

(2012) 11 GUJ CK 0021

In the Gujarat High Court

Case No : Special Civil Application No. 4583 of 2002

Funworld and Tourism Development Ltd.

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 09-11-2012

Acts Referred:

Bombay Entertainments Duty Act, 1923 — Section 3(1)

Constitution of India, 1950 — Article 226, 227

Gujarat Entertainment Tax Act, 1977 — Section 12, 13, 2, 2(a), 2(e)

Citation : (2012) 3 GLH 816 : (2013) 59 VST 306

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

Bench : Division Bench

Advocate : D.C. Dave, for the Appellant; Maithili Mehta, Asstt. Government Pleader for Respondents 1-4, for the Respondent

Judgement

Harsha N. Devani, J.—By this petition under Article 226 and 227 of the Constitution of India, the petitioner has challenged the order dated 5.4.2002 passed by the respondent No. 2 (Exhibit-G to the petition), confirming the orders dated 20.5.2001 and 27.5.1997 passed by the respondents No. 3 and 4 (Exhibits-E and C respectively, to the petition). The facts as stated in the petition are that the petitioner, a Company is, inter alia, engaged in the business of running amusement parks with the aid and assistance of mechanical devices, which are popularly known as "Rides". One such amusement park by the name and style of "Funworld" is located at Rajkot and is situated on a parcel of land owned by the Municipal Corporation of Rajkot, which has been leased out to the petitioner for the purpose of establishing and running the aforesaid amusement park. It is the case of the petitioner that in view of an agreement by and between the petitioner and the Municipal Corporation of Rajkot, the rates in respect of various rides provided in the said amusement park are kept at the minimum to the extent possible.

2. The said amusement park became functional for its operational usage with effect from 17th January, 1991. Subsequent thereto, the Government of Gujarat,

through its Information, Broadcasting & Tourism Department, in exercise of the powers conferred upon it u/s 29(1) of the Gujarat Entertainments Tax Act, 1977 (hereinafter referred to as "the Act"), promulgated a notification dated 24th December, 1991 by virtue of which the amusement parks came to be totally exempted from the scope and purview of the said Act for a period of six years from the date of commencement of the functional usage of such amusement parks, provided such amusement parks were established subsequent to 1st January, 1991. In view of the said notification, the petitioner was exempted from the payment of entertainment tax and accordingly, for the period commencing from 17th January, 1991 and ending on 16th January, 1997 the petitioner was not subjected to any of the provisions of the Act for the purpose of assessing the liability of the petitioner for entertainment tax under the provisions of the Act.

3. However, upon expiry of the said period of six years, with effect from 17th January, 1997, by a notice dated 3rd May, 1999 issued by the prescribed officer, namely, the Mamlatdar, Entertainment Tax, Rajkot, the petitioner was called upon to show cause as to why it should not be subjected to assessment for entertainment tax for the period commencing from 17th January, 1997 and ending on 16th February, 1997 and as to why entertainment tax to the tune of Rs. 2,26,809/- should not be levied on the petitioner. It is the case of the petitioner that prior to the issuance of the said show cause notice, the prescribed Officer had called for certain information from the petitioner with regard to the sale of entry tickets and total revenue earned by the petitioner from various rides in the said amusement park. In response to the aforesaid show cause notice, the petitioner submitted its reply on 22nd May, 1997. By an order dated 27th May, 1997, the prescribed officer held that the petitioner was liable to pay entertainment tax to the tune of Rs. 2,26,809/- for the period ranging from 17th January, 1997 to 16th February, 1997 under the provisions of the Act. Being aggrieved, the petitioner went in appeal before the third respondent, namely the Collector, Rajkot, under the provisions of Section 12 of the Act. By an order dated 20th May, 2001, the third respondent concurred with the view taken by the prescribed officer and confirmed the order dated 27th May, 1997. The petitioner carried the matter in revision before the second respondent, namely the Commissioner of Entertainment Tax, Gujarat State, u/s 13 of the Act. By the impugned order dated 5th April, 2002, the revision came to be rejected giving rise to the present petition.

4. Mr. Dhaval Dave, learned Advocate appearing on behalf of the petitioner invited attention to the notification dated 4th September, 1992 issued by the Government of Gujarat in exercise of powers under sub-Section (1) of Section 29 of the Act, whereby it has exempted the classes of entertainment specified in column 2 of the Schedule appended thereto from payment of tax leviable u/s 3 of the Act. Attention was invited to item No. 3 of the Schedule, to point out that under the said notification, any entertainment other than something shown in theatres licensed under the Bombay Cinema (Regulation) Act, 1953 where entertainment is by a machine operated by electricity, petrol or diesel or

otherwise, and admission of which is conditional on payment of a sum not exceeding Rs. 6/- per ticket was fully exempt from payment of entertainment tax. It was submitted that in the case of the petitioner, the petitioner runs an amusement park which comprises of different rides. Each ride is a separate entertainment operated by electricity, petrol or diesel or otherwise and the admission to each ride is on payment of a sum less than Rs. 6/- per ticket. Therefore, while subjecting the petitioner to entertainment tax in respect of various rides provided in the amusement park, each and every ride is to be taken into consideration separately without clubbing the same, as is sought to be done in the present case. According to the learned Counsel, purchase of a ticket for a particular ride is nothing but a ticket for an entry in such a ride and accordingly, usage of each and every ride by a visitor is required to be viewed as a separate and distinct transaction of entertainment by and between the applicant as the owner of the amusement park and the concerned visitor. Thereafter, as and when the concerned visitor purchases a ticket for another ride, another contract with reference to such particular ride would come into play. Hence, the entertainment in the amusement park of the petitioner is covered under the said notification inasmuch as, in no case, does the petitioner charge a sum exceeding Rs. 6/- per ticket in any of the rides in its amusement park.

