

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5184 of 2001

For Approval and Signature:

HON'BLE MISS JUSTICE R.M. DOSHIT

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

EXPRESS HOTELS PRIVATE LTD.THRO' MANAGING DIRECTOR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 5184 of 2001
MR BS PATEL for
MRS RANJAN B PATEL for Petitioner
MR NAGESH SOOD AGP for Respondents

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT
Date of decision: 31/03/2004

ORAL JUDGEMENT

Heard the learned advocates.

The petitioner is a Company registered under the Companies Act, 1956. It is a 'Hotel' within the meaning of the Gujarat Tax on Luxuries [Hotel & Lodging Houses] Act, 1977 {hereinafter referred to as, "the Act of 1977"}.

It is not disputed that the petitioner is liable to pay taxes under the Act of 1977. However, in the year 1977, the petitioner challenged the constitutionality of the Act of 1977 before this Court in Special Civil Application No. 405 of 1979. The said petition came to be dismissed on 23rd July, 1980. The judgment and order of this Court came to be confirmed by the Hon'ble Supreme Court in Civil Appeals No. 338 of 1981 and 339 of 1981 by its judgment and order dated 2nd May, 1989. During the pendency of the aforesaid litigation, in view of the interim stay granted by this Court and latter by the Hon'ble Supreme Court, the petitioner did not pay taxes payable under the Act of 1977. Since the dismissal of the appeal on 2nd May, 1989, the petitioner paid the aforesaid taxes during the months of June & July, 1989. During pendency of the said litigation, by Gujarat Ordinance No. 12 of 1988 and latter by Gujarat Act no. 8 of 1989, Section 7-A came to be inserted in the Act of 1977. By said Section 7-A, interest has been made chargeable on the amount of tax not paid within the time and in the manner prescribed in the Act. The said Section 7A & Section 8 of the Act of 1977 read as under:-

7A. Where any proprietor does not pay the tax within the time and in the manner provided in the Act, he shall, without prejudice to any other consequences and liabilities, which he may incur, be liable to pay, in addition to the amount of tax, simple interest at two per cent of the amount of tax due for each month or part thereof for the period for which the tax remains unpaid.

8(1)(a) The amount of tax -

[i] due where returns have been furnished without full payment thereof;

[ii] assessed for any period under section 6 less any sum already paid by the proprietor in respect of such period;

(b) the amount of penalty; if any, levied under section 7;

(c) the amount of interest, if any, payable under section 7A shall be paid by the proprietor liable thereof into a Government treasury by such date as may be specified in the notice issued by the Collector for this purpose, being a date not earlier than thirty days from the date of service of notice.

Provided that the Collector or the appellate authority in an appeal under section 9 may, in respect of any particular proprietor and for reasons to be recorded in writing, extend the date of payment or allow him to pay the tax payable or interest (if any) by instalments.

(2) Any tax, penalty, or interest which remains unpaid as per the date specified in the notice of payment or after the extended date of payment, and any instalment not duly paid, shall be recoverable as an arrear of land revenue.

In view of the said section 7A, the District Collector, Vadodara by its order dated 30th December, 1999 directed recovery of a sum of Rs. 1,00,230/= being the amount of interest payable under the said section 7-A and imposed a fine of Rs 21,000/= under Section 7 of the Act of 1977. Feeling aggrieved, the petitioner preferred appeal before the State Government. The said appeal came to be rejected on 5th January, 2001. Feeling aggrieved, the petitioner has preferred the present petition.

Learned advocate Mr. Patel has submitted that the petitioner had been legitimately prosecuting the litigation with respect to the constitutionality of the Act of 1977. During the pendency of the said litigation, the recovery of the tax from the petitioner was stayed by this Court and latter by the Hon'ble Supreme Court. Soon after dismissal of the appeal by the Hon'ble Supreme Court, the petitioner paid the amount of taxes due. The petitioner, therefore, cannot be charged with interest under Section 7A of the Act of 1977. He has also submitted that the taxes in question were for the years 1981-82 till the year 1988-89. The aforesaid section 7A came to be inserted on 22nd December, 1988 i.e. after the date the aforesaid taxes became due and payable. The said section 7A does not have retrospective application.

The petitioner, therefore, cannot be charged interest under the said Section 7A on the taxes that had already become due and payable prior to 22nd December, 1988. In the submission of Mr. Patel, even otherwise, in view of the stay granted by the Courts, as aforesaid, no interest can be charged from the petitioner. At last, he has submitted that even if such interest is chargeable, the same would become due and payable from the date notice is issued by the Collector for this purpose, as envisaged under sub-section (1) of Section 8 of the Act. Such notice was issued in the year 1995. Hence, the petitioner cannot be charged interest for the period prior to the date of issuance of notice and thirty days thereafter. Mr. Patel has also challenged the imposition of fine of Rs. 21,000/= under Section 7 of the Act of 1977. He has submitted that neither of the conditions mentioned in Section 7 of the Act of 1977 did exist. The District Collector, therefore, could not have invoked penal provision under Section 7 of the Act of 1977. Mr. Patel has relied upon the judgment of the Hon'ble Supreme Court in the matter of Commissioner of Income Tax, Bhopal vs. Hindustan Elector Graphites Limited, Indore [(2000) 3 SCC 595]. 593.

