipts from time share. Thus, the petitioners argue that such receipts should stand excluded. This is one of the arguments that have found favour with the learned single Judges of this Court in the case of Coonoor Club (supra) and the Karnataka High Court in the case of Bangalore Golf Club (supra) in allowing the challenge of the petitioners therein to luxury tax assessments and both cases have been relied upon by the petitioners before me. Pursuant to the decision of the Karnataka High Court in Bangalore Golf Club (supra), the Luxury tax Act of that State stood amended by way of insertion of Explanation explicitly bringing to tax the receipts from time share.

21. However, a distinction has been drawn by the Kerala High Court in Mahindra Holidays and Resorts India Ltd (supra) to the aforesaid decisions, the Bench holding that the receipts from

time share constituted consideration for a bundle of rights including 'residence', the latter being the fundamental reason for the time share collections. Hence, the Kerala High Court, in the case of this petitioner agitating the assessment of its resort situated in Kerala, held that such receipts would be amenable to Luxury Tax.

22. Reliance upon the Explanations contained in the Himachal Pradesh & Goa enactments was rejected in the following terms:

'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 connected cases "Hotel". The Explanation neither defines nor control the charge to tax.

23. There is yet another aspect to the matter. As can be seen from the impugned assessments, while a portion of the residential accommodation provided is earmarked for time share holders, the remaining are made available for regular hire. Both categories constitute residential accommodation and in regard to the receipts from the second category, the petitioner has remitted luxury tax. I fail to see any distinction whatsoever between the first category and the second, both being for residential purposes. Curiously, the argument advanced by the petitioners is also to the effect that the receipts from time

share constitute consideration for a 'bundle of rights' for availment of the facility of a timeshare arrangement such as exchange and splitting up of holidays, carrying forward, advancing and postponing holidays and transfer, bequeathing, gifting and succession of the same. However, at the end of the day, what remains fundamental to the arrangement is the residential accommodation provided by way of the arrangement to the time share holder, with or without board, the consideration for which is inherent in the amount charged to the customer.

24. The petitioners also urge that the common parlance test be adopted, that is to say, that the accommodation provided would not specify the definition of 'luxury' at all. However, the necessity to apply the common parlance test to understand a 'time share' becomes necessary only when the term has not been defined for the purposes of the relevant enactment. In this particular case, a 'hotel' is defined and hence all that I have to see is whether the resort in question would fall within the sweep of the relevant definition so as to render it a 'hotel'. I have, at paragraph 19, held that it does.

25. Section 2 (fff) defines "luxury" as meaning 'luxury provided in hotel or any tobacco product supplied by a Tobacconist or the scheduled commodity which is for enjoyment over and above the necessities of life. The phrase 'luxury provided in a hotel' is defined as under:

(g) "luxury provided in a hotel" means accommodation for residence provided in a hotel, the rate of charges for which (including charges for air conditioning, television, radio, music, extra beds and the like but excluding charges for food, drink and telephone calls) is two hundred rupees or more:

26. In Godfrey Philips (supra), a Constitution Bench of the Supreme Court settled the position that the word 'luxury' refers to an activity of indulgence, enjoyment or pleasure. In A.B.Abdul Kadir (supra) the question that was considered is whether tax on vending and stocking of tobacco could be considered to be a luxury tax. The argument advanced was that tobacco, by its very nature and by the wide profile of persons who used it, can hardly be considered to be the exclusive preserve of the rich. In this context, the Supreme Court states that what connotes luxury should be seen in the context of an expenditure in excess of what is required for economic and personal well being bearing in mind that such expenditure could well be one that is incurred by a large number of people including those from all strata of society. Thus the argument that the resorts do not, per se, offer a luxurious way of life does not advance the case of the petitioners.

27. Paragraphs 35, 92 and 93 deal specifically with this argument and are extracted below:

35. The word luxury may possibly be susceptible of all three meanings. According to the Oxford English Dictionary (2nd Edn; Vol. IX) 'luxury' could among other meanings be defined as (1) abundance, sumptuous enjoyment (2) the habitual use of, or indulgence in what is choice or costly (3) refined and intense enjoyment; means of luxurious enjoyment; (4) in a particularized sense: something which conduces to enjoyment or comfort in addition to what are accounted the necessities. Hence, in recent use, something which is desirable but not indispensable and (5) as an attribute as luxury coach, cruise duty, edition, flat, liner, shop, tax, trade".

