

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

Reserved on: 02.12.2015
Pronounced on: 22.04.2016

+ **W.P.(C) 1896/2002 & C.M.No.8767/2012**

COMMISSIONER OF EXCISE ENTERTAINMENT..... Petitioner

Through: Mr. Satyakam, Addl. Standing
Counsel, GNCTD with Mr. Nikhil
Bhardwaj, Advocate.

versus

M/S POLO AMUSEMENT PARK LTD. & ORS. Respondents

Through: Mr. Hari Shankar, Senior Advocate
with Mr. Vivek Chib, Mr. Kushal
Gupta and Mr. S. Sunil, Advocates.

+ **W.P.(C) 7589/2012 & C.M.No.19267/2012**

POLO AMUSEMENT PARK LTD. Petitioner

Through: Mr. Hari Shankar, Senior Advocate
with Mr. Vivek Chib, Mr. Kushal
Gupta and Mr. S. Sunil, Advocates.

versus

GOVT OF NCT OF DELHI AND ANR. Respondents

Through: Mr. Naushad Ahmed Khan, Addl.
Standing Counsel (Civil), GNCTD.

+ **W.P.(C) 2424/2013 & C.M.No.4611/2013**

M/S POLO AMUSEMENT PARK LTD Petitioner

Through: Mr. Hari Shankar, Sr. Advocate with
Mr. Vivek Chib, Mr. Kushal Gupta
and Mr. S. Sunil, Advocates.

versus

GOVT. OF NCT OF DELHI AND ANR. Respondents

Through: Mr. Naushad Ahmed
Khan, Addl. Standing Counsel (Civil),
GNCTD.

+ **W.P.(C) 2425/2013 & C.M.No.4612/2013**

M/S POLO AMUSEMENT PARK LTD Petitioner
Through: Mr. Hari Shankar, Senior Advocate
with Mr. Vivek Chib, Mr. Kushal
Gupta and Mr. S. Sunil, Advocates.

versus

GOVT. OF NCT OF DELHI AND ANR. Respondents
Through: Mr. Naushad Ahmed Khan, Addl.
Standing Counsel (Civil), GNCTD.

+ **W.P.(C) 2450/2013 & C.M.No.4646/2013**

M/S POLO AMUSEMENT PARK LTD Petitioner
Through: Mr. Hari Shankar, Senior Advocate
with Mr. Vivek Chib, Mr. Kushal
Gupta and Mr. S. Sunil, Advocates.

versus

GOVT. OF NCT OF DELHI AND ANR. Respondents
Through: Mr. Naushad Ahmed Khan, Addl.
Standing Counsel (Civil), GNCTD.

+ **W.P.(C) 2451/2013 & C.M.No.4647/2013**

M/S POLO AMUSEMENT PARK LTD. Petitioner
Through: Mr. Hari Shankar, Senior Advocate
with Mr. Vivek Chib, Mr. Kushal
Gupta and Mr. S. Sunil, Advocates.

versus

GOVT. OF NCT OF DELHI AND ANR. Respondents
Through: Mr. Naushad Ahmed Khan,
Addl. Standing Counsel (Civil), GNCTD

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This common judgment would dispose of a batch of writ petitions; the first writ petition, W.P.(C) 1896/2002 is preferred by the Govt. of NCT of Delhi (hereafter "GNCTD"), which is aggrieved by an order of the Financial Commissioner (hereafter "FC") who held that the respondent - Polo Amusement Park Ltd. (hereafter "Polo Amusement") was not liable to levy of Entertainment Tax (hereafter "ET") for the activities it offered in its amusement park. The second batch of writ petitions [W.P.(C) 7589/2012, W.P.(C) 2424/2013, W.P.(C) 2425/2013, W.P.(C) 2450/2013 & W.P.(C) 2451/2013] is been preferred by Polo Amusement, aggrieved by the Notification dated 07.06.2007 (hereafter referred to as "the impugned 2007 notification") and the consequent assessment order dated 15.11.2012.

2. The brief facts are that Polo Amusement, through its letter dated 28.08.1992 sought permission to set-up an amusement/fun park "Fun 'N' Food Village" (hereafter referred to as "the Fun Village") at Plot Nos. 1279-1280 to 1283-1284 at Village Kapashera, Mehrauli, New Delhi. The Fun Village was initially designed to include well-developed lawns, music and a set of amusements. The entry charges were ₹30/- for adults and ₹20/- for children. Originally, the ticket holders were to enjoy all rides except for "*bumpy beats*" for which separate rates were to be charged. The rates proposed included Entertainment Tax (hereafter referred to as "ET"). Permission was granted to Polo Amusement by the GNCTD. The rates of entry fees were increased and also regulated depending on the days - they were less during working days and on holidays they were higher. On 19.05.1996, the office of the Entertainment Tax Department (hereafter referred to as the "ET Department") carried out inspection in the Fun

Village. The area Entertainment Tax Inspector, submitted a report, which pointed out that Polo Amusement had started a Village Club [hereafter referred to as "the Club"] adjacent to the Fun Village with restricted entry on the basis of membership cards. The ET Department issued a letter to Polo Amusement asking it about the Club and to explain the circumstances why this was not intimated prior to the starting of the Club. Polo Amusement was asked to furnish all details. The letter was issued on 21.06.1996. On 16.07.1996, it responded to the letter, claiming that it had a separate identity and the premises of the Club were adjacent to the Fun Village and its facilities were available to its members and accompanying guests and the activities and facilities were exempted from Entertainment Tax. It, therefore, stated that there was no need to report this to the Department. The letter further went to state that the Club had swimming facilities in different form for all its members and guests on all seven days of the week. Polo Amusement also claimed that several other clubs in Delhi extended swimming facilities to their members who were exempted from ET. Its facilities were no different from those given by other clubs. The ET Department thereafter carried out an inspection on 13.06.1997. This time, the management of the Polo Amusement did not produce any records relating to the life memberships clubbed to the fees collected from the life members of its Club who had paid ₹50,000/- or records pertaining to seasonal members who paid ₹3,000/- (payable in four installments during the year). People using the Club as guests by paying ₹2,000/- for adults and ₹150/- for children could avail one-time entry on a daily basis into the Club. The management was unable to and did not produce the membership list of the Club, stating that these records had been sent to its audit party.

3. On the basis of the spot inspection and materials collected during that time, the ET Department observed that the management was resorting to ET evasion by adopting the so-called membership techniques of the Club. According to the ET Department, the *modus operandi* used for charging guests one time daily fees of ₹2000/- for adults and ₹150/- for children was to independent customers by issuing receipts shown against guests of some unknown members on random basis. Such membership numbers were used commonly for several independent customers without any relation to those members. The management was asked to furnish explanation and details. It held meetings with the officials of the ET Department and pursuant to personal appearance, it wrote a letter dated 19.04.1999, stating the details of the water sports activities in its Club which according to it was operational during April-October. The relevant part of the explanation, reproduced from its letter, dated 19.04.1999 is as follows:

"1. Sea Wave: This is a water pool starts from the shallow level with the maximum depth of seven feet. Other dimension and sketch of the pool is enclosed. This pool is basically meant for non-swimmers, weak swimmers and also for the perfect swimmers. One can witness waves while swimming. This facility was started in April 1996.

