
(2019) 04 PAT CK 0043

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 6413 Of 2018

M/S Den Networks Limited

APPELLANT

Vs

State Of Bihar Through The Principal Secretary And Ors

RESPONDENT

Date of Decision : 17-04-2019

Acts Referred:

Bihar Entertainment Tax Rules, 1984 — Rule 19(A), 23(A)
Bihar Entertainment Tax Act, 1948 — Section 2(q), 3(AA)

Citation : (2019) 04 PAT CK 0043

Hon'ble Judges : Jyoti Saran, J;Arvind Srivastava, J

Bench : Division Bench

Advocate : Dr. Krishna Nandan Singh, Jayant Ttripathi, Sriram Krishna, Tushar Vaibhav, Vikash Kumar, Akash Chaturvedi, Rewti Kant Raman, D.K. Verma

Final Decision : Allowed

Judgement

The petitioner while questioning the vires of the provisions of Section 3AA of the Bihar Entertainment Tax Act, 1948 (hereinafter referred to as

the Act), has alongside prayed for issuance of an appropriate writ for quashing the assessment orders pertaining to the 4th quarter of the

Assessment Year 2015-16 (01.01.2016 to 31.03.2016), the Assessment Year 2016-17 (all four quarters) and the 1st quarter of the Assessment Year

2017-18 (01.04.2017 to 30.06.2017).

The petitioner is a company incorporated under the Companies Act, 1956 and also registered with the Registrar of Companies, New Delhi. The

petitioner is engaged in the business of providing entertainment through cables and the procedure which it follows is detailed at paragraph 4 of the writ

petition which runs under:

A. The television channels uplink their encrypted content to a satellite.

B. These encrypted signals of various television channels are then downloaded by entities like the petitioner, who are known as Multi System Operators (MSOs).

C. The MSOs decrypt the content of various channels, and after converting them for transmission at a different frequency, re-encrypt them for transmission through cables to Local Cable Operators.

D. The cable network of the MSOs transmits the signals to the Local Cable Operators (LCOs).

E. For the purpose of transmitting the signal to the subscriber, the LCOs use their own cable network, which is wholly and solely owned by them.

F. These subscribers have a contractual relationship with the LCO. They do not have a contractual relationship with the MSO.

G. The MSO does not directly provide any content to the LCO's subscriber.

H. It is very relevant to note that both MSOs and LCOs, in order to operate, have to be licensed under the provisions of the Cable Television Network

(Regulation) Act, 1995 and the Rules made thereunder.

It is the stand of the petitioner that as a Multi System Operator (MSO) for the sake of brevity) the petitioner sometimes provides connection

directly to the subscriber but mostly it is a provider of entertainment through the local cable operators who in turn provide entertainment to the

subscriber. It is thus the case of the petitioner that while he provides direct point entertainment to a limited number of subscribers which may be a few

hundred in the State of Bihar, he is largely providing connections to the Local Cable Operators, who in turn are providing connections to the

subscribers.

The complaint in this writ petition is that even though Section 3AA was incorporated in the Act in the year 1997 vide Act 11 of 1997 and

appropriate amendments were also carried out in the Bihar Entertainment Tax Rules, 1984 (hereinafter referred to as the Rules) vide rules

19A and 23A which were incorporated vide S.O. 73 dated 05.09.2007 and S.O. 206 dated 17.12.1998 respectively but as until 3rd quarter of the

Assessment Year 2015-16 the concerned competent authorities under the Commercial Taxes Department acting in purported exercise of jurisdiction

vested under the Act were rightly realizing the tax admissible under the Act from the Local Cable Operators. It is the complaint of the

petitioner that on some misconception, mis-appreciation and misconstruction of the legal position that the respondents started coercing the petitioner to

taxation, with effect from the 4th quarter of the Assessment Year 2015-16 (01.01.2016 to 31.03.2016) and under the assessment orders put to

challenge they have realized such amount which is even greater than the amount assessed for the period in question.

Dr. Krishna Nandan Singh, learned senior counsel appearing for the petitioner submits that as against the assessed amount of Rs.12.78 crores for the

period in question as manifest from the composite demand notice dated 26.03.2019 impugned at Annexure 16 to the writ petition which relates to the

period in question, a recovery by attachment of Bank Account has been made to the tune of more than Rs.12.82 crores.