... ..  
92. Historically therefore the tax on luxury goods was seen as a part of Entry 54 of List II or Entries 83 and 84 of List I but not as a tax leviable under Entry 62 of List II. The only exception was the Kerala Validating Statute which was the subject matter of Abdul Kadir where the assessee did not question that Entry 62 related to goods and articles and the sole point of protest was that tobacco was not an article of luxury. It was only in 1993 the State of Maharashtra enacted the Bombay Luxury Tax Act, 1993 directly imposing luxury tax on goods. This was withdrawn in 1994 but the other states soon followed suit culminating in a rash of such legislation some of which are now impugned before us where the question as to the leviability of Luxury tax on goods is squarely raised.

93. Given the language of Entry 62 and the legislative history we hold that Entry 62 of List II does not permit the levy of tax on goods or articles. In our judgment, the word "luxuries" in the Entry refers to activities of indulgence, enjoyment or pleasure. . .

28. A Division Bench of the Supreme Court in the case of Tvl.Kalayana Mandapam Assn (supra) also reiterated this point while considering an argument as to whether managing a Kalyana Mandapam could be stated to be a service. Though in common parlance and usage, management of a Kalyana Mandapam is considered a commercial activity and not service, the Supreme Court held that once the activity was brought within the sweep of the Finance Act, 1994 in terms of which Service Tax was levied, that would suffice for the purposes of the levy. One need not thereafter go further to deliberate upon whether the common man understood such activity as a service or not. The Bench states,

at paragraph 54 'Therefore, a levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to a common understanding of the word "service" so long as it does not transgress any specific restriction contained in the Constitution.'

29. The petitioner relies on the judgment in the case of Orissa State Warehousing Corporation (supra) for the proposition that a taxing statute is to be strictly construed. According to it, since the charging provision does not contain any reference to a time share, the scope of the Section cannot be enlarged by bringing within it receipts not contemplated. Specifically, my attention is drawn to the observations of Rowlatt, J. in the case of Cape Brandy Syndicate v. Inland Revenue Commissioners ((1921) 1 KB 64), wherein he says 'in a taxing statute one has to look at what is clearly said. There is no equity about a tax. There is no intendment. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly on the language used.'

30. There is no dispute whatsoever on this proposition. However the entire premise of the petitioners' argument hinges on the absence of an Explanation as in the Statutes in Goa and Himachal Pradesh relating to time share. The argument is that since, there is no specific reference to a time share agreement such an agreement and receipts therefrom stand excluded from the ambit of tax. However, a wholistic reading of the provisions can only, in my view, lead to the conclusion that reference to a time share, being but one arrangement for providing residential accommodation, is implicit within the charging section itself. There is thus no necessity to introduce additional words or phrases in the provisions. Thus, and to put it differently, the provision as it stands now, encompasses a time share agreement as well.

31. A Division Bench of this Court in Sri Palani Dhandayuthabani Devasthanam (supra), specifically paragraph 17 have been cited to state that it is only the petitioners, who have been singled out for the imposition of luxury tax. There has been a dichotomy of approach even between the two resorts run by the petitioner in Ooty, insofar as one is subject to tax, whereas the other has escaped the clutches of the Department. The Division Bench observes in the case of Sri Palani Dhandayuthabani Devasthanam (supra) that the respondent, i.e., the Commercial Taxes Department should take a pragmatic approach in matters of taxation. Having not brought to tax the Tituttani Devasthanam, where also Lord Muruga is the presiding deity, the Department ought not to have invoked the Act for the Palani Dhandayuthabani Devasthanam also presided over by the same deity.

There is no doubt that the State Government should take a consistent and uniform policy and it stands to reason that the legal position adopted in the case of one assessee should be consistently applied across the Board to other similarly placed assesses as well.

