

(1987) 09 MAD CK 0017

In the Madras High Court

Case No : W.A. No. 838 of 1987 and W.P. No. 6525 of 1984

Annamalai

APPELLANT

Vs

Assistant Commissioner (C.T.), Kancheepuram and Another

RESPONDENT

Date of Decision : 16-09-1987

Acts Referred:

Tamil Nadu Entertainments Tax Act, 1939 — Section 4, 5

Citation : (1987) 09 MAD CK 0017

Hon'ble Judges : M.N. Chandurkar, C.J.;Srinivasan, J

Bench : Division Bench

Advocate : P. Abboy, for the Appellant; K.S. Bakthavatsalam, Additional Government Pleader (Taxes), for the Respondent

Judgement

M.N. Chandurkar, C.J.—The short question which arises in the writ appeal is whether in the case of a cinema theatre where entertainments

tax is paid in accordance with section 5-A of the Tamil Nadu Entertainments Tax Act, 1939, the power u/s 7-B of the said Act can be exercised

on the ground that some tax had escaped assessment.

2. There is in this case no dispute that the petitioner-appellant who is the owner of what is described as National Talkies, Athimanjeripet, Tiruttani

taluk, Chengalpattu district, was submitting returns under the Act and paying the tax which, according to him, was due in accordance with section

5-A(3)(b) of the Act. His returns showed that in the relevant year 1980-81, he had 187 shows. The deputy Commercial Tax Officer, suspecting

that the petitioner-appellant had suppressed the actual number of shows held in the theatre took the view that the electrical consumption in the

theatre for the whole year was 4,909 units and taking 11 units as to consumption per show, the number of shows conducted should have been

446. Finding therefore, that tax was not paid for 259 shows, he determined the liability of the petitioner-appellant at the rate of Rs. 71 per show

which came to Rs. 18,389. In arriving at this conclusion, he referred to the figures available in the survey report of the Statistical Inspector,

Kancheepuram, who had carried out a survey on 21st February, 1981, to determine the consumption of electrical energy per show. The Deputy

Commercial Tax Officer also found that the usual length of Tamil feature film was 14,000 to 15,000 ft. and the normal consumption per show

should, therefore, work out to 11 units. He obtained the figures of consumption from the Assistant Accounts Officer, Tamil Nadu Electricity

System, Tiruttani.

3. An appeal came to be filed by the petitioner-appellant against the order of the Deputy Commercial Tax Officer before the Assistant

Commissioner which came to be decided by him on 2nd May, 1984. The Assistant Commissioner also found that the case of the petitioner-

appellant that he was running only 3 to 4 shows a week had to be rejected. He confirmed the finding that the petitioner-appellant had suppressed

the number of shows and dismissed the appeal. He held that the provision with regard to assessment u/s 7-B would be applicable in a case in

which entertainments tax is paid in accordance with section 5-A. These orders are challenged by the petitioner in the writ petition. When the stay

matter came before the learned single Judge, he took the view that the petitioner-appellant had other statutory remedies and he could not be

permitted to approach this Court and seek stay of collection of tax. This order has been challenged in the appeal.

4. When at the hearing of the appeal we found that a question of general importance with regard to the powers of the assessing officers was

involved, we decided to take up the writ petition itself for final disposal. This order will, therefore, dispose of the appeal as well as the writ petition.

5. The learned counsel appearing on behalf of the petitioner-appellant contends that on a bare reading of section 7-B of the Act, it is found that the

power to reassess is given only in respect of a cinematograph exhibition which is assessed u/s 4 or section 4-A. The contention is that the

petitioner-appellant paid the tax having regard to the special provisions in section 5-A and, therefore, in the absence of any specific power u/s 7-B

with reference to the tax payable u/s 5-A, the order of the Deputy Commercial Tax Officer and the order in appeal of the Assistant Commissioner

are without jurisdiction.

6. The learned Government Pleader has contended that though the provisions of section 5-A are not referred to in section 7-B, there is an express

provision in section 5-C(3) which enables the assessing authority to exercise the power u/s 7-B of the Act even in respect of the tax which is

payable u/s 5-A. Therefore, according to the learned counsel for the State, there is no illegality in the assessment. In order to appreciate these

contentions, it becomes necessary to refer to certain provisions of the Act.

