(1998) 08 PAT CK 0002

In the Patna High Court

Case No : C.W.J.C. No. 1011 of 1994 (R)

M/s Nivas Talkies and Another APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 25-08-1998

Acts Referred:
Bihar Entertainment Tax Act, 1948 — Section 13B
Bihar Finance Act, 1981 — Section 19

Citation : (1998) 3 PLJR 833

Hon'ble Judges : S.N. Jha, J;Aftab Alam, J

Bench : Division Bench

Advocate : Pawan Kumar and M.S. Mittal, for the Appellant; A. Sahay, Ritu Kumar and Rajesh Lala, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Jha, J.—This writ petition on behalf of M/s Nivas Talkies and M/s Shankar Talkies, described as proprietorship firms of Shri Ramesh Kumar Poddar, proprietor of cinema shows doing business at Musabani in the district of Singhbhum East, is directed against the notices dated 5.1.94 issued by the Deputy Commissioner of Commercial Taxes, Singhbhum Circle, Jamshedpur, asking the petitioners to show cause why tax be not re-assessed u/s 19 of the Bihar Finance Act, 1981 in the light of the audit objection. It may be stated at the outset that the dispute involved in this case relates to payment of entertainment tax, governed by the Entertainments Tax Act, 1948, hereinafter referred to as ''the Act'', section 13B of which contains provisions regarding escaped assessment para materia with those of section 19 of the Bihar Finance Act. However, as would appear from the following discussion, this aspect of the matter is completely irrelevant for decision of this case.

2. Mr. Pawan Kumar, learned counsel for the petitioners made submissions in the beginning, under the assumption that section 19 of the Bihar Finance Act is applicable even in the case of reassessment of entertainment tax. Later, when it

transpired that the Entertainments Tax Act contains an independent provision in that regard, he submitted that irrespective of the question as to whether section 19 of the Bihar Finance Act, 1981 or section 13B of the Bihar Entertainments Tax Act, 1948 is applicable, the legal position is well settled that assessment once completed can be reopened only when the Assessing Officer is satisfied that reasonable grounds exist to believe that amount liable to be taxed has escaped assessment. In the present case, however, no such satisfaction has been recorded by the Deputy Commissioner. As a matter of fact, he pointed out, notice has been issued in printed form which is indicative of the non-application of mind. He contended that the fact that in the notice reference has been made to section 19 of the Bihar Finance Act and not to section 13B of the Entertainments Tax Act also is suggestive of non-application of mind as if the authority was not even aware as to under which Act it proposed to take action against the petitioners. Counsel submitted that notice has been issued simply in the light of the audit objection without being satisfied that reasonable grounds exist to believe that any amount has escaped assessment. It was urged that Assessing Officers perform quasi judicial functions and they are supposed to act within the parameters of statute and not at the behest of others, Counsel continuing his submission urged that when return is filed it is open to the Assessing Officer to make enquiry and assess the tax but after assessment has been completed, the same cannot be reopened unless there are some new materials before him and he is satisfied on the basis of such materials that amount liable to be taxed has escaped assessment. In support of his contentions counsel placed reliance on a full Bench decision of this Court in Bhimraj Madanlal vs. State of Bihar, 56 STC 273: 1984 PLJR 584 and unreported judgment in Barabhara Fertilisers vs. State of Bihar (CWJC No. 464 of 1993, decided on 13.4.93), copy whereof has been marked Annexure-3 to the writ petition.

3. The submissions aforesaid are based on wrong assumptions and, if I may say so are completely out of place. The arguments would have been worth consideration had this been a case of reassessment u/s 13B of the Act. The petitioners, admittedly, had opted for compounding of their entertainment tax liability u/s 3B of the Act. Having done so, so long as the Notification u/s 3A of the Act remains in force, the provisions relating to assessment, reassessment or escaped assessment are not applicable. This however does not mean that the impugned notice becomes illegal. In order to appreciate the point at issue it would be proper to notice, briefly, the scheme of the Act and some of its relevant provisions as follows.

4. The Bihar Entertainments Tax Act, 1948 has been enacted to consolidate and amend the law relating to the imposition of tax on amusement and other entertainments in the State of Bihar. Section 3 which contains the charging provision of the Act, empowers the State Government to levy tax on entertainment and makes the proprietor of an entertainment liable to pay the same. The Act like any other tax statute contains detailed provisions regarding submission of returns, assessment, reassessment and appeal etc. therefrom. In

1985, by Bihar Act 4 of 1985 the legislature provided alternative modes of realisation and payment of tax. Section 3A inserted by the said Amendment Act, empowers the State Government to levy consolidated amount of tax on the basis of the gross collection capacity for every show. Section 3B, also inserted by the same amendment, gave an option to the proprietors to compound their tax liability by paying fixed amount as may be permitted by the State Government, calculated on the basis of gross collection capacity for specified number of shows in a specified period.