32. However, if this were not done, that by itself, would not vitiate assessments that are otherwise found to be legally tenable passed in appropriate cases. The observations of the Division Bench at paragraph 17 are the context of grant of exemption that, while being granted to Lord Murugan at Tiruttani and Rameswaran Devasthanam was denied to him at Palani. The proposition canvassed and accepted was that where a benefit was extended to an assessee on a specific factual and legal basis then, another identically placed assessee is also entitled to the same benefit and should not be denied the same. There is no quarrel with this proposition. However, the mere fact that the Commercial taxes Department has omitted to frame assessments in the cases of some resorts would not invalidate assessments made in the cases of others as long as the latter have been made in line with the provisions of the applicable statute and the principles of natural justice. A mistake or omission such as the present committed by the Department cannot be taken advantage of by the petitioners and the comparison sought to be made with cases of grant of exemption is, in my view, misconceived.

33. This Court in Coonoor Club (supra) and the Karnataka High Court in Bangalore Golf Club (supra), proceed on the basis that the term 'hotel' includes a lodging house, but not a club. The decisions are of no assistance to the petitioners that, admittedly, are not clubs, but resorts providing residential accommodation.

34. What is offered to the customers is a bundle of rights, the primary right being one of 'accommodation'. Indeed, even in a hotel, what is offered to a customer is, along with the room, various other facilities, such as, dining, gymnasium, internet, phone facilities, valet and others. This does not militate or take away from the primary purpose of a hotel which is to provide residential facilities. Similar is the present case. In the light of the discussion as above, the assumption of jurisdiction by the respondent assessing officer cannot be faulted and the challenge to the same is rejected.

35. This takes us to the methodology for the levy and collection of Luxury tax set out in terms of Section 4 of the Act as under:

4. Levy and Collection of Luxury tax.--- (1) Subject to the provisions of this Act, there shall be levied and collected a tax

pm on the luxury provided in a hotel in respect of every room under occupation by any person to be known as "luxury tax" at the following rates, namely:

Rate of Tax

(a) Where the rate of charges for accommodation for residence is not less than rupees two hundred but than rupees five hundred per room per day. Five per centum of such rate

(b) Where such rate in is not less than rupees five hundred but less than rupees one thousand per room per day. Ten per centum of such rate

(c) Where such rate is rupees one thousand or more per room per day. Twelve and half per centum of such rate:

36. The mode of computation of tax is set out under Section 5 of the Act, extracted below:

'5.Mode of Collection of tax.-(1) Where no separate charges for luxury provided in a hotel and for food or drink or telephone calls are specified, but a consolidated payment is required to be made both for luxury provided in a hotel and for food or drink or telephone calls, then, the assessing authority may, from time to time, after giving the proprietor an opportunity of being heard, fix separate rates of charges for such luxury and for food or drink or telephone calls for the purpose of calculating the tax under this Act.

(2) Where, in addition to the charges for luxury provided in a hotel, service charges are levied and appropriated to the proprietor and not paid to the staff, then such charges shall be deemed to be part of the charges for luxury provided in the hotel.

(3) Where luxury provided in a hotel to any person (not being an employee of the hotel) is not charged at all, or is charged at a concessional rate, then the tax on luxury shall be levied and collected as if full charges for such luxury were paid to the proprietor of the hotel;

Provided that where luxury provided in a hotel to any person, whether an Indian or a foreigner, on tours organized by the Department of Tourism of the Government of India or the State Government is charged at a concessional rate, then tax on such luxury shall be levied and collected on such concessional rate paid to the proprietor of the hotel.

(4)\* \* \*

(5) Where any proprietor fails or neglects to collect the tax payable under this Act, the tax shall be paid by the proprietor as if the tax was collected by the proprietor from the person to whom the luxury was provided and who was accordingly liable to pay the same.

(Emphasis by highlighting

supplied)

37. Section 5 (5) contemplates a situation where the luxury provided in a hotel to any person, not being an employee of the hotel, is not charged to tax or is brought to tax at a concessional rate. In such an event, the section provides that tax upon such luxury shall be collected in full from the resort, whether collected by the resort from the customer or not.

38. The Assessing Authority has levied tax not upon the actual receipts from time share, but based upon the actual room rentals received from those occupants of the resort, not being time share holders. The comparison has thus been between the two kinds of occupants of the resort, those under regular rental occupancy and those under the time share arrangement. Such comparison, in my view, is proper as it equates two identical situations and the computational methodology adopted is consequently, in line with the method stipulated under Section 5 (3). I find no legal flaw or infirmity in the same and confirm the methodology followed in assessment as well.

