

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.11.2019
Delivered on : 20.11.2019

CORAM

THE HON'BLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.No.33077 of 2018
and
W.M.P.No.38348 of 2018

Balaji Theatre
By its partner
Mr.Perumal

..Petitioner

vs

- 1.The Chief Secretary
Secretariat Officer
Government of Puducherry
Puducherry.
- 2.The Secretary
Local Administration Department
Secretariat Officer
Government of Puducherry.
- 3.The District Magistrate cum Licensing Authority
Government of Pondicherry
Pondicherry.
- 4.The Director
Local Administration Department
Government of Puducherry
Puducherry.
- 5.The Commissioner
Oulgaret Municipality
Oulgaret, Puducherry.
- 6.The Commissioner (CT)
Commercial Tax Department
GST Officer, 100 Feet Road,
Ellaipillaichavadi, Puducherry.

..Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records on the file of the 5th respondent proceedings in letter No.15/Commr/OM/2017 dated 15.07.2017 and

quash the same and consequently, direct the 5th respondent to refund the entertainment tax paid from 01.07.2017 to till date.

For Petitioner : Mr.G.Masilamani
for Mr.P.Dinesh Kumar

For Respondents: Mr.A.Gandhi Raj
Government Pleader (P)
Assisted by Mr.J.Kumaran
Additional Government Pleader (P)

O R D E R

The petitioner is aggrieved against the order of the 5th respondent dated 15.07.2017, wherein and whereby, the petitioner and the other licensees of Cinema theaters were directed to remit the entertainment tax every week to the 5th respondent/Municipality. Consequently, the petitioner seeks for a direction to the 5th respondent to refund the entertainment tax paid from 01.07.2017 to till date.

2. The case of the petitioner, is as follows:

The petitioner is a Cinema Theater, run by a partnership firm. Till the introduction of Goods and Services Tax, the Government of Puducherry was collecting entertainment tax from the theater owners. In the year 1995, the Government, by its G.O.Ms.157 dated 20.10.1995, exempted 10% for maintenance and permitted to pay the entertainment tax for the remaining 90%. After introduction of GST, the 6th respondent issued a notice dated 29.05.2017 and informed that admission to the Cinema halls is treated as supply of service and thus, directed the petitioner to get registered under the Goods and Services Tax Act. Accordingly, the petitioner got registered under the GST Act with registration No.34AAAFB3557FIZU. As per notice dated 29.05.2017 issued by the 6th respondent, the petitioner is tendering GST at the rate of 18% with respect to tickets below Rs.100/- and 28% with respect to tickets above Rs.100/-. The amount taxable under the GST excludes 10% maintenance charges permitted to the theater owners. 50% of GST is paid to the Central Government and 50% to the State Government. GST was introduced with a single object of "One Nation, One Tax and One Market". Contrary to the said concept and against the said Act, the 5th respondent, by his letter dated 15.07.2017 directed the petitioner and other theater owners to pay the entertainment tax over and above GST at the rate of 25% to the Municipality. So, totally in all, the petitioner is forced to pay 53% towards tax (28% by way of GST and 25% by way of entertainment tax). In spite of several representations from the Puducherry Cine Exhibitors Association and Film Distributors Association, to cancel the entertainment tax in view of collection of GST, the

5th respondent did not consider the said request. Hence, with no option, the petitioner and other theater owners forced to pay 53% as tax. Collection of entertainment tax over and above the GST is nothing, but double taxation, which is against the Constitution of India. The 6th respondent has collected a sum of Rs.10,44,508.28 in excess for the period from 01.07.2017 to 31.10.2018. Likewise, the 5th respondent has collected a sum of Rs.96,19,068/- in excess for the period from 01.07.2017 to 31.10.2018. Such excess amount collected are liable to be refunded. Hence, the present writ petition.

