

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX REFERENCE NO. 4 OF 2009
IN
REFERENCE APPLICATION NO. 114 OF 2005

WITH
SALES TAX REFERENCE NO. 66 OF 2009
IN
REFERENCE APPLICATION NO. 111-112 OF 2005

WITH
SALES TAX REFERENCE NO. 88 OF 2009
IN
REFERENCE APPLICATION NO. 121 OF 2005

WITH
SALES TAX REFERENCE NO. 91 OF 2009
IN
REFERENCE APPLICATION NO. 118 OF 2005

WITH
SALES TAX REFERENCE NO. 97 OF 2009
IN
REFERENCE APPLICATION NO. 111 OF 2005

WITH
SALES TAX REFERENCE NO. 109 OF 2009
IN
REFERENCE APPLICATION NO. 117 OF 2005

WITH
SALES TAX REFERENCE NO. 110 OF 2009
IN
REFERENCE APPLICATION NO. 111-121 OF 2005

WITH
SALES TAX REFERENCE NO. 112 OF 2009
IN
REFERENCE APPLICATION NO. 113 OF 2005

WITH
SALES TAX REFERENCE NO. 4 OF 2010
IN
REFERENCE APPLICATION NO. 112 OF 2005

WITH
SALES TAX REFERENCE NO. 14 OF 2010
IN
REFERENCE APPLICATION NO. 119 OF 2005

WITH
SALES TAX REFERENCE NO. 15 OF 2010
IN
REFERENCE APPLICATION NO. 120 OF 2005

Commissioner of Sales Tax	}	Applicant
versus		
M/s. Klip Nail Care	}	Respondent

Ms. Uma Palsuledesai - AGP for the applicant.

None for the Respondents, though served.

CORAM :- S. C. DHARMADHIKARI &
A. A. SAYED, JJ.

DATED :- MARCH 15, 2016

ORAL JUDGMENT :- (Per S.C.Dharmadhikari, J.)

1) In all these applications, the Tribunal has referred the following question of law for opinion and answer of this court:-

“Whether on facts and circumstances of the case, the Tribunal was justified in law in holding that the assessment orders were non-est orders even though the person Mrs. Janaki Soman, proprietress of the business has accepted the notices, attended the

assessment proceedings as well as the first appeal proceedings and has not challenged the legality of notice on the ground of issuing it in the trade name before the assessing authority, revisional authority as well as the first appellate authority only on the ground that the notices were issued in the 'trade name'?"

2) We take the facts, as they are stated to be common to all the references, from Sales Tax Reference No. 4 of 2009. The applicant sought a reference of the above question because the respondent in this case, though duly served and absent, was a dealer. The respondent was carrying on business in the trade name and style as M/s. Klip Nail Care and manufacturing nail cutters under this name and style. The respondent was registered as a dealer and holding a registration certificate under both, the Bombay Sales Tax Act, 1959 (for short "the BST") and the Central Sales Tax Act, 1956 (for short "the CST"). The registrations were ultimately cancelled with effect from 1st April, 2000 owing to losses in the business. The assessment period from 14th January, 1992 to 31st March, 1992, 1992-93, 1993-94, 1994-95 and 1995-96 under the BST and for the period 1992-93, 1993-94 and 1994-95 under the CST was the period involved.

3) The assessing authority held that the nail cutters manufactured by the dealer are covered by Entry C-II-152 and

liable to tax at the rate of 10%. However, the Commissioner of Sales Tax, Pune Division, Pune took a view that the goods are used for personal grooming and, therefore, they are nothing but toilet articles within the meaning of Entry 86 of Schedule C part II and attract sales tax at the rate of 15%. He, therefore, initiated revisional proceedings taking recourse to section 57 by issuing a notice in form 40. As the dealer failed to respond to the notice, the matter proceeded *ex-parte* and that is how original assessment came to be revised. Being aggrieved and dissatisfied by this revisional order, the dealer preferred First Appeal before the Deputy Commissioner of Sales Tax (Appeals), Pune. The Deputy Commissioner also confirmed the finding of the revisional authority that the impugned product, namely, nail cutter falls under Entry 86 of Schedule C Part II and attracts sales tax at the rate of 15%. However, he refused the interest under section 36(3)(b) of the BST. Not satisfied with these orders, the dealer preferred Second Appeals before the Tribunal. The Second Appeals were allowed on 9th September, 2005 and the first appellate order dated 5th December, 2002 as also the revisional order dated 31st March, 1999 came to be set aside.

