

**M/S Pankaj Advertising Prop. ... vs State Of U.P. And 7 Others on
8 February, 2019**

Bench: Pankaj Mithal, Pankaj Bhatia

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

RESERVED ON 04.12.2018

DELIVERED ON 08.02.2019

Court No. - 29

Case :- WRIT TAX No. - 577 of 2018

Petitioner :- M/S Pankaj Advertising Prop. Through Its Prop.

Respondent :- State Of U.P. And 7 Others

Counsel for Petitioner :- C.K.Parekh,Vikas Rastogi

Counsel for Respondent :- C.S.C.,Sahab Tiwari, Saurabh Tiwari

Hon'ble Pankaj Mithal, J.

Hon'ble Pankaj Bhatia, J.

(Delivered by Hon'ble Pankaj Bhatia, J.) Heard Sri C.K. Parekh, learned counsel for the petitioner, Sri Avinash Chandra Tripathi, learned Standing Counsel and Sri Sahab Tiwari, learned counsel appearing for Nagar Palika Parishad, Hathras, (respondent nos. 2, 3 and 4).

The present writ petition has been filed seeking to declare the Nagar Palika Parishad Hathras (Vigyapan Kar Ka Nirdharan Aur Wasuli Viniyaman) Upvidhi, 2015 as ultra-vires of the provisions of Uttar Pradesh Goods and Service Tax Act, 2017; U.P. Municipalities Act, 1916 and Articles 14, 19, 21, 246, Seventh Schedule, List-II (State List - Entry-55 which has been amended and omitted by 101 Amendment w.e.f. 16.9.2016) and 265 of the Constitution of India.

This Court had also called the Additional Advocate General to ascertain whether the State Government was desirous on opposing the petitions with regard to vires of the levy of Advertisement Tax by the municipalities, however, Sri Manish Goel, Additional Advocate General, State of U.P. appeared and fairly stated that he had nothing to add or submit unless there was a challenge to levy of Advertisement Tax under the U.P. GST.

Facts, in brief, in the present petition, are that the petitioner is an advertising firm based at Ghaziabad and started the work of advertising in the district Hathras. The petitioner had taken private properties, not belonging to the Nagar Palika Parishad at four places for putting hoardings on the roof of the said premises. However, in pursuance of the bye-laws framed by Nagar Palika Parishad, Hathras on 12.1.2017 and published on 19.8.2017, a demand of advertisement tax on Hoardings/Sign Boards/Glow Signs affixed at various places including on the private buildings was sought to be recovered from the petitioner.

The petitioner therefore challenged the legislative competence to the imposition, collection and realization of the Advertisement Tax under the U.P. Municipalities Act, 1916 alleging that when there is no provision to impose such a tax there can be no power to frame any bye-laws in that regard.

The issue relating to the power of the municipality to levy and collect Advertisement Tax has a chequered history. Prior to 2011, the municipalities in exercise of their powers under the U.P. Municipality Act 1916 sought to levy and recover Advertisement Tax, which was challenged before the High Court, Allahabad by means of Writ Petition No. 7848 of 2010 (M/B) Bharti Airtel Limited through its Authorised Signature vs. State of U.P. And others, the said petition came to be decided on 21.10.2010 wherein the Hon'ble Court held that the Nagar Palika Parishad and Nagar Panchayat have no authority to impose tax on the Hoardings/Sign Boards/Glow Signs. A similar view was taken by this Court in Writ Tax No. 2300 of 2009 (Idea Cellular Limited And Another vs. State of U.P. And Others) wherein this Court has held that levy, imposition and collection of Advertisement Tax by the Nagar Palika Parishads/Nagar Panchayats was wholly illegal and without any sanction of law.

The U.P. Municipalities Act 1916 was amended by U.P. Act No. 8 of 2011, published in the U.P. Gazette Extraordinary Part-1 Section (Ka) on 11.3.2011 whereby Section 128(2)(vii) was introduced giving the municipality the power to impose the advertisement tax. Section 128 after its amendment on 11.3.2001 is as under:

[128. Taxes to be imposed. - (1) Subject to the provisions of this Act and of Article 285 of the Constitution of India, a Municipality shall impose the following taxes, namely :-

(i) a tax on the annual value of buildings or lands or both.

