IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.24647 of 2019

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M/s DEN Networks Limited, Aman Plaza, Patna having its registered Office at 236, Okhla Industrial Estate, Phase-III, New Delhi, 110020 through its Authorized Signatory GM Finance & Taxation, Shri Kunal Verma, aged 38 years approximately, Son of Shri. Vijay Verma, Resident of Flat No. CB 1, 201, Supertech Capetown, Sector 74, NOIDA, 201301

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Commercial Taxes, Bihar, Patna.
2. The Commissioner of Commercial Taxes, Patna.
3. The Deputy Commissioner of Commercial Taxes, Patna North Circle, Patna.
4. The Assistant Commissioner of Commercial Taxes, North, Patna.
5. The Joint Commissioner of Commercial Taxes, North, Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Sujit Ghosh, Advocate Mr. Sriram Krishna, Advocate Mr. Tushar Vaibhav, Advocate Dr. Kamal Deo Sharma, Advocate Mr. Asray Behera, Advocate
For the Respondent/s	:	Mr.Vikash Kumar (SC-11) Mr. Akash Chaturvedi, Advocate Mr. Rewati Kant Raman, A.C. to S.C. 11

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD

CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 18-05-2023

The petitioner is a Multi System Operator (“MSO” for brevity) who is mulcted with the liability to pay Entertainment Tax under the Bihar Entertainment Tax Act, 1948 (for brevity “Act of 1948”), as the proprietor who has the ultimate control in the transmission of programs; which he

receives from a satellite and through the Local Cable Operators ("LCO" for brevity), broadcasts to the subscribers. Earlier the petitioner was before this Court when an assessment order was passed, based on the number of set-top boxes recorded in the register of the petitioner. This Court by Annexure P-5 judgment in CWJC No. 6413 of 2018 dated 17.04.2019 found that the Assessing Officer has resorted to a short cut method to extract money from the petitioner by resorting to a special mode of recovery without even identifying the subscribers for the purpose of such levy. The assessment orders were quashed and the Assistant Commissioner, Commercial Taxes, Patna North Circle, Patna was directed to redo the assessment for the 4th quarter of the Assessment Year 2015-16 (01.01.2016 to 31.03.2016), the full Assessment Year of 2016-2017 and the 1st quarter of the Assessment Year 2017-18 (01.04.2017 to 30.06.2017). The learned Judges while remanding the matter, clearly observed that there is no expression on the inter party merits and all issues would be left open for consideration before the Assessing Authority. The Assessing Authority after notice to the petitioner carried out a fresh assessment which is produced as Annexure P-1 and impugned in the present writ petition.

2. Shri Sujit Ghosh, learned counsel for the petitioner

challenged the impugned order as perverse to boot; for non-application of mind, wrong application of precedents, reliance placed on irrelevant facts & materials as also the relevant facts & the decision on the point, placed on record by the assessee, having been completely ignored. The learned counsel would first take us to Section 3A of the Act of 1948 which is the charging section and point out that the charge is at the time of '*connection given to the subscriber*'; which is the taxable event from which the petitioner – MSO is once removed. The MSO does not give connections to subscribers and it is the LCO who does it, making the latter the taxable person going by the charging section. The taxable event does not occur at the hands of the MSO, who has no privity of contract with the subscriber. Rule 19AC of the Bihar Entertainment Tax Rules, 1984 (for brevity ('Rules of 1984') is specifically pointed out to again emphasize on the machinery provisions also having reckoned the taxable event as the point at which a connection is given to the subscriber. It is pointed out that earlier when there was transmission of programs through cables, it was the LCO who was taxed under the Act of 1948 and in the present scenario of technical advancement, which removes the MSO and keeps it apart from the act of giving connection to the subscriber, there

are no corresponding amendments made to the charging Section to enable the levy on the MSO, who has absolutely no connection with the taxing event.

3. The impugned order at Annexure P-1 was copiously read, to point out the factually incorrect assumptions made by the Assessing Officer which makes the order a perverse one and legally unsustainable. The distinction drawn between the analog signal system and the present digital signaling system to find a pervasive control on the MSO is not supported by the facts on the ground. There is no marketing or innovation work done by the MSO as has been presumed by the Assessing Officer and there is no right of exclusive transmission conferred on the LCO within the area of its operation, as found in the impugned order. The finding that the LCOs have been reduced to repairing agents carrying out the repairs of set-top boxes and networks cannot be countenanced going by the relationship between the MSO and the LCO, as coming out from the agreement. The Assessing Officer even goes to the extent of faulting the petitioner for not having produced the registers of the LCO; which definitely is not their obligation. The Assessing Officer even at this point has not made any inquiry regarding the subscribers and has merely proceeded on the basis of the set-top

boxes supplied; which action was deprecated as a short cut to extract money and set aside, in the earlier litigation. The impugned order is vitiated for the error in facts and of law, as is evident from the facts emanating from the decisions relied on by the Assessing Officer; which have no application to the present system of transmission of programs by the MSO, through the LCOs to the ultimate subscriber. The specific charging Sections, dealt with by the Hon'ble Supreme Court in **The State of W.B. and others v. Purvi Communication (P) Ltd.,** (**2005) 3 SCC 711**, the High Court of Rajasthan in **Sky Media (P) Ltd. v. Asstt. Commissioner, Commercial Taxes, Circle 'A', Jodhpur, 2015 SCC OnLine Raj 3271** and **Indusind Media and Communications Limited and another v. Mamlatdar and other,** (**2011) 15 SCC 294,** the last with reference to the Gujrat Entertainments Tax Act, 1977, were specifically pointed out to draw a distinction from the charging provision in the enactment which is the subject matter of consideration in this writ petition. It is pointed out that the charging section, in the State of West Bengal, imposed the liability to tax on both the persons dealing with a direct and indirect transmission of programs while the Rajasthan levy was on the admission to an entertainment through a Direct to Home broadcasting service or