4) The Revenue sought reference of the above question to this court and by the order passed on 19th January, 2007, the

Tribunal referred the above question and common to all the applications, for answer and opinion of this court.

5) The Second Appeals of the dealer came to be allowed not on consideration of merits thereof, but on a singular ground stated to be of law, namely, the assessment proceedings were vitiated for, notice has been issued in the trade name and not in the name of the sole proprietress. It was stated that M/s. Klip Nail Care is a proprietary concern and Ms. Janaki Soman is the sole proprietress thereof. The notice could not have been issued in the trade name M/s. Klip Nail Care, but should have been issued in the name of the proprietress. Such a invalid notice, according to the Tribunal, could not be a foundation of the proceedings. The proceedings, therefore, are not only invalid and illegal, but non-est. That part of the reasoning of the Tribunal reads as under:-

“6. We have heard both the counsels. Perused the record. In view of the rival submission, it is felt necessary instead of looking to the merits of the case first to consider the additional plea taken on behalf of the appellant. It is needless to say that there is no impediment to take the new ground in the appeal on the point of law. A perusal of the registration certificate record certainly reveals that the appellant firm M/s. Klip Nail Care is a proprietary concern and Mrs. Janak Soman is a proprietor of the said concern. It may be noted that before proceeding to assess the “dealer” to tax

under sub-section (5) and/or (6) of section 33, the Commissioner is required to call upon him by a notice in form 27 to show cause as to why he(dealer) should not be assessed. A combined reading of section 33(1), 33(6) and rule 33 makes it clear that the proceedings are to be initiated against the “dealer” and the order of assessment is to be passed against the “dealer”. Issuing assessment notice in form 27 under rule 33 for initiation of assessment under section 33 of the Bombay Act is mandatory. The dealer has been defined in section 2(11) of the Bombay Act. Accordingly, the dealer means any person, who carries business of buying and selling goods for commission, remuneration or otherwise. In the case in hand, the proprietor namely Mrs. Janaki Soman is a person carrying on business under the trade name “Klip Nail Care”. It was therefore, to initiate the assessment proceeding in the name of proprietor and not in the trade name. The proceeding initiated in the trade name instead in the name of dealer is bad in law. This point had came for consideration before the Hon'ble Bombay High Court in the case of Shankar Dhawan (supra). It is observed therein that under the C. P. and Bearer Sales Tax Act, 1947, a dealer must be a person. The trade name of an individual (Laxmi Stores) is not by any means a person within the meaning of the law and therefore a notice used in the trade name is not either to person to a dealer and the entire proceedings founded upon such a notice are invalid. Following the said decision, this Tribunal in the case of M/s. Kiran Oil Mills (supra) held that notices issued and the assessment order passed in the trade name are bad in law and the orders passed by the lower authorities were set aside on that ground.

7. Smt. Deshpande has further rightly pointed out that as the impugned assessment order is a non-est order response to such notice by the assessee does not cure the defect and, therefore, the revisional authority has not jurisdiction to revise the non-est order. Her contention has been fortified by earlier decision of this Tribunal in the case of M/s. Parwani Builders (supra). In the said case, the assessing authority had issued notices after period of limitation and the assessing authority lacked jurisdiction to pass any assessment order section 33(5) of the Bombay Act. The revision orders passed against such assessment orders which were passed after expiry of the limitation period are held to be without jurisdiction. In this context, the Tribunal has observed that even though the appellant has not challenged either the assessment notices, or the assessment orders, the facts remains that the assessment orders having been passed without valid jurisdiction were non-est or nullify and therefore, they were certainly assailable even in the collateral proceedings like revision. That being the position, the Administrative Assistant Commissioner of Sales Tax had no jurisdiction to revise a non-est order. There is therefore, no other alternative but to annul the impugned revision orders for want of jurisdiction. Accordingly, the Tribunal has set aside the revision orders and the first appeal orders in those revision proceedings. Shri Akhade, learned Assistant Commissioner of Sales Tax was not able to convince us to take the different view than the view already taken by this Tribunal in the case of M/s. Parwani Builders (supra).”