2. Lazy River: Lazy River pool is again meant for the non and weak swimmers. Sketch along with the dimensions of this pool is enclosed. In this pool the recycled water flows slowly with the help of pumps which further helps to learn how to swim. This facility was also started in April 1996.

3. Kiddies Pool: The depth of this pool is from one feet to two feet. Kids from one year to ten years can easily learn swimming in this pool. Dimensions of this pool are enclosed. This facility was made operational in April 1996.

4. *Fun Slides: In this pool one can swim after landing in the pool from top of the slide which gives a diving experience. The depth of the pool is three feet. Other dimensions are enclosed along with the sketch of the pool. This facility was started in April 1997.*

5. *Aqua Shute: One can feel surfing experience after landing in the pool from the top of the slide by sitting on a floating mat. For dimensions you can see the enclosed sketch of the pool. Depth of this Pool is 2 to 4 feet and this facility was started in April 1997.*

6. *Super Slide: The depth of the pool is one and half feet only and is specially made for the non-swimmers as the non-swimmers can come down from the top of the slide in a zig-zag manner and can enter into the water without any fear. Dimensions are enclosed. This facility was made operational in September 1996.*

7. *Aqua Ball: This pool was recently started in June 1999 having different types of showers.*

Your goodself must be aware of the fact that our Country with appx. 800 million people could not achieve a single medal in swimming at the international level because this sport has been ignored and no initiatives has been taken by anyone to promote this sport.

We have designed our swimming pools to attract the people of all age groups considering that the majority of the people are from non swimmers who cannot swim in deep swimming pools. Our endeavor is to encourage the non and weak swimmers and to help them to learn how to swim so that they can compete at the international level and can do something for our country."

4. In the meanwhile, the ET Department had advised the management, directing it to apply for a No Objection Certificate under Section 8 of the Delhi Entertainment and Betting Tax Act (hereafter the "ET Act") read with Rule 11 of the Rules framed under it. The management did not comply and

in these circumstances, assessment proceedings were initiated during which Polo Amusement wrote the letter, dated 19.04.1999 (quoted above). The Entertainment Tax Officer [hereafter "ETO"] by his Order dated 12.11.1999, made under Section 15 of the ET Act held that the ET of ₹1,46,090/- calculated on the basis of 20% of the gross proceeds of gate money were payable. The order reads as follows:

"The assessee has consistently contended that the activity is swimming and hence should not be taxed unless swimming is taxed. The assessee also submitted that the activity is exempted from the Entertainment Tax in the states of UP, Rajasthan, Gujarat and Maharashtra with provisions/grounds of exemption varies from state to state and submitted notifications related to various States. The Department felt that the case has litigation potential and accordingly the advice of the Law and Finance Department was sought.

Subsequent to the advice of the Law Department and the Finance Department, a decision was taken by the Department to levy Entertainment Tax on the activity and an order was passed accordingly on 21.9.98, directing the establishment to apply for a No Objection Certificate from the Department as per Section 8 of the Delhi Entertainment and Betting Tax Act and Rule 11 of the Rules framed thereunder. Despite this order, the assessee failed to seek NOC under Section 8 and as such assessment proceedings under Section 15 of the Delhi Entertainment Tax Act were initiated.

In view of the Department's ambience in the matter duly noted by worthy Finance Secretary and reflected in seeking of opinion at all levels from Law and Finance Department, the decision taken by the Government is analogous to determination under Section 33 of the Delhi Luxury Tax Act or Section 49 of the Delhi Sales Tax Act and it stands to reason that tax may be levied only from the date when Department issued an order to this effect after seeking legal opinion and not from retrospective effect.

I have carefully examined assessee contention in a number of meanings from January 1999 and have taken on records the documents submitted by the assessee. It has been submitted that the facility terrified closed from 1.11.98 to 20.3.99 on account of winter season and the facility being water pours as per certified accounts the gross receipts of gate money from 21.9.98 to 31.3.99 were Rs.7,30,450/- only excluding the period of closure i.e. 1.11.98 to 20.3.99. The Entertainment Tax together constitute gate money. As such the Entertainment Tax constitutes 20% of the total gate money received for any determination of ticket.

Accordingly, Entertainment Tax is levied on the facility @ 20% of the gross proceeding of gate money to Rs.1,46,090/-.

Further, interest is being levied as per Section 40 of the Delhi Entertainment Tax Act @ for one month and 24% p.a. For following months on the amount of the tax. As the tax is payable weekly on weekly receipts and exact information as to weekly receipts is not available, interest is calculated by making a reasonable estimate by way of fixing the payment liability for the total amount of tax at the mind point of the liable period in the year of assessment, i.e. mid point of 21.9.93 to 31.3.99 being 25.12.96. From 25.12.98 to the date of this order, i.e. 12.11.99, the interest liability works out for 10 months 18 days to Rs.30,240. In addition a penalty under Section 28 of Delhi Entertainment and Betting Tax Act to the extent of 2000 is imposed on the assessment year 1998-99 within 15 days from the date of this order. The assessee is further directed to duly apply for registration with the Department under Section 8 of the Delhi Entertainment and Betting Tax Act and Rule 11 of the Delhi Entertainment Tax Rules."

5. Polo Amusement appealed to the appellate authority, i.e. the Deputy Commissioner, under Section 15(3) of the ET Act, aggrieved by the order of the ETO on 12.11.1999. Polo Amusement contended that the visitors to the Club were participants in swimming and badminton, which did not call for levy of ET and that swimming, related activities were carried on in the Club.

According to Polo Amusement, these did not fall within the purview of the expression "entertainment" under Section 2(i) of the ET Act. Polo Amusement, however, argued that people involving and participating themselves in sports activities like football and cricket are not taxed and that in any event sports tax is leviable on spectators and not participants. The Appellate authority was of the opinion that the relevant provisions of the ET Act [Sections 6(2), 6(6) and 7] read with Section 2(m) pre-supposed that entertainment, amusement purposes etc. were liable to ET subject to the condition that there was an element of payment for admission to such activities.

6. The appellate authority was of the opinion that the activity carried on at the Club was mere swimming was not established from the records and submission. The seven activities (quoted above) were held to have,

"not been created for swimming. Apparently, the basic purpose of these pools is amusement or entertainment to the visitors. The depth of the various pools clearly indicates that excepting the Sea-Wave Pool no pool has sufficient depth of water for swimming. It is further observed from the above facts that in most of these facilities visitors or the patron enters the pool with the help of some instruments/slides instead of swimming through movement of parts of the body like hands and feet. The facilities are basically for the enjoyment of those entering into the Village Club after having paid for admission."