through a cable service with addressable system or otherwise; which '*otherwise*' is not available in the Bihar enactment. In the Gujrat Entertainments Tax Act, the levy was on '*every*' proprietor providing entertainment by way of maintenance or operation of cable connections. The charging Section in the Bihar Act of 1948 falls short of such a levy being imposed on the MSO who has, (i) no direct contact with the subscriber, (ii) does not make any transmission directly to the subscriber or (iii) even does not deliver the set-top box to the subscriber. The petitioner before the Assessing Officer had specifically relied on the decision of the Delhi High Court in **Siti Cable Networks Limited v. Government of NCT of Delhi & Ors. in WP(C) 427/2014 & CM No. 851/2014** judgment dated 09.03.2017; which though referred to in the impugned order was not at all taken up for discussion. The learned counsel for the petitioner fairly concedes that the decision of the Delhi High Court has now been stayed by the Hon'ble Supreme Court, but however, the reasoning is relevant, to the point and identical to the present factual situation of transmission of programs through set-top boxes in which the MSOs were absolved from the liability to Entertainment Tax.

4. The learned counsel also took us through the

contract between the MSO and the LCO produced as Annexure A-3 and pointed out that the relationship between the MSO and the LCO is one of *'principal to principal'* and not that of a principal and agent. It is pointed out from the opening paragraphs of the agreement itself that the request was made by the LCO to the MSO for making available signals of TV channels and the agreement was, on a non-exclusive basis. Clause No. 3.2 is referred, to emphasize that the LCO had the right to terminate the agreement which indicates the pervasive control and dominant nature of the LCO; clearly defining the status of the parties to the agreement. Clause no. 14.2 is also read over to rubbish the finding of the Assessing Officer that the LCO is an agent of the MSO, who is wrongly assumed to be the principal. The disclaimer in Clause 16.1 further emphasizes the severability of the contractual relationship with the subscriber.

5. The learned counsel read out the various provisions of the agreement to specifically emphasize the physical aspect of the connection being given to the subscriber, which is carried out by the LCO and the entertainment related to the subscriber being re-transmitted by the LCO, thus, making the LCO the taxable person. Specific reference is made to Annexure-P-6 which is a reply given to the Assessing Officer to the notice, the

aspects raised in which, regarding the activation invoice and the sharing of revenue having not been properly addressed by the Assessing Officer. The MSO supplies set-top boxes to the LCO and collects their revenue share based on the number of set-top boxes and not the number of subscribers. The learned counsel clarifies that if 100 set-top boxes are supplied to the LCO, then the LCO is obliged to and the MSO is entitled to earnings based on that number, even if actually only 80 subscribers are enrolled.

6. It was reiterated that the impugned order is vitiated by an error in law insofar as the assessment having been carried out on the petitioner terming the petitioner to be a proprietor, without any inquiry carried out regarding the jurisdictional fact of the person, on whom the tax was leviable. **Commissioner of Income Tax Vs. Yokogawa India Ltd. (2017) 2 SCC 1** was relied on to argue that a taxing statute has to be construed strictly and there is no room for any intendment, equity or presumption. There can be nothing read into the provisions or implied and the plain meaning of the language has to be reckoned. As far as the error on facts, again the various presumptions or assumptions which allegedly border on surmises and conjectures were read out from the assessment

order. It is pointed out that the provisions of the Bihar Act of 1948 as it now exists does not permit the levy on the petitioner who is an MSO and the law unfortunately has not changed with the advancement of technology. Reliance is placed on **Commissioner of Customs (Import), Mumbai v. Dilip Kumar and Company and others, (2018) 9 SCC 1** to further buttress the position of any ambiguity in the taxation statute, being interpreted in favour of the taxpayer. If there are two reasonable views possible, the Courts have to interpret the provision in such a manner that it favours the taxpayer and not the Revenue and *vice-versa* when the interpretation is with respect to an exemption notification.

7. The learned counsel then raises the issue of the State having been denuded of the power to levy and collect tax after the 101st Amendment to the Constitution. The learned counsel argued that Entry 62 of List II to the Seventh Schedule of the Constitution of India, which is the field of legislation conferring the power to tax on the State, was substituted, enabling the levy and collection to be made by the Panchayats etc. on 08.09.2016. After the 101st Constitutional Amendment, the State has absolutely no power to continue with the levy as per the Act of 1948. The 101st Amendment also brought in, the

Goods and Services Tax regime. The transition provision under Section 19 of the amendment only speaks of the law relating to tax on goods or services or of both, enforced in any State, inconsistent with the provisions of the amendment, being in force, until amended or repealed by a competent legislature or other competent authority, or until expiry of one year from such amendment, whichever is earlier. Entry 62, the field of legislation available to the State, to tax entertainment is no more available in the Schedule to the Constitution under List II, in the form it was available and this denudes the power of the State to levy and collect tax in the manner it was done under the Act of 1948. Entry 62 has been substituted permitting levy and collection by the local bodies thus denuding the State's power to levy and collect taxes as provided in the Bihar Entertainment Tax Act and the Rules, by the Commercial Tax Officer.