6) Ms. Palsuledesai appearing for the Revenue/applicant in this case would submit that the Tribunal's order proceeds on a complete misconception of law. She would submit that the Tribunal has misread the definitions and the substantive provisions of the BST to arrive at the above conclusion. She would submit that if the Tribunal's view is accepted, that would mean that a dealer and who is defined to mean a person cannot be a sole proprietor. However, the definition of the word "dealer" appearing in section 2(11), the definition of the word "person" appearing in section 2(19) and the definition of the word "registered dealer" appearing in section 2(25) would take within their import a sole proprietor. That is an inclusive definition. Once the word other than the natural person is defined in an inclusive manner, then, the sole proprietor is also included therein. If the Tribunal's view is accepted, according to Ms. Palsuledesai, then, none of the transactions of sale and purchase and undertaken by the sole proprietor can be brought to tax. That could never be the intent of the legislature for, everybody who is answering the definition of the term "dealer" as also the word "person" can be registered under section 22. After being so registered, the liability to pay tax in terms of the law would arise. Once that arises, then, the law enables the Department/Revenue to proceed by issuing notice even against a sole proprietor. The

sole proprietary concern, in any event, has no existence independent of the sole proprietor or sole proprietress. Therefore, notice being issued in the trade name cannot be said to be fatal. Such proceedings can never be termed as non-est. If the law does not require strict adherence to procedural rules, then, there is no question of any prejudice much less miscarriage of justice. Therefore, the Tribunal's order deserves to be quashed and set aside.

7) We find much substance in the contentions of Ms. Palsuledesai. The Tribunal, though seized and possessed of Second Appeals, chuses not to go into any other grounds and questions raised for its consideration, but disposes of the appeals simply on the above ground. It takes up the ground as if it goes to the root of the case or matter and would enable it to dispose of the appeals themselves. In the facts and circumstances of the case, that was an incorrect approach.

8) Section 22 falling in Chapter IV of the BST provides for registration. Sub-section (1) thereof states that no dealer shall, while being liable to pay tax under section 3 or under sub-section (6) of section 19, carry on business as a dealer, unless he possesses a valid certificate of registration as provided by this Act. Provided that the provisions of this sub-section shall not be

deemed to have been contravened if the dealer having applied for such registration as in this section provided within the prescribed time or, as the case may be, within the period specified in sub-section (6) of section 19, carries on such business. Now, this provision enables registration and of a dealer. The word “dealer” is defined in section 2(11) in the following manner:-

“2(11) “dealer” means any person who whether for commission, remuneration or otherwise carries on business of buying or selling goods in the State, and includes the Central Government, or any State Government which carries on such business, and also any society, club or other association of persons which buys goods from or sells goods to its members;

Exception - (I) - An agriculturist who sells exclusively agricultural produce grown on land cultivated by him personally, shall not be deemed to be a dealer within the meaning of this clause;

Exception - (II) - An educational institution carrying on the activity of manufacturing, buying, selling or supplying goods, in the performance of its functions for achieving its objects shall not be deemed to be a dealer within the meaning of this clause;

Exception - (III) - A transporter holding permit for transport vehicles (including cranes) granted under the Motor Vehicles Act, 1988, which are used or adopted to be used for hire shall not be deemed to be a dealer within the meaning of this clause in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof.

