

(2003) 03 AHC CK 0054

In the Allahabad High Court

Case No : C.M. Writ Petition (Tax) No. 287 and 361 of 1998

Hotel Taj Ganges and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 07-03-2003

Acts Referred:

Constitution of India, 1950 — Article 265

Uttar Pradesh Entertainments and Betting Tax Act, 1979 — Section 2, 3(7), 4B

Citation : AIR 2003 All 304

Hon'ble Judges : Prakash Krishna, J; M. Katju, J

Bench : Division Bench

Advocate : Mool Behari Saxena, for the Appellant;

Final Decision : Allowed

Judgement

1. This Writ Petition No. 287 (Tax) of 1998 has been filed for a writ of certiorari to quash the impugned order of the Assistant Entertainment Tax Commissioner, Varanasi dated 24-9-1993 and 27-12-1993 Annexures 3 and 4 to the writ petition No. 287 (Tax) of 1998. Writ Petition No. 361 (Tax) of 1998 has been filed for quashing the orders dated 17-8-1998, 23-6-1998 and 27-4-1998 and for refund of the amount said to be illegally realized from the petitioner. Writ Petition No. 1056 of 1994 has been filed for quashing the orders dated 13-12-1993 and 6-1-1994. The petitioners have also prayed for a mandamus directing the respondents not to levy any entertainment tax on the petitioner on its providing dish-antenna services to its room in its hotels and to refund the amount said to be illegally realized by the respondents.

2. Heard learned counsel for the parties.

3. The petitioners are 5 Star government approved hotel which provide boarding and lodging facilities to its customers. The petitioners are part of a chain of hotels managed by the Taj Group of hotels having its hotels at various centers in the country and abroad. In its hotels the petitioners have a huge multi storied

building having shopping arcade, swimming pool, lavish lawn, badminton Court, tennis Court, jogging area, peacock garden etc. apart from other facilities e.g. conference hall, huge lobby, travel desk computer, in house bank, money changing facilities, post office etc. The petitioners also have restaurant, coffee shop, bar licence, 24 hours room service etc.

4. In Paragraph 6 of Writ Petition No. 287 of 1998 it is stated that to provide comforts and efficient service, the petitioner's rooms are equipped with modern and international standard gadgets having different channel music system, T.V. set etc. The petitioner has stated in Paragraph 12 (a) of the writ petition that the petitioner does not charge any amount for admission for entertainment except the fixed tariff for the rooms from its customers. The entertainment is part of the service rendered by the petitioner for which a fixed tariff is charged. It is alleged that it is difficult and impossible for the petitioner to calculate the payment towards the entertainment through the T.V. in the rooms. The occupancy in the hotel is not 100% everyday and sometimes the occupancy is up to 50% and sometimes as low as 10%.

5. In Paragraph 14 of the writ petition it is alleged that to provide maximum comfort to its customers and to give all the facilities available in the 5 Star hotel the petitioner has also made arrangement for dish antenna in its hotel premises through which a customer living in a room may enjoy any of the programmes such as Zee T.V., Star, T.V., B.B.C., Dordarshan etc. It is not possible to ascertain and calculate which of the rooms occupied by the customers availed the service of these channels of T.V. In Paragraph 15 of the writ petition it is alleged that being a 5 Star hotel, in order to keep its good-will and to compete with other hotels, it has to provide modern facilities which are internationally recognized and provided in other hotels in the world. The guests staying in the rooms pay irrespective of the fact whether they avail these facilities in the rooms, and the management does not charge any extra amount against these facilities available in the room. Being a 5 Star hotel the petitioner has to provide these facilities otherwise the classification committee constituted by the Tourism Department of the Government would be compelled to degrade the petitioners hotel from 5 Star hotel to a lower Star category hotel.

