(2014) 08 RAJ CK 0003

In the Rajasthan High Court

Case No : Civil Writ Petition Nos. 5133 of 2008, 15136 of 2010 and 6012 of 2011

Tata Sky Ltd. and Others APPELLANT

Vs

State of Rajasthan and Others RESPONDENT

Date of Decision : 19-08-2014

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g) 246(1) 286
Delhi Entertainments and Betting Tax Act, 1996 — Section 7
Punjab Entertainments Duty Act, 1955 — Section 3(3C)
Rajasthan Entertainments and Advertisements Tax Act, 1957 — Section 3 3(4A)
Telegraph Act, 1885 — Section 4

Citation : (2015) 82 VST 538

Hon'ble Judges : Ajay Rastogi, J;J.K. Ranka, J

Bench : Division Bench

Advocate : Padam Kumar Jain, Senior Executive Officer, Advocate for the Appellant; Pooran Singh, C.T.O., Advocate for the Respondent;

Judgement

J.K. Ranka, J.

1. The controversy involved in all the three writ petition is same, therefore, they are being decided by this common order. Since the facts of all the cases are similar, therefore, for the sake of convenience and brevity the facts relating to Writ Petition No. 6012 of 2011 are being taken into consideration for the purpose of disposal of these petitions. These instant writ petitions have been filed by the petitioner with the prayer to quash and set aside the order dated May 28, 2010 passed by the Commercial Taxes Officer, Circle-I, Jaipur, by which the petitioner was held liable for payment of entertainment tax under section 3(4A), 4AAA of the Rajasthan Entertainments & Advertisements Tax Act, 1957 read with rules 18BBBB and 18BBBBB of the Rajasthan Entertainments & Advertisements Tax Rules, 1957.

2. It is the claim of the petitioner that it is a limited company incorporated under the Companies Act, 1956 and is providing direct-to-home (DTH) broadcasting

services all over India including the State of Rajasthan. It is the claim of the petitioner that it had been granted licence under section 4 of the Indian Telegraph Act, 1885 and Indian Wireless Telegraph Act, 1933 by, the Government of India, Ministry of Information and Broadcasting to establish, operate a DTH platform and to provide DTH services on the terms and conditions as specified in the licence agreement to establish. It is the further claim of the petitioner that the Government of India granted a statutory licence dated March 24, 2006 to the petitioner under section 4 of the Indian Telegraph Act, 1885 and the Indian Wireless Telegraph Act, 1933 on the terms and conditions contained in the licence agreement for a period of 10 years. The petitioner has paid Rs. 10 crores to the Ministry of Information and Broadcasting as an initial non-refundable entry-fee and furnished a bank guarantee for an amount of Rs. 40 crores valid for the duration of the licence. As per terms and conditions of the licence the petitioner is further required to pay an annual fee equivalent to 10 per cent, of its gross revenue as reflected in the audited accounts of the company for that particular financial year within one month of the end of that financial year. The petitioner is also required to pay in addition to the licence fee, royalty for spectrum use as prescribed by the Wireless Planning & Co-ordination Authority (WPC) under the Department of Telecommunications. Pursuant to the fulfillment of the eligibility conditions, assurance and payment of requisite permission fee by the petitioner, as per the guidelines for unlinking from India notified on December 2, 2005 by the Union Government, the petitioner has also been granted permission on non-exclusive basis for a period of 10 years to establish, maintain and operate unlinking hub (teleport) and the said licence stands granted for whole of India and petitioner is not required to get any permission or licence from any other authority for providing DTH broadcasting service.

3. The petitioner has sought to challenge the levy of entertainment tax imposed by the Commercial Taxes Officer-I in the various assessments, wherein it is held by the assessing officer that the petitioner is liable for payment of entertainment tax in view of amendment in the Rajasthan Entertainments & Advertisements Tax Act, 1957 by the Rajasthan Finance Act, 2008 (Act No. 6 of 2008) dated February 25, 2008. According to the petitioner, the respondent-State cannot levy such tax as DTH broadcasting services specifically covered under List I, Schedule VII (entry 92C) by virtue of discipline of article 246(1) of the Constitution of India and it cannot be again taxed under any taxing entry under List II of Schedule VII (entry 62) just by artificially enlarging the scope of the entry under List II. The definition of "entertainment" remains un-amended, however the charging section states that the entertainment tax is on DTH broadcasting service.

4. A reply to the writ petition has been filed by the respondents.

5. Mr. Padam Kumar Jain, Senior Executive Officer appearing on behalf of the petitioner and Mr. Pooran Singh, C.T.O. appearing on behalf of the respondents argued the matter.