The aforesaid judgement in Re:Hindustan Elector Graphites Limited arose from the additional tax charged under Section 143 (1)(A) of the Income tax Act, 1961. The Hon'ble Supreme Court held that the said additional tax was in the nature of penalty. The same would not be attracted unless the assessee can be imputed with clairvoyance or lack of bona fide. While considering this, the assessing officer must determine questions of assessment by applying when the return was filed. In the case before the Hon'ble Supreme Court, the Hon'ble Court found that, "... It was not disputed that the return when filed by the assessee could not be termed out of hand as an incorrect return on the date of filing of the return." The aforesaid judgment is entirely on a different subject matter. By no stretch of imagination, the said judgment can be applied to the facts of the present case.

In the present case, the question is : Should the petitioner be liable to pay interest over the taxes due and payable under the Act of 1977 which he did not pay until the months of June & July, 1989. The contention that the interest chargeable under the said Section 7A can be applied to the taxes which became due and payable after the date the said section 7-A was enacted, is stated for being rejected at the outset.

It is not in dispute that on the date of

enactment i.e. 22nd December, 1988 the said taxes were payable but were not paid until after 20th December, 1988. Though the aforesaid section 7A is not retrospective in its application, it shall be attracted in the case of the petitioner with respect to the amounts of taxes which had become due and payable prior to 22nd December, 1988 but remained unpaid on 22nd December, 1988 and thereafter. Such interest would be payable from the date of the enactment i.e. 22nd December, 1988 till the date of payment. However, in view of the stay operating in favour of the petitioner till 2nd May, 1989, the petitioner has been charged such interest from 3rd May, 1989 till the date of payment. The action of the Collector in charging interest is in consonance with the aforesaid Section 7A. Learned advocate Mr. Patel has also submitted that the 2 per cent interest referred to in the said Section 7A shall be chargeable per annum. This contention also requires to be rejected outright. The said section 7A specifically stipulates charging of interest @ "two per cent of the amount of tax due for each month or part thereof for the period for which the tax remains unpaid." Thus, the petitioner is liable to pay interest @ 2 per cent of the amount of tax due for every month or part thereof till the date the said amount was paid.

Reliance placed on Section 8 of the Act of 1977 is misconceived. The contention that the said amount would become due and payable from the date the notice is issued by the Collector under sub-section (1) of the said Section 8 also requires to be rejected outright. The notice referred to in sub-section (1) of Section 8 of Act of 1977 is a condition precedent for recovery of the tax, penalty or interest due and payable as an arrear of land revenue. The said provision cannot be read as a proviso to Section 7A of the Act of 1977, as submitted by Mr. Patel.

Section 7 of the Act of 1977 empowers the Collector to impose upon the proprietor of a hotel or a lodging house, penalty not exceeding one and one half times [i.e. upto 150%] the amount of tax, in any of the circumstances enumerated in clauses (a) to (d) of the said Section 7. Mr. Patel has submitted that on reading of the said clauses (a) to (d), it is evident that the said conditions envisage an overt act on the part of such proprietor by failing or neglecting, without sufficient cause, to furnish return; to pay the whole amount of tax due according to such return; to comply with the terms of notice issued under section 6 (2)(a); or he has concealed the particulars of any transaction or has deliberately

furnished inaccurate particulars of any transaction liable to tax. Unless the proprietor is found to have committed any of the said overt acts, he cannot be visited with penalty under the said Section 7. In the present case, the petitioner had been legitimately prosecuting the legal proceedings. No overt act can be attributed to the petitioner. Hence, the action of the Collector in invoking the powers under Section 7 of the Act of 1977 is unsustainable. Imposition of penalty requires to be quashed and set-aside.

I do find substance in the contention raised by learned advocate Mr. Patel. Unless a proprietor is charged with commission of an overt act as envisaged by the said Clauses (a) to (d), the penal provision under Section 7 of the Act of 1977 cannot be invoked. In the present case, taxes due and payable from the petitioner were to the tune of Rs. 20,50,326/=. The maximum penalty that could be imposed under Section 7 of the Act of 1977 is one and one half times i.e. more than Rs. 30,75,000/=. As against that, a fine of Rs. 21,000/= has been imposed by the impugned order. Till the date neither the petitioner has paid interest chargeable under Section 7-A of the Act of 1977 nor has the petitioner paid fine of Rs. 21,000/=. Hence, I do not intend to interfere with the order of imposition of penalty of Rs. 21,000/= [i.e. little more than one per cent of the tax payable].

In view of the above discussion, the petition fails. The petition is dismissed in limine. Notice is discharged.

{Miss R.M Doshit, J.}
Prakash*