(ii) a water tax on the annual value of buildings or lands or both;

(iii) a drainage tax on the annual value of buildings leviable on such buildings as are situated within a distance, to be fixed by rules in this behalf for each municipality from the rearest sewer line;

(iv) a conservancy tax for the collection, removal and disposal of excrementious and polluted matter from privies, urinals, cesspools;

(2) In addition to the taxes specified in sub-section (1), the Municipality may, for the purposes of this Act and subject to the provisions thereof, impose any of the following taxes, namely :-

(i) a tax on trades and callings carried on within the municipal limits and deriving special advantages from, or imposing special burdens on, the municipal services;

(ii) a tax on trades, callings and vocations including all employments remunerated by salary or fees;

(iii) a theatre tax which means a tax of amusements or entertainments;

(iv) a tax on dogs kept within the Municipality;

(v) a scavenging tax;

(vi) a tax on deeds of transfer of immovable properties situated within the limits of the Municipality;

(vii) a tax on advertisements not being advertisements published in the newspapers;

(viii) a tax on vehicles and other conveyances plying within the Municipality limit or on boats moored therein.

(ix) betterment tax.

(3) The municipal taxes shall be assessed and levied in accordance with the provisions of this Act and the rules and bye-laws framed thereunder.

(4) Nothing in this section shall authorize the imposition of any tax which the State Legislature has no power to impose in the State under the Constitution:

Provided that a Municipality which immediately before the commencement of the Constitution was lawfully levying any such tax under this section as then in force, may continue to levy that tax until provisions to the contrary is made by the Parliament.] The subsection 3 of Section 128 provide that the municipal taxes shall be assessed and levied in accordance with the provision of this Act and the Rules and bye-laws framed thereunder.

The said amendment under section 128 was justified by legislative competence in view of the Entry-55 of the State List-II of the Seventh Schedule to the Constitution of India. The U.P. Municipal Corporation Rules were framed under U.P. Municipal Corporation Act which provided for the procedure for levy and collection of the Advertisement Tax. The said rules came up for consideration before the Full Bench in the case of Anurag Bansal vs. State of U.P. And Others, which was decided on 24.4.2011 wherein the said rules were held to be ultra vires, the provision of the Act as same were made without following the procedure laid down under the Act. In a similar manner, bye-laws framed by the Nagar Nigam, Lucknow, Nagar Nigam, Allahabad and Nagar Nigam, Bareilly were challenged and were declared as illegal, void and inoperative vide judgement of this Court in the case of Pepsico India Holdings (Pvt.) Ltd. vs. State of U.P. And others, 2015 (1) ADJ 273, decided on 08.1.2015. The bye-laws framed by Kanpur Nagar Nigam were also challenged and declared to be illegal by this Court in the case of U.P. Advertisers Association and others vs. State of U.P. And Others, 2017 (5) ADJ 780 (DB), decided on 04.05.2017.

The above being legal history of various attempts made for levy and collection of Advertisement Tax by the municipalities in the State of U.P.

Sri C.K. Parekh has argued that besides the judgements referred to above, the controversy and the challenge to the levy and collection of the Advertisement Tax is further narrowed on account of the subsequent developments after coming into effect of the 101 Amendment in the Constitution of India. The said amendment has a major bearing on the levy and collection of the Advertisement Tax as by the said amendment in the Constitution of India with effect from 8.4.2016. Article 265(A) was inserted and which provides for levy and collection of Goods and Services Tax and by virtue of the said amendment in the Constitution Entry-55 of the List-II which provided for taxes or advertisement has been omitted with effect from 16.9.2016. In pursuance of the 101 Amendment U.P. Goods and Service Tax 2017 (Act No. 1 of 2017) came into operation with effect from 01.7.2017.