6. At the outset, the officer appearing on behalf of the respondents contended that the issue is squarely covered by the judgment rendered by the honourable apex court in the case of The State of West Bengal and Others Vs. Purvi Communication Pvt. Ltd. and Others, . He further contended that even the petitioner raised this issue in the High Court of the Punjab and Haryana in the case of Tata Sky Limited Vs. State of Punjab and Another, where writ petition was dismissed. He further relied upon a judgment of Uttarakhand High Court in the case of Dish T.V. India Limited and Another etc. Vs. State of Uttarakhand and Others, and also a judgment of Jharkhand High Court in the case of Ms. Bharti Telemedia Limited Vs. The State of Jharkhand and Others, and contended that the similar controversy stood resolved in the petitioner''s own case then on the same analogy the present petitions deserve dismissal.

7. The officer appearing on behalf of the petitioner contended that the levy of entertainment tax by the respondents is against the law. He was, however, not in a position to controvert the judgments relied upon by the officer on behalf of respondent particularly in the case of petitioner itself by Punjab and Haryana High Court.

8. We have considered the arguments advanced by the officers appearing on behalf of both the parties and have also gone through the impugned order as well as the material available on record including the reply of the respondent-State.

9. It would be appropriate to quote the amendment and notifications, which were brought in statute from February 25, 2008 and which provides as under:

"Finance Department (Tax Division) Notification Jaipur, February 25, 2008

S.O. 443. In exercise of the powers conferred to section 4AAA of the Rajasthan Entertainments and Advertisements Tax Act, 1957 (Act No. 24 of 1957), the State Government hereby notifies that the proprietor of direct to home broadcasting service shall be liable to pay entertainment tax at the rate of 10 per cent of the subscription charges per subscriber.

[No. F. 12(15)FD/Tax/2008-91] By order of the Governor,

(Rajat Kumar Mishra) Secretary to Government."

10. It would also be appropriate to quote sections 3(4A), section 4AAA, rules 18BBBB and rules 18BBBBB:

"S. 3(4A) ''direct to home broadcasting service'' means distribution of multi channel television programmes by using ''satellite system'' by providing television signals direct to the premises of subscribers without passing through an intermediary such as cable services.

S. 4AAA. Levy of tax on direct-to-home broadcasting service.--The proprietor of a direct to home broadcasting service shall be liable to pay entertainment tax at such rates, not exceeding twenty per cent of the monthly subscription charges per subscriber, as the State Government may, from time to time, notify in the Official Gazette, in this behalf and different rates may be notified for different categories of subscribers.

R. 18BBBB. Permission to be obtained to operate direct to home broadcasting service.--(1) The proprietor of a direct to home broadcasting service shall submit to the Commissioner an application within 15 days from the date on which these rules come into force or at least within 15 days of his commencing entertainment through direct to home broadcasting service, whichever is later.

(2) The proprietor shall submit to the Commissioner a security of an amount fixed by the Commissioner along with any other information which may be so required by the Commissioner.

R. 18BBBBB. Payment of tax for direct to home broadcasting service.--(1) The proprietor of a direct to home broadcasting service liable to pay tax in accordance with section 4AAA of the Act, shall maintain a true and correct record of the number of subscribers, the name and address of each subscriber, the amount received from each subscriber and the amount of tax.

(2) The proprietor of a direct to home broadcasting service shall be required to deposit tax payable within seven days of the close of each calendar month.

(3) The proprietor of a direct to home broadcasting service shall file quarterly return in form S7 in duplicate, within fifteen days of the end of each quarter along with proof of deposit of tax payable under the Act."

11. The above amendment was introduced from February 25, 2008 under the aforesaid Acts/Rules and by this amendment direct-to-home (DTH) service was brought in the ambit of entertainment tax and to pay entertainment tax.

12. This issue came up, as referred to earlier, before the honourable apex court in the case of The State of West Bengal and Others Vs. Purvi Communication Pvt. Ltd. and Others, and while upholding the legislative competence of State held as under (paras 39 to 42, pages 174 to 176 in 140 STC):

"38. In the tax matters, the State Legislature is free, if it has legislative competence, to choose the persons from whom the tax levied on entertainments is to be collected. In other words, what are taxed are the entertainments, which is very much within the ambit of entry 62 of List II of the Seventh Schedule. It is the respondents who as cable operator for the purpose of the said 1982 Act is engaged in the business of providing or offering entertainments which include showing of films, various serials, cricket matches and dramatic performances to the subscribers, and the tax is imposed on the act of offering such entertainments in this way to such subscribers and/or viewers. The entire communication network service is built up and controlled by the respondents. Whatever amount is received or receivable by the respondent in respect of providing such entertainments is taxable under sub-section 4(a) of section 4A of the said 1982 Act which has a direct and sufficient nexus with the entertainments.

