

**(2015) 05 RAJ CK 0064**

**In the Rajasthan High Court**

**Case No :** Sales Tax Revision Petition Nos. 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139 and 140/2013 and 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41 of 2014

Citymax Hotels (India) Pvt. Ltd.

APPELLANT

Vs

CTO Anti Evasion Zone-I

RESPONDENT

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**Date of Decision :** 01-05-2015

**Acts Referred:**

Rajasthan Entertainments and Advertisements Tax Act, 1957 — Section 2, 2(5), 7(2)

**Citation :** (2015) 83 VST 314

**Hon'ble Judges :** Mohammad Rafiq, J

**Bench :** Single Bench

**Advocate :** Vaibhav Kasliwal, for the Appellant; Tanvi Sahai on behalf of R.B. Mathur, Advocates for the Respondent

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**Judgement**

Mohammad Rafiq, J.—Since similar issues of facts and law are involved in these matters, they are being decided by this common judgement, treating STR No. 128/2013 as the lead case.

2. All these revision petitions have been filed by the petitioner-M/s. Citymax Hotels (India) Pvt. Ltd., a company incorporated under the Companies Act, 1956 having its registered office at Jaipur. Petitioner-company carries on the activity of providing for a charge, games and indoor sports activities at its outlet known as Fun City located at Third Floor, MGF Mall, 22 Godam Circle, Jaipur. A survey was conducted by the officers of Anti Evasion Wing of the Commercial Taxes Department at its premises on 27.7.2010. The cause and reason of the survey was the activities carried out by the petitioner-company in providing opportunity of gaming and playing sports to visiting customers, which attracts liability under the Rajasthan Entertainment and Advertisement Tax Act, 1957. Consequent upon survey, a consolidated notice was issued by the Assessing Authority to the petitioner company on 23.3.2011, proposing to assess the liability of entertainment tax for the period from October, 2007 to March, 2009. The

assessment orders were passed by the competent authority on 31.3.2011 wherein a total receipt of Rs. 8,25,529 for the month of March, 2009, tax of Rs. 2,47,659, interest of Rs. 58,623 and penalty of Rs. 4,95,318, totaling to Rs. 8,01,600, came to be assessed. The assessment order accompanied with notice of demand was served upon the petitioner-company. Petitioner-company preferred appeal thereagainst before the Deputy Commissioner (Appeals-II), Commercial Taxes, Jaipur, who by order dated 7.12.2011 partly allowed the appeal and directed the Assessing Authority to bifurcate the revenues of petitioner-company into screen based and non-screen based video games and thereafter assess the tax liability of screen based video games and further determine whether entertainment tax would be leviable on non-screen based video games or not. The penalty levied of Rs. 4,95,318 was set aside on the ground that all the transactions were disclosed by the petitioner in its books of accounts and there was no concealment of revenue.

3. Aggrieved by part non-acceptance of appeal by Deputy Commissioner (Appeals-II), Jaipur, the petitioner-company preferred a further appeal before the Rajasthan Tax Board. A counter appeal was also filed by the revenue against part acceptance of appeal by the Deputy Commissioner (Appeals-II) setting aside the penalty. The learned Tax Board by the impugned judgement dated 28.3.2013 dismissed the the appeals filed by both the sides. Aggrieved thereby, the assessee-company has approached this Court in the present sales tax revision petitions.

4. In the revision petition, the following questions of law arises for consideration of this Court:

"1. Whether video games which are games for all intents and purposes and also fall within the broader sense of term can be treated to be outside the definition of games and hence denied the benefit of notification dated 26.3.1999.

2. Whether the benefits granted by a notification can be withdrawn by issuing a non-speaking and non-clarificatory clarification?

3. Whether anti-evasion authorities can assume jurisdiction, when the regular assessing authority has failed to carry out any assessment within the prescribed limitation.

4. Whether video games which are "games" for all instants and purposes and also fall within the broader sense of the term, can be treated to be outside the definition of "games" and hence denied the benefit of notification dated 26.3.1999?

5. Whether the benefits granted by a notification can be withdrawn by issuing a non-speaking and non-clarificatory clarification?"

5. In the course of arguments, however, learned counsel for the parties have confined their arguments on question Nos. 1, 2, 4 and 5 and therefore the matters are being decided on those questions, excluding question No. 3.