3. The 5th respondent, filed a counter affidavit, wherein, it is stated as follows:

The impugned communication is only for compliance of the law in force viz., Sections 118 and 161 of the Puducherry Municipalities Act, 1973 and thus, payment of entertainment tax by the petitioner is in accordance with law. No one has legal right to say that the law in force viz., Sections 118 and 161 of Puducherry Municipalities Act, 1973, cannot be enforced. Hence, the impugned communication does not affect the rights of the petitioner or any other persons carrying on Cinema business. Even otherwise, the said communication was accepted by the petitioner himself. The President of the Puducherry State Cine Exhibitors Association, who is none other than the petitioner, has stated in his letter dated 20.07.2017 that, on the one hand, they have expressed consent for the SGST and the CGST and on the other hand, they have also expressed their readiness to pay the entertainment tax subject to certain reservations. Thus, the petitioner is barred and estopped from disputing the collection of entertainment tax. The writ petition itself, is not maintainable as the prayer sought for is against the imposition of law in force. Admission to the Cinema halls is treated as supply of service and as per Section 15(2) of the Puducherry Goods and Services Tax Act, 2017, the value of supply shall include any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than the Puducherry Goods and Services Act, Central Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier. As per the salient features of GST, the entertainment tax is not subsumed under GST, when it is levied by the local bodies. Under Entry 62 of the State list of the Seventh Schedule of the Constitution of India, taxes on entertainments and amusements has to be collected by the Panchayat or Municipality concerned. Therefore, in view of the above constitutional provision, local bodies are entitled to levy and collect the entertainment tax. As per Section 118 of the Puducherry Municipalities Act, 1973, the Municipalities in the Union Territory of Puducherry, have power and authority to impose tax on entertainment. The entertainment tax being collected is the main source of income for the Municipalities.

4. Mr.G.Masilamani, the learned Senior Counsel appearing for the petitioner submitted as follows:

Out of the total tax collected, the dispute herein is in respect of 25% of entertainment tax being collected by the 5th respondent Municipality. After introduction of GST, and when the Puducherry Municipalities Act, 1973, is subject to GST, the 5th respondent has no authority to collect the entertainment tax. The entertainment tax is imposed by the Municipality and not by the State. The Puducherry Goods and Services Act, 2017, came into force with effect from 01.07.2017. Section 173(2) of the Puducherry Goods and Services Tax Act, 2017 annulled the collection of the tax by the Municipality. In view of Section 173(2) of the Puducherry Goods and Services Tax Act, 2017, Section 118(1)(b)(ii) of the Puducherry Municipalities Act, 1973, stands annulled and thus, the Municipality has no authority to collect the entertainment tax. If Section 118(1)(b)(ii) is annulled, no other law empowers collection of entertainment tax by the Municipality. As per Article 265 of the Constitution of India, no tax can be collected, without authority of law. Section 15(2) of Puducherry Goods and Services Tax Act, 2017, should not be construed as granting power to collect entertainment tax, especially, when GST includes entertainment tax.

5. Per contra, Mr.A.Gandhi Raj, learned Government Pleader appearing for the respondents submitted as follows:

Section 161 of the Puducherry Municipalities Act, 1973, specifically deals with the powers of the Municipalities to collect the entertainment tax. The impugned collection is made under this provision. This provision is not challenged. Therefore, the petitioner is not entitled to maintain the present writ petition, only against the consequential demand. Under Section 173(1) of the Puducherry Goods and Services Tax Act, 2017, Sub Section (iii) of Section 118(1)(a) of the Puducherry Municipalities Act, 1973, alone was omitted and the other taxes referred to under Section 118 of the Puducherry Municipalities Act, 1973, are retained, out of which, the entertainment tax is one. The petitioner is not entitled to take shelter under Section 173(2) of the Puducherry Goods and Services Tax Act, 2017, since the terms "inasmuch as" and "modified" referred therein would defeat the claim of the petitioner. Therefore, it is to be construed that Section 118 of the Puducherry Municipalities Act, 1973, is only modified to the extent stated under Section 173(1) of the Puducherry Goods and Services Tax Act, 2017, and not annulled in toto. Collection of entertainment tax is made by the local bodies and therefore, it is not subsumed under GST. Consequential refund claim also cannot be entertained, even otherwise, since the petitioner has collected the entertainment tax already from

various viewers and hence, it will not reach the persons, who paid it, even if refunded. If the petitioner is aggrieved against the impugned demand, a statutory appellate remedy is available before the concerned Appellate Authority and therefore, the present writ petition is not maintainable, even on that ground.

6. In support of his contention, the learned Government Pleader relied on the following decisions:

(a) (1997) 5 SCC 744, Assistant Collector of Customs and others Vs. Anam Electrical Manufacturing Co., and others

(b) (1983) 142 ITR 663, Titaghur Paper Mills Co. Ltd., and another Vs. State of Orissa and another

7. Heard the learned Senior Counsel appearing for the petitioner and the learned Government Pleader appearing for the respondents and perused the materials placed before this Court.

8. The points for consideration, in this writ petition, are as follows:

(a) Whether this writ petition is maintainable, based on the prayers sought for in this writ petition?

