IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 5TH DAY OF AUGUST 2016/14TH SRAVANA, 1938

WP(C).No. 20226 of 2011 (C)

PETITIONER(S):

M/S. HOTEL & ALLIED TRADES PRIVATE LIMITED,
UNIT: CASINO HOTEL, WILLINGDON ISLAND, KOCHI-3,
REPRESENTED BY ITS EXECUTIVE OFFICER
MR.MICHAEL DOMINIC.

BY ADVS.SRI.V.ABRAHAM MARKOS,
SRI.MATHEWS K.UTHUPPACHAN,
SRI.BINU MATHEW,
SRI.TERRY V.JAMES,
SRI.B.J.JOHN PRAKASH,
SRI.TOM THOMAS (KAKKUZHIYIL).

RESPONDENT(S):
----

1. COMMERCIAL TAX OFFICER,
LUXURY TAX, MATTANCHERRY, KOCHI-682 002.

2. INTELLIGENCE OFFICER (IB),
COMMERCIAL TAXES, EDAPALLY,
COCHIN-682 024.

BY SR. GOVT. PLEADER SRI.C.K. GOVINDAN.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05-08-2016, ALONG WITH WP(C).NO.24497 OF 2011, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

rs.

WP(C).No. 20226 of 2011 (C)

APPENDIX

PETITIONER'S EXHIBITS:-

EXT.P1A COPY OF THE NOTICE DATED 12/08/2008 ISSUED BY THE 2ND RESPONDENT IN RESPECT OF ASSESSMENT YEAR 2005-06.

EXT.P1B COPY OF THE NOTICE DATED 12/08/2008 ISSUED BY THE 2ND RESPONDENT IN RESPECT OF ASSESSMENT YEAR 2006-07.

EXT.P1C COPY OF THE NOTICE DATED 12/08/2008 ISSUED BY THE 2ND RESPONDENT IN RESPECT OF ASSESSMENT YEAR 2007-08.

EXT.P2 COPY OF THE OBJECTION DATED 04/09/2008 FILED BY THE PETITIONER.

EXT.P3 COPY OF THE PENALTY ORDER DATED 03/10/2008 ISSUED BY THE 2ND RESPONDENT IN RESPECT OF ASSESSMENT YEAR 2005-06.

EXT.P4 COPY OF THE PENALTY ORDER DATED 03/10/2008 ISSUED BY THE 2ND RESPONDENT IN RESPECT OF ASSESSMENT YEAR 2006-07.

EXT.P5 COPY OF THE PENALTY ORDER DATED 03/10/2008 ISSUED BY THE 2ND RESPONDENT IN RESPECT OF ASSESSMENT YEAR 2007-08.

EXT.P6 COPY OF THE ORDER DATED 30/06/2009 ISSUED BY THE DEPUTY COMMISSIONER (APPEALS) FOR THE YEARS 2005-06, 2006-07 AND 2007-08.

EXT.P7 COPY OF THE ORDER DATED 22/02/2011 PASSED BY THE TRIBUNAL IN APPEALS FOR THE YEARS 2005-06, 2006-07 AND 2007-08.

EXT.P8A COPY OF THE DEMAND NOTICE DATED 08/06/2011 ISSUED BY THE 2ND RESPONDENT FOR THE YEAR 2005-06.

EXT.P8B COPY OF THE DEMAND NOTICE DATED 08/06/2011 ISSUED BY \ THE 2ND RESPONDENT FOR THE YEAR 2006-07.

EXT.P8C COPY OF THE DEMAND NOTICE DATED 08/06/2011 ISSUED BY THE 2ND RESPONDENT FOR THE YEAR 2007-08.

RESPONDENT'S EXHIBITS:-

EXT.R1A COPY OF THE ASSESSMENT ORDER NO.LT 1051/2006-07 DATED 13/07/2009.

//TRUE COPY//

P.S. TO JUDGE

rs.

A.M. SHAFFIQUE, J.