6. Shri Vaibhav Kasliwal, learned counsel for the assessee-petitioner argued that the Assessing Authority was wholly unjustified in passing ex-parte assessment order dated 31.3.2011 in a hasty manner, without giving an opportunity of hearing to the petitioner-company and without following due process of law prescribed in the Act. The learned appellate authority and the Tax Board failed to appreciate that separate assessment orders required separate show cause notices and such assessment order in respect of different months could not be passed on single show cause notice for the entire financial year. The notice of assessment was served in Form-O by merely indicating the description "Notice for Reassessment" in place of heading "Notice for Assessment". The proceedings of re-assessment thus should be vitiated for reason of non-compliance of the statutory provisions inasmuch as no adherence to the principles of natural justice.

7. Learned counsel for the petitioner has argued that the issue of "taxing of non-screen based video games" was decided against the department at the stage of first appeal as also by the Tax Board. The department having not preferred the appeal/revision thereagainst, the issue of not taxing of "non-screen based video games" has attained finality in view of concurrent findings. As such, the essential ingredients for levy of entertainment tax namely "payment of admission" is not attracted in respect of the petitioner's outlet.

8. Shri Vaibhav Kasliwal, learned counsel for the petitioner further argued that the first appellate court and the Tax Board have erred in law in holding that the clarification dated 23.10.2004 specially excluded all video games and video parlors from the purview of the entry No. 6 of the notification dated 26.3.1999. It is well settled law that when a notification of government provides for exemption, the same cannot be withdrawn by clarification issued by the department. The requirement of law in issuing statutory notification has not been followed in issuance of the clarification notification dated 23.10.2004 and, therefore, the same cannot be made basis for withdrawing the benefit of exemption otherwise admissible to the petitioner under the statutory exemption notification dated 26.3.1999. It is argued that the learned Tax Board has also failed to appreciate that clarification cannot be applied in supercession of the notification. In support of his argument, learned counsel has relied on the judgement of Gujarat High Court in Inter Continental (India) Vs. Union of India (UOI) and Others, (2002) 82 ECC 497 : (2005) 118 ECR 167 : (2003) 154 ELT 37 : (2002) 2 GLR 1337 decided on 20.2.2002, which judgement was upheld by the Supreme Court by dismissing the Appeal (Civil) No. 6529/2002 filed thereagainst vide judgement dated 23.4.2008. Reliance is also placed on judgement of the Supreme Court in ITC Ltd. vs. Commissioner of Central Excise, Appeal (Civil) No. 70/1999 decided on 10.9.2004 with respect to prevalence of a notification.

9. Ms. Tanvi Sahai, learned counsel for the revenue opposed the revision petitions and argued that petitioner-assessee is a un-registered dealer carrying on the business of providing video games and indoor activities for a charge. Upon

a survey, which was conducted by the Anti Evasion Wing of the department, it was found that the services provided by the petitioner would fall under the purview of "entertainment" and therefore would attract a tax levy under the Rajasthan Entertainment and Advertisement Act, 1957. Since the petitioner failed to furnish any satisfactory reply to the notice, the assessing authority had rightly passed the assessment order and served a demand notice. It is argued that Section 2(5) of the Act, which defines "entertainment" that includes any exhibition(show), performance, amusement, games, or sport and cable services to which persons are admitted for payment. There is no dispute that the present assessee is engaged in the activity of providing video game and other indoor game facility to its customers. For the purpose of availing these videos game facilities, a "fun city" card is issued to the customers on payment and this card is further recharged on the wishes and requirement of the customer.

10. Learned counsel for the Revenue placed reliance on judgement of the Supreme Court in Geeta Enterprises and Others Vs. State of U.P. and Others, AIR 1983 SC 1098 : (1983) 2 SCALE 275 : (1983) 4 SCC 202 : (1983) 3 SCR 812 and argued that video games are the latest addition to the concept of entertainment and video game parlors providing the said services fall within the domain of entertainment. Therefore, the present matters are squarely covered by this judgement of the Supreme Court. Reference in particular is made to the observations made by the Supreme Court in para 14 of the report. It is argued that though the State Government by notification dated 26.3.1999 remits in full as many as fourteen activities of entertaining from the entertainment tax including the Additional Entertainment Tax, but in continuation therewith, the State Government also issued a clarification on 23.10.2004 regarding "all kinds of games and sports" mentioned at S. No. 6 of the notification dated 26.3.1999 to say that video games and videos games parlors are not covered under the entry No. 6 appended to the notification dated 26.3.1999 "all kinds of sports and games". Learned counsel in support of his argumetns has relied on the judgement of Bombay High Court in Ramesh Sippy and etc. Vs. State of Maharashtra, AIR 1989 Bom 250 : (1988) 3 BomCR 642 : (1988) 90 BOMLR 578 : (1989) MhLj 165 .

