

(2010) 09 GUJ CK 0084

In the Gujarat High Court

Case No : Special Civil Application No. 7169 of 2004

Hanjar Cinema

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 09-09-2010

Acts Referred:

Constitution of India, 1950 — Article 227
Gujarat Entertainment Tax Act, 1977 — Section 16, 18, 21, 3, 4
Gujarat Entertainment Tax Rules, 1979 — Rule 15, 17, 3

Citation : (2010) 51 GLR 2547

Hon'ble Judges : S.J. Mukhopadhaya, C.J;K.M. Thaker, J

Bench : Division Bench

Advocate : M.B. Gandhi, for the Appellant; Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Thaker, J.—The subject matter of present petition is the demand for and recovery of entertainment tax from the petitioner, pursuant to the adjudication in respect of the irregularities reportedly committed by the petitioner in the matter of payment of the entertainment tax.

1.1 The petitioner has brought under challenge concurrent orders dated 13.11.2000, 10.03.2003 and 17.03.2004 passed by the Deputy Commissioner Entertainment Tax, being the first adjudicating authority and the District Collector-being the Appellate Authority and the State Government/Commissioner of Entertainment Tax, being the revisional authority respectively.

1.2 After issuance of the Notice and upon adjudication, the adjudicating authority passed the order dated 13/18.11.2000 which came to be confirmed by the Appellate Authority in the appeal preferred by the petitioner herein and thereafter, the revision application came to be rejected by order dated 17.03.2004 confirming the order by the adjudicating and appellate authorities assessing petitioner's liability to pay Rs. 4,39,054/- towards entertainment tax.

It is against said three concurrent orders that the petitioner has preferred present petition praying, inter-alia, that the impugned orders may be set aside.

2. The relevant facts can be summarized as follows:

2.1 The petitioner cinema theater (who has filed the petition through its administrator) is liable, under the provisions of Gujarat Entertainment Tax Act, 1977 (hereinafter referred to as the "Act"), to pay entrainment tax, in the manner and at the rate and within time, prescribed under the Act and the rules framed thereunder.

2.2. Upon having received report about irregularities being committed in the matter of entertainment tax with a view to avoiding tax liability, the respondent authorities examined the matter and found discrepancies in the details declared in the prescribed form No. 17 and the rate of tickets printed on the tickets and the actual amount which was being charged from the cine-goers. Therefore, an employee of the respondent authority attended first show on 9th December, 1998 of a film being run in the petitioner-theater. He purchased two tickets of upper stall bearing No. 10900 and 11016. He was required to pay Rs. 12/- per ticket whereas the rate printed on the said tickets was Rs. 8/- per ticket.

2.3 Thereafter, further inquiries were made which included the inquiry about the printing press where the tickets were being printed. Another round of inspection was carried out on 23.12.1998 when it was noticed that though the tickets for balcony were being sold at Rs. 15/- per ticket and the upper stall tickets were being sold Rs. 12/- per ticket, the rates mentioned in the tickets was old rate which reflected the rate at Rs. 8/-.

2.4 In pursuance of such information, the authority asked the petitioner to furnish the details pertaining to the changes in the rates effected by the petitioner from time to time during the period from 7th April, 1998 to 21st December, 1998.

2.5 From the record it appears that after the intimation to furnish relevant details and documents, initially the petitioner did not furnish the details and it was only after several notices and reminders that certain details and documents came to be supplied.

2.6 It appears that on verification of the record, particularly Form No. 17, the authorities noticed that in several cases the increase in the rates was informed after prescribed period i.e. after delay whereas in several cases any intimation about the reduction/increase in the price was not intimated and in certain cases the Form No. 17 were maintained at reduced rate as against the actual rate. Having noticed such discrepancies, a notice dated 31.05.1999 was issued demanding payment of entertainment tax plus penalty for breach of Section 21 of the Act read with Rules 3 and 17 of the Tax Rules. The demand amount was to the tune of Rs. 10,10,863/- and the petitioner was required to show cause as to why action should not be taken u/s 16 of the Act.