Explanation – For the purposes of this clause -

(i) each of the following persons and bodies who dispose of any goods including goods as unclaimed or confiscated or as unserviceable or as scrap, surplus, old, obsolete or discarded material or waste products whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration, shall, notwithstanding anything contained in clause (5A) or any other provision of this Act, be deemed to be a dealer, to the extent of such disposals, namely:-

- (a) Port trust;*
- (b) Municipal Corporations, and Municipal Councils, and other local authorities;*
- (c) Railway administration as defined under the Indian Railway Act, 1890;*
- (d) Shipping and construction companies;*
- (e) Air transport Companies and Airlines;*
- (f) * * * * **
- (g) Maharashtra State Road Transport Corporation constituted under the Road Transport corporation Act, 1950;*
- (h) Customs Department of the Government of India administering the Customs Act, 1962;*
- (i) Insurance and financial corporations or Companies and Banks included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934);*
- (j) Advertising agencies;*
- (k) Any other corporation, company, body or authority owned or set-up by, or subject to*

administrative control of, the Central Government or any State Government.

(1) Incorporated or unincorporated society, club or other association of persons.

(ii) an auctioneer, who sells or auctions goods belonging to any principal whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or nominee of the principal, shall, notwithstanding anything contained in clause (5A) or any other provisions of this Act, be deemed to be a dealer;

(iii) a factor, broker, commission agent, del credere agent or any other mercantile agent, by whatever name called, who carries on business of buying, selling, supplying or distributing goods belonging to any principal or principals whether disclosed or not, shall, notwithstanding anything contained in clause (5A) or any other provisions of this Act, be deemed to be a dealer.”

9) There is, thus, a definition of this word to mean any person, who whether for commission, remuneration or otherwise carries on business of buying or selling goods in the State, and includes the Central Government, or any State Government which carries on such business, and also any society, club or other association of persons which buys goods from or sells goods to its members. The *Explanation*, which is an *Explanation to* the entire clause specifies the persons and bodies as capable of disposing any goods and to be deemed as a dealer for the purpose

of such disposal. That again specifies incorporated or unincorporated society, club or other association of persons.

10) If any clarity was necessary in the view of the Tribunal, then, it should have referred to other definitions. The other definitions are of the term “person” appearing in section 2(19). The word “person” is an inclusive definition, including any company or association or body of individuals whether incorporated or not, and also a Hindu undivided family, a firm and a local authority. In the broadest and widest sense, therefore, this would include a sole proprietor. The term “registered dealer” is defined in section 2(25) to mean a dealer registered under section 22. Thus, a dealer means a person and a person includes a firm and thus a sole proprietor.

11) Now, the substantive sections and which enable, according to the Tribunal, a revision of the assessment need to be referred. Section 33 has been referred in the Tribunal's order and that reads as under:-

“S. 33. Assessment of taxes. - (1) The amount of tax due from a dealer liable to pay tax shall be assessed separately for each year during which he so liable:

Provided that, the Commissioner may, subject to such conditions as may be prescribed and for reasons to be recorded in writing, assess the tax due from any dealer during a part of a year:

Provided further that, when a Registered dealer fails to furnish any return relating to any period of any year, by the prescribed date, the Commissioner may, if he thinks fit, assess the tax due from such dealer separately for different parts of such year.

(2) If the Commissioner is satisfied that the returns furnished by a Registered dealer in respect of any period are correct and complete, he shall assess the amount of tax due from the dealer on the basis of such returns.

Provided that where a notice under sub-section (5) has been issued or served on the dealer on the ground that returns in respect of any period ending on or before the 31st March, 1995 have not been filed by him and if the dealer proves to the satisfaction of the Commissioner that he has filed such returns on or before the 30th June 1995 and furnishes copies thereof, then, notwithstanding anything contained in the said notice, the Commissioner may, if he is satisfied that such returns are correct and complete, assess the amount of tax due from the dealer on the basis of such returns.