Section 17 of the 101 Constitutional Amendment Act is quoted as under:

17. Amendment of Seventh Schedule - In the Seventh Schedule to the Constitution,--

(a) in List I -- Union List,--

(i) for entry 84, the following entry shall be substituted, namely:--

"84. Duties of excise on the following goods manufactured or produced in India, namely:--

(a) petroleum crude;

(b) high speed diesel;

(c) motor spirit (commonly known as petrol);

(d) natural gas;

(e) aviation turbine fuel; and

(f) tobacco and tobacco products.";

(ii) entries 92 and 92C shall be omitted;

(b) in List II--State List,--

(i) entry 52 shall be omitted;

(ii) for entry 54, the following entry shall be substituted, namely:--

"54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods.";

(iii) entry 55 shall be omitted;

(iv) for entry 62, the following entry shall be substituted, namely:--

"62. Taxes on entertainments and amusements to the extent levied and collected by a Panchayat or a Municipality or a Regional Council or a District Council.".

Simultaneously with the constitutional amendment and the coming into force of GST, Section 128(2)(vii) was also omitted with effect from 01.7.2017 by virtue of Section 173 of the U.P. Goods and Service Tax Act, 2017.

Section 173 of the U.P. Goods and Service Tax Act, 2017 is quoted as under:

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

(i) In the Uttar Pradesh Municipal Corporation Act, 1959 Clause (h) of sub-section 2 of Section 172 and Sections 192, 193 shall be omitted.

(ii) In the Uttar Pradesh Municipalities Act, 1916 clause (7) of sub-section (2) of Section 128 shall be omitted.

(iii) In the Uttar Pradesh Taxation and Land revenue Laws Act, 1975, Chapter II shall be omitted.

Admittedly, the bye-laws by virtue of which the municipalities intended to levy and collect tax on advertisement were framed on 12.1.2017, however, the same were published on 19.8.2017 i.e. after 01.07.2017 when the U.P. Goods and Service Tax Act, 2017 came into being and after the omission of Section 128(2) sub-section (vii) of the U.P. Municipalities Act. That being the case, the narrow ground to be considered by this Court is whether the bye-laws framed on 12.1.2017 by the respondents and published on 19.8.2017, were beyond the statutory power of the municipalities.

Learned counsel for the Municipality tried to justify the levy on the ground that the bye-laws have been framed by virtue of directions issued by the Director on 30.5.2014 directing all the District Magistrates that there was intention to frame bye-laws for collection of tax on advertisement and, pursuant to the said directions, the bye-laws were framed and published on 19.8.2017.

This Court has no hesitation in holding that after the omission of Entry-55 of the List-II of the Seventh Schedule to the Constitution of India having been omitted by the 101 Amendment Act, 2016 with effect from 16.9.2016, even the State Government did not have the legislative competence to levy or collect taxes on advertisement which was earlier available under Entry-55, this coupled with the fact that the power of taxation earlier vested with the municipalities under section 128(2)(vii) of the U.P. Municipalities Act, 1916 having been omitted by virtue of Section 173 of the U.P. Goods and Service Tax Act, 2017, the municipality did not even have the statutory competence to levy, impose or collect Advertisement Tax.

In the said view of the matter, the levy and collection of the Advertisement Tax under the provisions of Nagar Palika Parishad, Hathras (Vigyapan Kar Ka Nirdharan Aur Wasuli Viniyaman) Upvidhi, 2015 is clearly without legislative or statutory competence and is ultra-vires under Article 265 of the Constitution of India, U.P. Municipalities Act, 1916 and U.P. Goods and Service Tax Act, 2017. This Court has no hesitation in holding that the said Nagar Palika Parishad, Hathras (Vigyapan Kar Ka Nirdharan Aur Wasuli Viniyaman) Upvidhi, 2015 is without any legislative or statutory competence and, thus, are hereby struck down.

In view of the fact that the Court has held the levy and collection of Advertisement Tax as ultra-vires, the amounts so collected from the petitioner are liable to be refunded. Accordingly, the Nagar Palika Parishad, Hathras is directed to refund all the amounts that it may have collected from the petitioner under the said Nagar Palika Parishad Hathras

(Vigyapan Kar Ka Nirdharan Aur Wasuli Viniyaman) Upvidhi, 2015 within a period of three months.

The writ petition is allowed in the aforesaid terms.

