



WP(C) NO. 28762 OF 2017

2024:KER:85681

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE HARISANKAR V. MENON

MONDAY, THE 18TH DAY OF NOVEMBER 2024 / 27TH KARTHIKA, 1946

WP(C) NO. 28762 OF 2017

PETITIONER:

M/S. CRADLE CALICUT MATERNITY CARE PVT. LTD
NH 17 BYPASS ROAD, CALICUT, KOZHIKODE, KERALA 673014,
REPRESENTED BY ITS AUTHORISED SIGNATORY VELLEKAT
MOHAMED KASIM, DIRECTOR.

BY ADV SRI.JOSE JACOB

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY THE SECRETARY, COMMERCIAL TAXES,
GOVT OF KERALA, TRIVANDRUM, KERALA.
- 2 COMMERCIAL TAX OFFICER (LUXURY TAX),
OFFICE OF THE DEPUTY COMMISSIONER, COMMERCIAL TAXES,
CALICUT-673006.

BY SRI.SAYED M. THANGAL, SENIOR GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
18.11.2024, ALONG WITH WP(C).36848/2017, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE HARISANKAR V. MENON

MONDAY, THE 18TH DAY OF NOVEMBER 2024 / 27TH KARTHIKA, 1946

WP(C) NO. 36848 OF 2017

PETITIONER:

M/S. CRADLE CALICUT MATERNITY CARE PVT. LTD.,
NH 17 BYPASS ROAD, CALICUT, KOZHIKODE, KERALA-673014,
REPRESENTED BY ITS AUTHORISED SIGNATORY,
VELLEKAT MOHAMED KASIM, DIRECTOR.

BY ADV SRI.JOSE JACOB

RESPONDENTS:

- 1 INTELLIGENCE OFFICER [IB]
OFFICE OF THE DEPUTY COMMISSIONER (INTELLIGENCE),
COMMERCIAL TAXES DEPARTMENT, SALES TAX COMPLEX,
JAWAHAR NAGAR, ERANHIPALAM, CALICUT-673006.
- 2 DEPUTY COMMISSIONER (APPEALS)
COMMERCIAL TAXES DEPARTMENT, SALES TAX COMPLEX,
JAWAHAR NAGAR, ERANHIPALAM, CALICUT-673006.
- 3 KERALA SALES TAX APPELLATE TRIBUNAL
MARIYAM B BUILDING, NEAR UNION BANK, CHERUVATTU ROAD,
KOZHIKODE-673032.
- 4 COMMERCIAL TAX OFFICER (LUXURY TAX)
OFFICE OF THE DEPUTY COMMISSIONER, COMMERCIAL TAXES,
CALICUT-673006.

BY SRI.SAYED M. THANGAL, SENIOR GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
18.11.2024, ALONG WITH WP(C).28762/2017, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

**“C.R.”****JUDGMENT**

These two writ petitions are filed by the petitioner—a private limited company—mainly engaged in providing health care services, specialised in maternity related care/treatment.

2. The petitioner is holding registration under the provisions of the Kerala Tax on Luxuries Act, 1976 (hereinafter referred to as ‘the Act’). The petitioner has a total of twenty two rooms of which four are Suite Rooms and the balance eighteen are Deluxe Rooms. The petitioner points out that, it is also providing some “sophisticated medical beds” imported from abroad having multiple functions for providing optimum nursing care for expecting mothers. Petitioner points out that the afore medical facility is provided to the patients/expecting mothers who require special medical care, collecting a separate amount towards the use of the said bed. The petitioner points out that as regards the room rent



collected, it is admittedly satisfying luxury tax under the statute. However, as regards the charges for the facility of "medical bed", as above, the petitioner had not declared the said receipts under the statute and was also not paying tax thereunder, taking the stand that the receipts for the use of the medical bed as above, are outside the purview of imposition of luxury tax under the Act.

