(1981) 02 KAR CK 0003

In the Karnataka High Court

Drive in Enterprises — APPELLANT

Vs

Commr. of Comml. Taxes and Another — RESPONDENT

Date of Decision : 04-02-1981

Acts Referred:

Constitution of India, 1950 — Article 226
Karnataka Entertainments Tax Act, 1958 — Section 6

Citation : (1981) 2 KarLJ 361

Hon'ble Judges : M. P. Chandrakantaraj Urs, J

Judgement

1. The petitioner herein is a partnership firm owning a Drive-in-Theatre on the out-skirts of the city of Bangalore on Bannerghatta Road. The petitioner wrote a letter seeking clarification from the Commissioner of Commercial Taxes who is also the Commissioner of Entertainment Taxes. The clarification sought for related to whether the charge put on each car that drove into the Drive-in-Theatre should also be subjected to the entertainment tax, having regard to the fact that each occupant of the car was separately issued with a ticket for admission on which alone the entertainment tax was being charged. The Commissioner of Commercial Taxes clarified in his letter dated 2-3-78 by stating that even the charge levied on the admission of the car into the Drive-in-Theatre was liable to be subjected to entertainment tax. The petitioner-firm by its letter dated 18th February, 1978 had sought this clarification. The Commissioner''s letter is produced at Ext.-A and the letter of 18th February, 1978 written by the firm is at Ext.-B. The firm has paid the taxes as demanded under protest. Aggrieved by the action of the Commissioner, the petitioner-firm has approached this court praying for a declaration that no entertainment tax is payable under Section 6 of the Karnataka Entertainments Tax Act, 1958 (hereinafter referred to as the Act) on car ramp service charges collected by it and further to issue a writ of prohibition prohibiting the 2nd respondent from collecting the entertainment taxes on tickets issued for allowing the car to be driven into the Drive-in-Theatre.

2. Mr. B.P. Gandhi, learned counsel appearing for the petitioner, has further elaborated the manner in which the Drive-in-Theatre functions and as averred in

the petition. According to him, the Drive-in-Theatre is an open air theatre encircled by a high wall having a huge open screen which is not enclosed. In front of the screen adequate and suitable place is provided for the parking of cars which drive into the enclosed space within the walls from where the occupants of the cars can view the Cinema exhibited, sitting in the car if they so chose to do so. He has further pointed out that though it is not necessary to have an enclosed seating space for people in a Drive-in-Theatre the petitioner-Firm in its Drive-in-Theatre has also provided in addition to parking space for the cars, an enclosed covered gallery with several seats where persons who have come in the car or persons who have come without a car can sit and watch the cinema exhibited on the same screen. The petitioner-firm charges Rs. 2 for the car to enter the enclosed space and per each occupant therein it charges Rs. 3. If a person comes either on a scooter or motor cycle or cycle or by walk and enters the place, no charge is made to the vehicle but like other persons in the car, they are also charged Rs. 3 per head.

3. It is the contention of the petitioner that having regard to the definition of the terms ''admission'', "admission to an entertainment." ''entertainment'', and "payment for admission" as defined in the Act, levy of tax on the tickets sold for the admission of the car, would be clearly illegal and without the authority of law.

4. It is, at this stage, useful to reproduce that portion of the letter of the 1st respondent-Commissioner of commercial Taxes which has clarified the same as follows:

"In view of the above provisions, it is considered that the additional charge of Rs. 2 realised by you while admitting spectators in cars, is liable to entertainment tax under the Karnataka Entertainment Tax Act, 1958."

5. The above clarification can hardly be said to clarify anything. The provisions referred to therein are with reference to the definition of the terms ''admission'' and ''payment for admission'' in the Act.

6. The respondents have entered appearance but have not filed any statement of objections. But, Shri Venkatachalaiah, learned Government pleader appearing for the respondents has, however, pointed out that what the said paragraph in the impugned letter of the Commissioner means. According to him, allowing the car to be parked on the ramps provided for such parking within the theatre, the petitioner-firm having serviced each car with loudspeakers would render the car itself into a mini auditorium and therefore charge for the car is liable to tax under the Act.

7. Having regard to the charging section and the definition of the various terms in the Act, it appears, ex facie, that the levy is illegal and without the authority of law. S. 3 is the charging section and it is as follows:

"Tax on payment for admission to entertainments: (1) There shall be levied and paid to the State Government on each payment for admission to an entertainment, entertainment tax at the following rates, namely: Where the payment (excluding the amount of tax) Rates of Tax.

(a) does not exceed fifty paise; Twenty per cent of such payment.

(b) exceeds fifty paise but does not exceed one rupee and fifty paise; Twenty five per cent of such payment.

(c) Exceeds one rupee and fifty paise but does not exceed three rupee Thirty per cent of such payment.

(d) exceeds three rupees; Thirty five per cent of such payment.

(2) Notwithstanding anything contained in sub-sec. (1), there shall be levied and paid to the State Government except as otherwise expressly provided in this Act on every complimentary ticket issued by the proprietor of an entertainment, the entertainments tax at the appropriate rate specified in sub-sec. (1) in respect of such entertainment, as if full payment had been made for admission to the entertainment according to the class of seat or accommodation which the holder of such ticket is entitled to occupy or use; and for the purpose of this Act, the holder of such ticket shall be deemed to have been admitted on payment.

