
(2009) 08 MP CK 0101
In the Madhya Pradesh High Court

Smt. Neelam Gandhi

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 24-08-2009

Acts Referred:

Madhya Pradesh Cable Televisions Network (Exhibition) Rules, 1999 — Rule 11, 9
Madhya Pradesh Entertainments Duty and Advertisements Tax Act, 1936 — Section 4C

Citation : AIR 2010 MP 31

Hon'ble Judges : R.K. Gupta, J;Dipak Misra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Dipak Misra, J.—In view of the common question of law involved in this batch of the writ appeals preferred u/s 2(1) of the M. P. Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005, they were heard analogously and are disposed of by a singular order. For the sake of clarity and convenience, the facts in W. P. No. 1628/2008 which has given rise to W. A. No. 324/2009 are adumbrated herein.

2. The expose of facts is that the appellant is a cable-operator and he was issued a show cause notice u/s 4-C of the M. P. Entertainments Duty and Advertisement Tax Act, 1936 (in short "the Act") read with Rules 9 and 11 of the M. P. Cable Televisions Network (Exhibition) Rules, 1999 (in short "the 1999 Rules"). In the notice of the show-cause, the petitioner was called upon to file a reply why he should not be penalised for evading duty and tax because of concealment of facts which pertain to furnishing of correct number of cable connections. As is demonstrable, the appellant-petitioner, by letter dated 22-11-2007, sought a week's time to file the reply but as no reply was filed despite extension of time, the respondent-authorities, by letter dated 24-12-2007, called upon him to deposit the amount of penalty as adjudged failing which the recovery would be effected as per Section 5(B) of the Act. The said communication was assailed invoking the extraordinary jurisdiction of this Court.

3. Before the learned single Judge, it was contended that before the assessment of the duty or tax, it was incumbent upon the authority to have afforded an opportunity of hearing to the petitioner, but without taking recourse to such procedure, he fastened the liability and issued a show-cause notice calling upon him to deposit the amount. It was further urged that the show-cause notice was confined only to the question of penalty though Section 4-C of the Act mandates grant of opportunity of being heard before the assessment is framed. It was also propounded that the show-cause notice only pertained to penalty which was the fall-out of the best assessment judgment which enables the authority to reach a conclusion that there has been evasion of tax or duty thereby empowering it to proceed with the imposition of penalty.

4. The stand and stance of the petitioner was combatted by the respondent-State contending, inter alia, that on the receipt of the complaints from the local councillor against the cable operator, an enquiry was ordered by the District Excise Officer by order dated 26-9-2007 and the incharge Sub-Inspector was asked to carry out the spot survey of the consumers and certain facts had come to notice. It was the further stand of the respondent State that the authority concerned, after considering all the material facts, passed the assessment order and the order of penalty which was in accordance with the provisions of the Act and the Rules and hence the same does not call for any interference.

5. The learned single Judge referred to Section 3-B of the Act which stipulates about the entertainment duty payable by cable operator. He analysed the anatomy of Section 4-C of the Act and Rules 9 and 11 of the 1999 Rules and came to hold that the subjective satisfaction of the authorised officer forms the basis to arrive at a conclusion that the entertainment duty or advertisement tax payable under the Act has been evaded by the proprietor and the said conclusion forms the basis for the best judgment assessment. It was further held by him that the same is not on hypothesis but is based on the facts available, inspection of the place of entertainment and examination of the records, accounts and stocks of stamps maintained by the proprietor. The learned single Judge further opined that it is open to the proprietor to contradict the facts as relied upon by the authority determining authority assessment. Thereafter, he addressed himself whether prior to framing the best judgment assessment, the proprietor should have been given an opportunity of hearing or that the opportunity of hearing is required when a penalty is proposed to be effected. Interpreting Section 4-C of the Act and placing reliance on the decisions rendered in *M/s. Hyderabad Asbestos Cement Products and Another Vs. Union of India and Others*, and *Vidyacharan Shukla Vs. Khubchand Baghel and Others*, , the learned single Judge expressed the view as follows:

10. This use of word "and" makes the second part an integral of the first and not independent thereof. If the two parts are treated as separate then the requirement for reasonable opportunity of hearing would be at the stage of arriving at a best judgment assessment and not when the penalty is proposed to

be imposed, but this could not have been the intention of makers because it is the penal clause which is of a consequence, whereas the best judgment assessment is to cover up the evasion and to supplement the loss to revenue. Therefore, any best judgment assessment ipso facto is not sufficient to impose penalty u/s 4-C which can be only after giving a reasonable opportunity of hearing.