The appellate authority clearly held that the activities on offer were not swimming and amusement activity:

"The activity, however, in view of the above facts is not swimming, but entertainment/amusement activity. The allegation of, discrimination in taxing the appellant, therefore, does not

hold good. The activity of swimming as provided in hotels, clubs, etc. is not for amusement or entertainment. The members of the club go to the swimming pool either with the purpose of learning swimming or for regular swimming in case of those persons who already know swimming. In these cases, the basic purpose of the participants is physical fitness/exercise not entertainment or amusement as is the case with the activities in Fun-N-Food Village/Village Club of the appellant. Moreover, the membership charges in the clubs are generally refundable at the time of resignation etc. because the clubs are generally not being run on commercial basis and are open to the members only or for their guests. As regard Five Star hotels, it is understood that such facilities are required to be created and maintained by the hotel for the purposes of Star categorization so that facility could be used by those hiring accommodation. Even otherwise, the facility of swimming pool provided in the hotels is used by swimmers for physical fitness/exercise. The facility is not open to non-swimmers for enjoyment/amusement or entertainment.

It would be relevant to see the dictionary meaning of swimming for proper appreciation of the point. As per Webster's Dictionary, swimming is propelling one self in water by means of hands and feet on surface, act of swimming.

It is thus clear from above facts that the activities of the appellant basically have amusement/entertainment character and admission is against the payment for admission which may be in the form of membership fee, maintenance charges or entry tickets from other visitors. The fact remains that those seeking admission to the facility have to pay for the same and the purpose of their visit is entertainment/enjoyment and not swimming. The appellant is, therefore, liable to pay the Entertainment Tax as the charges for admission being obtained by the Appellant are very well covered under the definition for payment for admission under Section 2(m). The purpose behind creation of various pools of the appellant is commercial and receipts are reflected in Schedule 8 of Audited Accounts under Sales and Identical Revenue."

The appellate authority later concluded as follows:

"In view of the above discussions, I am of the view that the activities of the appellant in the Village Club fall within the definition of Entertainment as the water park is run by the appellant on a commercial basis and is designed to provide entertainment and amusement to the visitors. Since the appellant is charging payment for admission for entry and enjoyment in Village Club payment for admission is taxable under the Delhi Entertainment and Betting Tax Act, 1996.

I would further like to comment on the date of liability with regard to tax. The taxability or the date of liability in respect of particular activity/event or entertainment shall have to be decided with reference to the provisions of the Act. The order of the ETO regarding the date of liability is apparently bad in law. The Appellant has himself submitted in his letter dated 19.4.99 to ETO that the activities/facilities known as Sea-wave, Lazy River and Kiddies Pool were started in April, 1996. Fun Slide and Aqua-shute were started in April 1997. Superslide was started in Sept. 1998. Aqua Ball was started in June 1999.

Section 8 of the Delhi Entertainment and Betting Tax Act, 1996 provides that no entertainment on which tax is leviable shall be held without prior information being given to the Commissioner.

Thus it was the responsibility of the proprietor/applicant to give prior information to the Commissioner (Entertainment Tax) regarding entertainment being held by him from April 1996 onwards, as per his own admission, in the Village Club.

The liability to pay the tax is therefore, to be determined with reference to the above said provisions of the Act from the date of commencement of business, i.e. Entertainment/Amusement activities in the water park at the Village Club.

As regards the taxability during the year 1998-99 the receipts from the charges collected from the visitors to the Village Club have been reflected by the Appellant in their audited statement in Schedule 8 of Sales and Incidental Revenue and the said receipts are reflected in the form of membership fee and maintenance charges from guests. The membership fee in the audited

statement of the year 1998-99 is reflected as Rs.24,38,300/- while maintenance charges from guests are to the tune of Rs.76,32,470/-. These receipts would, therefore, fall within the definition of payment for admission and shall be liable to tax in addition to charge on account of entry tickets.

In view of the above, I do not find merits in the contention of the appellant and appeal is accordingly dismissed.

The case is therefore remanded to the Entertainment Tax Officer to frame the Assessment Order afresh with reference to the aforesaid observation."

7. With the conclusion of the decision in the appeal - on 20.02.2001, the question as to the liability of Polo Amusement to pay ET for the relevant period became final. The ETO issued notices to deposit ET based upon the calculations worked out from the books of accounts and receipts made during the relevant period. The assessee was given a final opportunity on 07.09.2001 to deposit ET and books of accounts for the period up-to 31.03.2001. It did not comply with the directions and instead furnished a letter dated 18.09.2001, claiming that it had filed a petition before the Financial Commissioner [hereafter referred to as "the FC"]. The ETO, by order dated 15.10.2001 proceeded to assess the ET @ 25% of the gross proceeds from the membership fees and maintenance charges from the guests totalling ₹1,13,65,455/-. The amount of ET was assessed at ₹28,41,364/-; the interest liability was calculated at ₹20,47,948/-, and ₹49,89,312/- was directed to be deposited.

8. Polo Amusement had preferred a further appeal to the FC under Section 15(4) of the ET Act on 20.03.2001. By his order, the FC upset the concurrent findings of the assessment/ETO/AO and the appellate authority

on 04.01.2002. The FC was of the opinion that swimming pools at the Club were designed for swimming for all age groups - beginners as well as expert swimmers -and the dimensions of such pools were of international standards. The FC felt that the Sports Authority of India (SAI) was the apex body in the area of sports and its opinion carried weight and credibility. On the basis of these materials, it was concluded that the activities at the Club were swimming activities. The FC ruled out the respondent/GNCTD's argument that swimming pools in five-star hotels were mandatory and essential to retain their star-rating, by stating that they were neither relevant nor paramount to the issue. The FC held that:

"15. Thus, I hold that activities undertaken at the village club are swimming activities/sports activities and the entertainment tax as contended by the appellant can only be levied/collected from the spectators/audiences and not from those who actually participate in such sports activities.

16. I am also in agreement with the contention of the appellant that since the department is not collecting any entertainment tax from persons who are club members or guests staying in hotels in Delhi and who pay for swimming facilities in such clubs and hotels, it is not justified in levying entertainment tax on the village club."

9. The FC faulted the ETO's subsequent order of 20.02.2001, holding that since the earlier assessment order upheld in appeal had been accepted, the appellate authority could not enhance the tax liability when the ET Department had not questioned the assessment order.