Dr. Singh, learned senior counsel appearing for the petitioner has chosen not to press the relief prayed at paragraph 1(a) to the writ petition to the

extent it questions the vires of Section 3AA of the Act and submits that the petitioner would be pressing the other reliefs so prayed in the writ

petition which questions the assessment orders for the period 2015-16 (4th quarter), 2016-17 (all quarters) and 2017-18 (1st quarter) not only on merits

but also on the exercise of jurisdiction for according to Dr. Singh, the petitioner is not exigible to tax in so far as it is providing entertainment indirectly

through Local Cable Operators to the subscribers.

Learned counsel in support of his submission has relied upon a judgment of the Delhi High Court rendered in the case of SITI Cable Networks

Limited vs. Government of NCT of Delhi and others arising from W.P.(C) 427 of 2014 and C.M. No.851 of 2014 which was heard analogous with

other writ petitions to submit that it is raising identical issues that the MSO in Delhi had approached the Delhi High Court and when on a

similar grievance being raised and the order of assessment being questioned as against pari materia statutory provisions, the contention of the

MSO was upheld and the demand was set aside. According to Dr. Singh, the judgment of the Delhi High Court has also taken note of

contrary view expressed in reference to the statutory provisions prevalent in West Bengal which was a subject matter of consideration in a matter

reported in (2005)3 SCC 711 (State of W.B. vs. Purvi Communication (P) Ltd.)and (2011)15 SCC 294 (Indusind Media and Communication Limited

vs. Mamlatdar and others) as also the opinion expressed by the Madhya Pradesh High Court and Rajasthan High Court on the statutory provisions in

force in the said States, to conclude in favour of the â??MSOâ?? of Delhi and which opinion of the Delhi High Court would squarely apply to the case of the petitioner herein.

The arguments of Dr. Singh has been seriously opposed by Mr. Vikash Kumar, learned Standing Counsel No.11 appearing for the State and who by

placing strong reliance on the opinion expressed by the Supreme Court in the case of Purvi Communication (P) Ltd. (supra) has stated that it is

proceeding on the expression of the Supreme Court that the assessment orders in question have been passed and that the petitioner cannot escape the financial liability in question.

We have heard learned counsel for the parties and perused the records. Though learned counsel appearing for the petitioner and the State have been

exhaustive in their arguments but in the nature of the order that we propose to pass considering the manner in which the assessment orders in question

have been passed by the Assessing Authority we do not deem it necessary to discuss the arguments advanced on inter-party merits for the present.

Section 3AA of â??the Actâ?? opens with a non-obstante clause to have an overriding effect over the other provisions of â??the Actâ?? to levy a

consolidated amount of tax not exceeding Rs. One hundred and not below Rs. Ten, payable every month for each connection given to a subscriber by

the proprietor of any cable service or cable television network and which amount of tax is to be paid by the proprietor of an entertainment to the State

Government.

The enabling power vested in the Assessing Authority under â??the Actâ?? is to be exercised in the manner prescribed by â??the Rulesâ?? and

which have since been framed vide rules 19A and 23A of â??the Rulesâ??. Perhaps Dr. Singh, learned senior counsel appearing for the petitioner

has been wisely instructed not to press the relief questioning the vires of the provisions because even though the language of Section 3AA of â??the

Actâ?? is not very happily worded but the import is loud and clear and there is no confusion about the nature of impost. Perhaps the confusion as

regarding the identity of the â??proprietorâ?? has led to the challenge because while according to Dr. Singh, it would be â??MSOâ?? when it

provides entertainment to the subscriber through the cables directly and not when such "MSO" would be providing entertainment through the

Local Cable Operators to the subscriber, in which situation, it would be the Local Cable Operators, the position is contested by Mr. Vikash Kumar,

learned State Counsel to canvass that in either of the situation it would be "MSO" who would be treated to be the proprietor for the purpose of levy.

We would reserve our opinion for the present and leave it open for the parties contesting to advance these arguments before the authority concerned

because in the nature of the order passed by the Assessing Authority for the periods in question, we definitely intend to remit the matter back to the

Assessing Authority not because, we have recorded our satisfaction on the inter-party merits but because of the manner of exercise by the Assessing

Authority, which is de-hors the statutory provisions.