2.7 In response to the notice, the petitioner submitted reply and attended the hearing before the authority and claimed that under letters dated 02.04.1998, 06.04.1998, 13.04.1998, 04.06.1998, 06.08.1998 etc. the change in rates were informed to the authority. After considering the replies, the submissions and the record the first adjudicating authority reduced the demand by assessing the short payment of entertainment tax, at Rs. 4,39,054/- and a penalty of Rs. 20,000/-, instead of (imposing penalty) @ 150% as provided u/s 9(3) of the Act, was imposed. Since the petitioner had requested for compounding the offence u/s 18 of the Act, additional penalty for compounding the offence was imposed.

2.8 Aggrieved by the said decision dated 13/18.11.2000, the petitioner preferred an appeal before the Collector. After considering the objections of the petitioner, the appellate authority rejected the appeal vide order dated 10.03.2003. The petitioner preferred revision application against the said order of the appellate authority which was heard by the competent authority who, after considering the submissions, rejected the revision application by order dated 17.03.2004.

2.9 The petitioner is aggrieved by the said concurrent orders. Hence, present petition.

3. Mr. M.B. Gandhi, learned advocate has appeared for the petitioner. Though, all conceivable contentions against the impugned orders, including the ground of non-application of mind, arbitrariness, violation of principle of natural justice, lack of jurisdiction etc. have been stated in the petition memo, the learned advocate has restricted his grievance essentially on only two grounds viz. (a) since the last checking was carried out on 18.10.1988, the impugned demand and recovery for period prior to the said date is not justified and the petitioner cannot be asked to make payment of tax for period prior to the date of the last checking; (b) on the strength of tickets of one show, and that too only of upper stall, the difference for entire capacity for period of more than three months cannot be raised.

It has been submitted that once the exercise of checking is undertaken/carried out and any irregularity is not found or alleged then the authorities thereafter cannot demand of payment of tax for period beyond the last date of checking. Mr. Gandhi has, to support the said submission, relied upon certain orders passed on the ground that the working of the entertainment tax prior to the last date of checking cannot be made. Mr. Gandhi has submitted that the matter deserves to be remanded for reconsideration. He has also submitted that the petitioner would agree to make the payment for the period from last date of checking until 9th December, 1998 and the balance payment (deposited by the petitioner) may be refunded.

4. The petition is resisted by the respondent authorities. Mr. J.K. Shah, learned AGP has appeared for the respondent authorities and submitted that the petition against three concurrent orders does not deserve to be entertained. He has also submitted that the petition involves reappreciation of evidence which this Court

in exercise of writ jurisdiction may not undertake. He has also submitted that the initial demand was for Rs. 10,10,863/- however, upon taking into account, the submissions of the petitioner and the relevant record, the adjudicating authority reduced the demand to Rs. 4,39,055/- and instead of imposing penalty at 150% only Rs. 20,000/- is imposed. He has submitted that the said order is just and reasonable and in consonance with the provisions of the Act and has been confirmed by the appellate and revisional authorities and that therefore, it does not deserve to be set aside.

5. We have heard the learned Counsel and perused the record.

6. It emerges from the record that upon scrutiny of the documents received-pursuant to the notice for production of records from the petitioner and the returns filed from time to time, the authority noticed irregularities in payment of entertainment tax and also noticed that payment for admission to any entertainment or complimentary ticket i.e. entertainment tax had escaped assessment. Therefore, demand for the payment of tax for the period from 07.08.1988 to 04.10.1998 and 09.10.1998 to 20.12.1998 was raised.

7. The petition is directed against three concurrent orders. That is the first reason for which the writ jurisdiction does not deserve to be exercised. Furthermore, the orders are based on findings of facts recorded by the adjudicating authority and reappreciated and confirmed by the appellate and revisional authority. This Court, in exercise of writ jurisdiction, would not undertake reappreciation of evidence and would not disturb the finding of facts which have passed through the appellate and revisional authority, more so when it is neither claimed nor established that the conclusions are perverse and unsupported by any evidence. The petitioner has failed to establish that the conclusions are not based on evidence and are perverse. Any infirmity or error of law or arbitrary exercise of jurisdiction is neither demonstrated nor established. The petition, for these reasons, does not deserve to be entertained.