6. In Paragraph 17 of the writ petition it is stated that the petitioner was surprised to receive the letter dated 24-9-1993 of the Assistant Entertainment Tax Commissioner, Varanasi stating that the petitioner was providing entertainment through dish antenna to its customers in the rooms between the period 1-4-1992 to 24-9-1993 and it was liable to pay 30% entertainment tax in pursuance of the government notification dated 13-4-1989 vide Annexure-5 to the writ petition. True copy of the letter dated 24-9-1993 is Annexure-3 to the writ petition. In Paragraph 17 (b) of the writ petition it is stated that cable operation is a commercial business enterprise of entertainment through cable T.V. which also includes one channel of video film for which an exclusive fee is charged and is basically run for profit. On the other hand, the petitioner's hotel

does not show one additional video channel for film, and showing of foreign programmes through satellite is one of the main facilities provided to guests staying in the hotel for which there is no distinct charge. It is alleged in Paragraph 17 (d) of the writ petition that the demand of entertainment tax worked out is irrational, arbitrary as the entertainment tax is levied at 30% of the payment received for admission to the programmes. In the case of the petitioner no amount is received towards the entertainment or as an admission to watch T.V. programmes through dish antenna. It is providing dish antenna service to the room in the hotel which is a private place and it could not be termed to be a public place. It is alleged in Paragraph 17 (j) of the writ petition that providing satellite service, through dish antenna to its customers staying in the rooms in the hotel is clearly different from providing cable service and video shows in public places, vehicles or hotels. In this connection the petitioner met the Assistant Entertainment Tax Commissioner and placed the full facts and requested that the entertainment tax may not be demanded from it for providing dish antenna service to its rooms as this is not entertainment within the meaning of Section 2 (g) of the U.P. Entertainment & Betting Act 1979 (hereinafter referred to as "the Act"). However, the said authority vide letter dated 27-12-1993 directed the petitioner to pay Rs. 79380/- within, three days failing which the amount will be realized as arrears of land revenue vide Annexure-4 to the writ petition. In Paragraph 39 it is stated that it is always open to the guests occupying the rooms to switch on the T.V. or not, and it is purely in their discretion. In Paragraph 40 of the writ petition it is stated that many of foreign tourists do not understand English, what to say of Hindi. The programme is either in English or Hindi. Aggrieved this writ petition has been filed.

7. A counter affidavit has been filed in Writ Petition No. 361 of 1998 and we have perused the same. In Paragraph 5 of the same it is stated that providing entertainment to the customers by the petitioner is entertainment as defined in Section 2 (g) of the Act. The respondents have relied on several decisions of this Court in various writ petitions referred to in Paragraphs 7, 8 and 44 of the counter affidavit. We have carefully perused the decisions in the aforesaid cases. The facts of the present case are totally different from the facts of Writ Petition (Tax) No. 1353 of 1993 Universal Communication System v. State of U.P. connected with Writ Petition No. 831 of 1994 Suneel Kumar Agrawal v. District Magistrate, Writ Petition No. 823 of 1094 M/s. Osho Resorts v. District Magistrate and Writ Petition No. 13007 of 1994 Sudheer Kumar Gupta v. District Magistrate, which were all decided by a Division Bench of this Court by judgment dated 26-5-1995. The facts of those cases were totally different from the facts of the present case. Those writ petitions were filed by cable operators who had challenged the demand of entertainment, tax under the U.P. Entertainment and Betting Tax Act, 1979 as amended. The petitioner is not a cable T.V. operator and hence the aforesaid decisions have nothing to do with the facts of the present case.

8. It is not disputed that the petitioner does not charge any extra and separate

amount from its customers for providing T.V. service in the rooms to enable them to view different channels. This is also evident from the room brochure and tariff, vide Annexures 1 and 2 to the writ petition No. 287 of 1998. The petitioner does not take service of any cable operator nor pays any amount to them for enabling its customers to view films through cable operators. Whatever is available through the dish antenna installed by the petitioner in its hotel premises are only viewed by the customers on T.V. sets in their rooms without paying any extra amount.