(b) Whether the collection of entertainment tax made by the 5th respondent Municipality from the petitioner is without authority of law?

9. The facts and circumstances leading to filing of the present writ petition and the rival contentions of the respective parties have been extracted in detail supra. Hence, I am not reiterating the same once again except to refer certain facts, which are essential for the disposal of this writ petition.

10. The petitioner is a Cinema theater. Before introduction of GST, the petitioner and other theater owners were paying the entertainment tax to the Government of Puducherry. After introduction of GST, admission to Cinema halls is treated as supply of service and consequently, the petitioner and other similar persons got themselves registered under the GST. The Puducherry Goods and Services Tax Act, 2017 (hereinafter called as "the PGST Act"), came into force on 01.06.2017. Out of net ticket cost collected by the petitioner, 25% is demanded and collected towards entertainment tax by the 5th respondent Municipality. The petitioner is challenging the above collection of 25% towards entertainment tax alone. In other words, the petitioner is not having any grievance against the collection of balance tax towards State Goods and Service Tax and Central Goods and Service Tax. According to the petitioner, once GST is introduced, wherein, admission to Cinema halls is treated as supply of service and consequently, the petitioner is

also paying the GST both to the State and the Central Government, a separate entertainment tax cannot be collected by the Municipality, more particularly, when the collection of tax by the Municipality stands annulled even in respect of the tax, which are the subject matter of Entry 62 of the State list of the Seventh Schedule of the Constitution of India as well, as contemplated under Section 173(2) of the PGST Act. On the other hand, it is the contention of the respondents that the entertainment tax is collected by virtue of the powers conferred on the Municipality under Sections 118 and 161 of the Puducherry Municipalities Act, 1973, and therefore, such collection cannot be questioned by the petitioner, more particularly, when Section 173(1) of the PGST Act, omitted only Sub Clause (iii) of Clause (a) of Sub-Section 1 of Section 118 of the Puducherry Municipalities Act, 1973. In other words, it is the specific contention of the respondents that collection of entertainment tax under Sections 118 and 161 of the Puducherry Municipalities Act, 1973, is not specifically omitted under the PGST Act.

11. In order to answer the above question, it is better to look into the relevant provision of law first as referred to in this case. Article 265 of the Constitution of India commands that, no tax shall be levied or collected except by authority of law. Thus, any tax collected by any authority must have the support of law for such collection. In this case, the dispute is against the collection of entertainment tax by the 5th respondent Municipality. Chapter VIII of the Puducherry Municipalities Act, 1973, deals with the taxation. Section 118 therein deals with the taxation to be imposed.

12. Section 118(1) of the Puducherry Municipalities Act, 1973, reads as follows, before introduction of the PGST Act :

"118. Taxes to be imposed.- (1) (a) Subject to any general or special order which the Government may make in this behalf, every municipal council shall impose, for the purposes of this Act, the following taxes, namely: -
(i) a property tax;
(ii) a profession tax;
(iii) a tax on advertisements other than advertisements published in the newspapers.
(b) Every municipal council shall, with the sanction of and subject to such rules as may be prescribed by the Government, impose.-
(i) a duty on certain transfers of immovable property in the form of additional stamp duty in accordance with the provisions of section 158;

(ii) a tax on entertainments."

13. Section 173 of the Puducherry Goods and Services Tax Act, 2017, reads as follows:

"173. Save as otherwise provided in this Act, on and from the date of commencement of this Act,-

(1) in the Puducherry Municipalities Act, 1973,-

(a) in section 118, in sub-section (1), in clause (a), sub-clause (iii) shall be omitted;

(b) sections 152, 153, 154, 155, 156 and 157 shall be omitted; and

(c) schedule-VII appended to the Act shall be omitted.

(2) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the provisions, under any State law, authorizing levy and collection of taxes or cess or surcharge by the Government or a Municipality or a Commune Panchayat or any other authority shall stand annulled or rescinded or modified in as much as and to the extent such taxes are the subject matter of Entry 52, Entry 54, Entry 55 and Entry 62 of the State List of the Seventh Schedule of the Constitution, as amended by the Constitution (One Hundredth and First Amendment) Act, 2016."