No order as to costs.

Order Date :- 08.02.2019 Puspendra (Per Hon'ble Pankaj Mithal,J.) In concurring with the conclusion of my esteem brother that the Nagar Palika Parishad Hathras (Vigyapan Kar Nirdharan Va Vasuli Viniyam) Upvidhi 2015 promulgated w.e.f. 19.08.2017 are ultra vires not only to the constitutional provisions but also to the U.P. Municipalities Act, 1916 (hereinafter referred to as the Municipalities Act) and U.P. Goods and Service Tax Act, 2017 (hereinafter referred to as the G.S.T. Act), I propose to add my views to strengthen the opinion expressed by my brother.

Article 265 of the Constitution of India mandates that no tax shall be levied or collected except by authority of law. Therefore, the authority to levy any tax must be derived from some Statute.

The Nagar Palika Parishad, Hathras framed the said bye-laws in exercise of its powers under Sub-Section (2)(vii) of the Section 128 of the Municipalities Act which enabled the municipality to impose tax on advertisement not being advertisement published in the news papers.

The aforesaid provision of Sub-Section (2)(vii) of the Section 128 of the Municipalities Act was omitted vide Section 173 of the G.S.T. Act which was enforced w.e.f. 01.07.2017. It may be pertinent to note that not only the G.S.T. Act was implemented w.e.f. 01.07.2017 but even the provision of Section 173 thereof was enforced with effect from the said date. Thus, Section 128(2)(vii) of the Municipalities Act stood omitted w.e.f. 01.07.2017.

In view of the aforesaid omission of Section 128(2)(vii) of the Municipalities Act by the G.S.T. Act, all municipalities in the State of U.P. were denuded of the power to impose tax on advertisement after 01.01.2017. Once the said power of imposing tax on advertisement itself was taken away, no bye-laws in that regard could have been framed and promulgated.

The aforesaid bye laws were formulated by the Nagar Palika Parishad Hathras on 12.01.2017 but were notified in the gazette of the Uttar Pradesh dated 19.08.2017.

The aforesaid bye-laws in bye-law No.1(3) clearly states that the said bye-laws would be enforced from the date they are published in the gazette. Therefore, the aforesaid bye-laws came into operation w.e.f. 19.08.2017 which was not possible as by that time Sub-section (2) (vii) of Section 128 of the Municipalities Act was omitted.

The mere framing of the said bye-laws prior to the omission of Sub-section 2(vii) of Section 128 of the Municipalities Act would not bring the said bye-laws within the legislative

competence as on the effective date the statutory provision enabling the imposition of advertisement tax stood already deleted. Even otherwise, mere framing of bye-laws is not enough unless they see the light of the day which they saw for the first time on publication in the gazette by which time power to impose tax on advertisement was withdrawn.

Apart from the above, the State legislature was invested with the power to make laws in respect of taxes on advertisement vide Entry 55 of List II to the 7th Schedule of the Constitution but the said Entry was deleted by the Constitution (101st Amendment) Act, 2016 w.e.f. 12.09.2016. The said Amending Act vide Section 17 amends 7th Schedule and provides for the omission of Entry 55 of List 2 of the said Schedule. Thus, deleting the power of the State to make laws in respect of taxes on advertisement.

Accordingly, when the State was denuded of the power to make laws in respect of tax on advertisement obviously the municipalities also were divested of power to impose any tax on advertisement.

In view of the aforesaid, the impugned bye-laws are also ultra vires to Article 265 and List II of 7th Schedule of Constitution of India.

In short, the Nagar Palika Parishad had no legislative competence on 19.08.2017 to promulgate the aforesaid bye-laws in view of omission of Section 128(2)(vii) of the Municipalities Act by virtue of Section 173 of the G.S.T. which was enforced on 01.07.2017 as also due to the omission of Entry 55 of List II of 7th Schedule to the Constitution of India empowering the State to make bye-laws in respect of tax on advertisement vide Section 17 of the Constitution (101st amendment) 2016 enforced w.e.f. 16.09.2016.

Accordingly, the aforesaid bye-laws are struck down as ultra-vires.

Piyush 8.2.2019