REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3882 OF 2013
(ARISING OUT OF SLP (CIVIL) NO.27595 OF 2010)

M/s Tata Sky Ltd. … Appellant

Versus

State of M.P. and others … Respondents

WITH

CIVIL APPEAL NO.3888 OF 2013
(ARISING OUT OF SLP (CIVIL) NO.27655 OF 2010)

WITH

CIVIL APPEAL NO.3889 OF 2013
(ARISING OUT OF SLP (CIVIL) NO.30034 OF 2010)

WITH

CIVIL APPEAL NO. 3890 OF 2013
(ARISING OUT OF SLP (CIVIL) NO.32475 OF 2010)

WITH

CIVIL APPEAL NO.3891 OF 2013
(ARISING OUT OF SLP (CIVIL) NO.2528 OF 2011)

AND

CIVIL APPEAL NO. 3892 OF 2013
(ARISING OUT OF SLP (CIVIL) NO.2752 OF 2011)

J U D G M E N T

Aftab Alam, J.

1. Leave granted in all the special leave petitions.

2. All these appeals relate to the demand of entertainment tax raised by the

Government of Madhya Pradesh under the Madhya Pradesh Entertainment Duty and Advertisements Tax Act, 1936 (hereinafter referred to as "the 1936 Act") on DTH (direct to home) broadcast provided by the appellants to their respective customers on payment of subscriptions. The appellants in all the appeals challenged the demand by the State Government by filing writ petitions before the Madhya Pradesh High Court. The High Court dismissed the writ petitions, upholding the demand by the State Government by the judgment and order dated August 20, 2010. That judgment was rendered in a batch of three writ petitions, taking Writ Petition No. 10148 of 2009, filed on behalf of *Tata Sky Limited* (appellant in the appeal arising from SLP (C) No.2752 of 2011) as the lead case. The rest of the writ petitions were dismissed following the judgment dated August 20, 2010.

3. For the sake of convenience, we too have taken the facts from civil appeal arising out of special leave petition (civil) No.27595 of 2010.

4. The appellant operates under a licence from the Government of India under section 4 of the Indian Telegraph Act, 1885 and the Indian Telegraphy Act, 1933. It is, however, the case of the appellant that DTH broadcast is a "service" and it is chargeable to service tax. As a matter of fact, one of the several grounds on which the demand of entertainment tax by the State Government on DTH broadcasting is challenged by the appellant is that DTH broadcasting is one of the notified services under the Finance Act, 1994 and is chargeable to service tax by the Central Government. In that regard, it is stated on behalf of the appellant, that in 1991 the Government of India appointed a Tax Reform Committee under the Chairmanship of Dr. Chelliah. The recommendations made by the Tax Reform Committee were accepted and the service tax was introduced

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in the budget for the year 1994-1995 through the Finance Act, 1994 under the residuary entry 97 of List 1 of the 7th Schedule of the Constitution of India. Under the Act, service tax is levied on the notified services provided or to be provided.

5. For the purpose of levy of service tax on broadcasting, the expression "broadcasting" has been defined specifically under section 65(15) of the Finance Act. The broadcasting services were brought within the purview of the service tax under section 65(105)(zk) of the Finance Act, 1994 as amended with effect from July 16, 2011. Later on, DTH service was brought within the purview of the service tax with effect from June 16, 2006.

6. Under section 67 of the Finance Act, the value of taxable service is the gross amount charged by the service provider for provision of service.

7. On March 24, 2006, the appellant got a licence from the Government of India under section 4 of the Indian Telegraph Act, 1885 and the Indian Telegraphy Act, 1933 to establish, maintain and operate DTH platform for a period of 10 years on the terms and conditions stipulated in the licence agreement. The appellant paid Rs.10 crores as licence fee and furnished a bank guarantee for the sum of Rs.40 crores that is to remain valid for the entire duration of the licence. In terms of the licence the appellant is further required to pay an annual fee equivalent to 10 percent of its gross revenue as reflected in the audited accounts of the company for every financial year within one month from the end of the financial year. The appellant is also required to pay, in addition to licence fee, royalty for spectrum use as prescribed by the Wireless Planning and Coordination Authority (WPC) under the Department of Telecommunications.