11. I have given my thoughtful consideration to the rival submissions and perused the material on record.

12. The State Government, in supercession of notification dated 16.10.1985 and 8.5.1986, issued a notification dated 26.3.1999 in exercise of powers conferred under Section 7(2) of the Rajasthan Entertainment and Advertisement Tax Act, 1957. The State Government by this notification dated 26.3.1999 exempted certain class of entertainment including the additional entertainment tax chargeable under the said Act, which includes musical program, drama, songs and dances, puppet shows, kavi sammelan and mushairas, all kinds of sports and games, dungals, wrestling including free style wrestling and physical exercises, qawwali, mela and various items of entertainment, flower show, circus and magic

show. In continuation with the aforesaid notification, a clarification was also issued by the State Government on 23.10.2004 regarding "all kinds of games and sports" mentioned at entry No. 6. The clarification notification reads as under:

"GOVERNMENT OF RAJASTHAN FINANCE DEPARTMENT (TAX DIVISION)

No. F.10(1) FD/Tax/98-Pt-I

Jaipur, dated 23.10.2004

CLARIFICATION:

Subject: Regarding levy of Entertainment Tax on Video Games and Video Game Parlours.

The State Government has issued notification No. F.10 (6) FD/Tax-Div/99-168 dated 26th March, 1999 in relation to exemption from Levy of Entertainment Tax on certain classes of Entertainments. Vide entry No. 6 of the above mentioned notification the Government has exempted "All kind of Sports and Games" from levy of Entertainment Tax including the Additional Entertainment Tax chargeable under the Rajasthan Entertainments and Advertisements Tax Act, 1957.

It has been brought into the notice of the Government that there is some confusion regarding whether entry No. 6 of the above notification also includes Video Games and Video Game Parlours making them eligible for benefit of exemption. In this regard it is clarified that, "Video Games and Video Game Parlours" are not covered under the above mentioned entry No. 6 appended to notification No. F.10 (6) FD/Tax-Div./99-168 dated 26.3.1999 and hence are taxable at appropriate rates.

Needful may be done accordingly.

Sd/- (Ajitabh Sharma) Deputy Secretary to Government"

13. Indisputably, the aforesaid clarification dated 23.10.2004 has been issued by the Deputy Secretary to Government, Department of Finance, Government of Rajasthan and therefore it will have to be read into entry No. 6 of the original notification as to what would be meant by "all kinds of games and sports" as in the opinion of the State Government this has become necessary because there was some confusion whether the said entry would also include video games and video games parlors making them eligible for benefit of exemption. The Tax Board has rightly held that a scrutiny of general meaning of the words, games and sports, reveals that in collective psyche of masses they are considered as, and in common parlance, called tournaments, matches, events etc. of such activities as cricket, soccer, hockey, table tennis, lawn tennis, badminton, races, swimming, boxing and kabaddi etc. has made the following decision on analysis of the aforesaid notification/clarification as to whether the video games and video games parlors can be considered even otherwise to fall within the purview of "all kind of sports and games" and has made the following observations:

"An analysis of the above expositions is essential for adjudication sought by the counsel of the appellant dealer on the controversial "issue about which of the two shall prevail, the notification dated 26.3.1999 or the clarification dated 23.10.2004". There appears to be no ambiguity in respect of the meaning and intent of the notification dated 26.3.99 and the clarification dated 23.10.2004 issued in this regard, because the impugned clarification is just an explanation and is coherent and at tandem with inherent nature of the Notification dated 26.3.99. A scrutiny of the general meaning of the words, games and sports, reveals that in collective psyche of masses they are considered as, and in common parlance, called tournaments, matches, events, etc., of such activities as cricket, soccer, hockey, table tennis, lawn tennis badminton, races, swimming, boxing and kabaddi, etc. The very language of the aforesaid notification itself emphasizes that certain other specific entertainments were unambiguously earmarked for the purpose of exemption from tax, namely musical programmes, songs and dances, dramas, puppet shows, all kinds of sports and games, circus, magic shows, quawali, mela and its various items, flower shows, kavi sammelans and mushairas, dungals including wrestling". This list does not allow room for addition of other entertainments in it. There is not much scope for reading between the lines in the construct of the entry No. 6 of aforesaid notification, which only mentions the wording: all kinds of sports and games. In such a scenario, it is a far cry to add or include video games in the entry No. 6 appended to the notification dated 26.3.99. Along the lines of aforesaid analysis, the clarification dated 23.10.2004 assumes significance and appears to be a logical exercise in setting at naught admissibility of an alien or heterodox entry of video games and video game parlour in the organic construct of all kinds of sports and games."

