

(2011) 04 GUJ CK 0135

In the Gujarat High Court

Case No : Special Civil Application No. 8655 of 1991

Dhaval Talkies and Another

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 20-04-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Entertainment Tax Act, 1977 — Section 2, 29, 6, 6(2)

Citation : (2011) 3 GLR 2272

Hon'ble Judges : R.M. Chhaya, J; Harsha Devani, J

Bench : Division Bench

Advocate : Vandan Baxi for K.H. Baxi, for the Appellant; Maithili Mehta, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

R.M. Chhaya, J.—By way of this petition, under Article 226 of the Constitution of India the petitioners have prayed as under :

(A) Your Lordships may be pleased to issue a writ of mandamus and/ or in the nature of mandamus and/or any other appropriate writ, direction and order quashing and setting aside the order Annexure-F and further be pleased to direct the respondents to charge from 23-12-1988 to 21-8-1990 only consolidated tax of Rs. 2291-95 ps. per week and refund the excess recovery made by the respondents to the tune of Rs. 2,15,953-19 ps.

(B) That pending the hearing, admission and final disposal of this writ petition Your Lordships may be pleased to restrain the respondents by appropriate ad-interim relief or preventing the respondents from implementing, effectuating or executing the impugned order, Annexure-F or to make any recovery of the amount stated in the said order and further be pleased to restrain the respondents from claiming and/or recovering any amount in excess of the consolidated tax duly determined vide Annexure-F.

(C) That an ex-parte ad-interim injunction in terms of Paragraph 15-B hereinabove may please be granted in favour of the petitioners.

(D) That the costs of this petition may please be awarded from the respondents in favour of the petitioners.

(E) That any other and further relief that may be deemed just and proper in the facts and circumstances of the case may please be awarded in favour of the petitioners.

2. Petitioner No. 1 is a partnership firm registered under the Partnership Act, 1934 and petitioner No. 2 is its partner. The petitioner-firm is a cinema run and managed by petitioner No. 2 for which a licence has been granted by the respondent authority under the provisions of the Gujarat Entertainments Tax Act, 1977 (the Act) and the Bombay Cinemas (Regulation) Act, 1953 and the Rules framed thereunder. The petitioner-firm owns and runs a cinema under the name and style of Dhaval Talkies at Village Ranoli, Dist. Baroda, which has total population of 7,439. That as the said cinema has situated in village area having total population of less than 10,000, the cinema is licensed under the provisions of the Regulations as "Janta Cinema" as defined u/s 2(ddd) under the Bombay Cinema Rules, 1954 (the Rules), which was started on 22-8-1986.

3. The State Government vide Notification dated 11-12-1979 granted exemption to Janta Cinema as under :

Year

Extent of Exemption

(1) For the First year

Full

(2) For the Second year

75%

(3) For the Third year

50%

(4) For the Fourth year

25%

(5) For the Fifth year

NIL

4. The petitioner availed benefit of the exemption as per the above notification for the first year i.e. from 22-8-1986 to 21-8-1987 and enjoyed total exemption of the tax for the first year.

5. The petitioner having availed benefit of exemption of Section 29 of the Act, as aforesaid, on completion of the first year of the commencement of the cinema elected to forgo the exemption of janta benefits and applied for permission to pay consolidated tax u/s 6 of the Act, as aforesaid, vide application dated 29-6-1987.

6. The respondent authorities scrutinized the said application and vide order dated 31-8-1987 determined the amount of consolidated tax payable by petitioner No. 1 as per the provisions of the Act. Petitioner No. 1 on grant of such permission u/s 6 of the Act paid consolidated tax as determined by the authority for the period from 23-12-1988 to 21-8-1990. The petitioner No. 1 on grant of such application to pay consolidated tax u/s 6 of the Act was discontinued the benefit of exemption granted earlier u/s 29 of the Act.

7. On the basis of departmental instructions issued by Commission of Entertainment Tax in the meeting dated 14-2-1989 the respondent authority passed an order of re-assessment of Entertainment Tax w.e.f. 23-12-1988 to 21-8-1990 on the basis that the petitioner-cinema was entitled to only exemption under the notification as the Janta Cinema u/s 29 of the Act and claimed Rs. 5,52, 315-05 as Additional Entertainment Tax payable by the petitioner. Even though, the petitioner-cinema was granted permission u/s 6 of the Act and had already paid consolidated tax as and when it accrued.