3. It is seen that the Commercial Taxes Department has initiated proceedings under Section 17A of the Act for the years 2012-13, 2013-14 and 2014-15, culminating in the issue of Exts.P5 to P7 orders, passed by the 1st respondent in W.P.(C)No.36848 of 2017. By the afore orders; penalty of Rs.9,38,532/- for 2012-13, Rs.11,52,690/- for 2013-14 and Rs.6,60,430/- for 2014-15, being double the tax as regards the facility of medical bed provided as above, is imposed. Though separate appeals were filed, those appeals stood rejected by Ext.P8 order dated 29.03.2017. The findings in the said appellate order at Ext.P8 is the subject matter of



challenge in W.P.(C)No.36848 of 2017.

4. On the basis of the imposition of penalty as above, and the appellate order confirming such penalty, the 2nd respondent in W.P.(C)No.28762 of 2017 has issued Exts.P8 to P10 orders of assessments for 2012-13 to 2014-15, demanding tax payable as against the facility for medical beds provided as above. It is also noticed that by the afore assessment orders, an equal amount of the alleged suppression detected by the Intelligence Officer in the orders of penalty, have been added towards probable omissions and suppressions so as to arrive at the total rent collection for the purpose of levy of tax. The said orders at Exts.P8 to P10 are the subject matter of challenge in W.P.(C)No.28762 of 2017.

5. I have heard Sri.Jose Jacob, learned counsel for the petitioner and Sri.Sayed M. Thangal, the learned Government Pleader for the respondents in these writ petitions.

6. Sri.Jose Jacob, the learned counsel for the petitioner, contends that:



- (i) The petitioner is not liable to tax as regards the amounts realized for the use of “medical beds” as above.
- (ii) He would submit with reference to Ext.P1 in W.P.(C) No.28762 of 2017 and Ext.P19 document and Ext.P20 catalog in W.P.(C)No.36848 of 2017 that the medical beds as above were an essential part of the professional services provided in the hospital and hence not liable to taxation under the statute.
- (iii) With reference to the various provisions of the statute, he would elaborate that the receipts as against the medical beds provided by the petitioner were outside the purview of taxation, and hence, the demand that is sought to be enforced is without any basis.
- (iv) Without prejudice, he contends that the department was not justified in imposing penalty and also making arbitrary estimation of the



turnover as against the petitioner.

7. Per contra, Sri.Sayed M. Thangal, the learned Government Pleader contends that:

- (i) The nature of use as highlighted in the writ petition proves that the sophisticated medical bed is nothing but a luxury.
- (ii) He would point out with reference to the provisions of the statute that the receipts against the medical beds as above, have not been exempted from taxation.
- (iii) He would also rely on the findings in the impugned orders to contend that the receipts towards the medical bed provided by the petitioner to the expecting mothers have to be assessed under the statute since what is provided by the petitioner is luxury.

8. I have considered the rival submissions as well as the connected records.



9. The following questions arise for consideration in these writ petitions:

- (i) Is the petitioner liable to tax with reference to the medical bed facility provided by it, under the statute?
- (ii) If the answer to the above question is in the affirmative, is the imposition of penalty under Section 17A of the Act justified?
- (iii) Is the completion of assessment by estimating the receipts for the purpose of assessment, justified?

10. As regards the first question, the admitted facts are already noticed. The Act provides for levy and collection of luxury tax under Section 4 thereto and as regards a hospital, the provision for taxation is 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, hereinafter called the 'luxury tax', in respect of any luxury provided,-

.....

- (iii) in a hospital.....



.....

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

.....

(e) in respect of a hospital, for charges of accommodation for residence for use of amenities and services, at the rate of ten per cent per room where the gross charges, excluding charges of food, medicine and the professional services, is one thousand rupees per day or more."

Thus, as regards the luxury provided in a hospital, the statute provides for levy of tax on "charges of accommodation for residence for use of amenities and services" at a particular rate, when those charges collected from the patient are in excess of Rs.1000 per head. A reading of the afore provision would show that luxury tax is sought to be demanded for the accommodation for residence provided in the hospital. The fact that the petitioner is also admitting that as regards the expecting mothers, they are being permitted the use of amenities and services while being accommodated in the hospital rooms is not disputed. The stand of the learned counsel for the petitioner is, essentially, to the effect that the



petitioner's disputed receipts fall under the exclusion provided thereunder. It is true that even if the hospital provides accommodation for residence in the hospital, the gross charges for the purpose of taxation are to be arrived at after excluding -

- (i) Charges for food
- (ii) Charges for medicine
- (iii) Charges for professional services.

