

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP(C) No.987/2010**

Reserved on : 16th January, 2012.

% **Date of Decision : 8th February, 2012.**

THE DELHI RACE CLUB LTD.

....Appellant

Through Mr. Sanjay Jain, Sr. Adv. with Mrs.
Rana Pravee Siddiqui, Mrs. Ruchi Jain,
Ms.Namisha Gupta, Mr. Abhijit Mittal, Mr.
Rishabh Wadhwa and Mohd. Qumar Ali,
Advts.

VERSUS

GOVERNMENT OF NCT OF DELHI & ORS. Respondent

Through Mr. N. Waziri, standing counsel with
Mr. Shoaib Haider and Ms. Neha Kapoor,

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

R.V. EASWAR, J.:

The short question which arises in this writ petition is whether entertainment tax is payable on the amount paid by a person for carrying his mobile phone inside the Delhi Race Club, under the Delhi Entertainments and Betting Tax Act, 1996, hereinafter referred to as “the Act”.

2. The relevant facts which have given rise to the filing of the present writ petition are as follows.

3. The petitioner is Delhi Race Club (1940) Ltd., a company incorporated under Section 25 of the Indian Companies Act, 1913 and having its registered office at Race Course Road, New Delhi. It is engaged in organizing both “on-course” and “off-course” horse races. It collects entry charges from those who visit the Race Course to place bets on the races or merely derive pleasure from watching the races. On the entry fee collected by the petitioner, it collects entertainment tax under the Act @ 25% and pays the same to the betting tax authorities. It is submitted that with the advent of mobile phones, the petitioner felt that indiscriminate use of these phones inside the Race Course was becoming a nuisance. Therefore, in order to restrict the entry and use of the mobile phones, the petitioner decided to levy a separate charge or entry fee for carrying the mobile phones inside the premises as a regulatory measure. It was also felt that placing a total ban on the mobile phones may not be feasible since the patrons or punters would like to remain in touch with their families or place of work and the phones may also be useful in cases of emergency.

4. Apparently the betting tax authorities under the Act came to know that the petitioner was collecting mobile entry fee from its patrons. They, therefore, issued notice dated 18th February, 2002 asking the petitioner to pay entertainment tax @ 25% on the charges collected for carrying the

mobile phones. The notice was issued by the Entertainment and Betting tax officer, L&M Block, Vikas Bhawan, New Delhi who is the respondent No.3 in the present writ petition.

5. The petitioner submitted a reply dated 24th February, 2002 objecting to the notice. It was contended that the mobile phones did not fall in the category of entertainment nor were they attached to the entertainment in any manner and, therefore, the levy of entertainment tax on the same was illegal and not authorized by the Act. The petitioner also requested the respondent No.3 who issued the notice to inform it as to the statutory provision under which the tax was being demanded. There was no response to this reply sent by the petitioner from respondent No.3 for more than three years.

6. On 22nd June, 2005, the respondent No.2, namely, the Commissioner of Entertainment, Betting and Luxury Tax, L&M Block, Vikas Bhawan, New Delhi issued an order No.3171/ETO purporting to be issued under Section 46 of the Act alleging that the use of mobile phones inside the Race Course had given rise to illegal betting, that proper records were not being maintained by the petitioner in respect of the mobile phones used in the betting ring and, therefore, the entry of mobile phones into the betting ring of the petitioner during inter venue betting and betting on Delhi races was banned with immediate effect.

7. Apparently the above order banning the entry of mobile phones inside the betting ring of the petitioner gave rise to problems to the petitioner. Obviously, patrons and punters felt it inconvenient that they could not carry mobile phones inside the race club. The petitioner perhaps got worried about the falling patronage and accordingly made efforts to enter into an amicable settlement with the respondent and sort out the issue of the levy of entertainment tax on the entry of mobile phones in the larger interests of the club. It would appear that an understanding with the betting tax authorities was arrived at to the effect that 50% of the betting tax which amounted to Rs.39,50,406/- would be paid and the balance of 50% would be paid in yearly instalments. A sum of Rs. 10 lacs was paid immediately on 1st December, 2005 as the first yearly instalment. The terms of such settlement were recorded in the petitioner's letter to the second respondent written on 1st December, 2005, which is Annexure P-4 to the writ petition.