8. Section 19 of the 101st Amendment has a transition provision enabling the State to amend or repeal the existing enactments, to make it consistent with the provisions of the amendment. But Section 19 only applies to tax on goods or services or both and not to any other tax. Hence, the Act of 1948 as it exists cannot definitely enable the levy after the 101st Amendment and it cannot also justify the levy and collection for

the period prior to the amendment since the power to levy and collect tax under the Act of 1948 stands extinguished by the substitution of Entry 62. Reliance is placed on **State of Rajasthan v. Mangilal Pindwal, (1996) 5 SCC 60** and **Qudrant Ullah v. Municipal Board, Bareilly, (1974) 1 SCC 202** to bring home the consequence of a substitution which is a repeal and the introduction of a new law. As far as the aspect theory is concerned, reference is made to **Bharti Telemedia Ltd. v. Government of NCT of Delhi and Anr., WP(C) 2194 of 2010** dated 05.09.2011 in which all the earlier decisions have been considered.

9. The learned counsel for the petitioner concludes his arguments with the following conspectus:

(i) The assessment order does not allude to the jurisdictional facts necessary to fasten the tax liability and it wrongly relies on the decisions of the Hon'ble Supreme Court and the Rajasthan High Court without noticing that the provisions in the Entertainment Tax Act of the subject States were not in *pari materia* with that of Bihar.

(ii) The impugned order is vitiated by errors of law and on fact, for wrong application of precedents, assumptions and presumptions made bordering on surmises and conjectures;

without looking at the actual relationship between the MSO and LCO; clearly discernible from the terms of the agreement produced.

(iii) When there is advancement in technology and there is a different method of transmission, the law has to keep pace and ensure amendments to fasten the tax liability on a definite person, failing which, if there are two views possible, the benefit has to go to the taxpayer.

(iv) There cannot be any entertainment tax levied and collected after the 101st Amendment of the Constitution of India by the Act of 1948, for period prior to and after the amendment, due to the substitution brought about to Entry 62 to List-II of the Seventh Schedule.

10. Learned Advocate General Sri. P.K Sahi assisted by learned State Counsel Vikash Kumar submits that the Assessing Officer in accordance with the definitions of the Act has found the petitioner to be the person liable under the Act. It is pointed out from **Govind Saran Ganga Saran v. Commissioner of Sales Tax, 1985 (Suppl.) SCC 205** that there are four components to taxation - the taxable event, the taxable person the rate of tax and the measure or value to which the rate is applied. The taxable person in accordance with the Act is the

proprietor responsible for and in charge of the management in relation to any entertainment and in the present case, it is the MSO who has the ultimate control of the entire procedure of transmission of the entertainment programmes. The taxable event though is stated to be the giving of each connection, it refers to the initiation of the subscription, by the MSO, through the LCO, which ensures the display of the entertainment programme in the TV screen of the consumer, which is the place at which the subscriber desires to receive the signals of the cable television network. It is pointed out from **Purvi Communication** (supra) that the taxable event does not depend upon whether there is any entertainment or that the subscriber uses such facility for entertainment and that both the giver and receiver of the entertainment with equal propriety, can be made amenable to tax. The rate of tax and the measure also is quite obvious from the provisions and the machinery provision also enables such levy and collection from the MSO, who is in all pervasive control of the cable TV network. In fact, the LCO cannot exist without the MSO but, however, the MSO can survive by itself if it enrolls the subscribers and gives connection to them, by itself. It is only to get over the practical difficulties and to reach the maximum subscribers that an LCO

is appointed.

11. There can be absolutely no quarrel about the proposition that the taxable event is the connection given to the subscriber, which enables the subscriber to have entertainment and the taxable person is the MSO who gives such connection and controls the transmission of the entertainment programmes through the cable TV network; who is the proprietor. The rate of tax is a definite sum of money evident from the Act and Rules and it is recoverable from the subscriber; which aspects are not disputed in the above writ petition. The mere fact that the Assessing Officer in its order had relied on some irrelevant facts would not by itself vitiate the order, when those relevant facts stated by the Assessing Officer, clearly mulcts the liability on the petitioner herein, the MSO.

12. The learned Advocate General addressed us specifically on the constitutional issue raised by the petitioner with reference to the 101st Amendment of the Constitution of India. It was pointed out that the amendment came on 08.09.2016 and in Article 366, after Clause (12), for the first time, a new concept of Goods and Services Tax was introduced. By the insertion of Clause (26A) ‘services’ was defined, again for the first time, as anything other than goods. It is the

submission of the learned Advocate General that any tax other than on goods, would be consumed and subsumed in the definition of 'services' which would enable the transitional clause under Section 19 of the 101st Amendment also to be availed of in the case of Entertainment Tax. Specific reference is made to Sections 173 and 174 of the Bihar Goods and Services Tax Act, 2017, brought out within one year from the date of the 101st Amendment to the Constitution of India. Section 173 provides for repeal *inter alia* of the Bihar Entertainment Tax Act, 1948. Section 174(e) *inter alia* provides for assessment proceedings, adjudication and any other legal proceedings or recovery of arrears, in respect of any tax to be levied or imposed as if the repealed Acts had not been so repealed under the provisions of the BGST Act. In the above circumstances, the entire period under consideration, dealt with by the impugned order in the writ petition, would be covered by the Bihar Entertainment Tax Act, despite its repeal.

13. The levy and collection prior to the 101st Amendment cannot at all be disputed and the BGST Act having been enacted, repealing the Act of 1948 and providing for the liability under the Act to be continued, even after the repeal; which also came into force on 01.07.2017, the entire period up-

to 30.06.2016 which is the period under consideration would be covered by the aforesaid provisions. In any event, it is also argued that the levy and collection for the period prior to 101st Amendment cannot at all be disputed or challenged. The repeal and saving in the BGST Act at least would save the levy and collection of the tax prior to the 101st Amendment, is the alternative plea taken.

