
(1987) 03 MP CK 0007
In the Madhya Pradesh High Court
Case No : M.P. No. 3851 of 1985

Raj Kumar

APPELLANT

Vs

Assistant Commissioner Excise, Ujjain

RESPONDENT

Date of Decision : 31-03-1987

Acts Referred:

Madhya Pradesh Entertainments Duty and Advertisements Tax Act, 1936 — Section 4C

Citation : (1987) JLJ 474

Hon'ble Judges : N.D. Ojha, C.J.; Faizan Uddin, J

Bench : Division Bench

Advocate : M. Dalai, for the Appellant; Rajendra Tiwari, Dy. Advocate General, for the Respondent

Final Decision : Dismissed

Judgement

N.D. Ojha, C.J.—This order shall also govern the disposal of Misc. Petitions Nos. 3864 of 1985, 3867 of 1985 and 3096 of 1985. All these writ petitions raise identical questions and are, therefore, being decided by a common order. The petitioners in each of these four writ petitions are proprietors of cinema houses and are liable to pay entertainment duty under the M.P. Entertainment Duty and Advertisement Tax Act, 1936 (hereinafter referred to as the Act,).

2. The facts of writ petition no. 3851 of 1985 are that the Assistant Commissioner Excise Flying Squad, Ujjain Division, Ujjain, made an inspection of the cinema house of the petitioner on 18th June 1985 along with some of the subordinate officers. It was discovered that the petitioner had evaded entertainment duty. Consequently, after giving a notice to show cause to the petitioner, the Assistant Commissioner Excise Flying Squad passed an order dated 31st October 1985 (Annexure f) making a best judgment assessment and also imposing a penalty on the petitioner u/s 4-C of the Act. A similar inspection was made by the Assistant Commissioner Excise Flying Squad on 8th May 1985 of the cinema house of the petitioner of M.P. No. 3867 of 1985 and after giving the petitioner a notice to show cause, an order making a best judgment

assessment and imposition of penalty was passed by the Asstt, Commissioner Excise Flying Squad on 31st October 1985. In the case of the petitioner of M.P. No. 3864 of 1985, however, inspection of the cinema house was made on 1st July 1985 by the Sub-Inspector Excise. Subsequently, on the basis of the inspection report and other record, a notice to show cause was issued by the Assistant Commissioner Excise to the petitioner and order of best judgment assessment and imposition of penalty was passed on 28th October 1985 u/s 4-C of the Act. The facts of M.P. 3096 of 1985 are that inspections in this case were made by the Excise Sub-Inspector whereas orders of assessment and imposition of penalty u/s 4-C of the Act had been made by the District Excise Officer, Ujjain. It is these various orders which have been challenged in these four writ petitions.

3. It has been urged by the counsel for the petitioner that Section 4-C of the Act was ultra vires inasmuch as there was no basis for using the words "period not exceeding thirty days immediately preceding" in Section 4-C. Since the main arguments made by the counsel for the petitioner are all based on the language of Section 4-C, apart from the submission that this section was ultra vires, we find it useful to reproduce this section at this place which reads:

"4-C power to impose penalty-If on an inspection of a place of entertainment, or after examination of the records, accounts and stocks of stamps maintained by a proprietor, the Excise Commissioner or any other officer as may be authorised by the State Government in this behalf, comes to the conclusion that entertainments duty or advertisement tax payable under this Act has been evaded by the proprietor, he may, after giving the proprietor a reasonable opportunity of being heard, assess to the best of his judgment the duty of tax payable by the proprietor for a period not exceeding thirty days immediately preceding as if the evasion substituted for the whole of such period and he may direct that the proprietor shall pay by way of penalty in addition to the amount of duty or tax so assessed, as the case may be, a sum equal to half that amount for the first such evasion in a calendar year, and a sum not exceeding twice but not less than half that amount for the second of subsequent evasion in that year."

4. In our opinion, it is difficult to hold that section 4-C of the Act is ultra vires merely because it uses the words "period not exceeding thirty days immediately preceding". In a case where entertainment duty has been evaded and a best judgment assessment is to be made, such judgment obviously has to be made on the basis of such matter as may be available on record. The primary evidence in all such cases is the return which is required to be filed by the proprietor of a cinema house giving the details on the basis of which entertainment duty is to be calculated. In those cases, where a proprietor of a cinema house fails to file a correct return as contemplated by the Act with a view to evade entertainment duty, the primary evidence is not available and apparently a best judgment assessment has to be passed on the basis of such other evidence as may be gathered by the authorities concerned. It is settled law that in the matter of making a best judgment assessment, some element of guesswork is inevitable.