5. It would be appropriate at this stage to quote the provisions of section 3B and other related provisions of the Act at one place, as hereunder :?

3-B. Compounding of tax. - (1) The State Government may, in lieu of tax payable u/s 3-A on application of a proprietor, in the form prescribed under sub-section (2) of Section 3B, on such conditions, as may be prescribed, permit him to pay a fixed amount or a fixed percentage of gross collection capacity for a specified number of shows in a specified period irrespective of actual number of shows which may be held in that period.

(2) A proprietor intending to pay tax under sub-section (1) shall apply in the prescribed form to the Commissioner or any other officer, specially authorised by the Commissioner through the Deputy Assistant Commissioner Commercial Taxes officer I/C of the Circle/sub-circle not less than 15 days before the commencement of the period for which the proprietor intends to pay tax under sub-section (1).

(3) On receipt of application, the Commissioner or any other officer specially authorised by the Commissioner, shall, after making such inquiry as he may doom necessary, permit the proprietor in the form prescribed under sub-section (3) of Section 3-F to pay fixed sum in accordance with sub-section (1).

(4) The option permitted under sub-section (3) shall continue to be in force till the end of the financial year in which such option is permitted.

(5) The amount of tax specified in the permission granted under sub-section (3) shall be paid to the State Government in the prescribed manner in advance weekly before the week begins.

3-F. Forms for weekly return and application for permission and permission to pay compound tax. - (1) Every proprietor of an entertainment liable to pay tax u/ s 3-A or opting to pay tax u/s 3-B shall furnish to the Deputy/Assistant Commissioner-Commercial Taxes Officer of the Circle/Sub-Circle I/c, a duly signed weekly return in Form A of the Schedule before or latest by Wednesday following the week to which the return relates.

(2) Application for permission to pay tax u/s 3B shall be in Form B of the Schedule.

(3) The permission to pay tax u/s 3B shall be in form ''C'' of the Schedule.

9. Submission of returns and payment and recovery of entertainments tax.

(1)... ... ...

(2)... ... ...

(3)... ... ...

(4)... ... ...

(5) Where the proprietor fails to make payment of the amount of consolidated or compounded tax u/s 3A or 3B or sub-section (5) of section 3 or section 3C or fails to make payment of the entertainment tax according to the return furnished under sub-section (1) of this section within the prescribed period, without prejudice to any action which is or may be taken under clause (b) of sub-section (1) of Section 16, the prescribed authority shall after giving such proprietor an opportunity of being heard, impose a penalty which may extend to three percentum of the amount of tax for each of the first three months following the due date and to six percentum for each subsequent month or part thereof.

(6)... ... ...

(7) Any penalty imposed under sub-sections (2), (5) or (6) shall be without prejudice to any punishment that may be imposed u/s 16.

(8) Any amount of tax or penalty which remains unpaid under this Act or any sum required to be paid under sub-section (5) of section 3, which remains unpaid after the due date, shall be recoverable as an arrear of land revenue.

(9) ... ...

6. It would also be appropriate to notice the formats of the application for permission to pay tax u/s 3B (1) as contained in Form B, the weekly return to be furnished by the proprietor in Form A and permission to pay entertainment tax u/ s 3B in Form C which occur in the Schedule inserted by the aforesaid Amendment Act. i.e. Bihar Act 4 of 1985, so far as relevant, as hereunder :?

FORM B

Application for permission to pay tax under sub-section (1) of Section 3-B of the Bihar Entertainment Tax Act, 1948.

I........the proprietor of ......situated at......in the district of.....whose particulars are given below hereby signify my intention to opt for the payment of fixed amount to tax payable under sub-section (1) of Section 3-B in respect of the shows to be held in the said theatre. I hereby apply for permission to pay tax under the above mentioned section and agree to abide by the rules and conditions prescribed :

1. Name and address of the theatre in respect of which application is made.

2. Registration number and date.

3. Number and date of licence granted under the Bihar Cinemas (Regulation) Rules.

4. Date from which applicant opts to pay tax u/s 3-B.

5. Name of the proprietor

(b) Name of oilier partners, if any.

6. (a) Category of theatre assigned in Section 3-A.

Class of theatre 70 mm/35mm./16 mm./A.C. Air Cooled/ordinary (Delete which is not applicable).

7. Name of Classes

Rate of admission

Number of seats

Gross collection

1

2

3

4

Total :

8. Tax payable every week under sub-section (1) of Section 3. B with reference to gross collection capacity worked out in column 7 above. . .

I .....declare that to the best of my knowledge and belief the information furnished above are true and complete.