Therefore, it is to be seen as to whether the disputed amounts collected by the petitioner fall within any of the afore three exclusions. There cannot be any difference of opinion that the disputed receipts do not fall under item Nos.1 and 2 above. As regards item 3, the exclusion is the receipts for "professional services". In other words, the exclusion can only be of the charges realized by a hospital for the professional services provided by the professionals, who were employed in the hospital and not any other receipts. Here, the disputed receipts collected are not towards any such professional



services. Admittedly, the afore receipts are for the use of a furniture in the hospital, which is a costly specialized medical bed, as seen from Exts.P19 and P20 documents/photographs/catalog produced by the petitioner. A reference to Ext.P20 catalog would show that certain specialized facilities are provided through the medical bed. Various features are also provided by the said medical bed. However, the fact that these are only certain devices that provide some additional facilities cannot be disputed.

11. In this connection, the judgment of the Apex Court in **Godfrey Phillips India Ltd. v. State of U.P. and Others [(2005) 2 SCC 515]** is to be referred to. That was a case wherein, the issue considered by the Apex Court was the challenge against the imposition of luxury tax by various states with reference to Entry 62 of List II, of the Constitution of India. The Apex Court has summarized the declaration of law as regards the definition of the term "luxury" as under:

"85. Hence on an application of general principles of



interpretation, we would hold that the word “luxuries” in entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognized as being beyond the necessary requirements of an average member of society and not articles of luxury.”

(underlining supplied)

Thus, ultimately, what is to be looked into is as to whether the facility provided is a necessary requirement of an average member of the society. There cannot be any dispute that even without the aid of the medical bed provided by the petitioner, an expecting mother can give birth.

12. This Court also notices the judgment of a Division Bench of this court in **Rajah Healthy Acres (P) Ltd. v. State of Kerala and Others [2016 SCC Online Ker 39400]**, wherein the challenge against the provisions of the Act providing for levy of tax on receipts in hospitals was considered. The Division Bench of this Court held as under:

“21. We see that what is attempted by the Legislature is not to tax the fundamental and inherent services of a hospital like food, medicine



and professional charges, but only the luxury of accommodation with adscitious amenities, and that too, the gross value of which per day is more than rupees one thousand. These amenities and facilities are not intended for recovery, healing or treatment of the patients but are obviously intended for better comfort and pleasure of both the patient and bystander in a room. The Act defines the word 'luxury' to mean a commodity or service that ministers comfort or pleasure. The facilities that are provided in a hospital which are beyond the essential requirements like food, medicine, and professional services and a basic room have been accepted as luxury by the legislature in classifying them as such under the Act through the impugned amendments.

22. The definition of luxury in **Godfrey Phillips** (supra) has been declared by the Hon'ble Supreme Court to mean an activity of indulgence or enjoyment in that which is costly or which is generally recognised as beyond the necessary requirements of an average member of society and not articles of luxury. Hence, such activity which is intended to provide comfort and pleasure beyond the requirements of the constitutive facilities of a hospital, which are essentially in the nature of food, medicine and professional services and a basic



accommodation, would then satisfy the definition and tests of luxury laid down by the Hon'ble supreme Court in **Godfrey Phillips** (supra). The tax levied is not on the article providing luxury but on the experience of such luxury. To employ a simple analogy - tobacco is an article of luxury and smoking is the luxury. In such view of the matter, it is irrefutable that the amendments impugned in these appeals do not seek to tax any article of luxury per se but only the experience of the luxury relating to good accommodation and other amenities not linked directly to therapeutic, sanative or ameliorative constituents or components of the services given to a patient under its care by the hospitals. As we have already noticed above, the word 'luxury' has been defined in the Act itself and, therefore, that definition would prevail and it is competent on the part of the legislature to give it a wide meaning so as to take in all such experience which ministers comfort or pleasure. This is completely and wholly within the competence of the Legislature to enact upon under Entry 62 of the VII Schedule of the Constitution, the matter being intrinsically and irreparably related to 'luxuries' as obtaining in the said Entry."