Provided that where the seat or accommodation which the holder of such a ticket is entitled to occupy or use is different from the classes of seat or accommodation inside the auditorium or place of entertainment and for admission to the said seat or accommodation no payment is fixed, the holder of such ticket shall be deemed to be entitled to occupy or use the highest class of seat or accommodation and shall for purposes of this Act, be deemed to have been admitted on payment of the charges for such highest class of seat or accommodation."

8. From the above it is clear that the incidence of tax at the rates specified in the section itself falls on the person who is entertained, the exhibitor of a cinema or persons who offer the other form or entertainment are merely conduit types to collect the tax from the person entertained and pay the same to Government. The incidence of taxation under the Act is not on the entertainer but on the entertained. Therefore, what is clear from the charging section is that the entertainer is not to be taxed but the entertained only."Entertainment"is defined at S. 2(e) of the Act and is as follows:

"2(e) "entertainment" means a horse race or cinematograph show to which persons are admitted for payment."

At Section 2(b) admission to an entertainment is defined as admission to any place in which an entertainment is held. Thus, it is seen that on entering the place of entertainment a person is admitted and he is liable to pay tax. Sec. 2(i) of the Act defines ''payment for admission'' as follows:

"2 (i) "payment for admission" includes- (i) any payment made by a person who having been admitted to one part of a place of entertainment is subsequently admitted to another part thereof for admission to which a payment involving a tax or a higher tax is required;

(ii) any payment for seats or other accommodation in a place of entertainment."

From sub-clause (ii) of the definition of ''payment for admission'', it is obvious that payment for admission includes any payment for seats or other accommodation in a place of entertainment. It is, therefore, seen that when a car enters the Drive-in-Theatre, and parked at the appropriate place from which the occupants of the car can view or/and listen to the entertainment, no additional seat is provided other than the parking space for the car i.e., on a strict Construction of what a Drive-in-Theatre is normally. But learned counsel for the petitioner submits that there is no prohibition for the occupants of the car to get out and sit on the ground and view and listen to the entertainment. Similarly, persons are free to go and sit in the covered balcony which is far behind the space provided for the rows of cars. It is therefore his argument that the important taxable event is the fact of a human being entering the place of entertainment and therefore the person referred to in the definition for "payment for admission" can only be in relation to a human being and not any other. He therefore submits that the charges of entertainment at Rs. 3 per ticket on each of the occupants in the car or any person who comes without a cat only would be liable to pay entertainment. tax, because as only human beings can said to be entertained in the circumstances and not a car which the human being may take to such a place. It is also his argument that car charge for the entrance was made in the very nature of a Drive-in-Theatre in as much as the long rows of roads, suitably elevated ramps in front of the screen had to be provided and maintained. In the ramps provided for the parking of cars, for each car a speaker is provided for convenient listening by the occupants of the car which also required constant service and replacement. Therefore, Mr. Gandhi contends that the charge made is a service charge and not entertainment charges in so far it relates to the cars. He further states that the petitioner-Firm provides free mechanical service to the car owners in case there is mechanical failure of the car while they are in the theatre.

9. The thrust of the argument is that if it is a service charge not relatable to the entertainment offered, that cannot be a charge made for admission to a place of entertainment, but is different and therefore not taxable.

10. There is considerable force in the contentions advanced by the petitioner. The theatre is open to those who have cars and those who do not have cars. It is evident that incidence of tax is on the person who is entertained and not the vehicle in which he goes to the entertainment. If the vehicle, in the very nature of the drive-in-cinema, is to be a mini-auditorium that itself cannot be entertainment, for entertainment is on the screen in front of the row of cars. Therefore, the explanation submitted for respondent-1 explaining the paragraph extracted from Ext.-A is not well reasoned. I have already held that the incidence is on the person and not the vehicle in which he travels to the theatre. The

petitioner firm has separated the ticket for entertainment and for admission of the car. Therefore they are liable to pay entertainment tax only on the tickets issued to persons and not to the vehicle. The petitioner is therefore entitled to the declaration that only the tickets sold to the persons for admission to the place of entertainment namely the Drive-in-theatre, is liable to entertainment tax and not other charges made in respect of the vehicles or other services rendered within the theatre. Any other construction of the charging section would lead to the absurdity of subjecting pet animals which may be in the car also to pay entertainment tax.

11. Before parting with this case, it must be noticed that the learned counsel for respondents has strenuously contended that in the provisions of the Act, a hierarchy of appeals is provided and the petitioner not having made use of those reliefs as within the frame work of the Act itself is not entitled to maintain this petition. It is true that normally this court will not exercise its jurisdiction under Art. 226 of the Constitution when there is an effective efficacious alternative remedy. But when the matter involved or matter challenged goes to the very root of jurisdiction or the authority of law to levy tax, as in the instant case, the existence of a remedy under the Act would be a futile exercise and therefore this Court in such cases will entertain and give relief if necessary under Art. 226 of the Constitution, even though an alternative remedy may exist. This, principle is now well settled. Even otherwise, having regard to the fact that the Commissioner himself has clarified to the petitioner-firm that it is liable to pay tax on cars renders an appeal to an authority below him futile. That is also a good reason to interfere under Art. 226 of the Constitution, in the instant case.

12. The petitioner has paid the tax under protest in the sum of Rs. 15,613-60 and a further small amount before this Court granted interim stay. These amounts are liable to be refunded if the petitioner applies for the same. Petitioner is also entitled to a writ of prohibition as prayed for and therefore the 2nd respondent is prohibited from collecting entertainment tax on the tickets issued for the admission of the car to the petitioner''s Drive-in-Theatre. Rule issued earlier is made absolute.

13. In the circumstances of the case, there will be no order as to costs.