10. W.P.(C) 7589/2012 and connected cases filed by Polo Amusement challenges the notification issued by the GNCTD dated 07.06.2007 which is to the following effect:

"No.F.12(1)/Fin(T&E)/2007-2008/dsfte/436
: 07.06.2007

dated

ORDER

In exercise of powers conferred by sub-section (1) of Section 14 of the Delhi Entertainment and Betting Tax Act, 1996 (Delhi Act 8 of 1997), the Government of National Capital Territory of Delhi, for promotion of sports, hereby, exempts the following classes of sports activities from liability of entertainment tax on payment for admission, namely:-

- (a) The activity of swimming, carried out in swimming pools licensed under the Union Territory of Delhi Swimming Pools (Licensing and Controlling) Regulations, 1980 except in swimming pools or water games pools situated within the premises of amusement parks and other place of amusements licensed or liable for obtaining license under the Regulations for Licensing and Controlling places of public Amusement (other than Cinemas) and performances for public amusement, 1980; and*
- (b) Any other sports activities organized by schools or colleges or gymnasiums."*

11. Polo Amusement also challenges the consequential assessment orders made for various years and periods. It is submitted that during pendency of W.P.(C) 1896/2002, the FC's order was not stayed. Therefore, it operated in *rem.* The order had the effect of ruling out levy of any ET on the Club's swimming and sports activities. The impugned 2007 notification, it is contended, substantially exempts from payment of ET on swimming and other sports activities organized by schools, colleges and gymnasiums, and is under Section 14 of the ET Act. It is argued that this notification, in differentiating between the same activities carried on in different places, is discriminatory. Polo Amusement contends that exempting one set of

organizations such as schools, colleges and gymnasiums from carrying out the same activities, but carried on in different premises has no rational basis with the object of Section 14 of the ET Act which is to grant exemption to an entire class. It is urged that swimming forms one indivisible activity regardless of where it is carried on. If the GNCTD decides that such activity is essentially a sporting activity, and further that it should be exempted, the condition imposed as to the premises where they are carried on, has no rational nexus with the object of granting exemption.

12. It is next contended that the Club also has a pool, which according to the ET Department's notification of 30.06.1999 were tax-free as it was basically meant for swimming for all age-groups. The assessee further relies upon the view of the Law Department of GNCTD, noting that tax should be collected *"uniformly from all the organizers and clubs/hotels etc. We are required to maintain uniformity in our actions."* This opinion was even considered by the FC in the order, dated 04.02.2002. By the order dated 15.11.2012 (impugned in W.P.(C) 7589/2012), Polo Amusement was asked to deposit ₹5,63,16,858/- (being ET determined at ₹2,67,72,750/- and interest with further penalty of ₹1 crore). Similarly, the subject matter of W.P.(C) 2424/2013 is identical except that apart from questioning the notification-dated 07.06.2007, the assessed levy of ET of ₹2,67,72,750/- plus interest and penalty, i.e. total working out to ₹4,64,35,938/- for the period 2011-2012 is challenged. W.P.(C) 2450/2013 challenges an identical levy - the Recovery Notice dated 18.02.2013 for the said relevant period 2011-12 and seeks to recover ₹4,34,65,938/-. W.P.(C) 2451/2013 questions the Recovery Notice for the relevant period 2007 to 31.03.2008 at

₹5,78,69,677/- and in W.P.(C) 2425/2013, the challenge is on identical grounds - the Recovery Certificate dated 18.02.2013 for ₹4,98,91,398/- for the assessment period 2010-2011.

Common contentions of Polo Amusement:

13. It is firstly contended by Sh. C. Harishankar, learned senior counsel for the Polo Amusement that levy of ET under the ET Act is conditional upon the activity being "amusement" where people are given admission to an entertainment as defined under Section 2(a). It is urged that the import of the words under Section 2(a) unmistakably point to an activity carried on by someone other than the spectator. It is submitted that once someone enters the Club area to undertake as a participant in the activities offered, it cannot be said that he has attempted to an entertainment for the simple reason that the premises and the entertainment have to be different from the spectator. In the context of swimming or water sports, it is submitted that the expression "held" in the context of entertainment has two meanings. Polo Amusement does not hold entertainment as understood either logically or legally. "Amusing onself", urges counsel, does not amount to being entertained - intrinsically different since the entertainment would be shown or activity other than that of the spectator, passively observing it. Reliance is placed on the decision in *Associated Hotels of India v. UOI* (1961) 1 ILR (P&H) 66, where it was held that, "*the persons who go to the pool to bathe there do not go to a place of entertainment. After all a common sense view of the matter must be taken. It is impossible to say that the bather on payment of admission charges when entering the pool is entering a place where entertainment is being held.*"

14. The assessee's interpretation is supported by the expression "payment for admission" under Section 2(m)(iv) which includes "any payment for any purpose whatsoever connected with entertainment" which a person is required to make:

"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."

The concept of someone amusing himself or herself is implicitly excluded in the expression "attending entertainment". Reference is also made to Section 6(5) that explicitly talks of a place of enjoyment to which access is enabled upon payment. The assessee/Polo Amusement further relies upon Section 8 which states that no ET and entertainment on which tax is leviable shall be held without prior information to the Commissioner by suppressing that holding of an event other than someone participating in it is of the essence to the entertainment. Thus, swimmers who are given entry to the facility do not participate in amusing or entertainment held or organized by the management.

15. Learned counsel relies upon the decision reported as *State of Maharashtra v. Indian Hotel and Restaurants Association* 2013 (8) SCC 519 and states that the basic activity which the club undertakes, i.e. granting access to swimming and that merely because these activities include or involves slides etc. does not convert the swimming activity into entertainment. These remain identical to the activities of visitors and guests to hotels, clubs etc. It is also emphasized that the Fun Village and Club are open to all and not confined to a few. In that sense, it is open to all members

of the public on payment of entry fee. However, it is stated that the ET Department does not dispute that the Club facilities are not open to the public but restricted to its members and guests. In these circumstances, the point of distinction between the two was lost. Lastly, it is argued that the appellate authority in the order of 20.02.2001 fell into error in enhancing the tax payment on Polo without an appeal on the part of the ET department against the order dated 12.11.1999. Reliance is placed on the decisions of the Supreme Court in *State of Kerala v. Vijaya Stores* 1978 (4) SCC 41 and *ICICI Bank v. Ahmedabad Manufacturing Calico Printing Ltd.* 2004 (9) SCC 747.

16. In its writ petitions, Polo Amusement argues that subsequent upon the order of the FC, the question of ET liability for a subsequent period could not have arisen. It is stated that by purporting to issue the impugned order/notification, differentiating between swimming activities in institutions, Clubs etc. and other places and thus seeking to tax the amusement parks, the GNCTD exceeded its powers. So long as the FC's order remained unaltered, the question of seeking to recover any amount on the basis of such notification did not arise. It was argued that on the strength of the decision in *Union of India v. Kamlakshi Finance Corporation* 1992 Supp. (1) SCC 443 that having found that once the FC determined that the activities in the Polo Amusement were not liable to ET, the Govt. of NCT, issued a Notification illegally. In the absence of a stay or eventual setting-aside of the FC's order, in fact, no tax could be levied for the intervening period. It is argued next that the notification and the subsequent assessment orders as well as the recoveries are unlawful because Section 6(1) authorizes

the levy of tax not on the proprietor of the establishment providing the amusement or enjoyment but on the person who pays for admission. The establishment offering entertainment merely collects the tax. If the law as it stood after the FC's order was that collection itself was impermissible, the question of levying and recovering amount from Polo Amusement did not arise. It is argued that in any case, for the period the matter remained pending final decision [in the GNCTD's petition, W.P.(C) 1896/2002], recovering any amounts towards tax liabilities of the assessee would not be justified. Reliance is placed upon the decision *ESI Corporation v. Hyderabad Race Club* 2004 (6) SCC 191.

