

(2009) 08 KL CK 0097

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 33966 and 32816 of 2006, 21040, 22721 and 35719 of 2007

Asianet Satellite Communications Limited and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 27-08-2009

Acts Referred:

Cable Television Networks (Regulation) Act, 1995 — Section 2
Constitution of India, 1950 — Article 14, 268A
Finance Act, 1994 — Section 65(105), 65(22), 66
Kerala Tax on Luxuries Act, 1976 — Section 2, 4(2)

Citation : (2012) 3 KLJ 672 : (2011) 37 VST 321

Hon'ble Judges : C.N. Ramachandran Nair, J;C.K. Abdul Rahim, J

Bench : Division Bench

Advocate : C.S. Vaidyanathan and Saji Varghese, for the Appellant; Vinod Chandran, Special Government Pleader and John Varghese, Standing Counsel, Central Board of Excise, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The connected W. P. (C)s are filed by cable operators challenging the constitutional validity of the provisions introduced to the Kerala Tax on Luxuries Act, 1976 (hereinafter called, "the Act") by the Finance Act, 2006 with effect from April 1, 2006, authorising levy of luxury tax at the rate of Rs. 5 per connection per month to be collected and remitted by every cable TV operator from the person enjoying the connection. In one of the writ petitions a subscriber to cable TV connection is also a petitioner along with the cable TV operating company. We have heard senior counsel Sri C. S. Vaidyanathan and other counsel appearing for the petitioners, Special Government Pleader Sri Vinod Chandran, appearing for the State and Sri John Varghese, counsel appearing for the Customs, Excise and Service Tax Department of the Central Government.

2. The impugned provisions providing for the levy of luxury tax introduced in the

Act are extracted hereunder for easy reference :

Section 2. Definition clauses--...

(ca) "cable operator", means a person engaged in the business of receiving and distributing satellite television signals, communication network including production and transmission of programmes and packages for a monetary consideration.

(fa) "Luxury provided by a cable operator" means any service by means of transmission of television signals by wire, where subscriber's television set is linked by metallic co-axial cable or optic fibre cable to a central system called the "headend" and by using a video cassette or disc or both, recorder or player or similar such apparatus on which pre-recorded video cassettes or disc or both are played or replayed and the films or moving pictures or series of pictures which are viewed and heard on television receiving set at a residential or a non-residential place of a connection holder.

3. Charging section:

Section 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,--

(i)...

(ii) by cable operators;

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

(d) in respect of a cable TV operator at the rate of rupees five per connection per month, and shall be collectable from the person enjoying the luxury :

Provided that no luxury tax shall be payable in respect of a connection provided by a cable operator engaged in the distribution of programmes of Doordarshan channels only:

Provided further that luxury tax, if any, collected shall be paid over to the Government:

4. Leading the arguments for the petitioners, learned senior counsel Sri C. S. Vaidyanathan first contended that the State Legislature has no authority to introduce the tax on cable TV operator or on their subscribers under entry 62 of List II of the Seventh Schedule to the Constitution of India which gives authority to the State to levy taxes on luxuries, including taxes on entertainments, amusements, betting and gambling. In the first place, counsel relied on a decision of the Supreme Court in *Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others*, and contended that a cable TV connection enjoyed by a customer cannot be termed a luxury enjoyed by the customer. The finding of the Supreme Court relied on by the counsel is the following:

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 recognised as being beyond the necessary requirements of an average member of society and not articles of luxury.