14. We have given our anxious consideration to the arguments raised on both sides and have minutely examined the same with reference to the records. At the outset, we have to say that there is no dispute in so far as the tax, is on the entertainment which a subscriber gets to enjoy from the transmission of programmes through the Cable TV Network. The rates and the measure; the collection permitted from the subscribers, are also not disputed. The contention raised based on the statutory provisions, is insofar as there being an ambiguity in the taxable event and also the taxable person, who is the LCO having a direct link with the subscriber.

15. We have looked at the statutory provisions in the Bihar Entertainments Tax Act, 1948 to decipher the two; out of the four components of taxation, the taxable event and the taxable person. Section 3AA of the Act of 1948 is a *non*

obstante clause which makes the taxable event the point at which the connection is given to the subscriber by the proprietor of any cable service or cable transmission network; which tax has to be paid by the proprietor of an entertainment, to the State Government. It is not in dispute that the proprietor, who pays the tax is also entitled to collect such tax under the Act of 1948 from the persons admitted to the entertainment; who are the subscribers. The distinction of an analog cable network which existed prior to the present advancement of using a set-top box is that, earlier the programmes used to be transmitted by the MSO to the LCO who further transmits it to the subscriber through cables laid. In the present system, a subscriber can view the entertainment programmes transmitted by the MSO through the LCO, only if the subscriber purchases a set-top box and also activates it; which activation can be done only by the MSO; through the LCO. However, the connections are still transmitted through the cables laid. There is no substantial change, hence, from the earlier analog system. The change, if at all, in the MSO exercising more control on the subscribers, by way of the set-top box and its activation.

16. It is very evident from the earlier proceedings also that the set-top boxes are supplied by the MSO to the LCO for

ultimate handing over to the subscriber; since the earlier assessment order was based on set-top boxes purchased by the MSO, as revealed from its registers. In fact the specific argument was that the revenue share of the MSO is based on the number of set-top boxes supplied and not based on the subscribers; which we cannot accept, as arising from the terms of the agreement. Clause 11 of the agreement indicates that the billing for subscriber shall be in the name of the LCO; but that is only for receipt of the subscription, which has to be shared as per Clause 12.1, which shall be paid by the LCO on the MSO raising an invoice. Clause 12.1 relating to the revenue settlement between the LCO & the MSO lays down the ratio of sharing of the collections made from the subscribers, dependent on the various categories indicated in sub-clauses (a) and (b); respectively 50:50 & 60:40. This is quite contrary to the argument raised and the revenue sharing of the subscription fees collected by the LCO is further clarified by the communication Annexure P-6, issued to the Joint Commissioner of State Taxes on the remand made by this Court, at the earlier point of time. Exhibit P-6 provides the list of LCOs with their respective subscribers at Annexure-1. Annexure-2 to Exhibit P-6 are the copies of activation invoices raised by the MSO on the LCO,

which is the ‘One time Activation Charges’ recovered on invoices raised at the time of providing set-top boxes to the LCO, who installs it at the place of end subscribers. This puts the relationship between the LCO & the MSO in its proper perspective, and it is crystal clear that the LCO acts on behalf of the MSO from the time when the set-top boxes are installed at the place of the end subscriber and the set-top boxes are activated, for which activation also an invoice - styled as one time - is raised on the LCO; which the LCO recovers from the subscriber too. Annexure-3 to Ext. P6 is the monthly subscription invoice raised by the MSO on the LCO.

17. A Division Bench of this Court had found that the assessment based on the mere number of set-top boxes without reference to the actual subscribers would be a short cut for extraction of money from the MSO. We fully agree with the said proposition but, however, observe that the LCO in the earlier analog system and also in the present system, of set-top box activation, acts for and on behalf of the MSO and is the go-between of the MSO and the ultimate subscriber.

18. The petitioner’s counsel had taken us through the various terms of the agreement to impress upon us that the relationship between the MSO and the LCO is *‘principal to*

principal' and not that of *'principal and agent'*. At the outset, we have to state that a particular condition or a few, taken out of context, from the agreement cannot decide the issue and it definitely does not depend upon a mere statement in the agreement that the relationship between them is one of *'principal to principal'*. We have noticed the revenue sharing between the LCO & the MCO which clearly indicates a relationship of *'principal and agent'*.

19. The learned counsel had pointed out from the preamble of the agreement that it was on the request made by the LCO that the MSO agreed to provide signals of TV channels to the LCO; which is available in Clause C. It is very pertinent that the blanks left, for entering the number of the communications and the date of agreement between the LCO and MSO are not filled up. It is a mere term in the agreement entered into, which does not define the relationship and in any event, the MSO being in the dominant position would be approached by the LCO for being their intermediary with the subscribers. This discloses the pervasive control of the MSO who decides whether the connections to the subscribers should be made through a particular LCO or not. Another provision pointed out is Clause 3.2 which indicates that the LCO has the

right to terminate the Agreement, which is only in the event of the MSO discontinuing the business of re-transmission of signals of TV channels in the Territory; which is a foregone conclusion and is a mere statement of the obvious. The agreement would necessarily fail, if the MSO discontinues his business in the territory assigned to the LCO. More relevant is Clause 3.1 where either party has a right to terminate their agreement, with 21 days' advance notice if there is material breach of the agreement, not rectified within 15 days; bankruptcy, insolvency or appointment of receiver having been visited on either of the parties and if either of the parties indulge in piracy or acts in contravention of the regulatory statutes. Clause 5.1 indicates that the MSO would make available TV signals to the LCO on a non-exclusive basis to re-transmit the same to the subscribers in the territory; which permits the MSO to have any number of LCOs within a specified territory. Such right has also been given to the LCO who obtains the right of re-transmission of TV signals made available by the MSO, on a non-exclusive basis. The right of the LCO, as found from Clause 7, is in so far as the maintenance of the quality of service which shall not be subject to any interruption or degradation; which is the obligation of the MSO.