17. It is argued furthermore that the orders of assessment made are not based on any rational grounds since there is no material to substantiate the *ad hoc* determination that four tickets were issued on an average per day. Furthermore, the assessing authority assumed that the prices of tickets remained uniform and unaltered throughout the year whereas the prices actually varied from season to season. Other issues of fact, such as the school children being provided free admission on production of School Identity Cards were also ignored. It is also argued that the ET Act does not authorise recovery of interest or penalty.

Contentions of the Govt. of NCT of Delhi

18. The GNCTD firstly contends that the FC fell into grave error in re-appreciation of factual material. It is argued that a combined reading of Section 2(a), Section 2(l) and Section 2(m) of the ET Act clearly discloses that the artificial distinction sought to be made between the participants and spectator in the context of the amusement offered or in question is highly

artificial and not borne out. Reliance is placed on the judgment of the Supreme Court in *M/s. Geeta Enterprises and Ors. v. State of UP and Others* 1983 (4) SCC 202. Section 3(3) of the ET Act, which was considered by the Supreme Court, defined "entertainment" as including any performance, amusement, game or sport of which persons are admitted for payment. The question involved there was recovery of ET for operating video game. The Supreme Court had stated that four tests ought to be fulfilled:

"1. that the show, performance, game or sport, etc. must contain a public colour in that the show should be open to public in a hall, theatre or any other place where members of the public are invited or attend the show.

2. that the show may provide any kind of amusement whether sport, game or even a performance which requires some amount of skill; in some of the cases, it has been held that even holding of a tombola in a club hall amounts to entertainment although the playing of tombola does, to some extent, involves a little skill.

3. that even if admission to the hall may be free but if the exhibitor derives some benefit in terms of money it would be deemed to be an entertainment.

4. that the duration of the show or the identity of the person who operates the machine and derives pleasure or entertained or that the operator who pays himself feels entertainment is wholly irrelevant in judging the actual meaning of the word 'entertainment' as used in s. 2 (3) of the Act. So also the fact that the income derived from the show is shared by one or more persons who run the show."

19. It was argued that the Supreme Court approved the view that games, which require skill and precision where the participants also derive amusement and enjoyment and further, provided by the organizer or event owner. Similarly amusement too but not to the same degree would amount to entertainment. The Supreme Court also approved the decision of the Madhya

Pradesh High Court in *Harris Wilson v. State of Madhya Pradesh* AIR 1982 MP 171. It was argued that the FC completely overlooked the factual findings of the appellate authority who had analyzed not only the kind of activities which the assessee provided for a fee but also the judgments from different jurisdictions and the deficiencies under the enactment. It was argued that the FC interpreted the expression "enjoyment" narrowly by taking note only of the dictionary meaning and the view of the Sports Authority of India (SAI), which could not be held conclusive.

20. Learned counsel also relied upon the decision of this Court in *East India Hotels Ltd. v. UOI* 2004 (77) DRJ 274 which interpreted Section 2(3) of the *U.P. Entertainment and Betting Tax Act, 1937* as applicable to Delhi. The Court had applied the law in *Geeta Enterprises (supra)* and in the context of another participating/activity, which involved both active and passive participation of the person seeking amusement, i.e. entry into a discotheque. It is submitted that the said judgment is conclusive on the issue that the entertainment or amusement activity has to be such that the spectator does not participate in it to be liable to ET. In other words, even activities that involve participation of the entrant can amount to amusement or enjoyment.

21. It was argued that as far as the validity of the Notification dated 07.06.2007 is concerned, although there was no stay of the order of FC, the independent power of the GNCTD to notify and classify exemption under Section 14 was in no way or manner lowered. Learned counsel highlighted that whilst the question of levy or collection of ET during pendency of W.P.(C) 1896/2002 remained a subject matter of scrutiny by the Court, so far

as the issue was concerned, it was open to the GNCTD to exercise its sovereign powers which in no way were impeded. The power to classify exemptions under Section 14 was not suspended or stayed and was exercised justly by issuing the notification dated 07.06.2007.

22. Learned counsel argued that there is justification for differentiating between "commercial establishments" such as the Fun Village and the Club, which provided standalone entertainment and activities to its members. It was highlighted that the inspection reports consistently revealed that memberships were provided contrary to the claims made and that rather than one or two members, names were cited to give daily entries to guests by collection of daily guest charges. This in fact amounted to providing entertainment to members of public. Given these and the very nature of the activities, which members of the public were allowed access to in the Fun Village, i.e. different kinds of pools, which did not involve any swimming skills at all, the classification between swimming activities and amusement and fun parks was entirely well-founded.

23. It is argued that in matters of tax and levy of duties, the State has wider latitude in classifying goods, services, activities and articles as compared with activities that fatally affect the fundamental rights of individuals. Learned counsel argued that sporting activities carried on in educational institutions and schools, such as swimming in schools, is designed to promote the well-being, health and sports generally. Likewise, the State recognizes that commercial establishments, such as hotels charge their guests who avail of the facilities in the form of room tariff. These were subject to taxation. However, the facilities at the Club were exclusively

given for the pure amusement and enjoyment of those seeking it. Consequently, they could be treated differently.

24. It is argued that once it is held that availing facilities in the Fun Village and the Club of Polo Amusement amounts to entertainment within the term defined under the ET Act, the question of waiving any penalty or interest would not arise. The management deliberately chose not to collect any amounts from the guests who availed of its facilities and cannot now complain that it is not liable.

Analysis and Findings

25. The two points which require to be decided in this case are whether the activities offered by Polo Amusement are liable to ET and the validity of the impugned notification dated 07.06.2007. Certain provisions of the ET Act are essential, for the decision in this case. They are set out below:

"Section 2(a) - "admission to an entertainment includes admission to any place in which the entertainment is held and in case of entertainment through cable service each connection to a subscriber shall be deemed to be an admission for entertainment."

Section 2(i) - "entertainment means an exhibition, performance, amusement, game, sport or race (including horse race) or in the case of cinematograph exhibitions, cover exhibition or news-reels, documentaries, cartoons, advertisement shorts or slides, whether before or during the exhibition of a feature film or separately, and also includes entertainment through cable service;"

"Section 2(m) - "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."

"Section 6 Tax on payment for admission to entertainment.

(1) 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 7 applies, an entertainment tax at such rate not exceeding one hundred per cent of each such payment as the 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.

(2) Nothing in sub-section (1) shall preclude the government from notifying different rates of entertainment tax for different classes of entertainment or for different payments for admission to entertainment.

(3) Where the payment for admission to an entertainment together with the tax is not a multiple of fifty paise, then notwithstanding anything contained in sub-section (1) or sub-section (2) or any notification issued thereunder, the tax shall be increased to such extent and be so computed that the aggregate of such payment for admission to entertainment and the tax is rounded off to the next higher multiple of fifty paise, and such increased tax shall also be collected by the proprietor and paid to the government in the manner prescribed.