8. Contemporaneously with the settlement arrived at, a letter dated 30th November, 2005 was written by the Deputy Commissioner (Tax) to the president of the petitioner club, which is annexure P-5 to the writ petition. The petitioner was informed that with effect from 1st December, 2005 entry of mobile phones into the petitioner club was being allowed subject to the following conditions:-

“a) DRC will pay weekly entertainment tax @ 25% on collection of charges of mobile phones by DRC.

b) DRC will maintain a detailed record in form of bound register mentioning the names of persons who are carrying the mobile phones, mobile phone numbers, addresses of persons who are carrying the mobile phones, amount of charge collected for entry of mobile phone by DRC, amount of entertainment tax collected.

c) The register to be maintained by Delhi Race Club shall be serially of entertainment tax department, Govt. of NCT of Delhi.

d) That DRC shall be liable to pay the entertainment tax on amount received from mobile phone charges from Financial Year 2002-03 onwards till 21.6.2005 as per the decision of the Competent Authority which will be conveyed separately.”

(DRC stands for Delhi Race Club, the petitioner)

The petitioner was also informed that the order dated 21st June, 2005 banning the use of mobile phones was being withdrawn with immediate effect.

9. While matters rested as noted above, a show cause notice dated 10th August, 2006 was received by the petitioner from respondent No.3, that is, the Entertainment Tax Officer. The notice is annexed to the writ petition as Annexure P-6. The same is reproduced below:-

“No: F23(1)/(06-07)/ETO/3407

Dated:- 10-08-2006

SHOW CAUSE NOTICE

Whereas the Delhi Race Course Club (DRC) has allowed the entry of mobile phones in the Race Course Club During the venue and inter-venue races on payment per mobile phone per day.

AND WHEREAS, DRC had collected payment on entry of mobile phones since financial year 2002-03 onwards without taking permission from the Commissioner as per section 8 (1) of Delhi Entertainments & Betting Tax Act, 1996 till 30th Nov. 2005.

AND WHEREAS, the payment received on mobile phones is taxable under the said Act, as per provisions 6 (1) and 2 (m) of the said Act @ 25% on the collection charges of entry of mobile phones.

AND WHEREAS, DRC has not made the payment of tax since financial year 2002-03 till 30th Nov. 2005.

NOW THEREFORE, I DEEPAK VIRMANI, ENTERTAINMENT TAX OFFICER would like to carry out the assessment proceedings u/s 15 (1) of the said Act. M/s DRC is directed to appear in person or through the authorized representative on 17.8.06 at 11.00 a.m. along with the relevant books of accounts and the amount received on account of payment of entry of mobile phones on the weekly basis since 1st April 2002 onwards and to show cause as to why interest and penalty shall not be leviable on DRC.

In case of non-appearance, I will recover the dues as arrears of land revenue and will take necessary action as per relevant provisions of law.

(DEEPAK VIRMANI)
ENTT. TAX OFFICER”

In response to the show cause notice, the petitioner sent a detailed reply dated 5th October, 2006 explaining that the tax was not leviable on the charges received for carrying the mobile phones inside the club and that a settlement had already been arrived at between the petitioner and respondent No.2 to buy peace and avoid litigation, that the petitioner stood by the settlement provided the respondents also were willing to own their part of the settlement and that in these circumstances there was no justification for issuing show cause notice proposing to levy entertainment tax on the entry of mobile phones from 1st April, 2002 to 30th November, 2005.

