

(2012) 06 KL CK 0015

In the High Court Of Kerala

Case No : Writ Petition No. 33966 of 2006

Asianet Satellite Communication Ltd.

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 28-06-2012

Acts Referred:

Constitution of India, 1950 — Article 14
Finance Act, 1994 — Section 2(ee), 4(2)

Citation : AIR 2013 Ker 105 : (2013) 57 VST 389

Hon'ble Judges : C.N. Ramachandran Nair, J; Babu Mathew P. Joseph, J

Bench : Division Bench

Advocate : Dushyant Dave and Saji Varghese, General, for the Appellant; K.P. Dandapani, Spl. Government Pleader, Sojan James and John Varghese, SC, Cen. Board of Excise, for the Respondent

Final Decision : Allowed

Judgement

C.N. Ramachandran Nair, J.—This WP(C) filed challenging the constitutional validity of levy of luxury tax on Cable TV Operators with effect from 01/04/2006 was dismissed by this Court along with a few other cases upholding the amendment made to the Kerala Tax on Luxuries Act, 1976 (hereinafter referred to as the Act for short). However, on appeal filed before the Honourable Supreme Court, the Supreme Court remanded the case vide judgment dated 03/02/2011 giving freedom to the petitioners to amend the WP(C) raising additional grounds in addition to those raised in the WP(C). Based on direction of the Supreme Court, the petitioners were allowed to amend the WP(C) and on the amended WP(C) the respondents took notice and filed counter affidavit. We have heard learned Senior counsel Shri. Dushyant Dave along with learned counsel Shri. Saji Varghese appearing for the petitioners and also learned Advocate General Shri. K.P. Dandapani along with learned Special Government Pleader (Taxes) Shri. Sojan James appearing for the respondents. Both sides have also filed written argument notes, which also we have perused.

2. The Act was amended by Finance Act, 2006 introducing luxury tax on cable TV operators @ Rs. 5/- per connection to be collected and remitted from every subscriber of cable TV. The amendment made with effect from 01/07/2006 was challenged before this Court mainly on the ground that service provided by the cable TV operators do not amount to "luxury" within the meaning of Entry 62 of IInd List of the VIIth Schedule to the Constitution as well as the definition of that term contained in the Act. Another ground raised was that the provisions are discriminatory and violative of Article 14 of the Constitution of India inasmuch as Direct-to-Home operators providing same service to consumers were not subjected to luxury tax. This Court however rejected the contentions by holding that cinema and various entertainment programmes provided to subscribers by cable operators answer the description of "luxury" under the Act, and the levy is in fact on subscribers and petitioners are only required to collect and remit the tax. The judgment was challenged in appeal and during the pendency of the Appeals in the Supreme Court, the Government retrospectively amended the Act by exempting from liability those cable TV operators who had less than 7500 connections given to subscribers. This retrospective amendment was raised as a new ground before the Supreme Court for challenging the judgment and in turn the provisions of the Act. Besides this, the petitioners also raised the contention before the Supreme Court that this Court in the judgment has not considered the challenge against the constitutional validity with reference to Direct-to-Home operators who are also providing same service. Taking note of these contentions namely the subsequent amendment and petitioners' challenge based on Article 14 with reference to Direct-to-Home operators, the Supreme Court set aside the judgment and remanded the matter for enabling the petitioners to amend the WP(C) raising additional grounds for consideration by this Court.