9. It may be mentioned that the cable operators business is a commercial business enterprise of entertainment through cable T.V. which operates for profit motive for providing this service. The petitioner does not charge any extra amount for such entertainment and it does not show any additional video channels for films. The customers can see only the programmes which come through the dish antenna installed in the petitioner's premises which comes through satellite and the petitioner does not charge any extra amount for this.

10. To appreciate the submissions made in this case we may refer to certain relevant provisions of the Act.

Section 2 (g) of the Act defines entertainment as follows :

""entertainment" includes any exhibition, performance, amusement, game, sport or race (including horse race) to which persons are admitted for payment and in the case of cinematograph exhibition, includes exhibition or news-reels, documentaries, cartoons, advertisement shorts or slides, whether before or during the exhibition of a feature film or separately."

Section 2 (1) states :

""Payment for admission" includes-

(i) any payment for seats or other accommodation in any form in a place of entertainment;

(ii) any payment for a programme or synopsis of an entertainment;

(iii) any payment made for the loan or use of any instrument or contrivance which enables a person to get normal or better view or hearing or enjoyment of the entertainment, which without the aid of such instrument or contrivance such person would not get;

(iv) any payment, by whatever name called for any purpose whatsoever, connected with an entertainment, which a person is required to make in any form as a condition of attending or continuing to attend the entertainment, either in addition to the payment, if any, for admission to the entertainment or without any such payment for admission;

(v) 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;"

Section 3 (1) states :

"Subject to the provisions of this Act, there shall be levied and paid on all payments for admission to any entertainment other than an entertainment to which Section 4 applies, an entertainment tax at such rate not exceeding (one hundred and fifty percent) of each such payments as the State Government may from time to time notify in this behalf, and the tax shall be collected by the proprietor from the person making the payment for admission and paid to the Government in the manner prescribed."

Section 3 (6) states :

"Where in a hotel or a restaurant, entertainment by way of cabaret or floor show (by whatever name called, but excluding a mere band in attendance or recorded music) is provided along with any meal or refreshment with a view to attracting customers; whether or not payment for admission is charged distinctly for such entertainment, twenty percent of the amount payable by the customer for such meal or refreshment or the amount charged distinctly for such entertainment, whichever is higher, shall be deemed to be the payment for admission to such entertainment and the tax shall be levied and paid accordingly."

11. The Act was amended by the U.P. Entertainment and Betting Tax (Second Amendment) Act, 1995 (U.P. Act 28 of 1995). We may refer to the relevant provisions of this Amending Act.

12. By Section 2 (6) of this Act the following clauses have been inserted in Section 2 of the original Act ;

"(ee) "cable service" means the transmission by cables of programmes including retransmission by cable of any broadcast television signals; eee) "cable television network" means any system consisting of a set of closed transmission paths and associated signal generation, control and distribution equipment, designed to provide cable service for reception by multiple subscribers."

13. By the same Amendment of 1995 after Section 4-B of the principal Act the following section has been inserted :

"4-C. Tax on cable service-- (1). The proprietor of a cable television network providing cable service shall be liable to pay entertainment tax at such rate not exceeding two hundred rupees for every subscriber for every month, as the State Government may, from time to time, notify in this behalf:

Provided that the proprietor of a cable television network shall not be liable to pay entertainment tax in respect of a subscriber which is a hotel."

14. The original Act was again amended by U.P. Act 15 of 2001. The Statement of Object and Reasons of this 2001 Amendment Act states : "There was no specific provision in the said Act for levy and payment of tax on entertainments

provided through cable service. It was therefore decided to amend the said Act mainly to provide for

(1) the definition of the term "cable operator" and extending the meanings of words and expressions assigned to such in the Cable Television Network (Regulation) Act, 1995 as were used in the Act but are not defined therein.

(2) imposition of tax on the proprietor of a hotel who provides cable service to the hotel through his own cable television network....."