8. So as to appropriate the contentions it is necessary to take into account the provision u/s 9 of the Act as also the provision under Rule 15 of the Rules framed under the Act. The said provisions read thus:

Section 9. Assessment of escaped payments for admission and re-assessment of payments for admission assessed at lower rate (and assessment on failure to pay tax u/s 6-B)-

(1) Where for any reason any payment for admission to any entertainment or any complimentary ticket has escaped assessment to tax. (or the proprietor has failed to pay tax payable u/s 6-B), the prescribed officer may, subject to the provisions of Sub-section (3) and at any time within such period as may be prescribed, assess to the best of his judgment the tax due on such payment or ticket (or on failure to pay tax u/s 6-B), after making such inquiry as he may consider necessary and after giving the proprietor a reasonable opportunity to show cause against such assessment.

(2) Where for any reason any payment for admission to any entertainment or any complimentary ticket has been assessed at a rate lower than the rate at which it is assessable u/s 3 or Section 4, as the case may be, the prescribed officer may, subject to the provisions of Sub-section (3) and at any time within such period as may be prescribed, re-assess the tax due on such payment or ticket, after making such inquiry as he may consider necessary and after giving the proprietor a reasonable opportunity to show cause against such re-assessment.

(3) In making any assessment or re-assessment under Sub-section (1) or Sub-section (2), as the case may be, the prescribed officer may, if he is satisfied that due to wilful mis-statement or suppression of the facts by the proprietor, the tax has not been levied or has been levied at a rate lower than the rate at which it is leviable, direct the proprietor to pay, in addition to the tax assessed or re-assessed under Sub-section (1) or Sub-section (2), as the case may be, and without prejudice to any other liability that he may incur under the provisions of this Act, a penalty not exceeding one and a half times the tax so assessed or re-assessed:

Provided that no penalty under this Sub-section shall be imposed unless the proprietor affected has had a reasonable opportunity of showing cause against such imposition.

(4) The power under Sub-section (1) or Sub-section (2) may be exercised by the prescribed officer, notwithstanding that the original order of assessment, if any, passed in the matter has been the subject matter of an appeal or revision.

(5) In computing the period of limitation for assessment or re-assessment under this Section, the time during which proceedings for assessment or re-assessment may have remained stayed under the orders of a civil court or other competent authority shall be excluded.

[(6) The provisions of Sub-sections (1) to (5) shall, so far as may be, apply in any case where for any reason, tax (under Sections 6, 6-A or 6-B) has escaped assessment.

Rule 15 Period within which assessment or re-assessment u/s 9 may be made. -

(1) The assessment or re-assessment of tax u/s 9 may be made within a period of three years from the date the tax would have been payable.

9. It is noticed from the conjoint reading of the said provisions that the competent/adjudicating authority can at any time, within period of three years from the date, the tax would have been payable, direct the proprietor to pay the tax so assessed if he is satisfied that due to misstatement or suppression of facts the tax was not levied or had been levied at lower rate than the rate at which it is leviable or the proprietor failed to pay the tax payable u/s 6B of the Act.

10. The contention raised by the petitioner ignores the fact that in present case the assessment is made in exercise of Section 9 of the Act and that too on the

basis of the returns filed by the petitioner and not merely on the basis of tickets purchased by the employee on 09.12.2008 and/or not merely on the basis of the last date of checking but the demand is raised upon the authority being satisfied that it was due to misstatement and suppression of relevant facts the assessment had escaped as a result of which the tax was not paid and/or was not levied and collected at the rate of which it should have been paid and/or levied and collected. Therefore, in the facts of the case, the said orders relied upon by the learned advocate would not be applicable.