14. Thus, after introduction of the PGST Act, Section 118(1) of the Puducherry Municipalities Act, 1973, which is in force as on today, would read as follows:

"118. Taxes to be imposed.- (1) (a) Subject to any general or special order which the Government may make in this behalf, every municipal council shall impose, for the purposes of this Act, the following taxes, namely: -

(i) a property tax;

(ii) a profession tax;

(iii)(omitted)

(b) Every municipal council shall, with the sanction of and subject to such rules as may be prescribed by the Government, impose.-

(i) a duty on certain transfers of immovable property in the form of additional stamp duty in accordance with the

provisions of section 158;
(ii) a tax on entertainments."

15. Section 161 of the Puducherry Municipalities Act, 1973, specifically deals with the tax on payment for admission to entertainment, which reads as follows:

"161. Tax on payment for admission to entertainment. - The entertainments tax shall be levied on each payment for admission to any entertainment at rates the maxima and minima whereof are specified in Schedule V:

Provided that in the case of cinematograph exhibition, the tax shall be calculated at the rates specified on each payment for admission after excluding from such payment the amount of the tax."

16. Section 15(1)(2) of the Puducherry Goods and Services Tax Act, 2017, reads as follows:

"15. (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

(2) The value of supply shall include—

(a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the Central Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;"

17. Going by the above provisions of law, this Court has to decide and answer the questions raised supra. It is not in dispute that the Puducherry Municipalities Act, 1973, is an enactment, which is still in force and thus, the authorities competent under the above enactment are bound and entitled to act in accordance with the relevant provisions made thereunder. Section 118(1)(b)(ii) of the Puducherry Municipalities Act, 1973, empowers the Municipal Council to impose a tax on entertainment. It is to be noted at this juncture, that this power conferred on the Municipal Council under Section 118 to collect various taxes has not been totally taken away or subsumed under the PGST Act and on the other hand, it is

apparent that only the power to collect tax on a particular subject viz., advertisements other than advertisements published in the newspapers alone has been taken away or omitted by way of imposition made under Section 173(1)(a) of the PGST Act. A careful perusal of Section 173, Sub-Clause 1 of the PGST Act, would undoubtedly, indicate that the Legislature have consciously retained the power of the Municipal Council to collect tax on all other subjects except the collection of tax on advertisements other than advertisements published in the newspapers. In other words, even after introduction of the PGST Act, in view of the specific provision made under Section 173(1) therein, what was omitted from the purview of the Municipal Council is only a tax on advertisements other than advertisements published in the newspapers and not in respect of other taxes such as property tax, professional tax, duty on certain transfer of immovable property in the form of additional stamp duty and the "Tax on Entertainment". Therefore, it is very clear that the powers of the Municipal Council to collect the tax on entertainment, is retained, even after introduction of the PGST Act.

18. No doubt, only point, vehemently, urged on behalf of the petitioner is by harping upon and taking shelter under Sub-Clause 2 of Section 173 of the PGST Act. According to the petitioner, in view of Section 173(2) of the PGST Act, power to collect entertainment tax by the Municipality stands annulled. I have given my careful consideration to the above said submission made by the learned Senior Counsel for the petitioner. I am unable to appreciate the above contention, since the same was made without appreciating the scope and ambit of Section 173 of the PGST Act in toto. I have already pointed out that Section 173(1) of the PGST Act, specifically deals with Section 118 of the Puducherry Municipalities Act, 1973, under which, only Sub-Clause (iii) of Clause (a) of Sub-Section 1 of Section 118 alone was omitted. In other words, the powers conferred on the Municipal Council to impose tax on entertainment under Section 118 has not been omitted by virtue of Section 173(1)(a) of the PGST Act. Therefore, it is to be noted that Section 173(1)(a) is a specific provision dealing with in respect of powers of Municipal council to impose tax on different heads, out of which, the only one tax viz., tax on advertisements other than advertisements published in the newspapers was omitted. Therefore, this Court is of the considered view that the general provision made under Section 173(2) of the PGST Act cannot override or include a specific provision made under Section 173(1) of the PGST Act. In other words, it is to be noted that Section 173(1) of the PGST Act is a stand alone provision unaffected by Sub-Section 2 of Section 173 of PGST Act.