39. Before concluding, I may state that if the argument of the petitioners were to be accepted, then the consequences would be well-nigh absurd. One would be making a distinction, without any basis, between residents of a hotel, who pay rent for regular use and time share holders, who also pay rent for the use of the room, the latter merely utilising an alternate mechanism. Evidently, two identical scenarios should not and cannot have conflicting and incompatible consequences. A proper interpretation of the provisions of the Act make it clear that a time share is nothing but an alternate mechanism for room rental and a time-share arrangement is but a different arrangement for enjoying the facilities of residential hotel accommodation.

40. In the light of the discussion as above, the impugned orders are confirmed and the Writ Petitions dismissed. The appellate authority before whom appeals are stated to be pending will dispose the same in line with the conclusions contained in this order. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-  
Assistant Registrar

//True Copy//

Sub Assistant Registrar

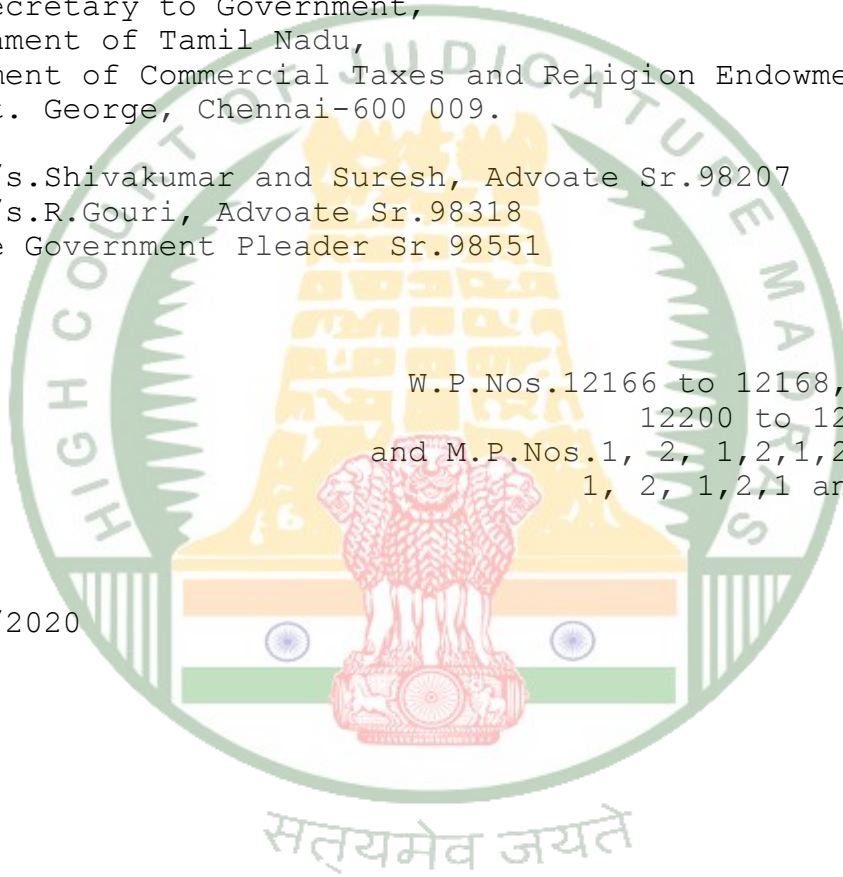
S1  
To

- 1.The Revenue Secretary,  
State of Tamil Nadu  
Fort St. George, Chennai - 600 009.
2. The Deputy Commercial Tax Officer,  
Udhagai (North) Nilgiris District.
3. The Secretary to Government,  
Government of Tamil Nadu,  
Department of Commercial Taxes and Religion Endowments,  
Fort St. George, Chennai-600 009.

+1cc to M/s.Shivakumar and Suresh, Advoate Sr.98207  
+1cc to M/s.R.Gouri, Advoate Sr.98318  
+1c to the Government Pleader Sr.98551

W.P.Nos.12166 to 12168, 15277 and  
12200 to 12203 of 2008  
and M.P.Nos.1, 2, 1,2,1,2, 2, 1, 2,  
1, 2, 1,2,1 and 2 of 2008

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srg 04/08/2020



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