39. The charging section is very clear and unambiguous inasmuch as there is no vagueness about the incidence of tax and the person who is liable to pay tax. So far as the declaration of liability to pay tax is concerned, the charging section does not suffer from any vagueness. The provision does not lead to any discrimination amongst persons. There is no scope of any discrimination inasmuch as either an owner or person who having in possession of electrical, electronic or mechanical device receive signals and instantly transmits such signals of visual image and audio to a sub-cable operator for presentation of any performance, film or any other programme to the subscriber and/or viewers against payment, and as such owner or person exhibits such performance, film or any other programme through his cable television network directly to customers he is liable to pay tax. Except that owner or person of the class referred to in sub-section (4a) of section 4A of the said 1982 Act, no other person can be held liable to pay such tax. There is clear indication of the character of tax-from the incidence of such tax or taxable event which takes place on the happening of the event of offering entertainments to the subscribers. The person on whom the legal liability to pay tax falls has also been clearly and unambiguously mentioned in the charging section. The rates of tax have been sought to be specified by the notification. The measure of tax is the ''gross receipt'' on the basis of which the person is saddled with the liability to pay tax. There is no uncertainty or vagueness of the legislative scheme. The tax levied by sub-section (4a) of section 4A of the said 1982 Act does not interfere with the fundamental rights guaranteed under article 19(1)(g) of the Constitution or is violative of article 19(1)(g).

40. We also see no substance in the submission that the impugned legislation impinges on the field occupied by the Central legislation. The aforesaid Central legislation has been enacted to regulate the operation of cable television network in the country and matters connected therewith or incidental thereto whereas the State legislation is for levy of entertainment tax on entertainment within the legislative field exclusively assigned to the State Legislature under entry 62 of List II of the Seventh Schedule to the Constitution. Thus the objects sought to be achieved by two different Acts enacted under two different legislative fields exclusively assigned to the respective Legislatures are entirely distinct and separate. The Cable Television Networks (Regulation) Act, 1995 of the Union Legislature does not denude the State Legislature for levying entertainment tax on entertainment.

41. It is thus clear that the cable operator-respondent No. 1 is the exhibitor in this case and also the provider of the entertainment to the customer. Hence, he alone can be asked to pay the tax on the entertainment that has resulted from this exhibition. This provision, therefore, does not cross the bounds of entry No. 62 of List II of the Seventh Schedule to the Constitution and is intra vires. Providing a cable link up to the viewers end is the only role of sub-cable operator.

It is, therefore, inconceivable that despite putting forth the ready entertainment in the form of signal on the cable line, the cable operator cannot be said to be providing the entertainment within the meaning of entry 62 of List II of the Seventh Schedule to the Constitution. So long as the State Act remains within the ambit of entry 62 of List II and is not offending the provisions of article 286 of the Constitution or the laws made thereunder/the State Act validity is beyond question. Thus, respondent No. 1 who is engaged in receiving and providing TV signals to individual cable operators is liable to pay tax under clause (ii) of sub-section (4a) of section 4A of the Act. From the definition of "communication network" given in the agreement between the cable operator and sub-cable operator (termed as franchise in the agreement), it will be clear that the service rendered by respondent No. 1 is not restricted only to receiving signals but also extends to sending visual images and audio and other information by means of telecommunication network for presentation to members of public. In the present case, respondent No. 1 sends visual images and audio signals for presentation to the individual subscribers at various homes through their feeder line, i.e., coaxial cable or any other device used for transmitting audio and visual signals in terms of clause 2 of the said agreement. The franchisee has access to the signals provided by respondent No. 1. Therefore, it cannot be disputed that the price or prices received or receivable by respondent No. 1 is the amount received or receivable by him for transmitting the signal for exhibition of any performance, film or any other programme telecast and the aggregate of such prices or amounts is the gross receipt of respondent No. 1 in relation to any month or part thereof."

13. The Punjab and Haryana High Court in petitioner''s own case Tata Sky Limited Vs. State of Punjab and Another, while upholding the levy of entertainment tax after elaborate discussion and considering various judgments held as under (pages 34 and 35 in 37 VST):

"26. We may now deal with the question raised in the present case in the light of the principles summed up in the preceding paras.