8. The licence granted by the Central Government is for the whole of India and the

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appellant is not obliged to take any permission or any other licence from any other authority for making DTH broadcast.

9. In August 2006, the appellant launched its operations all over India, including the State of Madhya Pradesh. The appellant is having a single broadcasting centre at Chhattarpur, Delhi. This centre downlinks the signals from satellite and then uplinks those signals to the designated transponders for their transmission in *Ku* band. These signals are received by the dish antenna installed at the subscribers' premises. The TV signals transmitted from the broadcasting centre at Chhattarpur, Delhi, are in encrypted format and those are decrypted/decoded by the set top boxes and the viewing card inside the set top box supplied by the appellant to its subscribers. The subscribers are required to pay certain charges for viewing DTH broadcasts by the appellant on their TV sets.

10. The appellant does not use any infrastructure from the State for its DTH broadcasts.

11. On May 5, 2008, the State Government in exercise of powers conferred under section 3(1) of the 1936 Act, issued a gazette notification fixing 20 percent entertainment duty in respect of every payment made for admission to an entertainment other than cinemas, videos cassette recorders and cable service. As the aforesaid notification forms the basis of the demand raised by the State Government it is useful to reproduce it here in full:-

> "No. (63) B-5-9-2006-2-V- In exercise of the powers conferred by sub section (1) of Section 3 of the Madhya Pradesh Entertainment Duty and Advertisements Tax Act 1936 (No 30 of 1936) the State Government hereby prescribed the rate of Entertainment Duty at 20 percent in respect of every payment for admission to an Entertainment other than Cinema, Video Cassette Recorder and Cable service.
> This notification shall come into force with effect from the date of publication.

By order and in the name of the Governor of Madhya Pradesh."

12. Following the notification dated May 5, 2008, a demand notice dated June 10, 2009 was issued by the Excise Commissioner Madhya Pradesh, Gwalior, to the appellant. The contents of the notice, insofar as relevant for the present, are as under:

> "S.No.7-Ent./2009-10/173 Gwalior Date 10.06.2009
>
> To,
>
> Tata Sky,
> …
> …
> Sub: Levy of Entertainment Duty on Direct to Home Entertainment Service
> You are providing entertainment in the State of Madhya Pradesh by Direct to Home (DTH) to registered consumers on monthly payment basis. Whereas:
>
> (1.) Under section 3(1) of the Madhya Pradesh Entertainment Duty and advertisements Tax Act, 1936 except cinema hall, videos and cable in all entertainments including entertainment provided through registered consumers through DTH on monthly subscription basis is included. In the aforesaid payment by the consumers, entertainment duty @ 20% is liable to be paid in advance in the treasury of the Government.
>
> …"

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13. The appellant was directed to provide the information as asked for in the notice failing which, the notice declared, an *ex parte* assessment would be made of the entertainment tax payable by it.

14. The appellant replied to the notice by its letter of July 22, 2009 stating that under the provisions of the 1936 Act, there is no specific entry with respect to DTH broadcasting and in absence of such an entry, the provisions of the Act are not applicable to DTH broadcasting and, therefore, the notice was illegal and without

jurisdiction. The appellant also referred to a decision of the Uttarakhand High Court in a case relating to a similar demand raised by the Uttarakhand Government and the order of this Court in the special leave petition filed by the Uttrakhand Government against the judgment of the High Court.

15. On August 1, 2009, the State of Madhya Pradesh passed the Madhya Pradesh Entertainment Duty and Advertisements Tax (Amendment) Act, 2009. By the Amendment Act, the failure to produce accounts and documents as required by the Excise Commissioner or any officer authorized by the State Government was made a penal offence. The Amendment Act, however, did not introduce any provision in the Parent Act with respect to levy of entertainment duty on DTH broadcasting.