20. The obligations of the MSO, as seen from Clause 8 again make its role all pervasive. By Clause 8.1 the MSO is required to set up and operate the Head-end, Conditional Access System (CAS) and Subscriber Management System (SMS), ensuring efficient and error-free services to the subscribers by recording and providing individualized preferences for channels, billing cycles or refunds. In so far as the obligation of the LCO, Clause 9.5 is significant, which places a fetter on the LCO from replacing the set-top boxes of the MSO without receiving a request from the subscriber through a written application for disconnecting the supplied set-top boxes and for providing a new connection. Hence, even a subscriber who wishes to get a new set-top box has to approach the LCO with a written application form for return of the existing set-top box and for purchase of a new one, which set-top box has to be provided by the MSO. We have already dealt with the revenue sharing as per the agreement, which is based on the number of subscriptions and the fees collected from them. The revenue sharing is of the revenue obtained as the subscription fees generated from the subscribers and not on the basis of the set-top boxes supplied by the MSO to the LCO; which was the argument of the learned Counsel.

21. Clause 16, the disclaimer and indemnity clause rather than absolving the MSO from the taxable event, in fact brings the MSO closer to it. The disclaimer and the absolution of indemnity is only when the damage caused is by reason of a disruption, interruption or discontinuance of service; by an act or omission which is not attributable to the MSO. Having gone through the various terms in the agreement, we are of the definite opinion that the MSO is in the dominant position and as argued by the learned Advocate General, the LCO has no independent existence; in so far as the programmes transmitted, without the MSO. The MSO can appoint any LCO even in the very same territory, for transmission of its programmes directly to the consumers. The contention that the MSO is once removed from the actual taxable event, i.e., the giving of the subscription cannot at all be countenanced especially when the connection is given to the subscriber by the LCO, on behalf of the MSO. The set-top boxes are supplied by the MSO to the subscriber through the LCO. This is very evident from the fact that there is also an activation charge, one-time, received from the LCO and even a set-top box change has to be requested for by the subscriber to the LCO through an application form. The mere supply or change of set-top boxes does not ensure the continued

transmission of programmes since every set-top box has to be activated which physical act of activation, done by the LCO is only on behalf of the MSO, on one-time charges paid to the MSO. The activation of a set-top box is exclusively in the domain of the MSO, who does it through the LCO. There is no difficulty in so far as the taxable event as arising from the Act of 1948, which is the act of giving connection, which takes within its ambit activation; both of which being on behalf of the MSO and the LCO acting as a mere intermediary or go-between.

22. Now, we go to the taxable person, which the petitioner asserts, is the LCO and not the MSO. Again, we look at the provisions of the Act which defines Proprietor as the person who is in the ultimate management and full responsibility in relation to an entertainment. An entertainment includes any exhibition, performance, amusement, game, sport or races to which persons are admitted for payment and also includes programmes relayed to a subscriber by a Cable Operator or by Cable Television Network and programmes relayed by an entertainment provider on payment or otherwise. There can be no doubt that the entertainment through a cable television network falls within the tax net of the Act of 1948, the taxable event being the time when the subscriber is given the

connection, by supply of the set-top box and its activation; both of which are at the instance of the MSO.

23. The definition of ‘subscriber’ in Section 2(q) is of a person who receives the signal of cable television network at a place indicated by him to the cable operator, without further transmission of the same to any other person. We also have to see the definition of ‘Entertainment Provider’, in Section 2(ee), who is a person transmitting or re-transmitting programmes or channels through a satellite by a set of closed transmission paths and associated signal generation for reception of multiple users, commonly known as Direct to Home Service (DTH), but does not include a cable operator. Here we have to specify that the use of the words ‘Direct to Home’ does not indicate the terminology as understood in the Cable Networking Industry, which is a direct transmission from the satellite, to the end subscriber through an apparatus provided by the network operator. We have to emphasize that the words employed of a *‘commonly known Direct to Home Service’,* indicates the programme being directly received at the home or a place indicated by the subscriber as distinguished from an admission to a place where the programme is displayed; like in a movie theater.

24. It is also to be emphasized that the definition of Entertainment Provider clearly excludes a Cable Operator. A Cable Operator is defined as any person who provides Cable TV service through a cable television network or otherwise controls or is responsible for the management and operation of a cable television network. Looking at the definition of Proprietor and Cable Operator, we are of the definite opinion that it refers respectively to the MSO and LCO; the former having absolute pervasive control over the entire network but the later has the incidental control and responsibility of management of the network, on the field, to the subscribers. There can be no doubt raised as to the petitioner who is the MSO, is the Proprietor, as defined in the statute, who is the taxable person as per the Act of 1948.

25. Now, we look at the question raised of wrong application of the various decisions based on the provisions in similar enactments of the States of West Bengal, Rajasthan, Gujarat and the National Capital Territory of Delhi and the applicability of the precedents which considered the respective provisions. **Purvi Communication (P) Ltd.** (supra) dealt with the West Bengal enactment which defines the Taxable Person as any person for the time being in possession, of any electrical,

electronic or mechanical device who is a cable operator and receives through such device the signals and telecasts them for payment received or receivable so as to exhibit such programmes directly or indirectly through cable television networks. There is a definition of Cable Operator and Sub Cable Operator in the said enactment and the decision, found the MSO to be the Cable Operator and the LCO to be the Sub Cable Operator, which is the very same position as it exists in the enactment we are concerned with, in the State of Bihar, which defines them respectively as ‘proprietor’ and ‘cable operator’. The distinction drawn in so far as the direct and indirect transmission being specified in the charging section under the West Bengal enactment, is taken care of in the Bihar enactment by making the taxing event, the giving of a connection. This act of giving the connection enables such transmissions to be received by the subscriber; which connection is given to the subscriber by the LCO on behalf of the MSO.