27. Levy under section 3 is called entertainment duty calculated at a percentage of payment for admission to entertainment. It is collected from the provider of entertainment which includes person responsible for management thereof. Entertainment provided with the aid of dish relating to DHTV has been specifically included in the levy by amendment in the year 2010. Entry 62 of List II permits tax on entertainment. Thus, tax on entertainment which squarely falls under entry 62 cannot be held to be encroachment of List I relating to tax on service. Levy of tax on service does not exclude State Legislature from levying tax provided in List II, Transaction of broadcasting service and levy of tax thereon does not exclude levy of entertainment tax covered by entry 62 of List II. Both the levies can co-exist and can be harmonized being on different aspects. Doctrine of pith and substance cannot be applied to exclude one from the other. Principle of federal supremacy cannot be applied to such a situation.

Aspect theory fully applies.

28. The observations in concluding para 92 of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, relied upon by the learned counsel for the petitioner cannot be read in isolation so as to exclude aspect theory when a transaction clearly falls in legislative competence of the State.

29. We also cannot accept the contention that the transaction of providing broadcasting services and entertainment should be treated as indivisible contract so as to exclude the aspect of entertainment by holding that predominantly transaction is broadcasting and not entertainment. Nor alternative plea of transaction being composite for splitting up entertainment from broadcasting be accepted. Rather, aspect theory has to be applied and levy of entertainment duty on entertainment aspect is fully justified independent of service tax on broadcasting service which is a different aspect of the transaction.

30. Thus, we hold that levy of entertainment duty falls under entry 62 of List II and is not hit by entry 92C of List I. We are unable to hold that levy of entertainment duty on providing entertainment by broadcasting signals on TV sets is ultra vires the powers of the State Legislature."

14. Thus, the Punjab and Haryana High Court in the petitioner''s own case while interpreting identical amendments brought by the State of Punjab regarding validity of duty provided under section 3(3C) of the Punjab Entertainment Duty Act, 1955 held that the levy of entertainment falls under entry 62 of List II of the Seventh Schedule to the Constitution and is not hit by entry 92C of List I and also upheld levy of entertainment tax by holding that it is not ultra vires to the provisions of the Constitution.

15. The Jharkhand High Court in the case of Ms. Bharti Telemedia Limited Vs. The State of Jharkhand and Others, had also an occasion to consider the similar issue as the said company was also providing DTH broadcasting services to its subscribers throughout the country and while observing observed "The levy of entertainment tax has been subject-matter of legislation of different States and the State Legislature such as State of Uttarakhand, State of Punjab, State of Delhi, State of Orissa and also the State of Uttar Pradesh as well. The impugned levy of the different State Legislatures have been upheld by the various judgments rendered by the respective High Court which have been relied upon by the respondent-State such as in the case of Tata Sky Limited Vs. The State of Uttarakhand and Others--> , Tata Sky Limited Vs. State of Punjab and Another, , Bharti Telemedia Ltd. Vs. Government of Nct of Delhi and Another, and Tata Sky Ltd. v. State of Orissa [2014] 2 VST-OL 468 (Orissa)." Thus, it is noticed that even the petitioner has challenged similar levy in the State of Uttarakhand, Punjab and Haryana and Orissa and all the three High Courts have upheld the levy in petitioner''s own case. It was further held as under (Ms. Bharti Telemedia Limited Vs. The State of Jharkhand and Others, :

"... The grounds of challenge raised by the petitioners herein were the subject-matter of consideration in more or less similar terms before the different High Courts which have negatived the contention raised by the DTH service provider upon consideration of judgment rendered by the honourable Supreme Court and also interpreting the provisions of the individual State legislation vis-a-vis legislative entry available under entries 62 and 31 of List II compared with entries 33 and 92C of List I of the Seventh Schedule to the Constitution of India. Even in the judgment rendered by the Madras High Court, legislative competence of the State Legislature to impose levy has been upheld in no uncertain terms. However, on the question of ambiguity in the charging section and on the grounds of unreasonable classification of the levy between the cable provider and DTH provider, the said levy was struck down by the Madras High Court. In the aforesaid aspect of the matter, it is therefore not open to the petitioners to contend that the State Legislature is denuded of its power to impose levy of entertainment tax on the activity of entertainment provided through television exhibition by the DTH service provider through set top box on payment of subscription and other charges for the same."

16. The Delhi High Court in the case of Bharti Telemedia Ltd. Vs. Government of Nct of Delhi and Another, had also an occasion to consider the identical issue of imposition of entertainment tax on direct to home (DTH) services in Delhi and after analysing the material on record and after considering the judgment of the honourable apex court in the case of The State of West Bengal and Others Vs. Purvi Communication Pvt. Ltd. and Others, upheld legislative competence of the State Legislature to levy entertainment tax on all payments for admission to an entertainment through direct-to-home (DTH) as contemplated under the relevant section 7 of the Delhi Entertainments and Betting Tax Act, 1996. In view of the foregoing discussion, we find no merit in all the three writ petitions and accordingly stand dismissed. No order as to costs.