16. On August 18, 2009, the Excise Commissioner Madhya Pradesh wrote to the Deputy Commissioner Excise, Flying Squad, Gwalior Division, Gwalior, telling him that entertainment duty at the rate of 20 percent was payable on subscription amounts received by the DTH entertainment service provider and directing to ensure the realization of entertainment duty from DTH entertainment service providers. The direction of the Excise Commissioner was followed by a number of notices given to the appellant and on October 1, 2009, the Vice President (Operation) and Area Operation (Manager) of the appellant company were arrested and later released on bail for non-compliance with the provisions of section 5(E) of the 1936 Act.

17. On October 3, 2009, the appellant filed a writ petition, being Writ Petition No.10148 of 2009, challenging the demand and collection of entertainment duty at the rate of 20 percent under section 3(1) of the 1936 Act. The writ petition was eventually dismissed by the High Court by its judgment and order dated August 20, 2010 and the

matter is now brought to this Court.

18. Before proceeding further, it needs to be stated that the controversy in all the appeals relates to the demand and realization of entertainment tax under the 1936 Act, which means for the period between the commencement of operation by the appellant in the year 2006 and March 31, 2011, i.e., the day prior to the coming into force of the new Act, called the *Madhya Pradesh Vilasita, Manoranjan, Amod Evam Vigyapan Kar Adiniyam,* 2011. Further, in course of hearing of the appeals Mr. Dave learned counsel appearing for the State of Madhya Pradesh submitted that he proposed to defend the demand and realization of the impugned tax only for the period between May 5, 2008, the date of the notification issued under section 3(1) of the 1936 Act and the coming into force of the new Act on April 1, 2011. It is, therefore, made clear that this judgment deals with the question of levy of entertainment tax on DTH broadcast under the 1936 Act for the period between the issuance of the notification (May 5, 2008) and the coming into force of the new Act (April 1, 2011). The judgment is not concerned with the legal position arising after the new Act came into force.

19. We now propose to examine whether on the basis of the provisions of the 1936 Act, it is permissible or possible for the State of Madhya Pradesh to levy on what in the lexicon of broadcasting is called direct-to-home or in short DTH. Here it needs to be clearly understood that the issue in this case is not whether direct to home broadcast is "entertainment" in the broader sense. Entry 62 of List 2 of Schedule 7 to the constitution may indeed be wide enough to include DTH as yet another form of entertainment but that is not the issue rising for consideration. The issue under consideration is whether the provisions of the 1936 Act have the necessary expanse and

flexibility to include DTH as an "entertainment" chargeable to tax and whether the notification dated May 5, 2008 in any manner extended the scope of chargeability under the 1936 Act.

20. The preamble to the 1936 Act reads as under:-

> "An Act to impose a duty in respect of **admission to entertainments** and a tax in respect of certain forms of advertisement exhibited at such entertainments in Madhya Pradesh."

21. Section 2 of the 1936 Act contains the definition clauses and clause (a) defines the expression "admission to an entertainment":

> "2(a) "admission to an entertainment" includes admission to any place in which the entertainment is held;"

22. **Clause (aaaa) was inserted in the Act with effect from May 1, 1999** to define 'Cable Operator", "Cable Service", "Cable Television Network" and "Subscriber".

> "2(aaaa) "Cable Operator", "Cable Service", "Cable Television Network" and "Subscriber" shall have the same meaning as assigned to them in the Cable Television Network (Regulation) Act, 1995 (No.7 of 1995)"

23. Clause (b) defines "entertainment":

> "2(b) "Entertainment" includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment;"

24. Clause (c) defines "entertainment duty":

> "2(c) "entertainments duty" means a duty levied under section 3;"

25. Clause (d) defines the expression "Payment for admission" as under:

> "2(d) "Payment for admission" includes –
> (i) any payment for seats or other accommodation in any form in a place of entertainment;
> (ii) any payment for a programme or synopsis of an entertainment;
> (iii) any payment made for the loan or use of any instrument or

contrivance which enables a person to get a normal or better view or hearing or enjoyment of the entertainment, which without the aid of such instrument or contrivance such person would not get;

(iv) **any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges, by whatever name called, for providing access to any entertainment, whether for a specified period or on a continuous basis;**