It is so for the simple reason, as already indicated above, that when the evidence stands suppressed by the assessee, best judgment assessment has to be made on the best evidence.

5. As regards the period of thirty days, the maximum period which has been prescribed in section 4-C for calculating the amount of tax, suffice it to say that in such cases some border line has always to be drawn to provide a guideline. In Union of India (UOI) and Another Vs. Parameswaran Match Works and Others, , a notification had been issued fixing a date as the border line for claiming concessional rate of duty it was held that"-----the purpose of the notification dated 4-9-1967 was to prevent the larger units who were producing and clearing more than 100 million matches in the financial year 1967-68 and who could not have made the declaration., from splitting up into smaller units in order to avail of the concessional rate of duty by making the declaration subsequently. To achieve that purpose, the Government chose September, 4, 1967, as the date before which the declaration should be filed. There can be no doubt that any date chosen for the purpose would, to a certain extent, be arbitrary. That is inevitable." The principle contained in the case of P. hi. Works (supra), in our opinion would apply even if in place of a date, multiple of days is fixed for constituting the guide line for determination of the amount of tax which is said to have been evaded. What has been done in the instant case by prescribing the period as not exceeding thirty days. This has been done to provide a guide line.

6. It was then urged by the counsel for the petitioner that on a plain reading of sections 4-C and 5-A, it appears that discretion has been given to the authorities concerned to pick and choose between two sets of persons. According to him, the authorities may in some case choose to pass an order of best judgment assessment with imposition of penalty u/s 4-C of the Act; whereas in cases of others they may choose to realise the lesser amount as contemplated by section 5-A of the Act. We find it difficult to agree with this submission either. Section 4-C and 5-A of the Act operate in different fields. Section 4-C deals with the question of making an order of best judgment assessment and imposition of penalty in those cases where entertainment duty and advertisement tax payable under the Act have been evaded. Section 5 of the Act deals with penalties and it inter alia provides that the proprietor falling under clauses (a), (b) or (c) of section 5 "shall without prejudice to the recovery of any tax that may be due from him, be punishable with a fine which may extend to five thousand rupees". The penalty provided in section 5 is apparently without prejudice to the recovery of any tax that may be due from a proprietor. One of the modes prescribed for determining the amount of tax which may be due from a proprietor of a cinema house is contained in section 4-C of the Act, whereunder an order of best judgment assessment has to be passed against those proprietors who have evaded entertainment duty or advertisement tax. The liability of being prosecuted and punished with a fine as contemplated by section 5 of the Act is without prejudice to the recovery of tax. Section 5-A of the Act only deals with

composition of offences. Section 5 of the Act refers to imposition of fine as punishment for an offence whereas section 5-A deals with composition of offences. It does not deal with the order of assessment and imposition of penalty u/s 4-C of the Act. The submission made by the counsel for the petitioner that these two sections leave ample scope to the authorities concerned to make discrimination, therefore, apparently no substance. In our opinion, therefore, no ground has been made out for holding that section 4-C is ultra vires.

7. It was urged by the counsel for the petitioner that on a plain reading of section 4-C of the Act, the order of assessment of tax and imposition of penalty has to be passed by the officer who makes the inspection. We find it difficult to agree with this submission either. In this connection it will be seen that between the words "if on an inspection of a place of entertainment" and the words "after examination of the records, accounts and stocks of stamps maintained by a proprietor", the word used is "or" and not "and". Accordingly the order of assessment and imposition of penalty can be passed not only on the basis of inspection of the place of entertainment but also on examination of the records and accounts etc. The officers mentioned in section 4-C of the Act are those officers who are entitled to pass the order of assessment and penalty. This section does not refer to those officers who are empowered to make inspection. It is true that the order of assessment and imposition of penalty may be passed by the same officer who has made the inspection. The language of section 4-C however also contemplates that the order of assessment and imposition of penalty may be passed by the officers mentioned in section 4-C, even though they may not have themselves made the inspection. In such cases, they will be competent to pass the order of assessment on the basis of the report of the officer who may have made the inspection which will fall within the term "record" as provided in section 4-C. In our opinion, therefore, it is not necessary that the order of assessment and imposition of penalty must be passed by the same officer who makes the inspection. In two of these cases, as already seen above, the order of assessment and imposition of penalty was passed by the same officer who made the inspection, namely, the Assistant Commissioner Excise Flying Squad. In other two cases, namely in Misc. Petitions Nos. 3096 and 3864 both of 1985, the inspection was made by a different officer i. e. Excise Sub-Inspector, and the order of assessment and imposition of penalty was passed by the District Excise Officer and Assistant Commissioner Excise. For the reasons stated above, in neither of these four cases the impugned orders of assessment can be said to suffer from any error of jurisdiction or any manifest error of law on the ground referred to above.