14. Admittedly, the petitioner-assessee is engaged in providing service of video game and other indoor game facility to its customers and for that purpose it issues a "fun city card" to its customers on payment, which is then further recharged on the wishes and requirement of the customers.

15. The Supreme Court in Geeta Enterprises, supra has held that videos games are the latest addition to the concept of entertainment and video game parlors providing the said services fall within the domain of entertainment. Consequently, entertainment tax shall be charged on the same. It was also held by their Lordships in the said judgement that even though no immediate fees is charged on the admittance to video game parlors, a certain amount is charged from their users if he wants to enjoy the entertainment. The relevant observations made by their Lordships in para 14 of the report is worth quoting:

"14. The Allahabad High Court in the case of Gopal Krishna Agarwal, v. State of Uttar Pradesh and Ors. which was also a case under the Act, held that entertainment tax was leviable on video games. The High Court has very carefully analysed sub-section 3 of s. 2 of the Act and the import of the word "entertainment" and observes as follows:-

"The context in which the word "includes, has been used in the definition clauses of the Act does not indicate that the Legislature intended to put a restriction or a limitation on words like "entertainment" or "admission to an entertainment" or "payment for admission". With the advance of civilization and scientific developments new forms of entertainment have come into existence. Video Games are probably the latest additions to the means of entertainment. These games require skill and precision as so many other games do. They are a source of amusement and enjoyment to those who participate in the games. Others who stand by and watch also derive some pleasure and amusement though not to the same degree. Admission to the premises where the Video Machines are installed may be free but payment is admittedly made if one wants to play the game. The money charged for use of the Video Machine is an admission to entertainment and the payment made by the person who uses the Machine is the payment for admission. In any case it is a payment for admission. In any case it is a payment connected with entertainment which a person is required to make as a condition of attending the entertainment."

16. As to the competence of the legislature in the matter of clarification for the purpose of levy of entertainment duty on video game parlors, case which may be of relevance for deciding the present controversy is of Bombay High Court in Ramesh Sippy, supra. It would be apposite to reproduce the observations made by Bombay High Court in para 7 of the judgement, which are as follows:

"7. It is by now well settled that in the matter of taxing statute the legislature enjoys a larger discretion in the matter of classification so long as it adheres to the fundamental principle underlying the doctrine of classification. The power of the legislature to classify is of wide range and flexibility so that it can against its taxation in all proper and reasonable ways. The legislature which is competent to levy a tax must inevitably be given full freedom to determine which articles should be taxed, in what manner and at what rate. In tax matters, the State is allowed to pick and choose districts objects persons, methods and even rates for taxation if it does so reasonably (see *State of Karnataka and Another Vs. Hansa Corporation*, AIR 1981 SC 463 : (1980) 4 SCC 697 : (1981) 1 SCR 823 ). It is equally well settled that the micro classification will not vitiate the tax. Only because the tax is levied at a conveniently flat rate having regard to the various circumstances or as an easy means of collection and a variety of other pragmatic variables, to call it invalid, is an absurdity, especially because in fiscal matters large liberality must be extended to the Government having regard to the plurality of criteria which have to go into the fiscal success of the measure. (See *Avinder Singh and Others Vs. State of Punjab and Others*, AIR 1979 SC 321 : (1979) 1 SCC 137 : (1979) 1 SCR 845 )."

17. The judgement of Supreme Court in *Inter Continental*, supra relied by learned counsel for the petitioner examined the question whether the end-use verification of the products is necessary for availing the benefit of concessional rate of duty. That judgement has no bearing on the controversy involved in the

present case and is of no help to the petitioner, which would be evident from the following observations in para 21 of the report:

"21. The position in law is well settled. It is not permissible to read some additional words in a notification, much less any condition where none have been prescribed. The entire matter is governed wholly by language of the notification and in a case where the plain term of the exemption show that the tax payer falls within the same, benefit cannot be denied by relying upon supposed intention of the exempting authority. Furthermore, it is well established that in a taxing statute the meaning of a particular word as accepted by the trade and its popular meaning should be preferred and should commend to the authority because it is the condition of the article at the time of importing which is material for the purpose of classification as to under what head duty will be leviable and whether it would be exempt wholly or partly xxxxxxxxxxxxxxxxxxxx".