(v) any payment, by whatever name called for any purpose whatever, connected with an entertainment, which a person is, required to make in any form as a condition of attending, or continuing to attend the entertainment, either in addition to the payment, if any, for admission to the entertainment or without any such payment for admission;

(vi) any payment, made by a person, who having been admitted to one part of a place of entertainment is subsequently admitted to another part thereof, for admission to which a payment involving tax or more tax is required;

Explanation - I. – Any subscription raised or donation collected in connection with an entertainment in any form shall be deemed to be payment for admission;

[Explanation - II. – Where entertainment is provided as part of any service by any person, whether forming an integral part of such service or otherwise the charges received by such person for providing the service shall be deemed to include charges for providing entertainment or access to entertainment also];

26. Clause (f) defines "proprietor":

"2(f) "proprietor" in relation to any entertainment, includes any person responsible for or for the time being in-charge of the management thereof;"

27. "Video Cassette Recorder" and "Video Cassette Player" are defined in clauses (g) and (h) of section 2.

28. The charging provision is contained in Section 3 of the 1936 Act which, insofar as relevant for the present, is extracted hereunder:

"Entertainment Duty payable by proprietor of an entertainment - (1) Every proprietor of an entertainment other than proprietor of an entertainment by Video Cassette Recorder (hereinafter referred to as V.C.R.) or Video Cassette Player (hereinafter referred to as V.C.P.) or a Cable Operator, shall in respect

of every payment for admission to the entertainment pay to the State Government a duty at the rate as prescribed by the State Government not exceeding seventy five per centum thereof:
Provided …
Provided further …
Provided also ….
Explanation …
(2) xxx
(3) Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any person, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, or for any privilege, right, facility or thing combined with the right of admission without further payment or at a reduced charge, the entertainments duty shall be paid on the amount of such lump sum:
Provided that where the State Government is of opinion that the payment of a lump sum represents payment for other privileges, rights, or purposes besides the admission to an entertainment, or covers admission to the entertainment during any period for which the duty has not been in operation, the duty shall be charged on such an amount as appears to the State Government to represent the right of admission to entertainment in respect of which the entertainment duty is payable."
(4) xxx
(i) xxx
(ii) xxx"

29. Section 3-A deals with entertainment duty payable by proprietor of V.C.R. or V.C.P. and **this provision was inserted in the Act with effect from May 1, 1999**.

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30. Section 3-B was inserted in the 1936 Act with effect from April 1, 2001. Sub-section (1) of section 3-B deals with entertainment duty payable by cable operator and it makes a cable operator, providing access to entertainments through cable service to subscribers of such service, not being owner or occupants of rooms of hotel or lodging house, liable to pay duty at the rate of twenty rupees per month per subscriber in urban and cantonment areas. Sub-section (2) of section 3-B makes every proprietor of hotel or lodging house, providing access to entertainments in the rooms of a hotel or lodging

house through the cable service of his own or obtained through any cable operator liable to pay a consolidated amount of duty per month determined on the basis of number of rooms.

31. Section 3-C deals with levy of Advertisement Tax.

32. The machinery for effectuating the charge created by section 3 is provided under section 4 of the 1936 Act which, insofar as relevant for the present, is quoted below:

> "4. Method of levy – (1) Save as otherwise provided by this Act, no person shall be admitted to any entertainment other than entertainment by V.C.R., **except with a ticket stamped with an impressed, embossed, engraved or adhesive stamp, (not before used) issued by the State Government, of nominal value equal to the duty payable under section 3**.
> (1A) Omitted.
> (2) The State Government may, on the application of a proprietor of any entertainment other than entertainment by V.C.R. in respect of which entertainments duty is payable under section 3, allow such proprietor to pay by one of the modes specified hereunder as it may think fit, in such manner and subject to such conditions as may be prescribed, the amount of the duty due, namely:-
> (a) by a consolidated payment of such percentage as determined by the State Government of the gross sum received by the proprietor on account of payments for admission to the entertainment and on account of the duty to be fixed by the State Government;
> (b) in accordance with returns of the payments for admission to the entertainment and on account of the duty;
> (c) in accordance with the results recorded by any mechanical contrivance which automatically registers the number of persons admitted;
> (d) xxx
> (e) xxx
> (f) xxx
> (3) xxx
> (4) xxx"