26. Before we go to the Rajasthan enactment, we have to notice that all the other States referred, including the State of Bihar defines the subscriber in the same manner, as a person who receives the signal provided by the cable television network at a place indicated by the subscriber to the cable

operator without further transmission being made. The end user is described as the subscriber, identically, in all the legislations we are referring to. The Rajasthan Act also levied tax on cable service and Direct to Home Broadcasting Service; specifically on the payments for admission to an entertainment through a Direct to Home broadcasting service or through a cable service, with addressable system or otherwise. It was held in **Sky Media (P) Ltd.** (supra) that "*it is beyond any doubt that the nature of work it does of receiving the satellite signals and transmitting the same to the cable operators is nothing but a work of cable operator as defined under the West Bengal Act, which was subject matter of the controversy before the Supreme Court in the case of* ***Purvi Communication*** ..." (sic-para15) and quoted para 34 & 35 of that decision.

27. The Gujarat Entertainments Tax Act, 1977 also levies tax on the proprietor who provides entertainment by way of entertainments or operation of cable connections, which proprietor has been defined as including and specified in sub-clauses (i), (ii), (iii) and (iv) which are indicated here under :-

> (i) responsible for, or for the time being in charge, of the management thereof, or
> (ii) connected in whatsoever manner with the organisation of the entertainment, for any duration, or

(iii) charged or entrusted or authorised with the work of admission to the entertainment, or

(iv) responsible for, or for the time being in charge of, the management of providing, of maintaining or operating cable connection from any type of antenna or cable television;

This includes both the MSO and the Cable Operator and it was found in **Indusind Media and Communication Limited** (supra) following **Purvi Communication (P) Ltd.** (supra) that the MSO also can be made liable under the said enactment.

28. In fact, a similar provision defining Proprietor was available in the Delhi enactment. The Division Bench which considered the matter in **Siti Cable Networks Limited** (supra) also proceeded on the basis that the definition of the word "Proprietor" covers both the MSO and the LCO. It was held that the expression '*in the manner prescribed*' in Section 7, the charging section, which requires the tax '*to be collected by the proprietor and paid to the Government in the manner prescribed*', and the definition of the word '*prescribed*' in Section 2(n); makes inevitable a reference to Rule 26, which also refers to the proprietor of a cable television network. It was thus held that where an MSO provides cable service directly to the subscribers, it would fall under the definition of the proprietor and if it is given through an LCO; then LCO would

fall under such definition.

29. It has to be noted that the High Court of Gujarat and High Court of Delhi found differently on a definition which was in *pari materia*. But the charging Section under the Gujarat statute does not have the word *'prescribed'* and the decision of the High Court of Delhi has been stayed by the Hon'ble Supreme Court. We are in the present case concerned with the Act of 1948, within the State of Bihar where the definition of 'Proprietor' and 'Cable Operator' raises absolutely no ambiguity and the further definition of 'Entertainment Provider' clearly excludes a Cable Operator. The taxing Section also speaks of the tax being levied on the Proprietor and not the Cable Operator, who we found to be respectively the MSO and the LCO. There can be absolutely no doubt that the 'Proprietor' as defined under the Act of 1948 is the MSO who has the ultimate pervasive control and management over the network which transmits the programmes, which it receives by way of satellite. The transmission is also by a cable network which reaches the ultimate subscriber through the LCO. The LCO enrolls the subscribers and provides them with set-top boxes, which set-top boxes, in the instant case, are being provided by the MSO and also activated by the MSO through the LCO.

30. The LCO as per clause 9.6 is interdicted from, (i) transmitting or retransmitting, interpolating any signals, not transmitted by the MSO, (ii) inserting any commercial or advertisement or information on any signal transmitted by the MSO, (iii) interfering in any way with the signals of the MSO or using any equipment for decoding, receiving, recording or using a counterfeit set-top box, (iv) altering or tampering the Hardware and (v) using any Hardware not supplied by the MSO. There shall also be no connection provided by the LCO to any entity for retransmission of the TV signals (Clause 9.7) and the LCO is also prohibited from recording and retransmitting and from blocking, adding or substituting the TV signals transmitted by the MSO. It was on similar provisions that the Hon'ble Supreme Court in paragraph 36 of **Purvi Communication (P) Ltd. (supra)** found the respondent therein, an MSO, to have a direct and proximate nexus with the entertainments provided by them through the cable TV network and found them to be liable as the taxable person, liable to pay tax on the gross receipts obtained from the viewers; the subscribers.