FORM A

Weekly return u/s 3-A/3-B of the Bihar Entertainment Tax Act, 1948 to be furnished by proprietor.

To

The Deputy/Assistant Commissioner/Commercial Taxes Officer, I/C.......Circle/ Sub-Circle.

I......the proprietor of......situated at.......in the district of......furnish herewith the following particulars for the week ending :?

(i) Registration no.

(ii) Category u/s 3-A/3-B.

(iii) Class of theatre

70 mm.

35 mm.

Air-conditioned

Air-cooled

ordinary (delete which is not applicable)

(iv) Period of return

(v) Seating capacity of the theatre.

Serial no.

Class

Rate of admission

No. of seats

Gross collection

1

2

3

4

5

Total collection capacity......

Tax on gross collection capacity

(vi) No. of shows held during the week :?

Name of picture screened on No of shows of each picture.

(a) of Taxable Films

(b) Tax-free films

(vii) Amount of tax payable under sec.3A/3-B Rs.....

Tax u/s 3(2) Rs......

(viii) Amount of entertainment the paid.

(ix) Challan no and date.

I.....declare that to the best of my knowledge and belief the infirmity furnished above are true and correct.

FORM C

Permission to pay entertainment tax under Section-3B of the Bihar Entertainment Tax Act, 1948.

Whereas Shri.........proprietor of 70 mm/35 mm./ 16mm./Air Conditioned/Air cooled ordinary theatre known as....... situated at......in the district of......has applied for compounding of tax under sub-section (1) of Section 3-B, I hereby permit the said proprietor to pay Rs.........(in words) per week commencing from.......subject to the following conditions :?

1. The amount of tax payable has been determined on the following information furnished by the proprietor in the application and certified by the.......of.......Circle/sub-circle :?

Name of Classes

Number of seats

Rates of admission

Grose collection

2. The amount of tax shall be deposited by the proprietor in advance for every week before the week begins and default in any payment shall invalidate this permission and in such case it shall be deemed that no permission has been granted.

3. This permission shall be valid from.....to ....

4. This permission may be revoked, suspended or cancelled at any time and no compensation shall be payable by the Government on account of any loss caused to the proprietor by reason of such revocation, suspension or cancellation.

5. The proprietor shall abide by the provisions of the Bihar Entertainment Tax Act, 1948 and the rules framed thereunder in so far as they are applicable to him.

6. A correct and complete statement shall be maintained by the proprietor in duplicate in respect of the number of tickets of each class issued and sold for each show and the amount received for, such tickets issued and sold by using double side carbon paper so as to make impression on reverse side of the statement also. The entries in the statement shall be written up and the accounts closed within 60 minutes or interval of the show whichever falls earlier and shall be produced before the Inspecting Officer at the time of inspection.

7. The proprietor shall not make any alteration in the seats and rate of admission without prior written permission of the Commissioner.

8. The proprietor shall not admit any person in excess of seats and shall not realise any amount from any person in excess of the rates specified in (h) above, the contravention of which shall make the proprietor from the commencement of the permission liable to pay tax applicable to the gross collection capacity on the basis of excess persons and realisation of excess amount of admission fee. The

proprietor shall also be liable to penalty u/s 13-A and 13-C.

9. The proprietor shall furnish to the Deputy/Assistant Commissioner/Commercial Taxes Officer of the Circle/Sub-circle a duly signed return prescribed in sub-section (1) of Section 3-F.

7. It would thus appear that provisions of section 3B and related provisions of the Act provide a complete code for realisation and payment of entertainment tax where proprietor of an entertainment opts for compounding of the tax. The usual procedure relating to submission of returns, assessment etc. in such a case are not applicable. In other words, where the proprietor has opted for compounding of his tax liability which he is otherwise liable to discharge u/s 3A (where notification as envisaged under that section has been issued) or section 3 (where no such notification as envisaged u/s 3A has been issued), and such option is allowed, he is not required to file the return as contemplated u/s 9 of the Act and therefore there is no question of assessment within the meaning of section 9B of the Act. Instead, he is required to file weekly returns in Form A in the manner laid down in section 3F, and to pay the tax in the matter indicated in para 2 of Form C, that is to say, in advance for every week before the week begins. Any default in payment of the tax in the prescribed manner would result in invalidation of the permission and it would be deemed as if no permission had even been granted making him liable to pay the tax as per the provisions of section 3 or section 3A, where notification as mentioned therein has been issued and the State Government has levied as consolidated amount of tax.