8. It was lastly urged by the counsel for the petitioner that the Assistant Commissioner of Excise Flying Squad did not have jurisdiction to pass the order of assessment or imposition of penalty u/s 4-C prior to the issue of the notification dated 24th February 1986 published in the Madhya Pradesh Raj Patra dated 27th February 1986. According to him, it was by virtue of this notification that an Assistant Commissioner of Excise, incharge of Flying Squad was for the

first time authorised to pass an order u/s 4-C of the Act, We find it difficult to agree with this submission also. The relevant part of the notification dated 24th February 1986 reads as under:

"In exercise of powers conferred by section 4-C of the Madhya Pradesh Entertainments Duty and Advertisements Tax Act, 1956, (No. XXX of 1936) and in supersession of this Department Notification No. 1203-125I-V-SR-78, dated 22nd March 1978, the State Government hereby authorises the officers mentioned below for purposes of the said section within the limits of their respective jurisdictions, namely-

xxx xxx xxx

xxx xxx xxx

(vi) All Assistant Commissioners of Excise,

(vii) All Assistant Commissioners of Excise in-charge of Flying Squads."

9. As seen above, this notification was issued in supersession of previous notification dated 22nd March 1978. A copy of the said notification dated 22nd March 1978 has been attached as Annexure R-VI in Misc. Petition No. 3851 of 1985. That notification conferred the power to pass an order u/s 4C on officer including all Assistant Commissioners of Excise. We are of the opinion that "All Assistant Commissioners of Excise" would include an Assistant Commissioner of Excise in-charge of Flying Squads. The words "in-charge of Flying Squads" only indicate the duty assigned to a particular officer for the time being. Notwithstanding such an officer may be for the time being discharging the duties of a Flying Squad, he continues to be an Assistant Commissioner of Excise. It is true that all Assistant Commissioner of Excise Flying Squad have been included in the notification dated 24th February 1986 but in our opinion, from that circumstances alone it cannot be inferred that as per the notification dated 22nd March 1978, "All Assistant Commissioners of Excise" did not include an Assistant Commissioner of Excise in-charge Flying Squad. What was implicit in the notification dated 22nd March 1978 has been made explicit in the subsequent notification dated 24th Feb. 1986. In this view of the matter, such of the orders which have been passed not by the Assistant Commissioner of Excise but by the Assistant Commissioner of Excise in-charge Flying Squad are with jurisdiction having been passed by the officer contemplated by section 4-C of the Act.

10. As regards the merits of the orders of assessment, we are of the opinion that the submissions made by the counsel for the petitioner in this behalf involve a decision on disputed questions of fact and can appropriately be decided only in an appeal which the petitioners have a right to prefer appropriately be decided only in an appeal which the petitioners have a right to prefer u/s 4-D of the Act. Since the vires of section 4-C of the Act was challenged and the writ petitions were entertained on that question, the petitioners, according to their counsel, did not consider it necessary to prefer an appeal separately. Now that we have taken

the view that section 4-C of the Act is not ultra vires, we are of the opinion that the petitioners should, if they so choose, prefer an appeal u/s 4-D of the Act against the impugned orders. Since the writ petitions were entertained and are being decided today, the appeal preferred within thirty days from to days" date, may be entertained and decided on merits without any objection as to limitation. We are supported in taking recourse to this procedure by the decision of the Supreme Court in S. Jagadeesan Vs. Ayya Nadar Janaki Ammal College and Another, .

11. In the result, subject to the observations made above in regard to the appeals that may be filed by the petitioners being entertained and decided on merits, all these four writ petitions fail and are dismissed. In the circumstances of the case, there shall be no order as to costs. The outstanding amount of security, if any, may be refunded to the petitioners.