4.1 It was further submitted that the amusement park belonging to the petitioner at Rajkot is having various rides. The concerned visitor, may be a child or an adult intending to visit the amusement park, is required to purchase, in the first place, a ticket from the entry gate of the said amusement park, which is popularly known as "entry ticket". The entry ticket would only make it possible on the part of the concerned visitor to enter the amusement park. However, the same would not confer a right upon the concerned visitor to make use of the various rides made available therein by the petitioner. An entry into the amusement park would have the simple effect of permitting the concerned visitor to visit the said amusement park for a specified period, without enjoying, in any manner, any of the rides made available in the said amusement park. Thus, mere entry into the amusement park would not provide any kind of entertainment to the concerned visitor. The entertainment would be available to the concerned visitor as and when the concerned visitor decides to avail of the facility of the various rides available in the amusement park. Thus, in substance, the joy and thrill of sitting in various rides provided in the said amusement park would constitute an entertainment for the concerned visitor.

4.2 Inviting attention to the order passed by the prescribed officer, it was pointed out that the prescribed officer has considered the number of entry tickets of the amusement park and the total income for the period in question and has divided the same by the number of entry tickets and arrived at an average which he has considered to be the amount payable for admission to the entertainment and has, accordingly, arrived at the conclusion that since the average price exceeds Rs. 6/- per ticket, the petitioner is liable to pay entertainment tax u/s 3 of the Act. It was contended that item No. 3 of the notification envisages payment of a

sum not exceeding Rs. 6/- per ticket. In the amusement park in relation to each ride, a separate ticket is issued and in none of the tickets, does the price exceed Rs. 6/- per ticket. It was further submitted that separate tickets are required to be purchased by the concerned visitor after entering the amusement park for the purpose of availing of the various rides made available there and as such, the methodology of computing the total income derived by the petitioner from the said amusement park, inclusive of entry tickets and, thereupon, to divide the same by total number of visitors and, thereupon, to subject the figure deduced therefrom for the purpose of calculating the amount of entertainment tax per ticket, is totally erroneous. It was urged that while assessing the petitioner for the purpose of entertainment tax, the methodology followed by the respondent No. 4 and approved by the respondent No. 2 is that irrespective of the fact as to whether the concerned visitor has availed of the rides provided in the amusement park or not, the petitioner is required to be subjected to assessment of entertainment tax even in respect of such a visitor. It was argued that each and every ride provided in the amusement park constitutes a separate and independent source of entertainment. Consequently, the concerned visitor is required to obtain separate ticket for the purpose of each and every ride. That the entertainment in the form of joy and thrill received by the concerned visitor comes to an end the moment the particular ride is exhausted by the visitor. Therefore, while subjecting the petitioner to assessment for the purpose of entertainment tax in respect of various rides provided in the amusement park, each and every ride is required to be taken into consideration separately without clubbing the same, as it is sought to be done in the present case. It was contended that in view of the above referred notification, not a single ride provided by the petitioner would be capable of being subjected to entertainment tax inasmuch as, the price fixed for each and every ride is far below the outer limit prescribed vide the said notification.

4.3 The learned Counsel further submitted that each and every ride provided in the amusement park constitutes a separate and independent source of entertainment. Even from the point of view of contract, purchase of a particular ride would constitute a specific contract with reference to the ride and the same would come to an end the moment the said ride is exhausted by the concerned visitor. Thereafter, as and when the concerned visitor purchases a ticket for another ride, another contract with reference to such particular ride would come into play. Under the circumstances, the computation made by the prescribed officer is totally contrary to the scheme and as such, both, the appellate Authority as well as revisional Authority, were not justified in upholding the same.

4.4 Insofar as the levy of entertainment tax on bumper tickets is concerned, which are priced at Rs. 25/- and Rs. 15/- for an adult and a child respectively, it was submitted that a bumper ticket, in fact, is a combination of several tickets whereby, a single visitor is given a discount on various rides if it purchases a bumper ticket. Bumper tickets are nothing but a form of special concession to the concerned visitor in the vicinity of 20% per ticket per ride provided to the

concerned visitor who is purchasing the tickets in respect of all the rides. It was submitted that even a bumper ticket is comprised of individual tickets for individual rides and as such, the prescribed officer was not justified in calculating the average price of the bumper ticket on the basis of number of entry tickets and the income derived from sale thereof. It was submitted that the respondent No. 3 has held that it would be justifiable to employ the concept of clubbing while assessing the liability of the petitioner in respect of the entertainment tax, whereas the bumper tickets are nothing but a form of special concession to the concerned visitor in the vicinity of 25% per ticket per ride, provided the concerned visitor is purchasing tickets in respect of all the rides. It was argued that even if the concerned visitor purchases the ticket in one lot in respect of all the rides, the concept of each ride being separate and distinct from the remaining rides and, thereupon, constituting a separate and distinct source of entertainment for the concerned visitor, is not at all lost. It is only for the purpose of persuading and encouraging the concerned visitor to go for all the rides in the said amusement park that the concept of bumper tickets was introduced by the petitioner. It was further submitted that assuming that in respect of the bumper tickets, since accumulated rate was exceeding the outer limit prescribed vide the said notification, it may be permissible on the part of the concerned Authority to take the same into consideration for the purpose of entertainment tax, the levy of entertainment tax ought to have been confined to the sale of bumper tickets, which comes to Rs. 10,634/- in respect of the period in question.