(underlining supplied)

Thus, ultimately what is taxed under the statute is the



experience of luxury as regards the accommodation/amenities in the hospital. There cannot be any challenge against an assessment with reference to the afore activity.

13. Though the learned counsel for the petitioner pointed out paragraph 22 referred to above, to contend that if the receipts are against amenities provided, which were directly linked to therapeutic, sanative or ameliorative constituents/components of services given in the hospital, I am of the view that such a challenge cannot be raised in view of the specific exclusion of three items alone under Section 4(2)(e) referred to earlier.

14. In the light of the above discussion, I am of the opinion that the petitioner is liable to tax on the charges collected as against the medical beds provided by it.

15. The 2nd issue arising for consideration is as to the sustainability or otherwise of the penalty imposed under Section 17A of the Act. Provisions of Section 17A, to the extent relevant hereunder read as under:



“Section 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

.....

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 this section shall be on such person.”

Thus, the statute entitles the assessing authority to impose a penalty in a situation, where an assessee has submitted an ‘untrue or incorrect return’. The fact that the petitioner had filed returns and satisfied tax as regards the receipts,



excluding the receipts for the medical bed in question, is not in dispute. In other words, the fact that the petitioner had satisfied tax on receipts as against the 22 rooms is admitted by the department. It is only that the receipts for the use of the medical bed were not declared in the return.

16. On a perusal of the impugned orders of penalty, it is seen that the petitioner was proceeding on the *bona fide* belief with reference to its non-liability as against the receipts for the use of the medical beds. The fact that what is being imposed is a penalty shows that unless and until *mens rea* is established, no penalty can be levied. There cannot be any contumacious conduct on account of the non-inclusion of the afore amounts in the return.

17. The Apex Court, in **Hindustan Steel Ltd. v. State of Orissa [AIR 1970 SC 253]** while considering the imposition of penalty in similar circumstances has held as under:

“An order imposing penalty for failure to carry out



a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a 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 the bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

18. In the light of the above, the imposition of penalty, which is the subject matter of challenge in W.P.(C)No.36848 of 2017 can only be declared as illegal.

19. The third issue arising for consideration is as regards the additions made by the assessing authority while finalizing the assessments at Exts.P8 to P10 orders in W.P.(C)



No.28762 of 2017. The amount of the alleged suppression as regards the receipts for the medical beds, already quantified in the penalty orders, was the basis for the finalisation of the assessment. Further additions on account of the afore receipts while finalising the assessments cannot be sustained since the actual receipts, which were not included in the returns, have already been quantified. When that be so, the further additions towards omissions and suppressions in Ext.P8 to P10 orders cannot be sustained.

On the whole, these writ petitions are disposed of as under:

- (i) It is found that the petitioner has the liability to satisfy luxury tax under the Act as against the receipts for the use of medical beds.
- (ii) The orders of penalty, as confirmed by Ext.P8 order in W.P.(C)No.36848 of 2017, are set aside.
- (iii) The 2nd respondent in W.P.(C)No.28762 of 2017 to pass a fresh assessment order for 2012-13 to



2014-15 by deleting the addition towards
“probable omissions and suppressions.”

- (iv) For facilitating the 2nd respondent in W.P.(C)
No.28762 of 2017 to pass fresh orders as above,
Ext.P8 to P10 challenged therein are set aside.