10. Apparently nothing was heard from respondent No.3 for a while. However, the petitioner received an assessment order dated 24th November, 2006 for the period April, 2002 to June 2005 in which entertainment tax @ 25% was levied on the charges for entry of mobile phones in accordance with Section 2(m)(iv) read with Section 6(1) of the Act. The total collections made by the petitioner as mobile charges for the aforesaid period and the entertainment tax demanded from it came to Rs. 3,40,26,718/- & Rs.85,06,679/- respectively as set out below:-

Year	Total Collection by DRC from mobile charges (in Rs.)	Entt. Tax Payable by DRC (in Rs.)
2002-03	63,31,568.00	15,82,892/-
2003-04	1,13,19,150.00	28,29,787/-
2004-05	1,39,52,750.00	34,88,187/-
2005-06 (upto June/2005)	24,23,250.00	6,05,812/-
Grand Total	3,40,26,718.00	85,06,679/-

Deducting the amount of Rs.10 lacs paid by the petitioner earlier a demand of Rs.75,06,679/- as entertainment tax and a demand of Rs.52,96,783/- as interest was raised on the petitioner. The total demand raised was thus Rs.1,28,03,462/-. The petitioner was directed to pay the aforesaid amount within a period of 15 days. A copy of the assessment order is annexed to the writ petition as Annexure P-8

11. Aggrieved by the assessment order, the petitioner filed a revision petition before the Commissioner of Entertainments and Betting Tax who is the second respondent in the writ petition, under Section 42 of the Act. Detailed submissions were made in the revision petition raising objections to the levy of the entertainment tax on the entry fee collected in respect of

the mobile phones. It was, inter alia, contended that the assessment order had been passed without following the rules of natural justice, that under Section 6(1) of the Act the tax was levied on admission to the entertainment and it cannot be levied for carrying a mobile phone, that the conditions prescribed in Section 2(m)(iii) of the Act were not satisfied because the mobile phones did not in any manner enable a person to get a normal or better view of the horse races and that the horse races can be viewed even without the aid of the mobile phones and that in these circumstances the levy of entertainment tax in the assessment order and the huge demand raised therein were illegal. It was, therefore, prayed that the revising authority may quash the assessment order and pass such further orders as may be deemed fit and proper.

12. By order dated 21st December, 2009, the Commissioner of Entertainment and Luxury Tax, the respondent No.2 herein, dismissed the revision petition. After noting the submissions of the petitioner and the departmental representative, he concluded as follows:-

“I have carefully considered the arguments advanced both by the Petitioner and the Departmental representative. I agree with the opinion of learned Entertainment Tax Officer that charges for entry of mobile phones in the Race Club attracts entertainment tax @ 25% as per section 2 (m) (4) and section 6(1) of the Delhi Enter Entertainment and Betting Tax Act, 1996. Hence the impugned order is upheld and the revision petition is rejected.”

This order is attached to the writ petition as Annexure P-10.

13. On 29th January, 2010 the Additional Entertainment Tax Officer sent a letter to the Deputy Commissioner/Collector (Revenue), District New Delhi, 12A, Jam Nagar House, S.R. New Delhi requesting him to recover a sum of Rs.1,28,03,462/- from the petitioner as arrears of land revenue and also recover interest @ 2% for the delay in payment of the above sum from the 15th day after the issuing of the assessment order dated 24th November, 2006. A copy of the aforesaid order was marked to the secretary of the petitioner.

14. The present writ petition has been filed against the assessment orders passed by the third respondent raising the demand and against the order passed by the second respondent in revision, rejecting the revision application filed by the petitioner. It is prayed that the assessment order and the revision order be quashed. Prayers have also been made for quashing the recovery notice dated 29th January, 2010 and for passing such further order or orders as may be deemed fit and proper.