4.5 Referring to Section 3-A of the Act, the learned Counsel submitted that the levy of entertainment tax on the petitioner is contrary to the provisions of the said Section. u/s 3-A of the Act, the admission to entertainments specified in Schedule III to the Act is exempt from payment of tax u/s 3. Referring to entry 13 of Schedule III which specifies the following entertainments:-- "All kinds of sports excluding the sports or rides provided in the water park or holiday resort", it was submitted that the entertainments provided by the petitioner would fall within the ambit of the said entry and as such, admission to the same is not exigible to entertainment tax. It was urged that the petitioner is sought to be assessed for the purpose of entertainment tax on the premise that the petitioner owns the amusement park wherein entertainment is provided in the form of various rides to the visitors. Thus, it is required to be ascertained as to whether the rides provided by the petitioner in the amusement park are in respect of a water park and holiday resort. It was contended that the amusement park belonging to the petitioner is neither a water park nor a holiday resort and therefore, the said rides provided by the petitioner would not qualify as rides provided in the water park or holiday resort within the meaning of the said expressions as contemplated in entry 13 of Schedule III to the Act. Under the circumstances, the rides provided by the petitioner being a kind of sport excluding the sports or rides provided in the water park or holiday resort, would be exempt from payment of tax u/s 3 of the Act.

4.6 In support of his submissions, the learned Counsel placed reliance upon the decisions of this High Court in *The Sports Club of Gujarat Vs. State of Gujarat*, , in *Gujarat Video Association and Others Vs. State of Gujarat*, and in *Ramanlal B. Jariwala Vs. District Magistrate, Surat and Another*, .

4.7 Lastly it was contended that the impugned order passed by the revisional Authority as well as the order passed by the appellate Authority are both non-speaking orders inasmuch as, no reasons have been assigned by the concerned Authority as to why the contentions raised by the petitioner are not acceptable. It was submitted that the contentions raised in the present petition had also been raised before the revisional Authority who, however, has not thought it fit to deal with the same. Under the circumstances, the impugned order is required to be set aside also on the ground of being a non-reasoned and non-speaking order.

4.8 In conclusion, it was submitted that the impugned order passed by the revisional Authority being a non-speaking order as well as being contrary to the provisions of the notification issued by the Government, the petition deserves to be allowed by quashing and setting aside the said order and holding that the petitioner is not liable to pay entertainment tax for the period in question on the entertainment provided in its amusement park.

5. Opposing the petition, Ms. Maithili Mehta, learned Assistant Government Pleader reiterated the averments made in the affidavit in reply. It was submitted that as per entry No. 3 of the Government Notification dated 4.9.1992 of the Information & Broadcasting Department, Sachivalaya, Gandhinagar, in case of amusement machines run by petrol, diesel or electricity, no tax is charged upto Rs. 6/- per ticket. It was further submitted that as per instructions dated 15.9.1990 issued by the Commissioner of Entertainment Tax, Gandhinagar, if different items are owned by different owners and if their charges are not more than the prescribed limit, that is, Rs. 6/-, no tax shall be charged. But if the different items are owned by one owner and if its charges are more than the prescribed limit, in that case, the tax shall be charged. It was, accordingly, submitted that the petitioner in the present case is running different rides and is charging separately for each ride and moreover, the entrance fee is also charged separately. Therefore, in view of the instructions read with the notification, if the total amount of entrance fees and ride fees are more than the above prescribed limit, in that case, the tax is chargeable and is required to be deposited with the Government.

5.1 It was submitted that tax free benefit was admissible in case of the petitioner till 16.1.1997 and thereafter, considering the fact that the income made out of the entrance fees and rides fees during the period from 17.1.1997 to 16.2.1997 was more than the prescribed limit, the petitioner was liable to pay the entertainment tax thereon. It was reiterated that as per entry No. 3 of the Government Notification dated 4.9.1992, if different items are owned by different owners and if their charges are not more than the prescribed limit, that is, Rs. 6/-, no tax shall be charged. But if the different items running and owned by one

owner and if its charges are more than prescribed limit, in that case, the tax would be chargeable. It was submitted that as the petitioner is charging entrance fee separately, the total amount viz., entrance fee plus the fee for rides exceeded the prescribed limit and hence, the computation of entertainment tax by dividing the income derived by the petitioner during the period in question by the total number of entry tickets is in accordance with the provisions of law.

5.2 Insofar as the sale of bumper tickets is concerned, the learned Assistant Government Pleader invited the attention of the Court to the provisions of Section 3 of the Act, which makes provision for levy of tax on payment for admission to entertainment, and more particularly, to sub-Section (3) thereof to submit that the same makes provision for payment of amount by way of lump sum. Thus, the sale of bumper tickets would be governed by sub-Section (3) of Section 3 of the Act and the petitioner would be liable to pay entertainment tax as prescribed under the said provision. It was further contended that the rate of tickets was to be computed by clubbing entry fees of Rs. 2/- as well as the fee charged for each of the rides and as such, the manner in which the prescribed officer has computed the rate of the entry ticket is in consonance with the relevant provisions of the Act and the notifications, and does not warrant interference by this Court.

5.3 The learned Assistant Government Pleader further invited the attention of the Court to the additional affidavit made by the prescribed officer wherein it has been averred as under:--

I say and submit that therefore no tax has been recovered from the petitioner for the period from 17.01.1991 to 16.01.1997. I say and submit that the respondent Authorities have in their order dated 27.07.1997 has specified as to on what basis the calculation of entertainment tax has been done which is explained herein, per person tax rate were fixed as Rs. 6 and for bumper tickets the petitioner had fixed Rs. 25 to 15. I say and submit that the calculation in the said order is from 17.01.1997 to 16.02.1997 and average amount was calculated for all single tickets issued by the petitioner which comes to Rs. 7.43, which was more than Rs. 6 as specified at the relevant point of time and therefore, as per the notification dated 15.10.1999 and clarificatory note dated 21.10.2000 as well as letter dated 29.01.1997, the respondent Authorities have consolidated the single tickets which were sold by the petitioner herein and as the average rates which was arrived was more than Rs. 6 tax has been levied. The respondent Authorities have accordingly calculated the entertainment tax on the said amount.