7. Section 5-A of the Act specifically provides that notwithstanding anything contained in the Act or in the Tamil Nadu Local Authorities Finance

Act, 1961, in the case of cinematograph exhibitions held in the theatres specified in column (2) of the Table given in the corresponding entry in

column (1) of the said Table, "there shall be levied and paid to the State Government, a tax at the rate specified in the corresponding entry in

column (3) thereof". In the Table, the first column refers to "local areas", the second column refers to the kind of the theatres such as permanent

and semi-permanent or temporary (touring) and open air theatres and the rate of tax which is given in terms of percentage of the gross collection

capacity for every show is specified in column (3).

8. Section 5-A requires the proprietor of a cinematograph exhibition who is liable to pay tax u/s 5-A or who opts to pay tax u/s 5-B, with which

we are not concerned, to submit a return relating to the actual number of shows held by the proprietor in a week to the prescribed authority in such

manner and within such period as may be prescribed. There is also an obligation on the part of the proprietor to give prior notice to the prescribed

authority of any proposed variation in the gross collection capacity per show in respect of the place of entertainment. u/s 5-A(3)(b) it is provided

that if the prescribed authority is satisfied that any return submitted under clause (a) is correct and complete, it shall assess the proprietor on the

basis thereof. Under clause (c) of section 5-A(3), power is given to the prescribed authority to assess the proprietor to the best of its judgment in

case no return is submitted by the proprietor under clause (a) within the prescribed period, or if the return submitted by him appears to the

prescribed authority to be incomplete or incorrect. There is a proviso which provides for reasonable opportunity to be given to the proprietor for

proving the correctness or completeness of any return submitted by him if any action is to be taken.

9. Section 7-B(1) reads as follows :

Where, for any reason, -

(i) any payment for admission to any entertainment has escaped assessment to tax u/s 4; or

(ii) any cinematograph exhibition has escaped assessment to tax u/s 4-A, the authority prescribed under sub-section (1) of section 7-A, may,

subject to the provisions of sub-section (3) and at any time within such period as may be prescribed, assess to the best of its judgment the tax due

on such payment or exhibition u/s 4 or 4-A, as the case may be, after making such enquiry as it may consider necessary and after giving the

proprietor a reasonable opportunity to show cause against such assessment ...

10. Since we are concerned with only section 7-B(1), we have not reproduced the other provisions of section 7-B.

11. Section 7-B as it reads is the normal provision which is made in tax laws with regard to bringing to tax any item which has escape assessment.

The power u/s 7-B on its plain terms is undoubtedly restricted only to two cases of escaped assessment, viz., (1) a payment for admission to any

entertainment which is liable to tax has escaped assessment and (2) any cinematograph exhibition which is liable to tax u/s 4-A but has escaped

assessment. In these two cases, the authority prescribed under sub-section (1) of section 7-A has the power, subject to the provisions of sub-

section (3) and at any time within such period as may be prescribed, to assess to the best of its judgment the tax due on such payment or exhibition

u/s 4 or 4-A, as the case may be. The assessment is to be made after making such enquiry as the prescribed authority may consider necessary and

after giving the proprietor a reasonable opportunity to show cause against such assessment. The authority prescribed is the authority to whom the

returns are to be submitted.

12. It is now necessary to refer to section 5-C which reads as follows :

(1) No tax or additional surcharge shall be payable under sections 4, 4-A, 4-B or 4-C of this Act and no surcharge shall be payable under the

Tamil Nadu Local Authorities Finance Act, 1961, by any proprietor of a cinematograph exhibition held in the theatres specified in column (2) of

the Table u/s 5-A or 5-B, and located in the local areas specified in the corresponding entry in column (1) of the said Table.

(2) The State Government may make rules whether prospectively or retrospectively for carrying into effect the provisions of sections 5-A and 5-B.

Such rules shall also provide for the issue of tickets for admission and the manner in which and the conditions subject to which a ticket may be

issued.

(3) The provisions of this Act (other than sections 4, 4-A, 4-B, 4-C, 6 and 7) and of the rules made thereunder shall, so far as may be, apply in

relation to the tax payable u/s 5-A or 5-B, as they apply in relation to the tax payable u/s 4-A.