(3) If the Commissioner is not satisfied that the returns furnished by a Registered dealer in respect of any period are correct and complete, and he thinks it, necessary to require the presence of the dealer or the production of further evidence, he shall serve on such dealer in the prescribed manner a notice requiring him on a date and at a place specified therein, either to attend and produce or cause to be produced all evidence on which such dealer relies in support of his returns, or to produce such evidence as is specified in the notice.

On the date specified in the notice, or as soon as maybe thereafter the Commissioner shall, after considering all the evidence which may be produced, assess the amount of tax due from the dealer.

(4) If a Registered dealer fails to comply with the terms of any notice issued under sub-section (3), the Commissioner shall assess, to the best of his judgment, the amount of tax due from him.

(4A) Where all the returns are filed by a Registered dealer for any year ending on or after the notified day within six months from the end of the year to which such returns relate, no order of assessment under sub-section (3) of (4) in respect of that year shall be made after the expiry of three years from the end of the said year; and if for any reason such order is not made within the period aforesaid, then, the returns so filed shall be deemed to have been accepted as correct and complete for assessing the tax due from such dealer.

Explanation I. - In the case of returns pertaining to the years ending prior to the notified day and filed on or before the notified day or on or before any such other date thereafter as the State Government may by notification in the Official Gazette specify in that behalf, the period of three years shall be computed from the notified day.

Explanation II. - In the case of returns filed by a registered dealer referred to in sub-clause (b) of clause (37) of section 2 and who has not opted for the financial year, the period of three years shall be computed from the end of the financial year in which the year, by reference to which the accounts of that dealer are maintained in his books, ends:

Provided that, where a fresh assessment has to be made to give effect to any finding or direction contained in any order made under this Act or any earlier law, or to any order of the Tribunal or the High Court or the Supreme Court, such assessment shall be made within thirty-six months from the date of communication to the commissioner of such finding, direction or order, as the case may be:

Provided further that , in computing any period of limitation laid down in this section, the time during which the assessment remained stayed under the order of the Tribunal or of the High Court or of the Supreme Court shall stand excluded:

Provided also that, the Commissioner may, in the interest of the revenue or at the instance of the dealer, issue directions not to proceed with the assessment of any particular dealers or class of dealers or any particular period, if such assessment involves a decision on a point which is concluded against the State by a judgment of the tribunal or the High Court and the State Government, or the Commissioner has initiated any proceedings against such judgment before an appropriated forum. As soon as may be after the final conclusion of such proceedings or, as the case may be, after recording the reasons therefor in writing, the Commissioner may, at any time, revoke such directions.

(4B) Notwithstanding anything contained in this section, the assessment shall be completed within a period of eighteen months from the date of such order of revocation as referred to in the third proviso to sub-section (4A) and the period of limitation laid down in this section shall be deemed to be modified accordingly.

(4C) Notwithstanding anything contained in this section or any other provisions of this Act, where the assessment involves a decision on the point which is concluded against the State by a judgment of the Tribunal and the State Government or the Commissioner has initiated any proceedings against such judgment before an appropriate forum, then the Commissioner may complete the assessment as if the point was not so decided against the State, but shall stay the recovery of such of the dues including interest and penalty, if any, in so far as they relate to such point, until the decision by the appropriate forum and after such decision modify the assessment order, if found necessary.

(5) If a Registered dealer does not furnish returns in respect of any period by the prescribed date, the Commissioner shall, at any time, within eight years from the end of the year in which such period occurs, after giving the dealer a reasonable opportunity of being heard, proceed to assess to the best of his judgment, the amount of tax (if any) due from him.

(6) If the Commissioner has reason to believe that a dealer is liable to pay tax in respect of any period, but has failed to apply for registration or failed to apply for registration within time as required by section 22, the Commissioner shall at any time within eight years from the end of the year in which such period occurs, after giving the dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment, the amount of tax (if any) due from the dealer in respect of that period, and any period or periods subsequent thereto.