(4) If in any entertainment, referred to in sub-section (1), to which admission is generally on payment, any person is admitted free of charge or on a concessional rate, the same amount of tax shall be payable as if such person was admitted on full payment.

(5) Where the admission to a place of entertainment is generally on payment, and if any entertainment is held in lieu of the regular entertainment programme without payment of admission or with payment of admission less than what would have been paid in the normal course, the proprietor shall be liable to pay tax which would have been payable in a normal course at full house capacity or the tax for the programme held in lieu of the regular entertainment programme whichever is higher.

(6) Where the payment for admission to an entertainment, referred to in sub-section (1), is made wholly or partly, by means of a lump sum paid as subscription, contribution, donation or otherwise, the tax shall be paid on the amount of such lump sum and on the amount of payment for admission, if any made otherwise.

(7) *Where in a hotel or a restaurant, or a club, entertainment is provided by way of cabarets, floor shows, or entertainment is organized on special occasions along with any meal or refreshment with a view to attract customers, the same shall be taxed at a rate to be notified under sub-section (1)."*

"Section 8-Information before holding entertainment.

(1) *No entertainment on which tax is leviable shall be held without prior information being given to the Commissioner in the manner prescribed.*

(2) *No proprietor of a cable television network or video camera shall provide entertainment unless he obtains permission from the Commissioner in the manner prescribed.*

(3)_ *Notwithstanding anything contained in this Act or any other law for the time being in force, the Commissioner, or any other officer authorised by the government in this behalf, may after giving reasonable opportunity of hearing to the proprietor, prohibit the holding of such entertainment and may also take all reasonable steps to ensure that order of prohibition is complied with, if he is satisfied that-*

(a) the proprietor has given any false information which is likely to result in the evasion of tax;

(b)the proprietor has failed to deposit the security due;

(c) the proprietor has committed breach of any of the provisions of this Act or the rules made thereunder."

"Section 14-Exemption

(1) *The government may, for promotion of arts, culture or sports, by general special order, exempt any individual*

entertainment programme or class or entertainments from liability to pay tax under this Act.

(2) The government may, by general or special order, exempt in public interest any class of audience or spectators from liability to pay tax under this Act.

(3) Without prejudice to the generality of the provisions of sub-section (1) where the government is satisfied that any entertainment,-

(a) is wholly of an educational character; or

(b) is provided partly for educational or partly for scientific purposes by a society not conducted or established for profit; or

(c) is provided by a society not conducted for profit and established solely for the purpose of promoting public health or the interests of agriculture, or a manufacturing industry; and consists solely of an exhibition of articles which are of material interest in connection with questions relating to public health or agriculture or are the products of the industry for promoting the interest whereof the society exists, or the materials, machinery appliances or foodstuff used in the production of such products;

it may, subject to such terms and conditions as it may deem fit to impose, grant exemption to such entertainment from payment of tax under this Act;

PROVIDED that the government may cancel such exemption if it is satisfied that the exemption was obtained through fraud or misrepresentation, or that the proprietor of such entertainment has failed to comply with any of the terms or conditions imposed or directions issued in this behalf and thereafter the proprietor shall be liable to pay the tax which would have been payable had not the entertainment been so exempted.

(4) Where the government is satisfied that the entertainment programme is not conducted for profit and the entire gross proceeds from payment for admission as defined in clause (1) of Section 2, of an entertainment are to be devoted to philanthropic,

religious or charitable purposes, without any deductions whatsoever on account of the expenses of the entertainment, it may, subject to the rules made under this Act, grant exemption to such entertainment from payment of tax under this Act on such terms and conditions as it may deem fit to impose.

(5) *Where any exemption from payment of tax is granted under sub-section (4) the proprietor of such entertainment shall furnish to the Commissioner such documents and records and in such manner as may be prescribed.*

(6) *If the proprietor of an entertainment exempted under sub-section (4) fails to furnish the documents and records required under sub-section (5), or fails to comply with any conditions imposed or directions issued in this behalf, or if the government is not satisfied with the correctness of such documents or records, the government may cancel the exemption so granted and thereupon the proprietor shall be liable to pay the tax which would have been payable had not the entertainment been so exempted.*

(7) *The government may for reasons to be recorded in writing grant export facto exemption from payment of entertainment tax in respect of any programme."*

26. *Geeta Enterprises (supra)* is conclusive on what kind of activity is "entertainment". The four pronged test: Public nature (as opposed to private, through invitation or restricted entry to guests etc); deriving of amusement by the person seeking it- whether by sport, performance or other entertainment; deriving of profit (i.e commercial element) to the provider of entertainment and the irrelevance of whether actual amusement is derived from the particular given form of entertainment, is all embracing. The statute in this case clearly states that entertainment is "*exhibition, performance, amusement, game, sport or race (including horse race)..*" (Section 2 (i)).

“Admission to entertainment” is defined as (See Section 2 (a)) “*includes admission to any place in which the entertainment is held..*”

27. The charging provision, Section 6 (1) enacts that tax is to be levied and paid on all payments for admission to any entertainment. Section 2 (m)(iv), in the Court's opinion, covers the payment made by visitors to the petitioner's club as charges since they are *connected with the entertainment*, the water sports activities (and not mere swimming) provided in the petitioner's premises. Section 2 (m)(iv), in effect, is that payment should be connected *with an entertainment*; the nomenclature of the payment is irrelevant. The only condition is that the payment should be connected with the entertainment, which are water sport activities in the present case. The added condition is that the payment should be one that an individual has to make as a condition of attending the entertainment. This condition is satisfied in the case of all those entering inside the Petitioner's club. If they want to use the water sports facilities, they have to make the payment for the entrances. Thus the requisite conditions are fulfilled.

28. The Court perceives no merit in Polo Amusement's submission that the expression "entertainment" not comprehending activity where the visitor/customer is a participant- in all these cases. *Geeta Enterprises (supra)* is itself an answer to this argument. The facts there were that the owner of a video parlor sought to question imposition of ET. The Court expressly rejected the submission. Furthermore, the decision in *East India (supra)* is conclusive that even where entertainment of a participant is involved, there is no question of the activity not being entertainment. In the sense understood by the legislature, the two terms “entertainment” and

“amusement” are synonymous. The Concise Oxford English Dictionary defines the terms "*amusement*", and "*amusement park*" as follows:-

"Amusement : The state or experience of finding something funny; the provision or enjoyment of entertainment; a game machine or other mechanical device for providing entertainment".

"Amusement Park : A large outdoor area with fairground rides and other entertainments. (Ref: 11th Indian Edition 2007. Oxford University Press)

The use of terms such as “entertainment”, “sport”, “amusement” etc. show that the legislature clearly intended no restriction of the nature urged by the petitioners. Both, being entertained or amused by viewing a show, or participating in an activity, (like in *Geeta Enterprises*) the legislative intent was to treat both alike. Interestingly an argument similar to that of the petitioner/*Polo Amusement* in this regard, was made, but rejected in *Black Thunder Theme Park Private vs State Of Tamil Nadu* (WP 1614/1999 and connected cases, decided on 23.10.2008). The Madras High Court held as follows:

“By relying upon certain English decisions, it was sought to argue that there is a distinction between "amusement" and "entertainment". When the petitioners are providing only facilities and the persons are enjoying such facilities, the same thing cannot be subjected to an entertainment tax. The legislative entry should not have any meaning from common parlance, but it should have a legislative definition. The definition "amusement" introduced by the Amending Act was an arbitrary definition.