8. While section 3 of the Act creates a charge in the matter of payment of tax on entertainment worked out on the basis of the amount of payment chargeable for admission (to the entertainment) as the State Government may fix by notification, section 3A provides that notwithstanding the provisions of section 3 (or other provisions of the Act) the State Government may, by notification, levy consolidated amount of tax on the basis of gross collection capacity for every show. With the issuance of the notification u/s 3A, the provisions of section 3 stand superseded and the proprietor becomes liable to pay the tax on the basis of gross collection capacity for every show at the rates fixed in the notification, and not on the basis of the amount of payment chargeable for admission to the entertainment show as laid down in section 3. Section 3B gives an option to compound the tax, otherwise payable u/s 3A, by paying a fixed amount on the basis of gross collection capacity for a specified number of shows in a specified period but irrespective of the number of shows that may be held in that period.

9. It may be pointed out here that the provisions as contained in section 3A were inserted, presumably, as the implementation of the Act and realisation of the tax u/s 3 by the usual mode of assessment of tax as contemplated by section 3A was considered to be more convenient from both the assessees'' and the Department''s points of view. Section 3B carves out an exception to the general rule of realisation and payment of consolidated amount of tax and is in nature of concession to the proprietor assessee. While u/s 3A he is liable to pay the

consolidated amount of tax not exceeding 45% and not below 10% of the gross collection capacity "for every show", when option u/s 3B is allowed, he is required to pay only a fixed amount "for a specified number of shows in a specified period irrespective of the actual number of shows which may be held in that period".

10. It is obvious that the provisions of section 3B are more favourable from the proprietor''s point of view. If compounding is allowed he is merely required to pay a fixed amount worked out on the basis of a specified number of shows in a specified period, without any restriction on the actual number of shows, unlike section 3A under which he is required to pay for every show. In other words, although the amount is worked out on the basis of specified number of shows he is free to hold more shows in a particular period However, he is required to pay the tax by a special mode as provided in the Permission Order contained in Form C. If a per son opts to compound his tax liability and pays a lesser sum he is certainly liable to pay the amount in the manner prescribed where he commits default he can not claim the benefit of such option. He cannot have best of both? to pay a lessor sum and according to his convenience The words used in Form C "shall invalidate this permission and in such case it shall be deemed that no permission has been granted", give clear indication of the intention of Legislature. Those who live by the sword also perish by it. In such a situation the notification issued u/s 3A in force at the relevant time becomes applicable making the proprietor liable to pay the tax in accordance with it. In fact, he also becomes liable to penalty, vide section 3(5) of the Act. That is the mandate of law and no person can escape the same.

11. Before I conclude I may refer to a particular submission made by the learned Govt. Advocate. In course of hearing he referred to the provisions of sub-rules (2) and (3) of rule 19 of the Bihar Entertainments Tax Rules, 1984 and submitted that where the proprietor fails to pay the fixed sum in accordance with the terms and conditions specified in the permission, not only such permission stands invalidated but in that case the general provisions of the Act and the Rules become applicable.

The provisions of rule 19, it would appear, are intended to give effect to a somewhat similar provision regarding compounding of tax as contained in sub-section (5) of section 3 of the Act. It may be mentioned that compounding provision is part of the Act from the very beginning, albeit in a different form. Sub-section (5) of section 3 empowers the State Government to permit a proprietor to pay, on such condition as may be prescribed, a fixed sum by compounding in the prescribed manner the tax payable in such entertainment or by consolidated payment worked out on the basis of gross receipts. It would thus appear that although the provisions of section 3 (5) and those of section 3B relate to compounding of tax, they are materially different from each other. I may mention in this connection that no corresponding rule appears to have been framed with respect to section 3B of the Act. However, as noticed above, the provisions of section 3B read with section 3B and the Forms contained in the Schedule, by themselves, provide a complete Code. Therefore for giving effect to the provisions of section 3B of the Act it is not necessary to fall back on the provisions of rule 19 of the Rules. I must however observe that although rule 19 of the Rules, in terms, is not applicable, reference to that rule has some relevance in order to snow that similar provisions relating to default in payment of fixed sum as compounded tax u/s 3(5) of the Act have been made in the Rules.

12. To conclude, where the proprietor of an entertainment has been allowed option of compounding of his tax liability, he is not liable to assessment as per the usual procedure laid down in section 92 and other related provisions of the Act, and hence there is no question of his reassessment u/s 13B of the Act. Instead, he is liable to file return in the manner laid down u/s 3F and to pay the tax in the manner laid down in Form C. In cases of default, he is liable to pay tax as per provisions of section 3A of the Act.

13. In the present case, it would appear, notice has been issued in the light of the audit objection to the effect that the petitioners committed default in payment of tax in the prescribed manner. The correctness of the audit objection has not been questioned. If that is so, I fail to find any error in the notice asking the petitioners to submit show cause against the proposed assessment as per the provisions of section 3A. In the above premises, I do not find any merit in the writ petition which is, accordingly, dismissed. However, I will make no order as to cost.

Aftab Alam, J.

I agree.