Section 2 (a) of this 2001 Amendment Act inserted Clause (ee) after Clause (e) which reads ;

"'cable Operator" means any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of cable television network and includes the proprietor of a hotel who provides cable service in the hotel through his own cable television network:"

Section 3 of the Amendment Act inserted Clause (7) after Section 3 (6) which reads :

"(7) Where in a hotel, entertainment by Way of cable service is provided in rooms or other places, the entertainment so provided in each room or other place shall be deemed to be a separate entertainment and the subscription for admission to each such entertainment shall be deemed to be equal to the amount or subscription charged from a subscriber in the vicinity of the hotel by the cable operator providing cable service in the hotel and the tax shall be levied and paid on the basis of such subscription :

Provided that where the cable operator himself is the proprietor of the hotel, the subscription for admission to each such entertainment shall be deemed to be equal to the amount of subscription charged from a subscriber in the vicinity of the hotel by any other cable operator."

15. We may now examine the above provisions which we have quoted. The word "entertainment" means exhibition, performance, etc. to which persons are admitted for payment. Hence the definition of entertainment itself means that to be entertainment under the Act persons have to be admitted for payment. As stated in the petition, the cable or video service to the petitioner hotel's room is not made for any payment. There is no separate charge for the same. Even if one does not see the programme on T.V. it will make no difference because the tariff of the hotel room will remain the same. Hence it cannot be said that the cable/video service which the petition is providing to its customers is entertainment as defined under the Act. It may be noted in this connection that it is only for cabaret and floor show that entertainment tax has to be paid even if there is no separate charge for the same, vide Section 3 (6) of the Act.

16. The word "payment for admission" has been defined in Section 2(1) which we have quoted above. The video/cable service provided by the petitioner is not

provided by payment for admission.

17. The charging provision in the Act is Section 3 which levies a tax on payments for admission to entertainment. Since in our view there is no payment for admission hence obviously no tax can be imposed under the Act on the petitioner's cable/video service.

18. As regards the 1995 amendment, that in our opinion relates to tax on proprietors of a cable television network. This obviously relates to the persons who run the cable operator business. The petitioner does not run any business of a cable television network. It is only providing the cable/video service from its own dish antenna. A careful reading of Section 4-C as inserted by the 1995 amendment shows that the tax is payable for every subscriber.

19. The word "subscriber" is defined in Section 2 (d) of the 1995 amendment to mean:

""Subscriber" means a person who receives the signals of cable television network at a place indicated by him to the proprietor of the cable television network, without further transmitting it to any other person."

20. The definition of subscriber indicates that a subscriber is a person who receives the signals of a cable television network at a place indicated by him to the proprietor of the cable television network. In our opinion the petitioner's customers cannot be called subscribers because they do not indicate to any proprietor of any cable television network any place for receiving signals of a cable television network.

21. In fact the legislature itself realized that the service of the kind rendered by the petitioner's hotel is not covered by the Act even after its amendment in 1995, and hence further amendment was made in the Act by U.P. Act No. 15 of 2001 which came into force from 5-3-2001 vide Section 1 (2) of the Amending Act. Hence it is only after 5-3-2001 that the petitioner had to pay entertainment tax and not for the period before 5-3-2001.

22. The statement of objects and reasons of the Amending Act of 2001 clearly indicates that since there were no specific provisions in the Act for levy and payment of tax on entertainment by hotel owners who provided cable service through their own T.V. set hence this Amendment had to be introduced before any such tax could be levied.

23. A perusal of the above amendment shows that now the legislature has clearly provided that even hotels which provide their own cable television network have to pay entertainment tax. Thus it is clear that the petitioner was not liable to pay such tax prior to 5-3-2001, and hence levy and realization of the tax prior to this date was violative of Article 265 of the Constitution.

24. In the result these writ petitions are allowed. The impugned orders are quashed. The respondents are directed to refund the amounts they have illegally

collected as entertainment tax from the petitioners for the period prior to 5-3-2001 within two months of production of copy of this order before the Respondent No. 3.