8. The petitioners being aggrieved by the said action of the respondent by issuing order dated 18-11-1991 (Annexure-F hereto) has filed the present petition. The petitioners also challenge the excess amount of Rs. 2,15,953-90 collected from the petitioners over and above the consolidated tax of Rs. 1,99,402-26.

9. Heard Mr. Vandan K. Baxi, learned Advocate, for Mr. K. H. Baxi, learned Advocate appearing on behalf of the petitioners, and Ms. Maithili Mehta, learned Assistant Government Pleader, for the respondents.

10. Mr. Baxi pointed out that the impugned order is absolutely bad and illegal and the same is passed without affording an opportunity of hearing to the petitioners and the same amounts to re-assessment. It was pointed out that the petitioners have not availed dual benefits. The infancy benefit which was granted by way of exemption u/s 29 of the Act was availed by the petitioners only for one year, and thereafter, it has been discontinued from the date on which the petitioner opted for payment of entertainment tax as a consolidated tax provided u/s 6 of the Act. It was further pointed out that the order is passed whereby retrospective differential demand was raised on a wrong belief that the petitioner has availed both benefits. It was further pointed out that exemption as provided u/s 29 of the Act is an option which is available to an assessee and as the incident of the tax otherwise provided by way of consolidated tax was available, the petitioner opted to discontinue the said exemption granted u/s 29 of the Act and the same cannot be refused or curtailed, revoked or cancelled without giving

opportunity of being heard as the same would amount to re-assessment as provided u/s 9 of the Act. It was pointed out that Section 6 of the Act is only a mode of payment of tax and such a right given by the statute cannot be refused or denied to the petitioner, which has been validly granted u/s 6 of the Act. It was pointed out that the respondent authorities have not cancelled the order dated 31-8-1987 and other orders for the subsequent years passed u/s 6 of the Act quantifying the consolidated tax as applicable to the petitioners. It was further pointed out that the respondent authorities have, without proper application of mind, recovered the differential amount based only on administrative instructions. It was further pointed out that the respondent authorities have not examined the aspect whether such administrative instructions would apply to the case of the petitioners or not, and therefore, it was submitted that the impugned action of recovery by the respondent deserves to be quashed and set aside and further the respondent authorities may be directed to refund the excess recovery made by them.

11. As against this, Ms. Mehta, learned A.G.P., has supported the impugned order dated 18-11-1991. Relying upon the provisions of the Act, it was pointed out that once the benefit of exemption is availed u/s 29 of the Act, the petitioners had no inherent right to discontinue the same after one year and apply for payment of the Entertainment Tax as a consolidated tax as provided u/s 6 of the Act. It was submitted that on examination of the facts of each similarly situated cinemas, State Government took a conscious decision to recover differential amount. She heavily relied upon resolutions of the State Government dated 19-8-1987, 26-7-1989 and 18-8-1989 and pointed out that Janta Cinema had availed benefit of exemption u/s 29 of the Act and under no circumstance can be permitted to pay Entertainment Tax as a consolidated tax as provided u/s 6 of the Act. Ms. Mehta further pointed out that after the said period of four years was over as prescribed under the notification issued u/s 29 of the Act then and then only the benefit of payment of Entertainment Tax by way of consolidated tax can be availed by Janta Cinema. It was further pointed out that no Janta Cinema can avail both benefits i.e. exemption u/s 29 of the Act and the payment of Entertainment Tax as a consolidated tax as provided u/s 6 of the Act. Therefore, it was pointed out that the order of recovery passed by the respondent authority is legal and proper and the authorities have rightly recovered the amount of Rs. 2,15,953-19 from the petitioner. Reliance was placed upon the affidavit-in-reply dated 24-2-2010 and pointed out that the petitioners are entitled only to one benefit at a time and submitted that the petitioner, is therefore, required to pay an amount of Rs. 5,52,315-05 as assessed by the respondent authorities. She, therefore, submitted that the petition is devoid of any merits and the same deserves to be dismissed with costs.

12. Section 29 of the Act empowers the State Government to exempt either wholly or partly an entertainment or class of entertainments from payment of tax subject to such conditions as may be specified. Section 29 reads as under :

29. Exemption : (1) The State Government may, by notification in the Official Gazette, exempt either wholly or partly, any entertainment or class of entertainments from payment of tax, subject to such conditions as may be specified therein-

(a) where such entertainment is provided for any educational, medical, charitable, philanthropic or such other purpose; or

(b) where the State Government considers it necessary so to do in the public interest.