Sd/-

HARISANKAR V. MENON
JUDGE

Skk

APPENDIX OF WP(C) NO.36848 OF 2017PETITIONER'S EXHIBITS:

EXHIBIT P1	TRUE COPY OF THE NOTICE DATED 28-02-2015.
EXHIBIT P2	TRUE COPY OF THE NOTICE DATED 18-02-2015.
EXHIBIT P3	TRUE COPY OF THE NOTICE DATED 18-02-2015.
EXHIBIT P4	TRUE COPY OF REPLY DATED 09-04-2015.
EXHIBIT P5	TRUE COPY OF ORDER DATED 08-07-2015.
EXHIBIT P6	TRUE COPY OF ORDER DATED 08-07-2015.
EXHIBIT P7	TRUE COPY OF ORDER DATED 08-07-2015.
EXHIBIT P8	TRUE COPY OF THE APPELLATE ORDER DATED 29.03.2017.
EXHIBIT P9	TRUE COPY OF APPEAL DATED 20-06-2017.
EXHIBIT P10	TRUE COPY OF APPEAL DATED 20-06-2017.
EXHIBIT P11	TRUE COPY OF APPEAL DATED 20-06-2017.
EXHIBIT P12	TRUE COPY OF THE ORDER DATED 03-07-2017.
EXHIBIT P13	TRUE COPY OF THE ORDER DATED 04-07-2017.
EXHIBIT P14	TRUE COPY OF THE ORDER DATED 05-07-2017.
EXHIBIT P15	TRUE COPY OF THE JUDGMENT DATED 05-07-2017.
EXHIBIT P16	TRUE COPY OF THE APPLICATION FOR WITHDRAWAL DATED 03-11-2017.
EXHIBIT P17	TRUE COPY OF THE APPLICATION FOR WITHDRAWAL DATED 03-11-2017.
EXHIBIT P18	TRUE COPY OF THE APPLICATION FOR WITHDRAWAL DATED 03-11-2017.



EXHIBIT P19

TRUE COPY OF THE DOCUMENT TITLED 'THE
IMPORTANCE OF MEDICAL BEDS IN PROVIDING CARE
FOR PREGNANT MOTHERS' DATED 01.08.2024

EXHIBIT P20

TRUE COPY OF THE PRODUCT CATALOGUE OF THE
MEDICAL BEDS USED IN THE PETITIONER HOSPITAL
TITLED 'AFFINITY FOUR BIRTHING BED' DATED NIL

APPENDIX OF WP(C) NO.28762 OF 2017PETITIONER'S EXHIBITS:

EXHIBIT P1	COPY OF NOTE ON USAGE OF MEDICAL BEDS.
EXHIBIT P2	COPY OF THE NOTICE UNDER SECTION 6(5) OF THE ACT FOR THE FY 2012-13.
EXHIBIT P3	COPY OF THE NOTICE UNDER SECTION 6(5) OF THE ACT FOR THE FY 2013-14.
EXHIBIT P4	COPY OF THE NOTICE UNDER SECTION 6(5) OF THE ACT FOR THE FY 2014-15.
EXHIBIT P5	COPY OF THE REPLY TO NOTICE UNDER SECTION 6(5) OF THE ACT RELATING TO FY 2012-13.
EXHIBIT P6	COPY OF THE REPLY TO NOTICE UNDER SECTION 6(5) OF THE ACT RELATING TO FY 2013-14.
EXHIBIT P7	COPY OF THE REPLY TO NOTICE UNDER SECTION 6(5) OF THE ACT RELATING TO FY 2014-15.
EXHIBIT P8	COPY OF ORDER RELATING TO FY 2012-13.
EXHIBIT P9	COPY OF ORDER RELATING TO FY 2013-14.
EXHIBIT P10	COPY OF ORDER RELATING TO FY 2014-15.
EXHIBIT P11	TRUE COPY OF THE DOCUMENT TITLED 'THE IMPORTANCE OF MEDICAL BEDS IN PROVIDING CARE FOR PREGNANT MOTHERS' DATED 01.08.2024
EXHIBIT P12	TRUE COPY OF THE PRODUCT CATALOGUE OF THE MEDICAL BEDS USED IN THE PETITIONER HOSPITAL TITLED 'AFFINITY FOUR BIRTHING BED' DATED NIL.