5. It is worthwhile to note that the Supreme Court has mainly held that there can be no luxury in respect of a commodity which is not the case here because here tax is levied not on any commodity, but on the enjoyment of the programmes by the person who enjoys a cable TV connection. In order to substantiate the contention, counsel has furnished the statistics pertaining to the number of television users in various districts in the State and the cable TV connections enjoyed by large number of subscribers. It is a fact that most of the average households have television connection. However, from the statistics furnished we are unable to accept the position that cable TV connection is a facility enjoyed by all TV viewers. On the other hand, a cable TV connection costs a monthly subscription fee ranging from Rs. 150 to Rs. 200 payable by every subscriber. In our view, it is a facility enjoyed by the middle class and above and not by all those who have TV. It cannot be said that an annual subscription fee of around Rs. 2,500 payable by a customer for maintaining a cable TV connection besides the initial cost of connection paid is a very low amount which an average Keralite can afford easily. There cannot be any doubt that a cable TV connection is not a necessary requirement of an average member of the society because a person who has a television set can with the help of an ordinary antenna watch programmes telecast by Doordarshan in their channels. Therefore, we have to only consider whether the other tests laid down by the Supreme Court about luxury are satisfied in respect of a cable TV connection enjoyed by the customer. Luxury, though not defined in the Constitution, is defined u/s 2(ee) of the Act, which "means a commodity or service that ministers comfort or pleasure". No one can dispute that a person who takes a cable TV connection avails of the facility to see pay channel programmes telecast by foreign telecast networks, movies and other entertainment programmes which are not generally available in Doordarshan channels. Applying the tests laid down by the Supreme Court we find that a cable TV connection is a "luxury" and therefore, the State is entitled to legislate on the subject under entry 62 of List II of the Seventh Schedule to the Constitution of India. The honourable Supreme Court in the decision in *State of West Bengal v. Purvi Communication P. Ltd.* reported in (2005) 140 STC 154 held that the performance, film or other programmes shown to the viewers through the cable television network comes within the meaning of "entertainments" and, therefore, within the legislative competence of the State Legislature under entry 62 of List II of the Seventh Schedule to the Constitution of India to make a law for the levy and collection of tax on such entertainments. In our view, it makes no difference whether the Legislature has treated cable TV connection, which essentially shows entertainment programmes, movies, etc., as an entertainment or a luxury because in either case the subject of legislation is

within the powers of the State Legislature under entry 62 of List II of the Seventh Schedule to the Constitution of India. We, therefore, reject the contention of the petitioners that the legislation is beyond the legislative competence of the State under entry 62 of List II of the Seventh Schedule to the Constitution of India.

6. The next contention raised by the petitioners is that the field is one occupied by Central legislation inasmuch as there is service tax payable by the cable TV operators for the services rendered by them to the subscribers. No doubt section 66 read with sections 65(22) and 65(105)(zs) of the Finance Act, 1994, provides for service tax on service rendered by "cable operator" in relation to cable services falling u/s 2(aa) of the Cable Television Networks (Regulation) Act, 1995. "Cable operator" means any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of a cable television network. According to the petitioners, being cable TV operators, they are required to pay 12.24 per cent of the amount collected from the subscribers towards service tax. It is their contention that the Supreme Court has upheld the validity of service tax under entry 97 of List I of the Seventh Schedule to the Constitution which is now specifically covered by article 268A of the Constitution and entry 92C of List I of the Seventh Schedule inserted by the 88th Amendment to the Constitution. Therefore, according to the petitioners, once service tax is levied on the cable services provided, the State has no authority to levy luxury tax on the very same services. The respondents contended that service tax is payable on the taxable service which is the total amount collected by the service provider from the subscribers for the cable TV services rendered. However, in this case it is very clear from the charging section that luxury tax is payable by the subscriber at the rate of Rs. 5 per connection per month and the liability of the service provider, namely, the petitioners, is only to recover the same from the customers and remit to the Government. We are in complete agreement with the argument of the State that the liability is not on the petitioners as cable TV operators, but is on the subscribers who have taken cable TV connection enjoying the luxury. In fact, the incidence of luxury tax on cable TV connection though directly falls on the customer, for the sake of easy recovery, the petitioners have been required to collect and remit the same to the Government. In our view, the petitioners cannot have any grievance against the levy of luxury tax at the rate of Rs. 5 per connection per month because if the Government had prescribed any other machinery or procedure for recovery from subscribers of cable TV without involving the petitioners, then the petitioners would not have got right to contest the levy. The Supreme Court has in *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, held that same or composite transactions may involve liability for service tax on services rendered and sales tax on sale of goods. If the ratio of the above decision is applied herein, then certainly the Central Government can levy service tax on the charges received by the cable service provider for the taxable services rendered by them and at the same time,

the subscribers enjoying the luxury from the cable TV connection, could be made liable for payment of luxury tax. As already noted by us, the incidence of luxury tax is not on the cable operators, but under the Act they are just required to collect luxury tax along with charges payable to them by the subscriber and remit the same to the Government. We do not find the statutory duty cast on the cable operators for the collection and remittance of tax from the subscribers can be considered arbitrary as claimed by them because petitioners are regularly collecting charges from the subscribers every month and along with charges payable to them, they can recover the luxury tax also and remit the same to the Government.