31. We also extract para 38 of **Purvi Communication (P) Ltd. (supra) :**

"38. A tax under Entry 62 of List II of the Seventh Schedule to the Constitution may be imposed not only on the person spending on entertainment but also on the act of a person entertaining, or the subject of entertainment. It is well settled by this Court that such tax may be levied on the person offering or providing entertainment or the person enjoying it. The respondents are admittedly engaged in the business of receiving broadcast signals and then instantaneously sending or transmitting such visual or audio-visual signals by coaxial cable, to subscribers' homes through their various franchisees. It has been made possible for the individual subscribers to choose the desired channels on their individual TV sets because of cable television technology of the respondents and of sending the visual or audio-visual signals to sub-cable operators, and instantly retransmitting such signals to individual subscribers for entertaining them through their franchisees. The respondents' act is, no doubt, an act of offering entertainment to the subscribers and/or viewers. The respondent is very much directly and closely involved in the act of offering or providing entertainment to subscribers who are on his record. For the fact of offering or providing entertainment to the subscribers and/or viewers, the respondents receive charges, which are realised or collected by their franchisee from the ultimate subscribers. Their franchisee, called as sub-cable operator under the said 1982 Act having no independent role to offer or provide entertainments to

> the subscribers inasmuch as franchisees have to depend entirely on the respondents' communication network and this communication network of the respondents consists of receiving and sending visual images and audio and other information for preparation of the subscribers and/or viewers; without the communication network service of the respondents, no entertainments can be offered or provided to the subscribers and/or viewers.”
>
> (underlining by us for emphasis)

The aforesaid declaration of law is squarely applicable in the facts of the instant case and the provisions of the enactment, taxing entertainments in the State of Bihar; specifically those received by the subscribers through cable television networks. We find the taxable event and the taxable person as defined in the enactment and the charge made, to be not at all ambiguous. The liability under the Act of 1948, having been found on the MSO, the petitioner herein as the proprietor of the cable television network, we turn our attention to the issue raised on the 101st amendment.

32. True, ‘services’ have been first defined under Clause (26A) of Article 366 by the 101st amendment as anything other than goods. Even prior to the 101st amendment, tax on services was imposed by the Finance Act of the successive years, by the Union Parliament, tracing the source of power to

Article 246 of the Constitution of India read with Entry 97 of List-I to Seventh Schedule of the Constitution of India. The power to tax entertainments remains with the State even after the amendment; as it did prior to the amendment, but restricted now to the extent it is levied and collected by the local self-government institutions. If the definition of 'services' consumes every tax levied and such taxes are subsumed in the definition of services, there was no reason to retain Entry 62 under List II to Seventh Schedule. It ought to have been omitted, as has the 101st Amendment omitted completely; Entry 52, the taxes on entry of goods into a local area for consumption, use or sale therein and Entry 55, the taxes on advertisements. Or even the taxes on luxuries, betting and gambling as was earlier available under Entry 62 of List II. When the Goods and Services Tax regime came into force by the 101st Amendment, Entry 54 which earlier included tax on the sale or purchase of goods other than newspapers was amended to retain only taxes on specified goods like petroleum products and alcoholic liquor for human consumption.

33. The tax under Entry 62 was retained, albeit in a new form, that too only of entertainments and amusements, among other taxes which were included under Entry 62 of List II prior

to the 101st Amendment; as also confined to those levied and collected by self-government institutions. Entry 62 prior to the subject amendment read as *"Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling" (sic)*. The Union Parliament consciously deleted the taxes on luxuries, betting and gambling and retained only taxes on entertainments and amusements to the extent levied and collected by a Panchayat, Municipality, Regional Council or a District Council. In the teeth of the amendment made to Entry 62 and also the complete omissions carried out by the subject amendment, of other taxation entries; while retaining that on entertainment, we cannot but hold that the tax on entertainments or amusements were never intended to be subsumed in or consumed by, the definition of services so as to include it under the common regime of Goods and Services Tax; brought in for the first time by virtue of the 101st Amendment. Tax on entertainments, hence, survived even after the 101st Amendment, but only to the extent of such tax being levied and collected by a Panchayat, Municipality, Regional Council or District Council.

34. Here, we have to specifically notice the emphasis laid by the learned counsel for the petitioner on Section 19 of the 101st Amendment. Section 19 is a *non obstante* clause and it

provides that any provision of law relating to tax on goods or services or on both in force in any State immediately before the commencement of the amendment act, even if it is inconsistent with the Constitution, as it stood amended by the 101st Amendment, would continue to be in force until such enactments are amended or repealed by the competent legislature or until expiration of one year from the commencement of the 101st Amendment, whichever is earlier. What was sought to be continued are those inconsistent provisions in the State legislations relating to goods or services or on both, which were in force immediately before the commencement of the 101st Amendment. Hence, any other tax levied and collected by an enactment which is inconsistent with the provisions of the Constitution after the 101st Amendment would have to fall at the way-side and will not be applicable either for the purpose of levy, or collection, after the 101st Amendment.

35. We have to reiterate that the inconsistent provisions in the State legislations which were sought to be continued for one year or till the amendment or repeal by the respective State Legislatures, by virtue of Section 19 of the 101st Amendment, was only those laws relating to tax on goods or services or on

both, and not any other tax levied properly by a legislature, for which the power was sourced to the Constitution as it existed prior to the 101st Amendment, which power stood denuded after such amendment. Entertainment tax levied under the Bihar Act of 1948 was a levy and collection made by the State through its Commercial Tax Officers, validly legislated under Entry 62 of List II as it existed prior to 101st Amendment. It cannot be sustained after the 101st Amendment as the amendment to Entry 62 required the levy and collection to be by a local self-government institution and not the State Government.