33. Section 4-B imposes restriction on admission without payment or at concession rates and provides as under:

> "4-B Restriction on admission without payment or at concession rates. – No proprietor shall admit any person to an entertainment other than entertainment by V.C.R. without payment for admission thereto or

at concession rates unless the entertainments duty payable in respect thereof or on the full value of the ticket for the class to which such person is admitted has been paid.

Provided that nothing in this section shall apply in respect of admission at concessional rates –

(i) to such class of persons; and

(ii) to such entertainment or class of entertainments;

As the State Government may, by notification, specify."

34. Section 4-C gives the power to impose penalty and section 5 deals with penalties. 5-A deals with composition of offences and section 5-B deals with suspension or revocation of licence for entertainment. Section 8 provides the rule making powers. Section 9 gives the power of entry and inspection and section 9-A makes production and inspection of accounts and documents obligatory. Section 10 deals with recovery of arrears of entertainment duty. Section 10 provides protection to persons acting in good faith and bars any suit or prosecution or other proceedings against officers and servant of the Government. Section 11 deals with delegation of powers and section 12 bars imposition of entertainment duty by any local authority.

35. On a careful examination of the 1936 Act as a whole, and more particularly on a conjoint reading of clauses (a) ["Admission to an entertainment"], (b) ["Entertainment"] and (d) ["Payment of admission"] along with section 3 creating the charge and section 4 providing the collection machinery, we find ourselves in agreement with the submission made on behalf of the appellants that the provisions of 1936 Act are applicable only to place-related entertainment. In other words, the provisions of the 1936 Act cover an entertainment which takes place in a specified physical location to which persons are admitted on payment of some charge as defined under clause (d) of section 2 of the 1936 Act. The legislative history and the amendments introduced in the 1936 Act also show

that it was how the scheme of the 1936 Act was viewed by the State itself. It was earlier found that the provisions of the 1936 Act were inadequate to bring shows by video cassette recorder or video cassette and player cable T.V. operations within the taxing net and hence, the legislature considered it necessary to amend the 1936 Act and to insert section 3-A and section 3-B respectively with effect from May 1, 1999 and April 1, 2001. In this regard, it is also very important to note that both in the case of shows by video cassette recorder or video cassette and player, cable T.V. operations, the collection machinery is in-built and provided within the respective provisions of section 3-A and section 3-B. and in those two cases the collection of duty does not take place under section 4 of the 1936 Act.

36. On behalf of the State the imposition of levy on DTH was sought to be justified on the basis of sub-clause(4) of clause (d) of section 2 which reads as under:

> "(iv) any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges, by whatever name called, for providing access to any entertainment, whether for a specified period or on a continuous basis;"

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37. In our view, the submission is untenable for more reasons than one. First, section 2(d)(iv) is only the measure of tax and it does not create the charge which is created by section 3. The question of going to the measure of the tax would arise only if it is found that the charge of tax is attracted. Under section 3 read with section 2(d) and section 2(a), the charge or levy of tax is attracted only if an entertainment takes place in a specified place or locations and persons are admitted to the place on payment of a charge to the proprietor providing the entertainment. In the present case, as DTH operation is not a place-related entertainment, it is not covered by the charging section 3

read with section 2(a) and 2(b) of the 1936 Act. Consequently, the question of going to section 2(d)(iv) does not arise. Moreover, even if section 2(d)(iv) is to be read as an extension of section 3 and, thus, as a part of the charge, it does not make any difference at all because section 2(d)(iv) refers to "entertainment" which takes us back to section 2(b) and finally to section 2(a).