5.4 Referring to the circular dated 21.10.2000, it was submitted that under the said circular, whenever in the case of water parks and amusement parks, the total entry fees of different items exceeds the prescribed exemption limit, entertainment tax is required to be recovered. Reference was also made to the letter dated 29.1.1997 of the Deputy Commissioner, Entertainment Tax, addressed to the District Collector, Rajkot wherein it is stated that in case of Fun-world, Amusement Park and Anand Mela, if the entry fee of items is limited to

Rs. 6/-, the same is ipso facto entitled to exemption. However, if the entry fee exceeds Rs. 6/-, then entertainment tax is liable to be recovered under the provisions of Section 3 of the Act. It is also stated in the said communication that by virtue of the instructions issued vide circular dated 15.9.1990, where there are different owners of different items, and the rates in respect of each item is below the exemption limit, entertainment tax is not required to be recovered. However, if one owner owns different rides and the rates of the total rides exceed the exemption limit, the entertainment tax would be recoverable. It was submitted that, in the facts of the present case, the petitioner is the sole owner of the various rides in the amusement park and if the entry fee as well as the total of the different rides is taken into consideration, the rate of each ticket exceeds the exemption limit and as such, the respondents are justified in holding that the petitioner is liable to pay entertainment tax on the entertainment provided by it.

6. In the light of the facts and contentions noted hereinabove, the main issues that arise for consideration are: firstly, as to whether in the light of the provisions of Section 3-A of the Act, the entertainment provided by the petitioner in its amusement park is exempt from the provisions of the Act; secondly, as to whether each ride provided by the petitioner in its amusement park is a separate amusement or as to whether all the rides provided by the petitioner are required to be clubbed together; and thirdly, as to whether the bumper tickets issued by the petitioner are in the nature of a single entertainment or separate entertainments clubbed together.

7. A perusal of the order passed by the prescribed officer shows that he has mainly placed reliance upon the communication dated 29th January, 1997 of the Office of the Commissioner of Entertainment whereby, it has been stated that the total rides have to be taken into consideration for the purpose of assessing entertainment tax. Accordingly, the prescribed officer has clubbed together the entire income for the month and thereafter, divided the same by the number of entry tickets and assessed the average income from each visitor to be 7.47 in case of ordinary tickets and 17.97 in case of bumper tickets and has come to the conclusion that the same exceeds the limit provided under the notification dated 4th September, 1992 and as such, are exigible to entertainment tax.

8. The Collector, Rajkot, in the appeal preferred by the petitioner against the order of the prescribed officer, has referred to the facts and contentions of the respective parties and without assigning any reasons whatsoever, has upheld the order passed by the prescribed officer. The revisional Authority, in the impugned order dated 5th April, 2002, has observed that the Government of Gujarat in item No. 3 of its notification dated 4th September, 1992 has exempted entertainments having the rate of admission upto Rs. 6/- per person. It has further observed that for the purpose of entry into the park, Rs. 2/- per person is being recovered and that by clubbing the same with the price of tickets for the rides provided in the park, the same exceeds Rs. 6/-. The revisional Authority

was of the view that u/s 3 of the Gujarat Entertainment Tax Act, any amount recovered for the purpose of entering into a place of entertainment is exigible to entertainment tax at the rate prescribed by the Government, under the circumstances the action of the Mamlatdar in clubbing together the entry fee along with the rides is just, proper and legal. The revisional Authority has further observed that the Collector, in his order, having discussed everything in detail, there is no reason for taking any different view and has, accordingly, rejected the revision.

9. From the facts noted hereinabove, it is apparent that the impugned order passed by the revisional Authority suffers from total non-application of mind inasmuch as, the revisional Authority has observed that the Collector has given detailed reasons for confirming the order passed by the Mamlatdar whereas in fact, the Collector in the appeal preferred by the petitioner, has merely referred to the facts of the case and the contentions of the parties and without assigning any reasons whatsoever, has dismissed the appeal. Thus, the learned Counsel for the petitioner is justified in contending that the orders passed by the appellate Authority as well as by the revisional Authority are non-speaking orders and have been passed without application of mind and as such are required to be quashed and set aside on this ground alone.

10. However, the petition raises various questions of law as noted hereinabove, hence, it is necessary to delve into the merits of the case.

11. From the affidavit in-reply filed on behalf of the respondents as well as the stand taken by the respondents during the course of arguments, it is apparent that the case of the respondents is that as per the instructions issued by the Commissioner of Entertainment Tax, Gandhinagar vide his letter dated 15.9.1990, if different items are owned by different owners and if the charge is not more than the prescribed limit of Rs. 6/-, no tax shall be charged. But if the different items are owned by one owner and the charges are more than the prescribed limit, in that case, the tax should be charged. It is the case of the respondents that the petitioner is running different rides and is charging separately for each ride. Moreover, entrance fee is also charged separately and hence, in view of the instructions read with the notification, if the total amount of entrance fees is more than the prescribed limit, in that case, tax is chargeable and is required to be deposited with the Government.

12. Before advertng to the merits of the case, it may be germane to refer to certain statutory provisions. Section 2(a) of the Act defines "admission to an entertainment" to include admission to any place in which the entertainment is held. Sub-Section (e) of Section 2 defines "entertainment" to include any exhibition, performance, amusement, game or sport to which persons are admitted for payment or in the case of television exhibition with the aid of any type of antenna with a cable network attached to it or cable television, for which persons are required to make payment by way of contribution or subscription or installation charges or connection charges or any other charges collected in any

manner whatsoever. Clause (g) of Section 2 defines "payment for admission" to include (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 tax or more tax is required; (ii) any payment for seats or other accommodation in a place of entertainment, (iii) to (vii).