(2) Every notification issued under sub-section (1) shall be laid for not less than thirty days before the State Legislature as soon as possible after it is issued and shall be subject to rescission by the State Legislature or to such modification as the State Legislature may make during the session in which it is so laid or the session immediately following.

(3) Any rescission or modification so made by the State Legislature shall be published in the Official Gazette and shall thereupon take effect.

13. It is clear that the State Government is empowered to grant general exemption on such conditions as may be specified therein. Exemption is an exception from payment of tax. The Apex Court has interpreted word "exemption" in the case of Union of India and others Vs. M/s. Wood Papers Ltd. and another, as under :

4.....Literally, exemption is freedom from liability, tax or duty. Fiscally, it may assume varying shapes, specially in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective etc. That is why its construction, unlike charging provision, has to be tested on different touchstone. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment state revenue. But once exception or exemption becomes applicable no rule or principle requires it to be construed strictly. Truly, speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it....

14. The petitioner-cinema had availed benefit of Janta Cinema under Notification dated 11-12-1979 for the first year from 22-8-1986 to 21-8-1987. However, on completion of one year the petitioner opted for payment of Entertainment Tax as provided u/s 6(2) of the Act vide application dated 22-8-1987, which was scrutinized and vide order dated 31-8-1987 the competent authority under the Entertainment Tax allowed the said application and quantified the consolidated tax payable by the petitioner u/s 6(2) of the Act. It also transpires from the record and which is not denied by the respondent authority that on completion of the first year the petitioners have not availed benefit of the exemption u/s 29 of

the Act granted as per Notification dated 11-12-1979. It is also admitted position that on completion of the first year the petitioners have paid consolidated tax as per the order dated 31-8-1987 passed by the competent authority under the Entertainment Tax u/s 6 of the Act. It is, therefore, crystal clear that the petitioners have not obtained dual benefits one u/s 29 of the Act and another u/s 6 of the Act.

14.1. It is clear that one is a general exception while other is an option which is granted to an assessee while selecting mode of payment of the Entertainment Tax in a consolidated form. Both these provisions are, therefore, two separate modes of payment of tax and benefits under Secs. 6 and 29 of the Act are different and distinct in nature. The Act does not prohibit an assessee to exercise either of the one option. It is also open for an assessee to select an option. The only limitation is that, both the benefits cannot be availed at a time.

15. The order passed u/s 6(2) of the Act is neither revoked nor cancelled, and therefore, the impugned order dated 18-11-1991 (at Annexure-F hereto) is mechanically passed applying general instructions received by the respondent authorities without appreciating this basic factor that too without affording an opportunity to the petitioners wrongly construing that the order passed u/s 6 of the Act dated 31-8-1987 stands cancelled.

16. This Court in the case of Arman Cinema and Another Vs. State of Gujarat and Others, while examining the same provisions has come to the conclusion that benefits under Secs. 6 and 29 of the Act are of different nature and has also held that a cinema is not entitled to benefit u/s 6 of the Act and also general exemption u/s 29 of the Act at a time. However, in the instant case, on completion of the first year the petitioners have not availed benefit of general exemption u/s 29 of the Act, but have opted for payment of tax by way of consolidated tax as provided u/s 6 of the Act, which is duly granted by the respondent authority, as the petitioners have not availed both the benefits at a time. The respondent authorities while passing the impugned order has wrongly presumed that the orders passed u/s 6 of the Act permitting the petitioners to pay consolidated tax stand cancelled w.e.f. 23-12-1988 as per amendment in the Act, in view of the fact that the very authority has also passed orders for the subsequent years under Section. 6 of the Act. We, therefore, find that the order impugned in the present petition is passed in a mechanical manner and the same deserves to be quashed and set aside.

17. This Court in the case of Arman Cinema (supra) has held that both the benefits cannot be availed together. However, in. the instant case, the petitioners have not availed both the benefits together. The petitioner-cinema has availed benefit of the general exemption granted u/s 29 of the Act for the first year, and thereafter, discontinued the same and applied for payment of Entertainment Tax as consolidated tax u/s 6(2) of the Act. The authorities, after examining such application, granted permission to the petitioner u/s 6(2) of the Act and the same is neither revoked nor rescinded.

18. In the facts and circumstances of the case, as noted hereinabove, the petition is allowed. The respondents are directed to charge consolidated tax as per orders passed u/s 6 of the Act. The respondents are further directed to refund the excess amount recovered from the petitioners, after undertaking the exercise of calculation of the same within a period of 1 (one) month from the date of receipt of copy of writ of this order. Rule made absolute to the aforesaid extent. There shall be no order as to costs.