In fact, more or less a similar contention, which had been raised in respect of entertainment tax regarding cinemas, was repelled

by the Supreme Court Y.V. Srinivasamurthy & Ors v The State of Mysore & Anr reported in AIR 1959 SC 894. Para 3 of the said judgment may be usefully extracted below:-

"3. It is only necessary here to refer to an additional argument that was advanced by learned counsel for the appellants before us in support of his contention. He drew our attention to Entry 33 of List II of the Seventh Schedule to the Constitution which runs as follows: _Theatres and dramatic performances; cinemas subject to the provisions of Entry 60 of List I; sports, entertainments and amusements._ He contends that that entry covers laws made with respect to each of the items as a separate subject, but points out that Entry 62, which has been quoted above, permits imposition of tax only on luxuries including taxes on entertainments, amusements, betting and gambling. Learned counsel concludes that law made with respect to Entry 62 cannot permit imposition of taxes on cinemas, for the word _cinemas_ mentioned in Entry 33 has been omitted from Entry 62. We do not think there is any substance in this argument. Learned counsel agrees that the words _entertainments_ and _amusements_ are wide enough to include theatres, dramatic performances, cinemas, sports and the like. If his argument is correct, then, on a parity of reasoning, the State Legislature will have no competence to enact a law imposing a tax on theatres or dramatic performances or sports, for none of those words are mentioned in Entry 62. This is sufficient to repel this argument. The truth of the matter is that _cinema_ had to be specifically mentioned in Entry 33 of List II in order to avoid any possible conflict between it and Entry 60 in List I.

13. While defining the term "entertainment", a Division Bench of Madhya Pradesh High Court in Calico Mills Ltd v State of M.P reported in AIR 1961 Madhya Pradesh 257 has dealt with the

issue in some detail. The passage found in para 6 may be usefully extracted below:-

"6. The natural import of the term 'entertainment' is amusement and gratification of some sort. The term connotes something in the nature of an organised entertainment. This is evident from the fact that the Act was enacted to provide for the levy of a duty in respect of admission to theatres, cinemas and other places of public entertainment. Therefore, an entertainment to come within the definition of section 2 (b) and of the provisions of the Act must be some exhibition, performance, amusement, game or sport for the purpose of entertainment, that is, for affording some sort of amusement and gratification to those who see or hear it." (Emphasis added)."

29. The petitioner, Polo Amusement had relied on the decision of the Supreme Court in *Indian Hotel Association (supra)* where it was held that the classification made for the purpose of banning dance bars was irrational. This Court finds that the judgment has no relevance to the context here; the Court there was of opinion that an improper distinction on grounds of classes of establishments or classes of persons, who frequent the establishment had been made by the State, which was discriminatory and that there was no *rationale* to justify the conclusion that a dance that leads to depravity in one place would get converted into an acceptable performance by a mere change of venue. The Court held that morality and depravity cannot be pigeon-holed by degrees depending upon the class of the audience. Thus, activities which are obscene or which are likely to deprave and corrupt those whose minds are open to such immoral influences, cannot be distinguished on basis of whether they are performed in five-starred hotels or in dance bars. The Court

held that it could give credence to a notion that high morals and decent behavior is the exclusive domain of the “upper” classes, whereas vulgarity and depravity are limited to the “lower” classes.

30. It is consequently held that there is no merit in the petitioners’ argument that participation in the activities provided by Polo Amusement to its subscribers’ guest, i.e. Sea Wave, Lazy River, Fun Slide, Kiddies Pool, Aqua Shute, Aqua Ball, Super slide, are not covered within the definition “entertainment” or that its facilities do not constitute places of entertainment, for the entry of which the amounts collected are liable to ET.

31. The next issue is whether the order of the Appellate Authority (not the FC) could have resulted in imposition of liability greater than what was found by the ET Department at the stage of assessment. At the stage of assessment, it was held that the collections for the period in question, i.e. 21.09.1998 to 31.03.1999, were ₹7,30,450/- (excluding the period of closure i.e. 01.11.1998 to 20.03.99). The assessing authority held that *“As such the Entertainment Tax constitutes 20% of the total gate money received for any determination of ticket..”* and directed that *Entertainment Tax is levied on the facility @ 20% of the gross proceeding of gate money to Rs.1,46,090/-*. The officer also levied interest under Section 40 @ for one month and 24% p.a. for following months on the amount of the tax. He estimated the receipts on an average receipts on *“reasonable estimate by way of fixing the payment liability for the total amount of tax at the mid point of the liable period in the year of assessment, i.e. mid point of 21.9.93 to 31.3.99 being 25.12.96. From 25.12.98 to the date of this order, i.e. 12.11.99, the interest liability works out for 10 months 18 days to Rs.30,240. In addition a penalty under*

Section 28 of Delhi Entertainment and Betting Tax Act to the extent of 2000 is imposed.” The petitioner appealed against this decision under Section 15 (3). The Deputy Commissioner, who heard the appeal, not only upheld the assessment, but also observed as follows:

“As regards the taxability during the year 1998-99 the receipts from the charges collected from the visitors to the Village Club have been reflected by the Appellant in their audited statement in Schedule 8 of Sales and Incidental Revenue and the said receipts are reflected in the form of membership fee and maintenance charges from guests. The membership fee in the audited statement of the year 1998-99 is reflected as Rs.24,38,300/- while maintenance charges from guests are to the tune of Rs.76,32,470/-. These receipts would, therefore, fall within the definition of payment for admission and shall be liable to tax in addition to charge on account of entry tickets.”

32. This Court does not see how the GNCTD can justify the additional imposition by the Commissioner. It is true that the Deputy Commissioner (i.e. the authority named as the appellate official under Section 15 (3)) is empowered *suo motu* revision to modify, annul, reverse or otherwise revise the assessment authority’s decision. However, that power-to modify or revise any assessment or demand can be invoked only if a separate show cause notice is issued, by virtue of proviso to Section 42 of the ET Act. That apart, the Deputy Commissioner could not have enlarged the scope of the proceedings before him, which was an appeal from the decision seeking to recover a much smaller amount. In this respect the submission of the petitioner and its reliance on *State of Kerala v. Vijaya Stores* is well founded.