13. Section 3 of the Act bears the marginal note "Tax on payments for admissions to entertainments" and as it stood at the relevant time reads thus:--

3. (1) There shall be levied and paid to the State Government on,-

1. every payment for admission to an entertainment, other than the payment of admission referred to in clause (b), a tax, at the following rates, namely:--

i. xxxxx

ii. xxxxx

2. every payment for admission of a motor vehicle into the auditorium of a cinema known as Drive-in-Cinema, if such payment is separately charged by the proprietor for such admission, a tax at the rate of fifty per cent of such payment.

(3) Where the payment for admission to an entertainment is made wholly or partly by means of lump sum paid as a subscription or contribution to any person, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time or for any privilege, right, facility or thing combined with the right of admission to any entertainment or involving such right of admission without further payment or at a reduced rate, the tax shall be levied on the amount of the lump sum but where the prescribed officer is of opinion that the payment of lump sum or any payment for a ticket, represents payment for other privileges, rights or purposes besides the admission to an entertainment the tax shall be levied on such an amount as appears to the prescribed officer to represent the right of admission to the entertainment in respect of which the tax is payable.

(4) Save as otherwise provided in this Act, every ticket, pass or other document issued for admission to an entertainment shall state therein the amount of payment for admission to such entertainment, and the amount of tax payable under Sec. 3 or 4 on such payment for admission.

5. Section 7 of the Act bears the marginal note "Admission to entertainment" and reads thus:--

7. (1) Save as otherwise provided by this Act, where a tax u/s 3 or 4 or Section 6 or Section 6A is leviable, in respect of the admission of a person to an entertainment, no person other than a person who has to perform any duty in connection with such entertainment shall be admitted to any entertainment, except,-

1. with a ticket, or complimentary ticket, as the case may be, issued in such manner and subject to such conditions as may be prescribed;

(b) in special cases, with the approval of the State Government, through a barrier which, or by means of mechanical contrivance which, automatically registers the number of persons admitted.

(2) Except in the cases referred to in sub-sec. (1) of Section 6 and clause (b) of sub-Section (1), no proprietor shall conduct the entertainment unless he has given security for such amount and in such manner as may be approved by the State Government.

(3) Nothing in sub-Section (1) or sub-Section (2) shall be deemed to preclude the State Government from requiring security from the proprietor for the payment of the tax in any case.

14. From the affidavit-in-reply filed on behalf of the respondents it is apparent that if the owner of each ride is different no entertainment tax is payable if the admission to each ride is less than rupees six. Thus, it is apparent that admission to the place where the rides are kept is not an entertainment, as in such cases there is no charge for the entry ticket and even if there is a charge for entry tickets the same are not to be clubbed.

15. On a plain reading of Section 3 of the Act, it is amply clear that the chargeable event is the admission to an entertainment. Thus, if in the case of individual owners of rides, each ride is considered as a separate entertainment, merely because the owner of all the rides is the same, the charging event would not change. The charge is on admission to an entertainment, thus if each ride constitutes an entertainment, the tax is to be levied accordingly. In the present case there is no dispute that the fee for each ride is less than rupees six. In a given case a person may opt for only one ride, in another a person may opt for any number of rides. Thus, entertainment tax cannot be levied in such a case on the basis of the number of persons who have entered the amusement park. It is not the case of the respondents that the amusement park provides for amusements other than rides, viz., magic shows, and other kinds of entertainment which a person would be entitled to take the benefit of merely by entering the amusement park. Under the circumstances, by entering the amusement park simpliciter without enjoying of any of the rides, the concerned visitor does not get any entertainment. The amusement park per se is not a place of entertainment, like a cinema hall or a theatre where any person who enters the cinema hall or theatre gets to watch the film or the play. In a case like the present one, a person who pays for an entry ticket thereby is not entitled to avail of the benefit of any ride, he only avails of the facilities provided at the amusement park. For getting entertainment, viz. rides, the visitor is required to purchase a separate ticket. Moreover for every ride, be it of the same kind or a different one, a different ticket is required to be purchased. Thus a ticket for a ride is more or less akin to a cinema ticket on the basis of which one can watch

one film only. If one wants to watch another film or the same film again, a separate ticket would be required to be purchased. Purchase of a ticket for mere entry into an amusement park, like in the present case, without getting any kind of entertainment on the basis thereof, not being a payment for admission to an entertainment, would not be exigible to entertainment tax. Under the circumstances, when payment made for entry is not payment for admission to an entertainment, the question of clubbing the same with tickets for rides does not arise, inasmuch as unless Section 3 is applicable no entertainment tax can be levied.

16. The above view is fortified by the decision of this Court in the case of *Ramanlal B. Jariwala Vs. District Magistrate, Surat and Another*, wherein it has been held thus:--