W.P.(C) Nos. 20226 & 24497 of 2011

Dated this the 5th day of August, 2016

JUDGMENT

These writ petitions have been filed against a common order in T.A. (VAT) Nos.284/09, 285/09, 386/09, 387/09 and 388/09 of the Kerala Value Added Tax Appellate Tribunal, Ernakulam. The issue relates to penalty orders being passed against the petitioner in W.P.(C) No.20226 of 2011 under the Kerala Tax on Luxuries Act, 1976. T.A.Nos.284/2009 and 285/2009 were filed by the petitioner in W.P.(C) No.20226 of 2011 and T.A.(VAT) Nos.386/2009, 387/2009 and 388/2009 were filed by the State of Kerala with respect to the very same issue.

2. The question that had arisen for consideration in the appeals, was regarding the bifurcation of luxury tax as far as the usage of Banquet Hall and Poolside area for serving food as well as conducting other services are concerned. By an

amendment which had come into force on 28.7.2006, Rule 3 C had been incorporated in the Kerala Tax on Luxuries Rules, 1976. By virtue of the aforesaid provision, rough estimate had been made with respect to the services rendered while serving food, drink and other services in a hotel, hall, auditorium and other similar places, as per which 25% of the total charges has to be treated as eligible for luxury tax. In respect of assessment years 2005-06, 2006-07 and 2007-08, the petitioner did not bifurcate the luxury tax component, but paid value added tax (VAT) for the entire amount. In the assessment proceedings taken against the petitioner during the year 2005-2006, the issue was finally determined by judgment of this Court in W.P.(C) No.21791 of 2009. This Court, as per judgment dated 29.5.2015 held that the assessment proceedings can be completed by verifying whether any differential amount has to be paid to the Government on account of such bifurcation of the total charges levied. It was observed that insofar as the petitioner was charging VAT on the total amount collected from the customer, even if there was no bifurcation, substantial loss will not be suffered by the Government. However, direction was issued to complete the assessment after verifying whether any additional amount was liable to be paid on account of the difference in the VAT as well as luxury tax and credit for the excess amount, if any.

3. The proceedings now under challenge is with reference to the penalty steps taken by the authorities for imposing penalty on the petitioner in W.P.(C) No.20226 of 2011. The proposal for penalty had been initiated on the basis of the assessment orders for the year 2005-2006 to 2007-2008.

4. In an appeal filed before the Deputy Commissioner (Appeals), the penalty for the year 2005-2006 was set aside. Further it was found that there was no reason to impose penalty on the amount involved as far as the Poolside area is concerned whereas, the penalty imposed for not levying luxury

tax in respect of the Banquet Hall was confirmed. Appeals were filed before the Tribunal by the State ie, T.A.Nos.387/2009 and 388/2009 were dismissed and appeal No.386/2009 in respect of penalty order for assessment years 2005-06 has been allowed and thereby imposing penalty on the petitioner for that assessment year as well. However, the penalty had been reduced to an amount equal to the tax due for the respective years.

5. The short issue to be considered in these writ petitions is whether there was any necessity to impose penalty on the petitioner for not having bifurcated the assessment to tax with reference to VAT and luxury tax for the years 2005-06, 2006-07 and 2007-08. As far as the assessment year 2005-06 is concerned, there is no dispute about the fact that the amendment to the Rules had come into effect only on 28.07.2006. Under such circumstances, there was no necessity to initiate any penalty proceedings against the petitioner for having not complied with the

bifurcation so contemplated during the said assessment year. Under such circumstances, I am of the view that the Tribunal was not justified in imposing penalty on the petitioner as far as assessment year 2005-06 is concerned on this ground itself.

6. Now coming to question of penalty being imposed for the year 2006-07 and 2007-08, the main contention urged by the learned Senior Counsel appearing for the petitioner is that no loss has been suffered by the Government on account of such bifurcation. It is submitted that though Rule 3 C had been brought into force, still the hotel was charging 12.5% as VAT for the entire amount received for usage of the Banquet Hall including food, drinks etc, as such, no loss had been suffered by the Government in this regard. Even assuming that there was a bifurcation, still the difference in tax would be of a minor percentage. Therefore, there was no intention on the part of the petitioner to evade any tax whereas only issue was regarding bifurcation of the tax, viz; VAT as well as luxury tax. It is submitted that after initiation of proceedings,

the petitioner had already corrected the same and presently, it is being done in accordance with the statutory format.