15. Section 6(1) of the Act which is the charging section, provides that “there shall be levied and paid on all payments for admission to any entertainment” an entertainment tax and the tax shall be collected by the proprietor of the entertainment from the person making the demand for admission and it shall be paid over to the government of the national capital territory of Delhi. Section 2(a) defines “admission to an entertainment” as including admission to any place in which the entertainment is held. It further provides that in case of entertainment

through cable service, each connection to a subscriber shall be deemed to be an admission for entertainment. Section 2(i) defines the word “entertainment” as meaning “any exhibition, performance, amusement, game, sport or race(including horse races) or in the case of cinematograph exhibitions, cover exhibitions of news reels, documentaries, cartoons, advertisements, shorts or slides, whether before or during the exhibition of a feature film or separately, and also includes entertainment through cable service.”

16. Section 2(m) defines “payment for admission” as follows:-

“payment for admission” includes-

- (i) any payment made by a person for seats or other accommodation in any form in a place of entertainment;
- (ii) any payment for cable service;
- (iii) any payment made for the loan or use of any instrument or contrivance which enables a person to get a 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;

Explanation ---Any subscription raised, contribution received or donation collected in connection with an entertainment, where admission is partly or entirely by tickets/invitation specifying the amount of admission or reduced rate of ticket shall be deemed to be payment for admission;”

The question for decision is whether entertainment tax can be levied on amounts collected by the petitioner as entry fee for mobile phones under sub-clause (iv) of clause (m) of Section 2 read with Section 6(1) of the Act. There was some debate as to the applicability of sub-clause (iii) and the objection taken on behalf of the petitioner was that this sub-clause is not applicable at all since the mobile phone cannot be considered as something which enables a person to get a normal or better view of the races or as an instrument or contrivance without which the person viewing the races would not get any enjoyment. A further objection raised is that sub-clause (iv) was referred to and relied upon only in the counter-affidavit filed by the respondents and not in the assessment order. It was however, clarified on behalf of the respondents that sub-clause (iii) is not applicable to the present case and that the basis of the assessment order was sub-clause (iv). We find that the assessment order refers to only sub-clause (iv). We would, therefore, proceed to consider the question posed before us only with reference to this sub-clause.

17. A careful perusal of the charging Section 6(1) shows that the entertainment tax is to be levied and paid on all payments for admission to any entertainment. Sub-clause (iv) of clause (m) of Section 2 of the Act, in our opinion, covers the payment made by visitors to the petitioner club as mobile entry fee charges since such payment is connected with the entertainment, namely, horse races conducted by the petitioner. A careful perusal of the sub-clause(iv) would show that the payment should be connected with an entertainment and it is a matter of irrelevance as to how the payment is called or as to for what purpose it is made. The only condition is that the payment should be connected with the entertainment, which is the horse races in the present case. The further condition is that the payment should be one which a person is required to make as a condition of attending the entertainment. This condition is satisfied in the case of persons who wish to carry their mobile phones inside the race club. If they want to attend the races carrying a mobile phone with them, they are obliged to make the payment for the entry of mobile phones. This payment is in addition to the payment made by them for their entry. Thus all these conditions of the sub-clause are satisfied.

18. The argument of the petitioner that the mobile phone is not connected with the horse race and, therefore, the levy is not covered by sub-clause (iv) is based on the premise that the words “connected with an entertainment” qualify the words “for any purpose whatsoever”, appearing just before them. With respect, this is an incorrect way of

reading the sub-clause having due regard to grammar and punctuation. There is a comma after the words “any payment”. There is also a comma after the words “by whatever name called for any purpose whatsoever”. If it is the intention of the legislature that the purpose for which the payment is made should be connected with the entertainment and not that the payment should be connected with the entertainment; then there is no need to place a comma after the words “for any purpose whatsoever”. Secondly Section 6(1) levies the tax on all payments for admission to any entertainment. The tax is on payments, though the taxable event may be the holding of an entertainment. Any payment which is connected with the entertainment thus attracts the levy under Section 6(1). Therefore, in our opinion, the entertainment tax authorities were right in law in invoking sub-clause (iv) of clause (m) of Section 2 read with Section 6(1) of the Act for levying entertainment tax on payments made as mobile phone entry charges. Moreover, had it been the intention to provide that the purpose (use of mobile) should be connected with the entertainment (horse race), then the use of restrictive words “connected with the entertainment” would make no sense, because the purpose could be “whatsoever”. This is one more reason to hold that it is the payment which should be connected with the entertainment and not the purpose of the payment.