38. We have held that DTH is not covered by the provisions of section 3 read with section 2(a), 2(b) and 2(d) of the 1936 Act. The issue gets further settled on reference being made to the mechanism of collection of the charge as provided under section 4 of the 1936 Act. Section 4(1) mandates that no person shall be admitted to any entertainment other than entertainment by V.C.R. except with a ticket stamped with an impressed, embossed, engraved or adhesive stamp issued by the State Government of nominal value equal to the duty payable under section 3; sub-section (2) of section 4 provides for different modes specified thereunder for payment of the amount of duty due on the entertainment. Neither the provision of section 4(1) nor any of the modes provided under section 4(2) can be made applicable for collection of duty on DTH operation. Further, it is noted above that section 8 provides rule making powers. In exercise of the powers under that provision the Madhya Pradesh Entertainment Duty and Advertisement Tax Rules 1942 were framed. A perusal of the Rules makes it absolutely clear that the collection mechanism under the 1936 Act is based on revenue stamps stuck to the tickets issued by the proprietor for entry to the specified place where entertainment is held.

39. The machinery for collection of duty provided under the 1936 Act has no application to DTH. It is well settled that if the collection machinery provided under the

Act is such that it cannot be applied to an event, it follows that the event is beyond the charge created by the taxing statute. See: *Commissioner of Income Tax v. B.C. Srinivasa Setty*, (1981) 2 SCC 460, *Commissioner of Income-Tax Ernakulam, Kerala* v. *Official Liquidator, Palai Central Bank Ltd.*. (1985) 1 SCC 45 (pages 50-51), *PNB Finance Limited* v. *Commissioner of Income Tax I, New Delhi* (2008) 13 SCC 94 (paragraphs 21 and 24 pages 100 to 101).

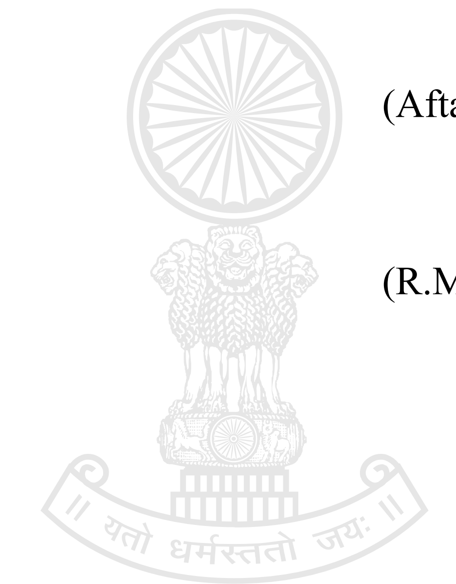
40. In light of the discussions made above, we are clearly of the view that the 1936 Act cannot be extended to cover DTH operations being carried out by the appellants.

41. Coming now to the notification dated May 5, 2008, it is elementary that a notification issued in exercise of powers under the Act cannot amend the Act. Moreover, the notification merely prescribes the rate of entertainment duty at 20 percent in respect of every payment for admission to an entertainment other than cinema, video cassette recorder and cable service. The notification cannot enlarge either the charging section or amend the provision of collection under section 4 of the Act read with the 1942 Rules. It is, therefore, clear that the notification in no way improves the case of the State. If no duty could be levied on DTH operation under the 1936 Act prior to the issuance of the notification dated May 5, 2008 as fairly stated by Mr. Dave, we fail to see how duty can be levied under the 1936 Act after the issuance of the notification.

42. We have held that the 1936 Act does not cover DTH operations on an interpretation of the provisions of 1936 Act itself. We, therefore, see no need to refer to the cases relied upon by the appellants relating to demand of duty on DTH operations under the Uttar Pradesh Entertainments and Betting Tax Act, 1979 and under the Bihar Entertainment Tax Act.

43. Further, as we have held that the 1936 Act does not cover the DTH operations we need not go to the other submissions made on behalf of the appellants *inter alia* regarding the legislative competence of the statute legislature to impose tax on DTH operation as it was a notified service chargeable to service tax under the Finance Act, 1994.

44. In the result, the appeals are allowed but with no order as to costs.



…..…………………………..J.
(Aftab Alam)

…..…………………………..J.
(R.M. Lodha)

New Delhi;
April 16, 2013

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