(6A) Notwithstanding the foregoing provisions of this section, where the Commissioner is not satisfied about the correctness or the completeness of the accounts of a dealer, or where no method of accounting has been regularly employed by a dealer, the Commissioner may, after giving the dealer a reasonable opportunity of being heard, assess to the best of his judgment, the amount of tax (if any) due from him.

(6B) If, during the course of any proceedings under section 49, in case of any dealer or person, the Commissioner, on the basis of evidence available to him, is of the opinion that tax is sought to be evaded in respect of any period by not recording or recording in an incorrect manner, any transaction of sale or transaction of purchase, or that any deduction has been incorrectly claimed on any transaction, then, notwithstanding that any notice for assessment has been issued under other provisions of this section, the Commissioner may, after giving the dealer or the person a reasonable opportunity of being heard, proceed to assess, without prejudice to any assessment which may be made in respect of the said period under other provisions of this section, to the best of his judgment, the amount of tax, if any, due from him on such transaction:

Provided that tax on such transaction and penalty and interest, if any, consequent upon such tax, will not be levied or demanded when the dealer or person is assessed to tax under the other provisions of this section in respect of the same period.

(7) Any assessment made under this section shall be without prejudice to any penalty or liability to pay interest, or prosecution for an offence, under this Act."

12) Section 33 enables assessment of taxes and that is due from a dealer liable to pay tax. We are concerned in this case with sub-section (6). A bare perusal of sub-section (6) would indicate as to how if the Commissioner has reason to believe that a dealer is liable to pay tax in respect of any period, but has failed to apply for registration or failed to apply for registration within time as required by section 22, the Commissioner shall at any time within eight years from the end of the year in which such period occurs, after giving the dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment, the amount of tax (if any) due from the dealer in respect of that period, and any period or periods subsequent thereto.

13) We do not see how within the meaning of sub-section (1) of section 33 and in the light of the above clear legal provisions, a sole proprietor/dealer cannot be brought to tax. If he can be brought to tax and his income assessed on the basis of the transactions of sale and purchase of goods undertaken by him/her and that section also enables the Commissioner to carry on best judgment assessment, then, merely because the notice under sub-section (6) addressed and sent to the dealer is in the

trade name and not the sole proprietress that would not be fatal. The Tribunal has referred, in this case, to the definitions and which, according to it, are relevant. We have reproduced that paragraph of the Tribunal's order and which requires a registered dealer to furnish returns and if non filing of returns and non registration of a dealer enable the Commissioner to carry out best judgment assessment, that any notice being addressed and sent in the above manner would be an illegality and of such nature as to be termed as incurable. The Tribunal's opinion is that this is an incurable defect and not a mere irregularity. The Tribunal has declared the assessment to be non-est. Pertinently, the Tribunal notes that the dealer has not challenged the assessment notice and the assessment orders. Yet, the Tribunal declares them as above.

14) We are unable to agree with the Tribunal, for, both sub-sections contemplate giving the dealer reasonable opportunity of being heard. That, according to the Tribunal, upon a notice under Rules 32 and 33 being served. Rules 32 and 33 of the Bombay Sales Tax Rules, 1959 read as under:-

“R. 32. Assessment of tax. - The notice required by sub-section (3) of section 33 shall be in form 27 and the date fixed for compliance therewith shall not be earlier than fifteen days from the date of service thereof.

R. 33. Notice under sub-section (5) and (6) of section 33. - The Commissioner shall before proceeding to assess the dealer to tax under sub-section (5) or (6) of section 33 call upon him by a notice in Form 27 to show cause as to why he should not be assessed. The date for compliance with the notice shall not be earlier than fifteen days from the date of service thereof.”