19. It is, therefore, not necessary that the purpose for which the payment was made should be connected with the entertainment. Herein,

the purpose for which the payment was made was the carrying of the mobile phone inside the premises of the petitioner. As rightly pointed out on behalf of the petitioner, there is no connection between the mobile phone and the horse races. However, as we have pointed out in the preceding paragraphs, it is the payment that should be connected with the horse race. That connection is afforded by the fact that it is collected from persons who wish to attend the races carrying their mobile phones with them. If any person wishes to enter the premises of the petitioner to attend the horse race carrying his mobile with him, he has to make the payment for the entry of the mobile phone. The payment is thus a condition for attending the horse race. The payment for carrying the mobile phone inside the premises of the petitioner is in addition to the payment which the person is required to pay for his own entry. Thus all the conditions of the sub-clause are satisfied. Hence the levy is legal and valid. In this view of the matter, we are unable to uphold the contention of the petitioner that the subject of taxation is not covered by the taxable event since the use of mobile phone has no connection with the taxable activity.

20. Even if the sub-clause is interpreted to mean that the purpose for which the payment is made should be connected with the entertainment, that condition also stands satisfied in the present case. The payment has been made for the purpose of carrying the mobile phone inside the race club. The purpose of the payment cannot, therefore, be separated from

the entertainment, namely, the horse race. If any person wants to carry his mobile phone inside the premises of the race club for the purpose of attending the horse race, he has to pay separate charges for the mobile phone, in addition to what he pays for his entry. The purpose of the payment is thus connected with the entertainment. To put it simply, the patron would not have carried the mobile phone inside the premises of the race club except for attending the horse races, just as he himself would not have entered the premises of the race club had it not been for attending the entertainment. Both the person and the mobile phone, therefore, stand on the same footing for the purpose of the sub-clause.

21. Reference was made to the judgment of the Supreme court in *State of Karnataka & Ors. vs. Driven Enterprices (2001) 4 SCC 60*. In this case, the State of Karnataka levied entertainment tax on admission of cars into drive-in theaters. The levy was challenged and the challenge was upheld by the Karnataka High Court. On appeal by the State of Karnataka to the Supreme Court, it was contended by the respondent that the state legislature could levy entertainment tax on human beings but not on any inanimate object. The Supreme Court, however, rejected the contention of the respondent and allowed the appeal of the State holding that the real nature and character of the levy was not on the admission of cars or motor vehicles, but the levy was on the person entertained who takes the car inside the theater and watches the film while sitting in his car. The contention of the petitioner on the basis of this judgment was that unless

the mobile telephones were in any manner connected with the entertainment (the horse races in the present case), the levy cannot be brought under sub- clause (iv) of clause (m) of Section 2. This judgment, contrary to what the petitioner contends, is actually against it. If the decision is to be applied to the present case, it has to be held that the levy of entertainment tax was really not on the admission of mobile phones into the premises of the petitioner, but it was on the person entertained who takes the mobile phone inside the race club and watches the horse races. Moreover, we are not in the present writ petition concerned with the constitutional validity or the competence of the state legislature to enact sub-clause (iv). We are only concerned with the interpretation thereof. In our view, Section 6(1) read with Section 2(m)(iv) of the Act authorises the levy of entertainment tax on all payments for admission to any entertainment provided the payment is connected with the entertainment and is required to be made by the person as a condition for attending the entertainment, whether in addition to the payment made for admission to the entertainment or whether without any such payment for admission. The payment under the sub-clause may be called by any name or may have to be made for any purpose whatsoever, but so long as the payment is connected with the entertainment, the tax is leviable.