7. In view of our finding above that the petitioners cannot have any grievance against imposition of luxury tax which directly falls on the subscriber, the question to be considered is challenge raised against the statutory provision by one of the subscribers who is a party along with the service provider in W. P. (C) No. 33966 of 2006. The average monthly charges payable for enjoying a TV connection ranges from Rs. 150 to Rs. 200. In other words, as against the subscriber paying around Rs. 200 every month to the service provider for the cable TV connection retained by him, he has to pay a paltry sum of Rs. 5 towards luxury tax payable to the State Government. It is the settled position that so long as the levy of tax is constitutional, the court has no authority to go into the reasonableness of the levy or justification of the same which are purely matters of legislative policy. Further, cable TV subscribers as a whole or any substantial number have not approached this court raising objection against the levy which means that there is general acceptability of the tax liability by those who are liable under the Act. We, therefore, find no merit in the challenge raised by the individual subscriber against the levy of luxury tax on cable TV subscriber who enjoys the luxury.

8. The next ground of challenge raised is based on article 14 of the Constitution and the reason for the challenge is that under the charging section 4 there is exemption in respect of connection provided by a cable operator engaged in the distribution of programmes of Doordarshan channels only. According to the petitioners, Doordarshan is also telecasting movies and entertainment programmes of the type transmitted by the cable TV operators through their lines and so much so, services are similar in nature. The respondents on the other hand contended that Doordarshan is a Government of India undertaking and the programmes in their channels are modulated in such a way that it covers news, programmes on agriculture, education, farming, etc., and the limited movies and entertainment programmes telecast by them are not comparable with the variety of programmes provided by cable TV operators which include programmes of foreign telecasting companies. We are in agreement with this contention because what is excluded is only telecast of Doordarshan programmes distributed through cable network which include very limited entertainment programmes, whereas cable TV operators give exposure to the subscribers to various channels besides exhibiting large number of entertainment programmes

of their own including movies, sports, etc. In fact, anybody installing a TV with antenna will have access to Doordarshan channels without any payment, whereas cable TV subscribers get access to pay-channels and lot of entertainment programmes shown by cable TV operators. Therefore, those who have access to only programmes from Doordarshan channels are not comparable to other class of cable TV subscribers who get access to large number of other channels and entertainment programmes. So much so, we do not find any substance in the allegation of discrimination pertaining to exclusion of subscribers who have taken only cable connection giving Doordarshan channels only. This contention also, therefore, fails and is rejected.

9. Senior counsel appearing for the petitioners raised a contention that the definition of "proprietor" contained u/s 2(h) of the Act is not amended to cover cable network operator to be covered under it and in view of this lacuna, levy is not permissible against the cable TV operator. We are unable to accept this contention because even without inclusion of cable TV operator under clause (h) of section 2, they are required to recover the tax and remit the same through the mandatory provision contained in clause (d) of section 4(2) of the Act, which says that the luxury tax at the rate provided therein shall be collected from every person enjoying the connection. In fact, the right to collect tax unlike in other statutes is not left to the discretion of the cable TV operators, but the statute makes it their duty to collect and remit the same to the Government. We, therefore, find no merit in this contention raised by the petitioners and therefore, the same is also rejected.

10. In view of the findings above, we uphold the constitutional validity of the legislation. However, since the matter was pending before this court and this court had stayed proceedings for recovery, there will be direction to the respondents not to levy or recover penalty, if the petitioners file returns and remit the arrears of luxury tax within one month from date of receipt of copy of this judgment.