13. Sub-section (1) of section 5-C is really in the nature of a clarification that no tax or additional surcharge is payable u/s 4, 4-A, 4-B or 4-C of

the Act and no surcharge is payable under the Tamil Nadu Local Authorities Finance Act, 1961, by any proprietor of a cinematograph exhibition

held in the theatres specified in column (2) of the Table u/s 5-A or 5-B and located in the local areas specified in the corresponding entry in column

(1) of the said table. Sub-section (2) of section 5-C is only a rule-making power given to the State Government for carrying into effect the

provisions of section 5-A and 5-B and such rules would provide for the issue of tickets for admission and the manner in which and the conditions

subject to which a ticket may be issued. When we read carefully sub-section (3) of section 5-C, we find that the mandate in that section is that the

provisions of the Act, except sections 4, 4-A, 4-B, 4-C, 6 and 7, and the rules made thereunder are made applicable in relation to the tax payable

u/s 5-A or 5-B, as they apply in relation to the tax payable u/s 4-A. On a plain reading of the section, the only meaning which this provision is

susceptible of is that if there was any provision in the Act, except sections 4, 4-A, 4-B, 4-C, 6 and 7, which could be attracted or could be

invoked in the case of a tax payable u/s 4-A, then that provisions can also be invoked in the case of a tax which is payable u/s 5-A or 5-B. If that

is the purpose of enacting section 5-C(3) of the Act, then if it is shown that the provision in section 7-B could be invoke in respect of tax payable

u/s 4-A it must necessarily follow that section 7-B can also be invoked in the case of a tax which becomes payable u/s 5-A or 5-B. We have

already pointed out that section 7-B expressly refers to a power to make a best judgment assessment in case where the tax which the

cinematograph exhibitor is liable to pay u/s 4-A has escaped assessment. Therefore, by virtue of section 5-C(3) the power of assessment u/s 7-B

can also be exercised to make a best judgment assessment in a case where the tax either u/s 5-A or 5-B has escaped assessment.

14. The learned counsel for the petitioner-appellant, has contended that when we go to section 4-A(3), that itself refers to section 4. We fail to see

how that can be of any consequence in so far as the construction of section 5-C(3) is concerned. Section 4-A provides for an additional tax on

cinematograph exhibition. It refers to the rate of additional tax. It also provides for the manner in which the tax is to be calculated. Sub-section (2)

of section 4-A then provides that the tax levied under sub-section (1) shall be recoverable from the proprietor. Then there is a provision in sub-

section (3) of section 4-A which reads as follows :

The provisions of this Act other than sections 4, 6, 7 and 13 shall, so far as may be, apply in relation to the tax payable under sub-section (1) as

they apply in relation to the tax payable u/s 4.

15. The purpose of sub-section (3) of section 4-A therefore, appears to be similar to the purpose with which section 5-C(3) was enacted. The

pattern which seems to have been adopted by the Legislature is that instead of amending section 7-B, after section 5-C was added, provision was

made in section 5-C itself by enacting section 5-C(3) so as to make the provision in section 7-B and other provisions applicable in case of tax

payable u/s 5-A or 5-B in the same manner as section 7-B and other provisions of the Act were applicable to cases covered by section 4 and 4-A

of the Act. Therefore, merely because section 4-A refers to section 4, the necessary consequence will not be that a power which is expressly given

by enacting section 5-C(3) will be rendered ineffective in any way. We are not, therefore, inclined to accept the submission that there is no express

provision which makes the provision in section 7-B applicable in a case governed by section 5-A and that the power to reassess on the ground of

escaped assessment cannot be exercised. Section 5-C(3) in our view, is an

express provision which by reference brings in the provisions of section 7-B in respect of a tax which is payable u/s 5-A.

16. The other argument which has been advanced on behalf of the petitioner is that the authorities could not reach the conclusion of escaped

assessment on the ground that the electrical consumption is much more than what it would have been in respect of the 187 shows which have been

returned in the returns. This contention is advanced on the basis of a decision of the Kerala High Court in *St. Teresa's Oil Mills v. State of Kerala*

[1970] 25 STC 497. In this decision, a Division Bench of the Kerala High Court held that the accounts regularly maintained in the course of business

have to be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable and that the department has to prove

satisfactorily that the account books are unreliable, incorrect or incomplete before it can reject them. It was then observed that wide disparity in the

consumption of electricity, by itself without any other supporting circumstance, will not justify the rejection of the accounts of an assessee running

an oil mill and also engaged in hulling paddy. That was a case with regard to the levy of sales tax when the account books were rejected since

there was wide disparity in the consumption of electricity. The Division Bench observed as follows :

..... In our opinion, this factor by itself without any other supporting circumstance does not justify the rejection of accounts. Such variation in

the consumption of electricity can be due to various factors outside the control of the assessee. It is unsafe to categorically say that because there is

variation in the consumption of electricity the accounts are incorrect or unreliable. It sometimes happens that current supply falls far below the usual

voltage and to such occasions the output will necessarily be much lower than the normal rate. The efficiency of the crushing machine as also the

moisture content in the copra would also be relevant factors to be taken into account in arriving at the output. It is, therefore, unsafe to uphold the

the rejection of the accounts purely on the ground that there has been divergence in the consumption of electricity.