7. On the other hand, learned Government Pleader while supporting the Tribunal's stand with reference to imposition of penalty, submits that the penalty ought to have been imposed for usage of poolside area also which is the subject matter in W.P.(C) No.24497 of 2011.

8. A counter affidavit also is filed in W.P.(C) No.20226 of 2011, by which they supported the stand taken by the Tribunal, which is being challenged by the petitioner. Learned Government Pleader also placed reliance on the judgment of this Court in **Tissan J. v. State of Kerala and others [2014 KHC 3123]** and **Brunton Boatyard (M/s.), Fort Kochi and another v. State of Kerala [2013 KHC 605]** in order to contend that there is suppression of the services rendered and hence the authorities are justified in imposing penalty on the petitioner.

9. Having heard the learned counsel on either side and

having perused the records, it is true that there is deficiency on the part of the assessee in bifurcating the luxury tax as well as VAT, even after the Rule had been amended. However, it is to be noticed that when the entire VAT amount has been paid for the total amount received which includes the rent for Banquet Hall or the Poolside, there is no deliberate attempt to evade payment of VAT or luxury tax. That apart, when the assessment orders were under challenge, this Court, while considering the assessment order with reference to the year 2005-06, held at paragraphs 5 and 6 as under:

> "5. However, it is to be noted that merely because there is no definite procedure as contemplated under Rule 3C for determination of luxury tax in the year 2005, it does not divest the petitioner from any liability to pay luxury tax in the light of *non obstante* clause under Section 4(2) of the Act. There is no dispute that the petitioner charged a consolidated amount as food bill, including service charges of banquet hall. The petitioner has failed to provide any other evidence to delineate the components of charges levied on the food bill. In that view of the matter, there is nothing wrong on the part of the Authority to apply the components under Rule 3C of the Rules to arrive at a

> calculation for the purpose of luxury tax. Though, Rule 3C would not apply, its yardstick can be applied to arrive at a best judgment. Therefore, I do not find any infirmity with the calculation of the luxury tax.
>
> 6. The learned Senior Counsel for the petitioner submits that the petitioner has already paid 12.5% VAT on full value of the banquet sales, the same has to be given credit by bifurcating rent and food sale. I do find merit in this argument. Since the petitioner has already paid VAT on full value on banquet sales, excess VAT paid has to be set off against luxury tax payable. Accordingly, the impugned order is set aside. Fresh assessment shall be made after giving credit to the excess VAT paid."

10. Though it was contended by the learned Senior Government Pleader that there is suppression, I do not think that the facts involved in the present case would demonstrate a case of suppression. It is apparently a mistake being committed by the assessee while imposing tax and insofar as no loss has been caused to the Government in that regard, I am of the view that there is no necessity to impose any penalty on the petitioner. If at all there is any deficit in the collection of tax, the same can be recovered by assessment

proceedings.

Under such circumstances, these writ petitions are disposed of as under:

W.P.(C) No.20226 of 2011 is allowed, setting aside the orders imposing penalty on the petitioner for the assessment years 2005-2006, 2006-2007 and 2007-2008.

As far as W.P.(C) No.24497 of 2011 is concerned, since I have already come to the conclusion that penalty need not be imposed on the fact of the case, this question does not arise for consideration. As far as the charging of luxury tax on the Poolside area is concerned, the Deputy Commissioner (Appeals) had come to a finding that the luxury tax is not leviable as far as the Poolside is concerned. Therefore, the penalty cannot be imposed. I do not think that there is any reason to consider the said question on merits. It is for the assessee to submit necessary returns taking into consideration the services they offer during the relevant years. There is no reason to consider these aspects separately in the persent proceedings. Therefore, I am of the view that this question can be left open to be decided in appropriate proceedings as far as the petitioner is concerned taking into account the nature of services that are being rendered by the petitioner.

Sd/-
A.M. SHAFFIQUE
JUDGE

Scl/05.08.2016