3. Learned Senior Counsel Shri. Dushyant Dave appearing for the petitioners argued in support of all the grounds raised including the additional grounds raised after remand by the Supreme Court. The first ground raised by him is that the service rendered by the cable TV operators falls under Entry 92C, List I of the VIIth Schedule of the Constitution which is covered by the Finance Act, 1994 providing for service tax on cable TV operators. Since the field is fully occupied by Central legislation, the State has no authority to levy tax under the Act in exercise of powers under Entry 62 of List II of the VIIth Schedule of the Constitution of India is the contention raised. Learned Advocate General appearing for the respondents on the other hand, relied on the decision of the Supreme Court in *The State of West Bengal and Others Vs. Purvi Communication Pvt. Ltd. and Others*, wherein the Supreme Court held that service rendered by cable TV network through which films, serials and various other programmes are shown to the consumers, amounts to entertainment, on which levy of tax could be authorised by the State legislature under Entry 62, List II of Schedule VII. The contention raised by the petitioners' counsel is that u/s 2(ee) of the Act, luxury is defined as to mean a commodity or service that ministers comfort or pleasure. According to the petitioners, cable TV connection is taken by large

number of people in the State and monthly contribution is only around Rs. 200/-, and therefore going by the meaning of luxury explained by the Supreme Court in the decision in *Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others*, , cable TV connection cannot be termed as luxury. Even though learned counsel for the petitioners relied on several other decisions of the Supreme Court, particularly in *Ayurveda Pharmacy and Another Vs. State of Tamil Nadu*, and in *Aashirwad Films Vs. Union of India (UOI) and Others*, , though not directly on the point but which have a bearing on the interpretation of the constitutional entries, what we notice is that the issue is squarely covered by the decision of the Supreme Court in *Purvi Communication's* case stated above. Even though "entertainment" as such is not specifically stated in the Act and what is defined is only luxury, we notice that Entry 62 of list II of Schedule VII specifically covers "entertainment" separately along with luxury and going by the decision of the Supreme Court in the above case, there can be no doubt that the State can levy tax on "entertainment" as tax on luxury under the said entry of the Constitution. The fact that service tax payable by cable TV operators under the Central Act also should not stand in the way of State levy of luxury tax because the Supreme Court in the decision in *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, , held that same transaction may attract liability for service tax as well as liability for tax under any other head permissible in law. So much so, since the service rendered by cable TV Operators involves "entertainment" to subscribers certainly both service tax as well as luxury tax could be levied. Further, what we notice is that service tax is payable on taxable service, which is the charges collected by the cable TV operators from subscribers for providing the service. Cable TV provides facility to consumers to access news, serials, cinemas and other entertainment programmes telecast in various channels. The provision in the charging section of the Act, i.e. Section 4(2), is to levy Rs. 5/- per connection per month towards luxury tax and collection from the subscriber is to be made compulsorily under the provision. So much so, what is to be seen is that though the tax is a charge on the cable TV operators, the incidence of tax falls on the subscribers, i.e. Rs. 5/- per month, which is probably 2% of the monthly collection by the cable TV operators from the customers as average collection ranges from Rs. 200/- to Rs. 250/- per month. We therefore, do not find any constitutional infirmity in the levy of luxury tax on cable TV operators which they are bound to collect and remit from the subscribers at the rate of Rs. 5/- per month, which is in addition to the service tax payable for the service provided by the cable TV operators.

4. The next ground raised by the petitioners' counsel is based on Article 14 of the Constitution of India inasmuch as while the Government retrospectively exempted all cable TV operators who have less than 7500 connections from tax liability, the cable TV operators who have above 7500 connections are discriminated by making them alone liable to pay luxury tax. This is an additional ground provided to the petitioners by the Government by making amendment to the statute in 2010 when appeals against this Court's judgment was pending