18. Another judgement of Supreme Court in ITC Ltd., supra relied by learned counsel for the petitioner involved the dispute as to the excise duty payable by appellant for the period 1983 to 1987 on the cigarettes manufactured by it, which although dealt with the effect of two notifications, but the questions involved therein were entirely different and have no bearing on the present controversy and also do not afford any help to the petitioner.

19. In the case of Sedco Forex International Drill. Inc. and Others Vs. Commissioner of Income Tax, Dehradun and Another, AIR 2006 SC 428 : (2005) 199 CTR 320 : (2005) 279 ITR 310 : (2005) 5 JT 639 : (2005) 12 SCC 717 : (2005) AIRSCW 6082 : (2005) AIRSCW 2939 : (2005) 8 Supreme 174 : (2005) 5 Supreme 775 , the Supreme Court observed in para 17 as follows:

"As was affirmed by this Court in Goslino Mario (supra), a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. [See also: Reliance Jute and Industries Ltd. Vs. Commissioner of Income Tax, West Bengal, AIR 1980 SC 251 : (1979) 13 CTR 186 : (1979) 120 ITR 921 : (1980) 1 SCC 139 : (1980) 1 SCR 906 : (1980) 12 UJ 255 ]. An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force. But if it changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used are "it is declared" or "for the removal of doubts".

20. It is trite that benefit of exemption in a notification or circular or a statutory provision or a rule and incentive thereunder has to be granted on strict construction thereof and if such benefit is admissible on fulfillment of certain condition, it would not be granted unless that condition is satisfied. A provision or notification granting concession/incentive has to be in the first stage interpreted

strictly. If on such construction, the subject falls within its scope, then full play has to be given to the same so as to extend the intended benefit. In case of any ambiguity or doubt regarding interpretation of ordinary tax statute, the relevant provision has to be construed in favour of assess. If however, there be any doubt about interpretation of any provision or notification granting exemption/incentive, the benefit thereof has to go to the Revenue.

21. A constitution bench of the Supreme Court in Commissioner of Central Excise, New Delhi Vs. Hari Chand Shri Gopal and Others, etc. etc., (2010) 182 ECR 143 : (2010) 260 ELT 3 : (2010) 12 JT 563 : (2010) 12 SCALE 122 : (2011) 1 SCC 236 : (2011) AIRSCW 1119 : (2010) 8 Supreme 225 , while revisiting previous judgments on the subject, held that a provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the setting on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. That decision has been followed in a recent judgment of the Supreme Court in Indian Oil Corporation Ltd. Vs. Commissioner of Central Excise, Vadodara, (2012) 189 ECR 150 : (2012) 276 ELT 145 : (2012) 1 JT 265 : (2013) 3 RCR(Civil) 726 : (2012) 1 SCALE 292 : (2012) 1 UJ 315 : (2012) AIRSCW 666 , holding that exemption notification relied therein, required that for availing such exemptions two conditions must be satisfied. Unless both the conditions stipulated in the notification are complied with, the appellant was not entitled to exemption.

22. In Novopan India Limited, Hyderabad Vs. Collector of Central Excise and Customs, Hyderabad - 1994 Supp (3) SCC 606, the Supreme Court held that in case of ambiguity, a taxing statute should be construed in favour of the assessee- assuming that the said principle is good and sound-does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the Revenue.

23. Following the judgment in Novopan India Limited, supra, the Supreme Court recently in State of Gujarat and Others Vs. Essar Oil Limited and Another, AIR 2012 SC 1146 : (2012) 189 ECR 121 : (2012) 3 RCR(Civil) 667 : (2012) 1 SCALE 397 : (2012) 3 SCC 522 : (2012) 34 STT 629 : (2012) 1 UJ 285 : (2012) 48 VST 1 : (2012) AIRSCW 1008 , held that general principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee, does not apply to the construction of an exception or an exempting provision, as the same have to be construed strictly and that in construing the exemption notification, question of equity does not arise. The exception or exemption provision must be construed strictly. Give it or does not give it at all. An exemption is a standalone process.

24. In view of above discussion, the judgements passed by the first appellate authority and the Tax Board cannot be said to suffer from any legal infirmity and error apparent on the face of record so as to justify interference by this court.

25. All the revision petitions fail and are accordingly dismissed.