Section 3AA of "the Act" read alongside rules 19A and 23A of "the Rules" makes the taxing event at the point where the entertainment

reaches a subscriber through the cables. Now whether it is the "MSO" like the petitioner who not only is providing such entertainment to the

subscriber directly but also through the Local Cable Operators or the Local Cable Operators, when providing such service to the subscribers, is to be

termed as a "proprietor", is a matter of adjudication in the backdrop of the statutory provisions.

We do not intend to record our opinion at this stage on the issue but would allow the Assessing Authority to apply his mind on the issue raised in the

backdrop of the statutory provisions underlying "the Act" as well as the legal position settled by the Courts, relied upon by the contesting parties

herein because while the legislation in question creates a liability of taxation where the connection reaches the subscriber, in so far as the present

assessment orders put to challenge are concerned it is resting on the number of set top boxes recorded in the register of the petitioner. The

assessment orders indicate that it is the details of the set top boxes recorded in the register of the petitioner, which has been treated as a subscribed

connection for the purpose of levy.

Now, while it is the case of the petitioner herein that these set top boxes were imported by the petitioner for its distribution to the subscribers through

the Local Cable Operators, who obtain connection from them, even though a few of the subscribers have been provided connection directly by the

writ petitioner, it is canvassed by Mr. Vikash Kumar that the moment the petitioner admits to the procurement of the "set top boxes" which is

identifiable to a subscriber, it succinctly explains the tax exigibility and the petitioner cannot escape.

Having heard learned counsel for the parties we are in no confusion that the assessment orders passed for the assessment years put to question in this

writ petition lacks foundation because it is not based on the number of subscribers rather is based upon the number of set top boxes, the details of

which was available in the register of the petitioner. This fact situation that the assessment orders are based on set top boxes and are not relatable to

the subscribers as mandated under section 3AA of "the Act" read alongside the "Rules" framed thereunder, is not in contest rather is an

admitted position.

As we have noted above, the taxing event happens when such connection reaches the "subscriber" who is defined under section 2(q) of "the

Act" and means a person who receives the signal of cable television network at a place indicated by him to the cable operator without further

transmitting it to any other person. The definition of a "subscriber" is self eloquent and literally means the "consumer" i.e. the end user of

the connection because he does not further transmit the signal to any other person. The definition of a "subscriber" as found in section 2(q) of

"the Act" is thus identifiable by a person and not by a "set top box" as has been done in the present case by the Assessing Authority, to

pass the orders put to challenge.

In our opinion the assessment orders having been passed on the basis of the details of the set top boxes found available in the record register of the

petitioner and not the subscribers of such set top boxes, is grossly illegal and is de-hors the statutory provisions underlying Section 3AA of "the

Act" which levies consolidated tax on the connection given to a subscriber and not on the set top box itself.

In our opinion the Assessing Authority has failed in his discharge of functions as a quasi-judicial authority to assess the tax in the manner provided

under "the Act" rather he has taken a short route to extract money from the

petitioner by resorting to special mode of recovery without even identifying the subscribers for the purpose of such levy. We cannot but express our anguish on the manner of discharge by the Assessing Authority because what we find is that simply because an exercise to identify the subscriber is time consuming that the Assessing Authority has chosen to take a short route of imposing tax on the basis of set top boxes in complete violation of the legislative intent.

We accordingly quash the assessment orders passed by the Assistant Commissioner, Commercial Taxes, Patna North Circle, Patna for the Assessment year 2015-16 (4th quarter i.e. 01.01.2016 to 31.03.2016), Assessment year 2016-17 (all 4 quarters) and for the 1st quarter of the Assessment year 2017-18 (01.04.2017 to 30.06.2017) some of which are impugned at Annexure 2 series together with the demand notice bearing No.298 dated 26.03.2019 impugned at Annexure 16 to the writ petition.

The matter is remitted to the Assistant Commissioner, Commercial Taxes, Northern Circle, Patna to proceed afresh and for its disposal in accordance with law within a period of four weeks of receipt/production of a copy of this judgment. It goes without saying that since we have not expressed ourselves on the inter-party merits, the parties contesting are at liberty to raise all issues, which they seek to raise including those raised in this writ petition, before the Assessing Authority.

As a consequence while all the attachment notices stands quashed, the recovery of tax to the tune of about Rs.12.82 crores, shall be governed by the outcome of the proceedings.

The petitioner would appear before the Assessing Authority on or before 3rd of May, 2019 at 11.00 AM and whereafter he shall proceed to dispose of the matter in the manner stipulated above.

The writ petition is allowed with direction above.