After so holding, the learned single Judge came to hold that after getting certain material, show cause notice was issued to the petitioner and only after giving him opportunity of hearing, the impugned order of recovery of amount of the tax or duty evaded and the imposition of penalty as provided u/s 4-C of the Act was passed. On the basis of the aforesaid, the learned single Judge further opined that the contention that the amount of evasion was prejudged without affording an opportunity of hearing has no substance and, accordingly, dismissed the writ petition.

6. We have heard Mr. Surendra Singh, learned senior counsel, along with Mr. G. S. Ahluwalia, for the appellants and Mr. Deepak Awasthi, learned Government Advocate for the State and its functionaries.

7. Questioning the legal validity of the order passed by the learned single Judge, it is submitted by Mr. Singh that the appellant was not afforded an opportunity of hearing before the order of assessment was passed despite the statutory requirement for the same. It is urged by him that the notice that has been issued to the petitioner is basically a demand notice as the language would clearly exposit. It is urged by him that without following the due procedure steps have been taken for recovering the demanded amount.

8. Mr. Deepak Awasthi, learned Government Advocate, per contra, submitted that when the assessment is based on the material brought on record, it amounts to best judgment assessment where guess work is permissible and hence, the question of affording an opportunity of being heard does not arise. It is further propounded by him that the notice has been issued why there should not be imposition of penalty and that tantamounts to affording opportunity of hearing for the purpose of imposition of penalty which is the mandate of law. It is put forth by him as the petitioner did not file the show-cause, steps have been correctly taken for recovery.

9. To appreciate the rivalised submissions, it is apposite to refer to Section 4-C of the Act. It reads as follows:

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 entertainment 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 or tax payable by the

proprietor for a period not exceeding thirty days immediately preceding as if the evasion subsisted 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 or subsequent evasion in that year.

10. Rule 9 of the 1999 Rules deals with the previous information regarding commencement of entertainment and the rate being charged from a subscriber. Rule 11 provides for the mode of payment of duty. There can be no doubt that contravention of Rules can lead to initiation of action u/s 4-C of the Act. As we perceive, though the heading prefixed to Section 4-C is "power to impose penalty", yet the same cannot be allowed to control the whole gamut of the provision. In this regard, we may fruitfully refer to the decision rendered in *Frick India Ltd. v. Union of India and Ors.* (1990) 1 SCC 400 : AIR 1990 SC 689 wherein it has been held as under:

8. It is well settled that the headings prefixed to sections or entries cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision...

11. In the case of *M/s Forage and Co. (of Lushala) Vs. Municipal Corpn. of Greater Bombay and Others*, , a three-Judge Bench of the Apex Court followed the judgment rendered in *M/s. Frick India Ltd.* (supra) opining that the heading is not decisive of the question whether an article mentioned in the schedule can be subject to tax or not.

12. In the case at hand, in our considered opinion, the language used in the provision is absolutely unequivocal, clear and unambiguous. In fact, it does not give any kind of allowance to any sort of equivocality or ambiguity. The provision, read appositely, would convey that the competent authority has to come to a conclusion that entertainment duty or advertisement tax payable under the Act has been evaded by the proprietor and, on the basis of the said conclusion arrived give the proprietor an opportunity of being heard and assess to the best of his judgment the duty or tax payable by the proprietor for a period not exceeding thirty days immediately preceding as if the evasion subsisted for the whole of such period. The conclusion proprio vigore cannot form the basis of best judgment assessment. The conclusion arrived at by the authority only relates to the factum that there has been evasion of entertainment duty or advertisement tax. The assessment has to be done to the best of his judgment as regards the duty and tax payable. There should be grant of reasonable opportunity of being heard. We are disposed to think, as it is clearly the intendment of the

Legislature, that there is a maximum limit fixed as regards the quantum in best judgment assessment. The authorised officer may, if advised, assess it for a lesser period. Be that as it may, when the statute requires an opportunity of being heard to be given, the same has to be given. A best judgment assessment, in the obtaining factual matrix, has a quasi-judicial status where on the basis of an inspection a conclusion is arrived at for the purpose of evasion of entertainment duty or advertisement tax but that itself does not become the final conclusion as regards the assessment which gets fructified. Once the Act mandates the determination, a quasi-judicial one, the same is to be done by the authority after affording an opportunity of being heard. The said requirement cannot be marginalised and the assessee has a statutory right to explain his stand how he is not at fault or in a default. It is to be borne in mind that a best judgment assessment does not depend upon the whims and caprice of the authorities. It has to have nexus with the material available on record and depends on the circumstances of each case. It must spell of reasonableness. The power conferred on any authority to make best judgment assessment is not an absolute one. The authority has to be guided by the rules of justice, fair play and good conscience.