It is clear that Section 9 of the Act and Rule 15 of the Rules framed under the Act, authorizes the competent authority upon being satisfied that any assessment has escaped or tax has been levied and collected the rate lower than the rated which tax should have been paid to assess, to the best of his judgment, the tax due and demand the payment. The provision not only permits assessment but also reassessment for past 3 years. Thus, even completed assessment can be revisited. The provision also expressly authorizes the authority to make such assessment in respect of period past three years, and neither provides nor contemplates, even impliedly, any restriction other than or short of the limit prescribed by the rules and that therefore, in such cases, any restriction much less the restriction of not traveling beyond the last date of inspection cannot be read into the provision. An attempt to read such restriction into the provision would amount to adding words which is impermissible. Further such construction i.e. reading restriction into the Section would render the term reassessment, nugatory. In present case, the notice and the order make it clear that the demand was raised under the provision of Section 9 of the Act and that therefore, the contention of the petitioner is not sustainable.

10. It emerges from the impugned orders that the authorities detected several discrepancies and anomalies between the rates actually charged/collected by the petitioner vis-a-vis. the detailed mentioned in the form No. 17 and in the accounts maintained by the petitioner. The last date of checking in the facts of present case cannot be equated with the assessment or reassessment procedure contemplated u/s 9 of the Act undertaken in present case.

11. In present case it deserves to be noted that the demand has been raised on the ground that incorrect accounts were being maintained and submitted to the concerned respondent authorities which amounts to misstatement and/or suppression and on the ground that either the intimation regarding reduction or increase (i.e. change in the rates) was intimated subsequently or even after having intimating about reduction in the rates, actually original rate i.e. higher rate was charged and collected whereas tax was paid only on the reduced rate intimated to the authority. In short, the demand is in respect of and on the basis of assessment of "escaped payment" due to misstatement and/or suppression covered under the purview of the Section 9 of the Act which stipulates limitation of three years. The aforesaid aspects can be appreciated from the below mentioned findings (free translation) recorded by the first adjudicating authority:

Thus, as above, as per the intimation given about the change made in the ticket rate for relevant time, on reconciling the accounts from dt. 01/04/98 to 24/012/98 of the Form No. 17, though the increased rate was informed, the false accounts have been written as per the reduced ticket rate as below.

[1]. Hanjar Cinema vide its letter dtd. 07/04/98, has intimated about increase in the rate from dt. 10/04/98. There is an entry of receipt of the said letter in the Mamlatdar Office on dt. 27/04/98. Thus, the intimation in respect of increasing the ticket rate is given lately in the old date. Looking to the accounts of Form-17, the accounts from the dt. 03/04/98 to the dt. 05/04/98 are as per the increased ticket rate, wherein it is not informed for reduction in the rate. Despite this, the accounts from dt. 06/04/98 to dt. 07/04/98 are mentioned as per reduced ticket rate and the letter dtd. 07/04/98 wherein it has been intimated that the ticket rates are increased from 10/04/98. The same was intimated at the Mamlatdar Office on 27/04/98. Thus, though the ticket rates for the concerned class have been increased from dt. 03/04/98, the tax evasion is committed by writing accounts as per low ticket rate for the period of from dt. 06/04/98 to 09/04/98.

[2]. After the intimation was given about increase in the ticket rate from dt. 10/04/98 as mentioned in the point No. 1, again vide the letter dtd. 25/05/98, it has been intimated that the ticket rate was to be increased from 25/05/98. But as above, during the period between dt. 10/04/98 and dt. 25/04/98, no intimation in respect of reduction in the ticket rate was given. That is to say that, the selling of the tickets for the concerned class is done as per the increased ticket rate. While the entertainment tax evasion is committed by writing sale accounts of the tickets as per the decreased ticket rate from Dt.13/04/98 to 25/04/98.

[3]. The intimation as to increase in the ticket rates from dt. 29/05/98, is given vide the letter dtd. 28/05/98 and the accounts are written as per the reduced ticket rate till dt. 04/06/98. Thereafter, the accounts from dt. 05/06/98 to 07/06/98 are written as per the increased ticket rate. In this respect the Prescribed Office is not intimated. And in the same way, the accounts from the Dt. 08/06/98 to the Dt. 12/07/98 are written as per the reduced ticket rate. The same has been not intimated. That is to say that, the selling of the tickets is done as per the increased ticket rate from dt. 05/06/98. Despite that, The entertainment tax evasion is committed by writing sale accounts of the tickets as per the reduced ticket rate from Dt. 08/06/98 to the dt. 12/07/98.