4. We have heard the learned Advocates of the parties on this question. In our view, the submission made by the petitioner is well justified and has got to be accepted. The facts stated in the petition are not controverted by the respondents by filing any affidavit-in-reply. We must, therefore, proceed on the uncontroverted factual position that the petitioners' cinema theatre, which would be having an auditorium and where cinema pictures are exhibited, is situated at a height of 35" from the ground floor and that auditorium can be approached after crossing the foyer on the first floor and thereafter crossing glass partition as mentioned in the petition. So far as lift is concerned, the facility is provided by the petitioner on the ground floor and any party who wants to go on the first floor can approach the foyer and utilise the lift on payment of ten paise per upward trip. The short question is, whether such payment which the petitioner collects from the cinegoer can be brought within the network of the Act. The answer to this question depends upon true construction of the relevant provisions of the Act. Section 3(1) of the Act is relevant charging Section for our present purpose. It provides that there shall be levied and paid to the State Government on every payment for admission to an entertainment, other than the payment for admission referred to in clause (b), a tax, at the following rates..... We are not concerned with the rates of tax. Clause (b) also is not relevant for our present purpose as it refers to drive-in-cinema. The petitioners' cinema is not drive-in-cinema. From Sec. 3(1), it becomes obvious that for attracting charge to tax, payment should be levied by the entertainer, viz., cinema owner for admission to entertainment. It is also obvious that tax cannot be levied for payment for admission to any other facility which does not amount to entertainment, as such type of levy which is not levied for the purpose of entertainment would become ultra vires the powers of the State Legislature, as seen from Entry 62 of Part II, Seventh Schedule to the Constitution. The said Entry provides that State Legislature is competent to levy taxes on luxuries, including taxes on entertainments, amusements, betting and gambling. Consequently, tax must be on payment received for permitting benefit of entertainment. It must, therefore, be found out as to whether payment of ten paise per passenger for user of lift charged by the petitioner for going to the first

floor foyer is payment for admission to entertainment. On first principle, it is difficult to comprehend as to what entertainment a person would get by travelling in the lift for approaching given destination. But even that apart, when we turn to the relevant definitions in the Act, we find that admission to entertainment is defined by Sec. 2(a) to include admission to any place in which the entertainment is held. Entertainment is defined by Sec. 2(e) to include any exhibition, performance, amusement, game or sport to which persons are admitted for payment. Payment for admission is defined by Sec. 2(g) to include various payments such as payment for seats or other accommodation in a place of entertainment. Especially, clause (v) of Sec. 2(g) is worth noting in this connection. It provides that any payment for any purpose whatsoever connected with an entertainment which a person is required to make as a condition of attending or continuing to attend the entertainment in addition to the payment, if any, for admission to the entertainment. On the facts of the present case, it is difficult to comprehend as to how a person who pays ten paise per upward trip in lift for approaching the cine auditorium on the first floor is paying for being admitted to a place where entertainment is held. The term entertainment as seen above includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment. None of these elements exists when a person travels in a lift. There is no exhibition, amusement or game or sport, enjoyed by a person travelling in lift. What is relevant is payment for being admitted to place of entertainment. Ten paise charged by the petitioner from cinegoers are not for admission to auditorium but they are charged for admission to lift. Section 2(g)(v) cannot be of any avail to the Revenue for the simple reason that the payment is not for any purpose whatsoever connected with an entertainment which a person is required to make as a condition of attending or continuing to attend the entertainment. If the petitioner had provided that whether a person travels by lift or not, he will have to pay ten paise more for being admitted to the picture show in the auditorium then the respondent could have submitted with emphasis that Sec. 2(g)(v) would apply. But on the facts of the present case, it is obvious that it is not compulsory for any one to utilise the lift facility given by the petitioner at the cinema theatre. If a cinegoer climbs upto the first floor then he need not pay ten paise. But if he wants to avail of the extra facility of lift, he will have to pay ten paise more. It has nothing to do with entertainment for which he is said to be paying. Thus, on the scheme of the relevant provisions of the Act, conclusion is inescapable that charging of ten paise per passenger who is given facility of using lift situated in the cinema theatre is not any payment received for admission to any entertainment. It is easy to visualise that in a cinema theatre especially double decker cinema, lift facility may be offered for convenience of cinegoers to go to upper floor where cinema auditoriums are situated on upper floors, there may be book stalls, restaurants, ice-cream parlours and without entering the auditorium, person may like to utilise any of these other services or facilities. He may go to purchase books on the first floor or second floor. If he chooses to use the lift, he has to pay for it. But that may have nothing to do with the picture show which may be

exhibited in the auditorium. He may go only for snacks on the first floor or second floor or to have only a bowl of ice-cream there. Similarly, in many theatres, parking facilities are provided wherein cinema goers can conveniently park their scooters and/or cars on payment. Such payment cannot be said to be payment made for admission to entertainment unless such payments are made compulsory for every cinegoer before he can enter the auditorium. In the absence of such situation therefore, it cannot be said that mere collecting of ten paise for getting extra facility of lift if required by any cinegoer would by itself bring this levy within the fold of the Act. The respondents were, therefore, patently in error in insisting that the petitioner should pay entertainment tax on the lift charges collected by him, from the cinegoers who go to his cinema theatre. The learned Assistant Government Pleader could not show us how such type of levy can be sustained under the provisions of the Act. Consequently, it must be held that insistence of the respondents in calling upon the petitioner to pay entertainment tax on the lift charges on the facts of this case is totally illegal and without jurisdiction. The reasoning given in Annexure F for demanding entertainment tax on the basis of Secs. 2(g)(v) and 3(l)(k) is also patently illegal and ultra vires as these provisions do not cover such type of levy as seen earlier.

(Emphasis supplied).

17. As noticed earlier, the notification dated 4th September, 1992 has been issued by the Government of Gujarat in exercise of powers u/s 29(1) of the Act. By virtue of the said notification the classes of entertainment enumerated thereunder are exempted from payment of tax leviable u/s 3 of the Act to the extent specified thereunder. Item No. 3 thereof reads thus:--

Any entertainment other than cinema shows in theatres licensed under the Bombay Cinema (Regulation) Act, 1953, where entertainment is by a machine operated by electricity, petrol or diesel or otherwise and admission of which is conditional upon payment of a sum not exceeding Rs. 6/- per ticket.