17. This decision will, therefore, show that the main question before the assessing authority was whether there could be a direct relationship

between the output and the electrical consumption. The Division Bench pointed

out that there would be many other circumstances which would account for a reduced output and on that ground alone, the account books which indicated the figures with regard to the output could not be

rejected. That decision appears to us to be clearly distinguishable on facts.

18. In the instant case, statistics have been produced on behalf of the department based on actual inspection of the theatre where readings were

taken of a particular show and there was a regular computation and a decision on the question as to how electricity would be consumed for each

show. Actually, apart from the statistical study, the assessing officer has been little more liberal because while the statistical data showed that 9

units would be sufficient, the authority proceeded on the footing that 11 units should be taken as the consumption for each show. There is no

evidence to the contrary. It was incumbent on the petitioner-appellant to explain the large amount of consumption in the context of the very small

number of shows which have been returned by him. Even if he had adduced some material to show that the number of shows given would be

probable having regard to the large consumption of electricity, there could have been some substance in the contention that merely on the ground

of consumption of electricity, the number of shows cannot be said to have been returned at a lesser figure.

19. The decision of this Court in *Kalyani Oil Mills v. State of Madras* [1973] 32 STC 542, was also a decision in which the question was whether

there could be any assessment of actual production on the basis of consumption of electricity. The Division Bench held that in the case of

manufacturer and dealer in groundnut oil, in the absence of any other method to find out the actual production of oil, the calculation of the turnover

on the basis of the consumption of electricity can also be adopted. It is true that in that case the best judgment assessment was set aside but that

was done on the ground that it was not a permissible course if the electricity consumption was the only circumstances and there was no other

material which showed that the accounts were defective.

20. In a case where tax on a cinema show is in question, the high consumption of electricity unexplained, would in our view, be a sufficient ground

to doubt the figures of shows given by the proprietor of the cinema theatre.

21. The next contention which is raised by the learned counsel for the petitioner-

appellant is founded on the decision of this Court in Sellakumar

Talkies v. Board of Revenue (C.T.), Madras 1984 WLR Supp 113. The question in that case was whether a return given in a case where weekly

returns were made u/s 5-A(3)(a), a best judgment assessment could be made for a period longer than a week merely on the ground that on one

particular day, duplicate tickets were found to have issued. The Division Bench held that there was no presumption in law that an assessee having

been found to have used duplicate tickets on one occasion must be presumed to have used such duplicates in earlier periods also and that also

starting from number one of that serial. The Division Bench pointed out that the terminus a quo of the assessment period being a week, the material

found in a week will by itself have no thrust in an earlier assessment period, that is to say, a week, without there being any incriminating material to

show that it has been followed in the earlier assessment period as well. There is no reason to disagree with the view of the Division Bench. Merely

because a proprietor had sold a duplicate ticket in one week, it cannot be held that he was doing so for the rest of the earlier part of the year and

that is why the Division Bench held that the reassessment could be only in respect of a week. This decision, however, cannot be an authority for

the proposition that if there was material to show that during the earlier period also some malpractices were taken recourse to, which had the effect

of tax having escaped, there is no power u/s 7-B to reassess tax for that period. Indeed, the Division Bench said that unless there was incriminating

material to show that similar conduct was resorted to in the earlier period, a reassessment could not be made, which only meant that if there was

material, reassessment for the earlier weeks was also possible. We may also refer to the provisions in section 7-B(3-A) which reads as follows :

..... Notwithstanding anything contained in sub-section (1) or sub-section (2), in making an assessment or reassessment under sub-section

(1) or sub-section (2), as the case may be, the authority prescribed under sub-section (1) of section 7-A, may pass a single order in respect of a

financial year or any part thereof.

22. This provision clearly shows that a reassessing authority is vested with the power to make an order in respect of escaped tax in respect of the

whole financial year or a part thereof. This is of course subject to the condition

that there is material on record to show that tax had escaped.

23. In a case like the instant one where the consumption of electricity was unduly large which could not be reasonably accounted for by the limited

number of shows which have been returned by the proprietor, we do not see any error if the assessing authority assessed the number of shows on

the footing of the total consumption of electricity especially when there is no other plausible explanation with regard to the large consumption of

electricity. In our view, there is no substance in the writ petition.

24. The writ petition is dismissed. The appeal also stands dismissed. However, there will be no order as to costs.

25. Writ petition and appeal dismissed.