before the Supreme Court. Learned Senior counsel has referred to the statistics about the number of cable TV operators and their subscribers to contend that more than 90% of the operators are now outside the tax limit. We find force in the contention of the petitioners' counsel because the legislation was originally and even now sustained by us by holding that the incidence of tax is intended to be on the subscribers for the entertainment they enjoy and cable TV operator is only a collecting agency by virtue of the charge on them under the Act. Even though learned Advocate General submitted that classification is reasonable and the test laid down by the Supreme Court in various decisions on constitutional validity are satisfied, we do not know how there can be reasonable classification between cable TV operators with connections below 7500 and cable TV operators with connections above 7500 with reference to object of legislation that is to collect Rs. 5 each from every subscriber per month as luxury tax for the luxury or entertainment he/she enjoys at home through a cable TV connection. In fact, cable TV operators with 7500 consumers in rural areas are maintaining a big network with substantial infrastructure and manpower for maintenance. So far as subscriber is concerned, it makes no difference for the facility enjoyed by him whether the cable TV operator who serves him has above or below 7500 connections. When tax liability is to be borne by subscriber, he can avoid tax liability by joining an operator with less than 7500 connections. This is a clear discrimination without any basis is what we think. We do not want to refer various judgments of the Supreme Court on the application of Article 14 because it is settled position that legislation in taxation matters also should conform to the discipline contained under Part III of the Constitution inasmuch as tax should be levied without discrimination. We have to also take into account the subsequent amendment made to the statute in the year 2011 completely exonerating all cable TV operators including the petitioners, which is probably the largest operator in the State. So much so, the whole effort of the State now is to sustain the legislation for five years to collect the arrears from the petitioners and probably few others who have connections above 7500. In our view, the change of Policy and the subsequent two amendments have provided grounds to the petitioners and others to effectively and successfully challenge the constitutional validity of the legislation.

5. We are constrained to observe that going by the above two decisions of the Supreme Court we would have sustained the constitutional validity of the levy of luxury tax on cable TV connections but for the amendment in 2010 exonerating cable TV operators with less than 7500 connections. As already stated, after the amendment of 2011, cable TV operators irrespective of number of connections are completely exonerated from levy of luxury tax and therefore, this case only serves the purpose of collecting arrears from the petitioners and other cable TV operators with connections above 7500 for the period of four to five years from 2006 to 2010. We have already found that retrospective amendment of 2010 exonerating cable TV operators with less than 7500 connections from liability is discriminatory and violative of Article 14 of the Constitution of India because the

State could not bring to our notice any distinction between those operators with less than 7500 connections and those with 7500 or above connections with the object of levy of luxury tax at the rate of Rs. 5 per month per person enjoying connection. We therefore, declare the levy of luxury tax on cable TV operators with above 7500 connections as discriminatory and violative of Article 14 of the Constitution of India, and hence unconstitutional. Even though the petitioners have succeeded on the first additional ground raised and decided above, learned Senior counsel appearing for the petitioners wanted us to consider the next additional ground raised that is the allegation of discrimination and violation of Article 14 of the Constitution of India with reference to the Direct-to-Home operators, who are providing same service as cable TV operators to the subscribers. Learned Advocate General appearing for the respondents submitted that the argument is academic in nature because during 2006 when luxury tax was introduced on cable TV operators, Direct-to-Home connections were not in vogue. Further, the learned Advocate General brought to our notice the subsequent amendment, whereunder luxury tax is specifically introduced for Direct-to-Home operations. We find force in the contention of the learned Advocate General because Direct-to-Home connections were not popular or extensive in the State when luxury tax was introduced on cable TV operators in 2006, and as and when the Direct-to-Home operations became extensive and popular attracting lot of subscribers, the Government introduced luxury tax on Direct-to-Home operators. The allegation on the ground of discrimination cannot be considered hypothetically or theoretically and it has application only when the parties in relation to whose operations discrimination is alleged also are in actual and effective business. The petitioners also could not establish with any statistics as to the number of connections or magnitude of operations under the Direct-to-Home Scheme at the time when the impugned amendment was passed in 2006 levying luxury tax only on cable TV operators. We therefore, do not find any merit in the challenge against the legislation on this ground.

For the reasons above stated, we allow the WP(C) by declaring the impugned provisions of the Act authorizing levy and collection of luxury tax on cable TV operators including petitioners with connections of 7500 or above as discriminatory and hence unconstitutional and invalid. Consequently, all notices and proceedings issued under the Act are vacated. This WP(C) is allowed as above.