18. In the facts of the present case, the entertainment is in the nature of a ride, each of which is a separate entertainment and is operated by a machine operated by electricity, petrol, diesel or otherwise and admission to each ride is subject to payment of a sum not exceeding Rs. 6/- per ticket, hence, the same would squarely fall within the ambit of item No. 3 of the above notification and would be fully exempt from payment of entertainment tax.

19. As to what would be the chargeable event can be culled out from the affidavit filed by the respondents wherein it has been stated that if the items are owned by different owners and if the charges are not more than Rs. 6/-, no tax shall be charged. Thus, assuming that the amusement park is owned by the Corporation and different spaces are let out to different persons, in that case, even if an entry fee is charged by the Corporation for all those who enter the amusement park, there will be no clubbing or no averaging of the prices for the purpose of finding the liability of entertainment tax of each of the owners. Thus, it is

apparent that the chargeable event is the entertainment, viz., the ride.

20. As noted hereinabove, on a plain reading of Section 3 of the Act, the chargeable event is for admission to an entertainment. Thus, if in the case of individual owners of rides, each ride is considered as separate entertainment, merely because the owner of all the rides is the same, the charging event would not change. Under the circumstances, the question of clubbing the ticket fees of different rides provided by the same owner does not arise. It is the case of the respondents that the petitioner is running different rides and is charging separately for each ride. The respondents are, therefore, not justified in computing the entertainment tax by considering the number of entry tickets of the amusement park and the total income for the period in question and dividing the same by the number of entry tickets to arrive at an average which is considered to be the amount payable for admission to the entertainment. In the facts of the case, the amount payable for admission to entertainment would be the amount payable in respect of each ride and not the average price as computed by the prescribed officer. As discussed hereinabove, the fee charged by way of entry ticket not being an amount payable for admission to an entertainment cannot be charged to entertainment tax. The instructions issued by the Commissioner of Entertainment Tax, Gandhinagar vide his letter dated 15.9.1990, to the effect that if different items are owned by different owners and if the charge is not more than the prescribed limit of Rs. 6/-, no tax shall be charged, but if the different items are owned by one owner and the charges are more than the prescribed limit, in that case, the tax should be charged are clearly contrary to the provisions of the Act and the notification dated 4th September, 1992. Apart from the fact that it is difficult to comprehend the logic behind the said instructions, even otherwise, such instructions have no statutory basis and as such have no enforceability in law.

21. At this juncture it may be apposite to refer to certain decisions of this Court. This Court in the case of *The Sports Club of Gujarat Vs. State of Gujarat*, after referring to the provisions of Section 2(a) and Section 3 of the Act, held thus:--

The petitioner has challenged the action of the Government on several grounds. However, it is not necessary to deal with all the grounds in view of the fact that the petition can be disposed of only on one ground. Sec. 3(2) has been reproduced earlier where it is provided that where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to the club for a right of admission to a series of entertainments or to any entertainment during a certain period of time or for any privilege, right, facility or thing combined with the right of admission to any entertainment or involving such right of admission without further payment or at a reduced charge, the entertainment duty shall be charged on such amount of the lump sum as represents the right of admission to entertainments. Therefore, as is obvious the State Government has to undertake the exercise to see that the duty shall be charged on such amount as represents the right of admission to

entertainments in respect of which the entertainments duty is payable. Obviously the entire subscription does not represent the right to entertainment shows nor can it be said that the entire guest charge of Rs. 21- per guest on any day represents the payment for admission. The petitioner club submits that it is not possible to work out such an amount representing the payment for admission to the entertainment show, having regard to the fact that the annual subscription and guest charges are related to all rights, privileges and activities of the club. At present it is not possible to deal with this in view of the fact that the State Government has not undertaken any exercise to determine as to what amount represents the right of admission to the entertainment and without having done that the State Government Authorities have no basis and cause to make a demand and to ask the petitioner club to pay up the entertainment duty. Therefore, the letter dt. 30th November 1972 and 30th May 1973 of the, Home Department are illegal and without any basis; so also the subsequent letters rejecting the representation of the petitioner and the same are therefore quashed and set aside.

22. In *Gujarat Video Association and Others Vs. State of Gujarat*, , this Court held thus:--

Similar is the position in the case of video exhibition where lump sum duty is to be paid on the basis that the owner of a video exhibition conducts all the shows which he is permitted to conduct and that for those shows all the seats in the place of entertainment are occupied. In our opinion, this is not a tax on entertainment at all which the State Legislature is entitled to levy under item 62 of the State List. In order that the entertainment duty should amount to a tax on entertainment it should be levied on entertainment which is actually held and not on entertainment, which is theoretically capable of being held. Looking to the provisions which have been examined in details, it is clear to us that the said provisions do not take into account entertainment that is actually held by the owner of the touring cinema or the owner of the video exhibition. The basis on which tax can be validly levied is the fact of entertainment. The taxing event is the entertainment. If there is no entertainment at all, the question of levying entertainment tax in exercise of the legislative powers conferred upon the State Legislature does not arise at all. If the Act purports to levy tax on notional entertainment, then the exercise of that taxing power must be held to be ultra vires the Constitution. This is exactly what has happened in the instant case.

(emphasis by us).

6. In our case also, the position is somewhat strikingly analogous. The Act purports to levy tax on notional entertainment and, therefore, the exercise of that taxing power has to be held ultra vires the Constitution, i.e. Entry 62 of the List II of Schedule VII of the Constitution. As the above part is not severable from the other part, the whole of Sec. 6A is to be struck down as ultra vires.