19. Even otherwise, a careful perusal of Sub-Section 2 of Section 173 of the PGST Act, would disclose that it does not, in effect, support the case of the petitioner in any manner. First of all, it is to be noted that Sub-Section 2 begins with a Saving clause viz., "Save as otherwise provided this Act". Therefore, what is provided under Section 173(1) is saved and not affected by virtue of Sub-Clause 2 of Section 173. Further, it is to be noted that Sub-Clause 2 of Section 173 does not say that the collection of taxes or cess or surcharges by the Government or a Municipality or a Commune Panchayat or any other authority shall stand annulled in toto. On the other hand, it orders that such collection of tax by such authorities "shall stand annulled or rescinded or modified" inasmuch as and to the extent of such taxes are the subject matter of Entry 52, Entry 54, Entry 55 and Entry 62 of the State List of the Seventh Schedule of the Constitution of India. Thus, it is evident that insofar as the taxes being collected by the Municipality are concerned, referable to Section 118 of the Puducherry Municipalities Act, 1973, the power conferred on the Municipal Council under Section 118, is not totally annulled or rescinded and on the other hand, it is only modified as indicated under Section 173(1) of the PGST Act. The petitioner seeks to take shelter under Section 173(2) of the PGST Act, that too, on misinterpretation of the same, without properly making a conjoined reading of both sub-sections of Section 173 of the PGST Act. Therefore, the petitioner is not justified to contend that collection of entertainment tax, in this case, is without authority of law. It is to be noted at this juncture, that Entry 62 of the State List of the Seventh Schedule of the Constitution of India, as amended by the Constitution (One Hundredth and First Amendment) Act, 2016, would show that the taxes on luxuries including the taxes on entertainment, amusements, betting and gambling are taxes authorized by law and the authorities empowered under the relevant provisions of law to collect the said taxes are justified in doing so. Therefore, going by the above constitutional and statutory position, this Court is of the considered view that the collection of the entertainment tax by the 5th respondent Municipality is within their power, competence and with authority of law. This Court is also of the view that introduction of the PGST Act has not taken away the power of the Municipality to collect the entertainment tax. To put it specifically, Section 173(2) of the PGST Act, does not debar the Municipality, in any manner, from collecting the entertainment tax from the petitioner.

20. At this juncture, it is relevant to note that collection of service tax and entertainment tax is under different enactment by different authorities. In this case, providing admission into the Cinema theater is treated as service and thus, tax on such service is collected under the GST Act. On

such admission, the viewer gets the entertainment viz., Movie and thus, such entertainment being a different content, tax is levied on the same by the local authorities as "Entertainment Tax". Thus, the entertainment itself being a different content, will not fit into the act of service provided by the theater owner viz., admission of the viewer into the cinema hall. Therefore, the question of subsuming the entertainment tax under the PGST Act, or the event of double taxation as contended by the petitioner, does not arise in this case so long as the Puducherry Municipalities Act, 1973, is in force and not repealed by the introduction of the PGST Act.

21. Apart from the above legal aspects touching upon the merits of the matter, it is also to be noted that the present writ petition filed against the impugned demand is not maintainable not only on the reasons and findings rendered supra, on the merits of the matter and also on the reason that the challenge made is only against a consequential proceedings arising out of the powers vested on the 5th respondent under Sections 118 and 161 of the Puducherry Municipalities Act. Both the above provisions are not questioned or challenged by the petitioner. Needless to state that the challenge made against the consequential proceedings without challenging the original/main proceedings or relevant provision of law, is not maintainable. Therefore, on this ground also, this Court finds that the present challenge is not maintainable.

22. Insofar as the second limb of the prayer with regard to the refund of tax collection is concerned, the learned Senior Counsel for the petitioner fairly submitted that such consequential prayer cannot be entertained, even assuming that the petitioner succeeds in the main prayer, in view of the fact that the petitioner has already collected the entertainment tax from the Cinema viewers and thus, it is impossible to return the same to such viewers in the event of order for refund. In any event, the question of considering the consequential prayer does not arise in this case, as this Court found that the impugned challenge of the petitioner against the collection of entertainment tax itself is not maintainable. In view of the above stated facts and circumstances, the above two case laws relied on by the learned Government Pleader for the respondents touching upon the question of refund do not require consideration, since this Court has found the very challenge against the collection of entertainment tax is not maintainable.

23. Accordingly, this Writ Petition fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

s/d-

Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

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To

- 1.The Chief Secretary
Secretariat Officer
Government of Puducherry
Puducherry.
- 2.The Secretary
Local Administration Department
Secretariat Officer
Government of Puducherry.
- 3.The District Magistrate cum Licensing Authority
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Commercial Tax Department
GST Officer, 100 Feet Road,
Ellaipillaichavadi, Puducherry.

+1 CC to The Public Prosecutor, Govt. Of Puducherry sr 96719
+1 CC to Mr.Devendran, Advocate sr 96444.

W.P.No.33077 of 2018

PPA(CO)
SP(04/12/2019)