22. The other case cited on behalf of the petitioner is *Aashirwad Films vs. Union Of India & Ors. (2007) 6 SCC 624*. In this case the Andhra Pradesh government issued a notification levying entertainment tax at

10% on Telugu films and 24% on non-Telugu films. The petitioner M/s Aashirwad Films was a distributor of Hindi films and was required to pay entertainment tax at the higher rate of 24%. It challenged the constitutional validity of the notification under Article 32 of the Constitution. The contentions of the petitioner were that the levy contravened Article 351 of the Constitution and was discriminatory in nature and thus ultra vires under Article 14. These contentions were rejected by the Supreme Court. The controversy in the cited case has nothing to do with the controversy before us.

23. Another judgment cited on behalf of the petitioner is the case of *Express Hotels Pvt. Ltd. vs. State of Gujarat and Anr. AIR 1989 SC 1949*. In this case the levy of tax on luxuries was challenged on the ground that it should relate to and be based on the actual utilization of the luxury and not on the mere existence of the means of providing the luxury. This argument was rejected by the Supreme Court which held that the taxable event need not necessarily be the actual utilization or the actual consumption of the luxury and that a luxury which can reasonably be said to be amenable to potential conception can provide the nexus. Thus the levy was upheld. We are afraid that we are unable to appreciate the relevance of this judgment to the contention raised by the petitioner.

24. In *Markand Saroop v. M.M.Bajaj AIR 1979 SC 110*, the Supreme Court was concerned that the U.P. Entertainment and Betting Tax Act, 1937 which was extended to Delhi. A restaurant in Delhi conducted

cabaret performances every evening. The minimum charges for eatables at the time of the performance were Rs.5 for evening tea and Rs.10 for the dinner. These amounts were adjusted towards eatables that were consumed over and above what was provided by the restaurant for these charges. The price of the eatables were not raised for the purpose of covering the entertainment, but the condition was that whether a person consumed anything or not, he had to pay Rs.5 for the evening and Rs.10 for the night. A minimum fee was levied for taking a seat for witnessing the show and for taking tea or dinner. On these facts the Supreme Court held, affirming the judgment of a Division Bench of this Court in ***State vs. V.N.Sood and Ors, ILR 1976 Delhi 842*** that the payment for the tea or the dinner would come under Section 2(6) of the UP Act as a payment for admission. It is noteworthy that Section 2(6)(iv) of the UP Act is identically worded as Section 2(m)(iv) of the Act. It was held by the Supreme Court that though the payment may be for taking tea or dinner for a minimum charge, as the admission was to a place where the entertainment was held it would come within the definition of “payment for admission” and further held that the payment of Rs.5 or Rs.10, though it was stated to be for the tea or dinner, as it was connected with the entertainment and as the person was making the payment as a condition for attending the entertainment, it would attract the definition of payment for admission under Section 2(6)(iv) of the Act. The ratio of this judgment applies to the facts of the present case.

25. The contention of the petitioner that the levy is opposed to the settlement arrived at with the entertainment tax authorities and goes much beyond that and, therefore, should not be upheld, is untenable. There can be no settlement in the matter arising under a fiscal statute, in the absence of any specific provision in the statute. No such provision was pointed out to us. In any case, there can be no estoppel against the statute. In *Mathura Prasad & Sons vs. State AIR 1962 SC 745*, it was pointed out by the Supreme Court that if the law required that certain tax is to be collected, that cannot be given up and any assurance that it will not be collected will not bind the government, whenever it chose to collect the same. We need not dilate further on this aspect.

26. For the aforesaid reasons, we find no merit in this writ petition. The same is dismissed. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

FEBRUARY 8, 2012
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