[4]. After the intimation was given as to increasing the ticket rate from dt. 13/07/98, the intimation is given vide the letter dtd. 16/07/98 as to reduction in the ticket rate for a limited period from dt. 17/07/98 to dt. 19/07/98 and again it has been intimated vide the letter dtd. 23/07/98 as to the ticket rate would be reduced from dt. 24/07/98 and accordingly, the ticket rates have been increased in the accounts for a period from Dt. 12/07/98 to the dt. 16/07/98 and from dt. 20/07/98 to the dt. 23/07/98. the accounts for rest of all the time are as per the reduced ticket rate. That is to say, that the sale of the tickets is as per the increased ticket rate from the beginning. But, the entertainment tax evasion is

committed by showing the accounts as per the reduced ticket rate by such types of letters.

[5]. By giving intimation vide the letter dtd. 03/08/98 as to increase in the ticket rate, accordingly, the accounts have been written from dt. 03/08/98 to 06/08/98 and the accounts from the dt. 07/08/98 to the dt. 09/08/98 have been written as per the reduced ticket rate. The same is not intimated to the Prescribed Officer, and accordingly, the accounts for dt. 24/07/98 to the dt. 02/08/98 as mentioned in the point No. 4, are also written as per the reduced ticket rate.

[6]. Intimation as to reduction in the ticket rate for a period from dt. 14/08/98 to 16/08/98, has been given vide the letter dtd. 14/08/98. Looking to the details of the Point No. 5, the accounts from the dt. 03/08/98 to the dt. 13/08/98 must be as per the increased ticket rate and the account for the intimated period from dt. 14/08/98 to 16/08/98 must be as per the reduction in the ticket rate.

[7]. As stated above in the point No. 6, the intimation as to reduction in ticket rate is given only for three days from DT.14/08/89 to the dt. 16/08/98. Therefore, the accounts of the sale of tickets from dt. 17/08/98, should be as per the increased ticket rate. But again, the accounts from the dt. 21/08/98 to the dt. 31/08/98 are written as per the reduced ticket rate. The same has been not intimated to the Prescribed Officer. Thus, though the tickets have been sold as per the increased ticket rate, the tax evasion is committed by writing false accounts.

[8]. The accounts from the dt. 01/09/98 to the dt. 03/09/98 are written as per the increased ticket rates, while the accounts from the dt. 04/09/98 to the dt. 08/09/98, from the dt. 11/09/98 to the date 30/09/98, from the date 01/10/98 to the date 04/10/98 and from the dt. 09/10/98 to the dt. 15/10/98 are written as per the reduced ticket rate. The change in the ticket rate for the relevant time is not intimated to the Prescribed Officer. Thus, the tickets of the Cinema are sold as per the increased ticket rates, but the tax evasion is committed by writing false account.

[9]. Intimation in respect of increased ticket rate for a period from dt. 16/10/98 to the dt. 18/10/98 was given vide letter dtd. 16/10/98 and thereafter the intimation was given vide the letter dtd. 21/12/98 as to the ticket rate would be increased from dt. 21/12/98 and accordingly, the accounts from the dt. 19/10/98 to the dt. 31/11/98 and from the dt. 01/12/98 to the dt. 20/12/98, are written in reduced ticket rate. But as stated above, the tickets for Upper Stall which were purchased on dt. 09/12/1998, were sold as per the increased ticket rate. Despite that, the entertainment tax evasion is committed by writing the accounts as per the reduced ticket rate in the account for the said day to till 20/12/98.

[10]. In the accounts for the Matin'e Show on dt. 16/08/98 in the form No. 17, the sale of 60 tickets is shown instead of selling of total 69 tickets is done as per the Ticket Nos. from 1663 to No. 1731 for Balcony Class.