7. It was urged before the Bombay High Court in the above case that what was

sought to be levied by way of entertainment duty in clauses (c) and (d) amended was not entertainment duty at all in the sense that it was not the duty on entertainment. The basis of calculation of the consolidated sum in the case of a touring cinema was not the number of shows held in a touring cinema, nor was it the number of persons who were admitted to the cinema; it is not even the number of seats actually occupied on a particular day or in a particular month, but the basis for calculating the consolidated sum of money was the gross collection capacity calculated on the notional basis of all the seats and accommodation available in every show of every day of the month being occupied. Similar was the position in the case of video exhibition where lump sum duty was to be paid on the basis that the owner of a video exhibition conducted all the shows which he was permitted to conduct and that for those shows all the seats in the place of entertainment were occupied. Looking to the provisions of clauses (c) and (d) of Section 3(1) of the Bombay Entertainments Duty Act, the Division Bench held that the said provisions did not take into account entertainment that was actually offered by the owner of the touring cinema or the owner of the video exhibition and the Act purported to levy tax on notional entertainment and, therefore, exercising of that taxing power was held to be ultra vires the Constitution. Here, the consolidated amount cannot be quarrelled with because the Supreme Court has made position clear.

23. Both the aforesaid decisions reinforce the view taken by this Court that the taxing event is the entertainment, and if there is no entertainment at all, the question of levying entertainment tax does not arise at all. Accordingly, considering the nature of entertainment provided by the petitioner, mere entry into the amusement park does not provide any kind of amusement to the visitor and, therefore, is not chargeable to entertainment tax. Under the circumstances, it is not permissible for the respondents to take into consideration the amount collected by way of entry fee for the purpose of assessment of entertainment tax under the provisions of the Act. Moreover, for the reasons stated hereinabove, it is not permissible for the respondents to club the price of tickets for each individual ride together for the purpose of computing the entitlement of the petitioner for availing of the benefit of the notification dated 4th September, 1992 issued in exercise of powers u/s 29(1) of the Act whereby entertainment is exempt from the purview of the Act if the admission rates for such entertainment does not exceed Rs. 6/-. In the facts of the case, when the admission rates for each individual ride did not exceed Rs. 6/-the petitioner could not have been denied the benefit of the said notification by resorting to an artificial method of computing the admission rate by taking into consideration the total income derived by the petitioner from the said amusement park, inclusive of admission tickets and dividing the same by the number of visitors and taking such figure to be the admission rate. In the opinion of this Court, there is no legal basis for such computation.

24. As regards the bumper tickets, it may be germane to refer to sub-Section (3) of Section 3 which has been reproduced hereinabove. The said provision

envisages that in case of payment of lumpsum amount or any payment for a ticket which represents payment for other privileges, rights or purposes besides the admission to an entertainment, the tax shall be levied on such amount as appears to the prescribed officer to represent the right of admission to the entertainment in respect of which tax is payable. Thus, payment of Rs. 2/- towards entry ticket represents payment for other privileges, rights or purposes besides the admission to an entertainment and as such no tax can be levied thereon under the provisions of the Act. However, insofar as the clubbing of rides under the bumper ticket is concerned, considering the nature of the bumper ticket which permits a person to avail of different rides at a concessional rate provided he purchases a bumper ticket, the same would stand on a different footing, inasmuch as the petitioner itself has clubbed the tickets for different rides together into one bumper ticket. If a visitor desires to avail of a single ride, he would have to pay the full price for such ride and enjoy the same. It is only if he purchases a bumper ticket that he can avail of concessional rates in respect of each ride. Thus, here the admission rate is in respect of all the rides clubbed together and not for each individual ride, though for administrative purposes the bumper ticket may consist of several tickets for each separate ride. Under the circumstances, insofar as bumper tickets are concerned, there is no infirmity in the stand adopted by the respondents that the same has to be considered as one single ticket and as such the admission rate would be considered on the basis of the price of the bumper ticket. However, the admission rate would not include the entry fee which forms part of the price of the bumper ticket as the entry fee is not charged in respect of any entertainment.

25. Another contention raised on behalf of the petitioner is that in view of Schedule III framed u/s 3A of the Act, all kinds of sports excluding the sports of rides provided in water parks and holiday resorts are taken out of the purview of the Act for the purpose of fastening liability of entertainment tax. Thus, the rides provided by the petitioner not being rides provided in water parks and holiday resorts are not exigible to entertainment tax. In this regard, it may be noted that the orders impugned in the present case pertain to the period 17.1.1997 to 16.2.1997. Schedule III came to be inserted in the Entertainment Tax Act, vide Section 3 of Gujarat Entertainments Tax (Amendment) Act, 1998 (Gujarat Act No. 8 of 1998) which was brought into force on 1st August, 1998. In the aforesaid premises the provisions of Schedule III not being applicable in respect of the period under consideration, the contention raised by the petitioner does not merit acceptance insofar as the facts of the present case are concerned. For the period after 1.8.1998 the petitioner may agitate the issue if it so deemed fit in an appropriate case.

26. In the light of the aforesaid discussion, the impugned orders cannot be sustained to the extent the same adopt a mode of computation of entertainment tax not envisaged under the Act. In the light of the fact that the price of the ticket for each ride provided in the petitioner's amusement park does not exceed Rs. 6/- the petitioner was entitled to exemption under the notification dated 4th

September, 1992. Insofar as bumper tickets are concerned the respondents are not justified in including the price of entry ticket while computing the admission rate. For the foregoing reasons the petition partly succeeds and is accordingly allowed to the aforesaid extent. The impugned orders dated 5th April, 2002 passed by the respondent No. 2 confirming the orders dated 20.5.2001 and 27.5.1997 passed by the respondents No. 3 and 4 are hereby quashed and set aside. In the light of the fact that the petitioner's liability to pay entertainment tax in respect of the bumper tickets has been upheld to the extent discussed above, the fourth respondent shall re-calculate the liability of the petitioner in the light of what is held hereinabove and grant consequential relief to the petitioner. Rule is made absolute to the aforesaid extent with no order as to costs.