33. The next question is regarding validity of the notification dated 07.06.2007- the subject matter of W.P.(C) 7589/2012. The other writ

petitions relate to the imposition of liability, based on the demands for different periods, the interest levied and the penalty charged. The main argument with respect to *vires* of the notification is that no distinction can be made between swimming as a sporting event, swimming as an activity undertaken in a hotel or such establishment and swimming in a facility like the one owned by the petitioner, and its Fun Club. The Court finds this argument insubstantial. It is firstly well settled that in economic and fiscal matters, the legislative judgment is given greater deference than in areas where fundamental liberties are involved. This was spelt out in *R.K. Garg v Union of India* 1981 (4) SCC 675, in the following terms:

“..another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrine or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislature judgment in the field of economic regulation than in other areas where fundamental human rights are involved.”

This view had been earlier articulated in *Murthy Match Works v Collector of Central Excise*, 1974 (4) SCC 428, in the following terms:

“19. It is well-established that the modern state, in exercising its sovereign power of taxation, has to deal with complex factors relating to the objects to be taxed, the quantum to be levied, the conditions subject to which the levy has to be made, the social

and economic policies which the tax is designed to subserve, and what not.”

The principle was iterated in *Elel Hotels and Investments Ltd. v. Union of India*, (1989) 3 SCC 698, as follows:

“20. It is now well settled that a very wide latitude is available to the legislature in the matter of classification of objects, persons and things for purposes of taxation. It must need to be so, having regard to the complexities involved in the formulation of a taxation policy. Taxation is not now a mere source of raising money to defray expenses of Government. It is a recognised fiscal tool to achieve fiscal and social objectives. The differentia of classification presupposes and proceeds on the premise that it distinguishes and keeps apart as a distinct class hotels with higher economic status reflected in one of the indicia of such economic superiority.”

34. The Court also does not find any merit in the submission of the petitioners, because the legislature is deemed to have taken into account the circumstance that those hotels and other establishments offering swimming as an option to their guests do so as part of their normal facilities and services. This is taken into account by the State, which then imposes tax on a wide array of services, offered to guests and visitors (i.e restaurant facilities, hotel room facilities, purchase of articles, etc, all of which are subjected to taxation in one form or the other). The room tariff would then comprehend in sum, the value and cost charged for these services. Thus, to say that such establishments are privileged even while taxing fun park and services offered by the petitioner is unmerited. As far as swimming facilities offered for sports purposes go, the Court holds that the comparison is inapt. It can safely be said that there is State interest in promotion of sport for the promotion of sport besides in the larger interest of health of the users.

35. The Court next proposes to examine Polo Amusement's argument that the State could not have, during the pendency of its writ petition, sought to recover amounts, by issuing the impugned notification. It was urged additionally, on the basis of the judgment of the Supreme Court, in *Kamlakshi Finance Corporation (supra)* that the notification was contrary to the GNCTD's final determination by the FC, who was the final appellate authority which ruled decisively that the petitioner was not liable to ET for the activities it offered in its club, to the guests of its subscribers. At the outset, the Court notices that the decision in *Kamlakshi Finance Corporation (supra)* is an authority for the proposition that a lower authority cannot challenge the correctness of a higher, quasi judicial appellate body before a Tribunal which has appellate oversight over the appellate body. There, the Assistant Commissioner had sought to appeal against the decision of the appellate authority which had set aside his assessment. Those conditions do not exist in this case. The GNCTD itself is aggrieved by the FC's interpretation; there is no impediment to the Government invoking Article 226 of the Constitution against the quasi judicial body, i.e the appellate authority constituted under Section 5 (which exercised its power under Section 15 (4)) complaining that the decision of that body or tribunal is unsustainable in law. This power- to oversee the quasi judicial and judicial actions of tribunals, was spelt out in *T.C. Basappa v T. Nagappa* AIR 1954 SC 440, as one available

“in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law. One of the fundamental principles in regard to the issuing of a writ of certiorari is, that the writ can be of judicial

acts. The expression " judicial acts " includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions..”

This articulation has remained constant and unaltered (Ref. *H.V. Kamath v Syed Mohammed Ishaque* AIR 1955 SC 233 and *L. Chandra Kumar v Union of India* 1997 (3) SCC 262). Therefore, the submission that the GNCTD could not have issued the impugned notification is without merit. Furthermore, we notice that there was no impediment in the form of any interim order (nor could there have been one such, since the *vires* of the provision enabling exemption was not in issue) forbearing the issuance of any exemption. The notification was in exercise of statutory power. Polo Amusement is here mixing two issues: the correctness of the decision of the FC on the one hand (which is the subject matter of the State’s petition) and the *vires* of the notification. So long as the order of the FC stood – there is no dispute that Polo Amusement could not- *in the absence of any decision in* W.P.(C) 1896/2002, have been subjected to taxation for the period covered in that writ petition. However, whether the activities in question were eligible or not for taxation were certainly a matter for the State to decide, in the exercise of its statutory power. There was no impediment of any kind, whatsoever, for the State to exercise that power. Thus, the issuance of the notification could not have been faulted.

36. As far as demands for tax, interest and penalties in W.P.(C) 7589/2012, W.P.(C) 2424/2013, W.P.(C) 2425/2013, W.P.(C) 2450/2013 & W.P.(C) 2451/2013 preferred by Polo Amusement- in regard to the demands- are concerned, this Court is of the opinion that they were pursuant to the decision of the assessing authorities. These do not appear to have been

based on detailed investigation of facts and record. There is some substance in the argument of Polo Amusement that assessment was made in respect of all days including holidays. To facilitate a better inquiry, the assessing authorities are directed to give one opportunity to Polo Amusement to establish the actual collections, based on their gate receipts and related books of account. If for any reason, the petitioner is unable to or does not produce complete records, the assessing authority can use any reasonable method, to estimate the receipts, and issue demands. It is clarified that the Court is not quashing the assessments and demands impugned; they shall be kept in abeyance and, having regard to the decision of the assessing authority, be appropriately modified or altered, while working out the final demands. The petitioner, Polo Amusement, is directed to deposit 15% of the total amounts demanded in W.P.(C) 7589/2012, W.P.(C) 2424/2013, W.P.(C) 2425/2013, W.P.(C) 2450/2013 & W.P.(C) 2451/2013, with the respondent GNCTD, within six weeks from today. The assessments for the period or periods covered in the said writ petitions shall be finalized and the demands worked out, within 4 months from today. The petitioner Polo Amusement is at liberty to challenge the decision/assessment and demand, before the concerned appellate authorities in accordance with law. Accordingly, it is held that the notification dated 07.06.2007 is valid and binding. W.P.(C) 7589/2012, W.P.(C) 2424/2013, W.P.(C) 2425/2013, W.P.(C) 2450/2013 & W.P.(C) 2451/2013 are disposed of in terms of the directions made above, with regard to completion of assessment.

37. W.P.(C) 1896/2002 preferred by the GNCTD is to succeed in part; the order of the FC, holding that the assessee's activity was not entertainment

and not liable to Entertainment Tax, is set aside. At the same time, the Court holds that without properly invoking power under Section 42, the Deputy Commissioner (first appellate authority) could not have enhanced the demand made by the assessing officer. Accordingly, the order of the assessing authority is restored. W.P.(C) 1896/2002 is, therefore, allowed in part, in the said terms. There shall be no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

APRIL 22, 2016