[11]. On 16/04/98, in the second show the selling of the Balcony Class Tickets is shown by No. 4199 to No. 4839, accordingly it amounts to the selling of 741 tickets. In reality, there is selling of 41 tickets and accordingly, from Ticket No. 4799 to the No. 4839 should be there.

[12]. It is tampered with by making erasure in the account of selling of the tickets for Upper Stall class of the last show on dt. 22/05/98. Therein, first, after showing selling of the total 486 tickets as per 1201 to 1666, it has been shown by amending selling of total 200 tickets as per 1201 to 1400, thereby the tax evasion is proved to have been committed.

[13]. On 22/10/98, total selling of the tickets is 2016 for the Upper Class of total five Show. Its entertainment tax amounts to Rs. 6854-40/- and the entertainment tax Rs. 6834/- only is mentioned instead. That is to say, the less amount of Rs. 20-40/- is mentioned in the account.

[14]. In the form No. 17, dtd. 20/07/98, as per the entertainment tax of Rs. 7-95/-, the total Rs. 4006-80 should have been written for total selling of 504 tickets for the total five show of Balcony class, but instead of it, Rs. 2468-80 is mentioned, that is to say the less amount of Rs. 1638/- is written. In this way, as per the entertainment tax of Rs. 6/-, the total entertainment tax amounts to Rs. 9474/- for total 1579 tickets for all the day time show of the upper class, instead of it Rs. 5368-60 is mentioned. That is to say, the less amount of Rs. 4105-40 is mentioned. Thus, the less total amount of Rs. 5743-40 is mentioned in the account.

The aforesaid findings of factual aspects clearly and conclusively establish that (a) they are based on evidence (b) misstatements were made or relevant and material facts were suppressed or misrepresented (c) payable tax was not paid by the petitioner and (d) the details came to the notice upon examining the accounts, challans and other record. It also deserves to be noted that besides the aforesaid details and other aspects which emerged from the record, the adjudicating authority also took into consideration the explanation and submission by the petitioner and reduced the demand by making the assessment at Rs. 4,79,055/- as against of original demand of Rs. 10,10,863/- which reflects application of mind.

12. It emerges from the record that the assessment is based on documentary evidence placed before the authority. It has been concluded that in several instances though intimations about reduction in rates were given, actually any reduction was not made and the original the rate i.e. rate higher than the rate intimated to the authority was charged and collected whereas in certain cases rate higher than the rate printed on the tickets was charged and intimation about the increased was given subsequently and thereby, actual payment of entertainment tax required to be made, was avoided and entertainment tax was paid at lesser rate or was not paid. Such findings of facts do not deserve to be and cannot to be interfered with in exercise of writ jurisdiction, more so when it

calls for reappreciation of evidence and also to disturb concurrent orders passed by three authorities.

13. The learned Counsel for the petitioner has not been able to demonstrate that the findings of the facts and the conclusions are not based on and supported by evidence and are perverse. The contentions raised by the learned Counsel for the petitioner have been made on the premise that the demand came to be made only on the basis of the visit by the employee on 9th December, 2008 who purchased of two tickets of upper stall on the said date and the said contentions overlook the facts that the demand in question came to be made upon being satisfied about assessment having escaped (due to misstatement and/or suppression) as a result of verification and assessment of accounts in exercise of the power u/s 9 of the Act, which permits such assessment as well as reassessment for escaped payments for period upto last three years.

13.1 In this view of the matter and in light of the facts of the case, we do not find any merits in the challenge against the impugned orders when findings of facts and conclusions by the adjudicating authority are examined and reappreciated by two authorities i.e. appellate and revisional authorities who after close scrutiny confirmed the findings. In exercise of jurisdiction under Article 227 of the Constitution, do not see any reason to interfere with the concurrent orders. The petitioner has failed to show any material to hold that the findings are perverse. We also do not find any justification to interfere with concurrent orders and findings of facts. Further, in absence of any apparent error of jurisdiction we are not inclined to disturb such concurrent orders.

14. The petition, therefore, fails and deserves to be rejected. Accordingly, the petition is rejected. Rule discharged. Interim relief if any stands vacated. No costs.