36. Taxes other than on goods or services or on both, cannot survive after the Constitutional amendment since the same was not saved by the transition provision under Section 19 of the amendment. The tax on goods which earlier was under the general sales tax regime and then under the Value Added Tax regime can continue by virtue of the repeal and amendment, brought in by virtue of Sections 173 and 174 of the State Goods and Services Tax Act; within one year of the 101st amendment. The transitional provision under Section 19 specifically provides for continuance of the inconsistent provisions of any law on any tax on goods or services or on both; with reference to the Constitution as it exists after the 101st Amendment, which

were consistent with the Constitution as it existed prior to such amendment, for one year or till such a repeal or amendment is brought by the State Legislature, whichever is earlier. By virtue of the specific provision provided in Section 19 it does not necessarily mean that such levy and collection can be only for one year. If no repeal and amendment is made to the inconsistent State legislations then of course such levy could have been made and collected only till the expiry of one year from the commencement of the amendment. However, by bringing in Section 173 under the State Goods and Services Tax Act, the earlier enactment by which the levy of tax on goods was made by the State Legislature, the Value Added Tax Act, would stand repealed and by the saving clause under Section 174 the assessments and recovery of arrears with respect to any such tax, surcharge, penalty, fine, interest etc. would survive, notwithstanding the repeal as proper proceedings *de hors* the repeal. This is only by reason of the repeal and saving having been brought in by the State Legislature in an enactment, which is in tune with Section 19 of the 101st Amendment; within one year of the commencement of the subject amendment. As far as the general sales tax, the same was saved by a transition provision in the VAT Act and by the repeal and saving in the

State Goods and Services Tax Act, even that levy and collection survives validly, after the Constitutional amendment. By virtue of the repeal and saving clause the taxes imposed by such legislations, the provisions of which would be inconsistent with the Constitution as it exists after the 101st amendment could be continued to be levied and collected by way of appropriate proceedings under the earlier enactments, as if the said enactments were not repealed. This interpretation does not, however, hold good for taxes other than goods or services since the 101st Amendment to the constitution by Section 19, the transition provision, only saves the taxes so levied on goods or services or on both.

37. The Bihar Entertainment Tax Act, 1948 was one enacted when the field of legislation in Entry 62 to List II of Seventh Schedule, existed as it did prior to the 101st Amendment. It is clear from the provisions of the said Act & Rules and the notification issued thereunder that the levy and collection of such tax was also the responsibility of the Commercial Tax Officers, the collected amounts going into the consolidated fund of the State. While retaining the tax on entertainments in the 101st Amendment it was specifically indicated that taxes on entertainments & amusements can be

sustained; i.e. under Articles 245, 246 & 265 of the Constitution of India, only to the extent levied and collected by a Local Self Government Institution i.e. a Panchayat, Municipality, Regional Council or a District Council. Hence, the tax as it was levied on entertainments under the Bihar Entertainment Tax Act, 1948 cannot survive after the 101st Amendment since it is not levied and collected by a local self-government institution.

38. That the State could now bring out an enactment taxing entertainments, also levying tax on Cable TV Networks, by permitting such levy and collection to be made by the local self-government institutions, cannot at all be disputed. However, it is a moot question as to whether a repeal and saving clause as in the Bihar Goods and Services Tax Act, in such a new enactment brought under Entry 62 as it exists now in the Constitution, can provide for a repeal and saving as available under Sections 173 and 174 of the BGST Act, to sustain the levy and collection after the 101st Amendment. This is because the transitional provisions under Section 19 does not make the same applicable to tax on entertainments and confines it to tax on goods or services or on both. We need not dwell into the same since neither is there existing a repeal or saving clause in such an enactment nor even was such an enactment brought in. It

could have been done only if there was a foundational empowerment by a transition clause, in the nature of Section 19 permitting the survival of such entertainment tax levied and collected under the unamended Entry 62, as was permitted in the case of goods or services and the legislation was brought in, within one year from the commencement of the 101st amendment.

39. The periods we are concerned with are 01.01.2016 to 31.03.2016, the full Assessment Year of 2016-2017 and 01.04.2017 to 30.06.2017, prior to the amendment and after the amendment. If we understand the levy to have been made on the taxable event having occurred, that is the giving of connection and the collection being deferred to every month, when the subscription is paid, then as per the Act of 1948; it occurs on the giving of the set-top boxes, creating a liability on the taxable person to pay tax determined at a definite quantum, from the fees generated from the subscribers. But, it cannot be collected after the 101st Amendment, for even a period of one year, since there is no transition provision to save the taxes levied on entertainment by a legislation under the un-amended Entry 62 and there could be no question of a collection too, raised validly.

40. The Act of 1948 in the State of Bihar, by which the

State, through its Commercial Tax Officers collect entertainment tax *inter alia* from the proprietors of cable television networks cannot survive the 101st Amendment, since the field of taxation available to the State under the amended Entry 62 of List II is confined to those levied and collected by the local self-government institutions. The tax for the period prior to the amendment, though levied on the taxable event occurring, cannot also be collected since there is no transition provision available under the 101st Amendment making such collection of entertainment tax permissible for one year or by way of a repeal; by an enactment, consistent with the amendment, with a saving clause for continuance of the levy and collection under the old Act as it was never repealed. Despite our finding that the Act of 1948 levies the tax on the MSO, the petitioner as the proprietor, prior to the 101st amendment, such levy and also collection as indicated in the impugned orders have to be set aside since post amendment neither the levy nor the right to collect tax, as it existed earlier, survives.

41. The impugned orders are hence set aside, only on the ground of the authorities under the Act of 1948 having been denuded of the power to levy and collect the tax as per the enactment, after the 101st amendment. The State also is denuded

of the power to make an enactment in the nature of the Bihar Entertainment Tax Act, 1948 after the 101st Amendment. The repeal and the saving clause provided under the BGST Act does not inure to the benefit of the State since the enactment and the levy made by it cannot be sustained after the 101st amendment. We hence, allow the writ petition, setting aside the impugned order.

(K. Vinod Chandran, CJ)

Madhuresh Prasad, J: I agree.

(Madhuresh Prasad, J)

Anushka/PKP

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