13. In this context, we may refer with profit to the decision in *State of Orissa Vs. Maharaja Shri B.P. Singh Deo*, wherein it has been held as under:

Apart from coming to the conclusion that the material placed before him by the assessee were not reliable, the Assistant Collector has given no reasons for enhancing the assessment. His order does not disclose the basis on which he has enhanced the assessment. The mere fact that the material placed by the assessee before the assessing authorities is unreliable does not empower those authorities to make an arbitrary order. The power to levy assessment on the basis of best judgment is not an arbitrary power; it is an assessment on the basis of best judgment. In other words, that assessment must be based on some relevant material. It is not a power that can be exercised under the sweet will and pleasure of the concerned authorities. The scope of that power has been explained over and over again by this Court.

14. We have referred to the aforesaid decision for the purpose of what constitutes the best judgment assessment. True it is, in such a situation, some guess work is permissible but the ultimate determination should be in the realm of reasonableness. In the case at hand, it is to be seen whether any opportunity of being heard has been given. The show cause notice which is under assail has been brought on record as Annexure P-I. In the said document, in the first paragraph, reference has been made to Rules 9 and 11. The same pertains to duty to pay tax and the mode of payment. The second paragraph of the said document states the reasons how the petitioner has violated Section 4-C of the Act and Rules 9 and 11 of the Rules. Paragraph 3 of the same, on being translated into English, reads as under:

On the basis of the aforesaid facts, the entertainment tax amounting Rs.

59,640/- has been evaded by you for a period from April, 2007 till October, 2007. The evaded amount Rs. 59,640/- shall be deposited in the concerned head within a period of one week and inform this Department by appearing in person along with original challan of the treasury why a penalty under Rule 15 for violation of the Cable Televisions Network (Exhibition) Rules shall not be imposed on you. If you have any say as regards this show-cause notice, you may appear on 15-11-2007 in person and putforth your stand.

15. On a perusal of the same, it is clear as day that it is a demand. It is not in the nature of best judgment assessment. The show-cause notice is for the purpose of penalty. The petitioner had filed a reply as per Annexure R-4 stating, inter alia, that there is demand of entertainment tax and the notice to show-cause is for penalty. True it is, time was sought but no show-cause was filed and thereafter, further notice was sent vide Annexure R-5 for recovery.

16. In the obtaining factual matrix, as we have indicated earlier, no opportunity has been afforded before the determination was made. The determination has to be made by framing a best judgment assessment. On a perusal of paragraph 3 of the notice to the show cause, it is clear that it is in the nature of a demand and a show-cause as regards penalty. It is well settled in law that penalty cannot be imposed without affording an opportunity of hearing. But, in the context of present Act, an opportunity is also to be given before best judgment assessment is passed. That has not been done. Keeping the said principle in view, we are inclined to construe the notice to show-cause contained in Annexure P-I as a show-cause for best judgment assessment on the facts available to the concerned authority. There can be no shadow of doubt that the said facts could have been stated in a different manner and not in the form of a demand. The language is undubitably defective, therefore, it is to be treated as a show-cause for the purpose that there has been evasion and the petitioner would be permitted to file a show-cause/explanation within a period of six weeks from today controverting the facts mentioned in the notice. He shall be afforded an opportunity of personal hearing. The competent authority shall pass an order of best judgment assessment as advised in law and if he is further of the opinion that penalty should be imposed, he should hear the appellant on the issue of penalty. The purpose is to hear the affected person for the purpose of best judgment assessment and for the imposition of penalty. The same can be done in a singular and composite proceeding. We have said so as the imposition of penalty is not automatic and discretion is also left with the authority with regard to the extent of the penalty to be imposed. That apart, the command of the provision is to hear the assessee. The opinion that has been expressed in the show-cause notice shall not, in any way, influence the authority and he shall pass an order keeping in view the norms and also be guided by the concept of fair play, good conscience and justice.

17. Be it placed on record, while staying the demand, this Court had directed the appellant to deposit 50% of the demanded dues. The said deposit shall be

subject to the final adjudication.

18. Consequently, the writ appeals are allowed to the extent indicated above. The order passed by the learned single Judge is set aside. There shall be no order as to costs.