15) Both these Rules contemplate a notice required by section 33(3) and that ought to be in Form 27. Rule 33 says that the Commissioner shall, before proceeding to assess the dealer to tax under sub-section (5) or (6) of section 33 call upon him by a notice in Form 27 to show cause as to why he should not be assessed. The date for compliance with the notice shall not be earlier than 15 days from the date of service thereof. Form 27 is referable to Rules 32 and 33 and sets out the format of the notice. We have carefully perused the Rules and the Form so also the contents thereof. We do not think that description by the trade name is a contravention of these Rules or the Form. Eventually, procedural rules and matters of Form cannot be elevated to such a status and position as would make every part or prescription thereof mandatory and incapable of substantial compliance. Such provisions do not mandate strict compliance and are capable of substantial compliance. It cannot be that the trade name is mentioned and not that of the sole proprietor or proprietress that

the proceedings can be flawed to such an extent as to term them as incurable. This is not a fundamental flaw or defect going to the root of the case. It will have to be established and proved that there is a prejudice or miscarriage of justice. Merely because the trade name been incorporated or inserted in the notice does not mean that the dealer was prevented from contesting the proceedings or the exercise carried out by the commissioner under sub-sections (5) or (6) of section 33. Eventually, the dealer must be put to notice. The form is not mandatory and the requirement of notice may be such. Therefore, absence of notice by such mis-description would have to be established and proved by the dealer, else it cannot be said that the proceedings suffer from a fundamental or incurable defect and therefore non-est. The proceedings and the orders therein cannot be termed as *void ab initio* or null from inception. The orders also cannot be termed as null and void given the nature of the defect alleged. In such circumstances, the Tribunal was in error in allowing the Second Appeals on this ground alone. The Tribunal's order overlooks the fact that a sole proprietorship is a business in which one person owns all the assets, owns all the liabilities and operates in his or her personal capacity. In a sense it is a non-company business owned by one person. Therefore, a notice addressed to the sole proprietary firm can be in a trade name or in the name of the sole

proprietor but merely because it is addressed in the former name does not mean that no notice was issued. The Tribunal has gone by the form and missed the substance. In the case *Bhagabandas Agarwalla vs. Bhagwandas Kanu and Ors.*¹ in the context of a notice to quit under section 106 of the Transfer of property Act, 1882, the Hon'ble Supreme Court explained the rule of construction thus:-

“3. Now, it is settled law that a notice to quit must be construed not with a desire to find faults in it, which would render it defective, but it must be construed ut res magis valeat quam pereat. “The validity of a notice to quit” as pointed out by Lord Justice Lindley, L. J. in Side-botham v. Holland, (1895) 1 QB 378 “ought not to turn on the splitting of a straw”. It must not be read in a hyper-critical manner, nor must its interpretation be affected by pedagogic pendantism or over refined subtlety, but it must be construed in a common sense way. See Harihar Banerji v. Ramsashi Roy, 45 Ind App 222 = (AIR 1918 PC 102). The notice to quit in the present case must be judged for its validity in the light of this well recognised principle of interpretation.”

16) In reaching the conclusion as above, the Tribunal referred a Division Bench judgment of this Court in the case of *Shankar Dhawan and Ors. vs. Sales Tax Officer, Circle II, Nagpur and Anr.*². Certain persons, against whom recovery of arrears of

¹ AIR 1977 SC 1120

² XV STC 292

sales tax was sought to be made under the C. P. Bearer Sales Tax Act, 1947, filed a writ petition alleging that late Basantlal Ramsaran Dhawan was doing business at Nagpur under the name and style "Laxmi Stores, Residency road, Sadar, Nagpur". He was registered dealer for the purpose of sales tax. He passed away on 28th January, 1959. Yet, without any notice being issued, an assessment was made for the period 1st January, 1958 to 31st December, 1958 and Laxmi Stores was made liable to pay sales tax and penalty. Yet, for further period from 1st January, 1959 to 14th May, 1959 this business was assessed to tax and even a penalty was levied. The Division Bench noticed that part of the later period is after the death of Basantlal on 28th January, 1959. The most salient feature of the case was that the entire process commenced and concluded after the death of Basantlal and orders assessing the business to tax were passed on 5th December, 1960. That is much after the death of Basantlal. It is in these circumstances that the Division Bench concluded that not only the notice is illegal but the entire proceedings have to be quashed and set aside for, what the Commissioner sought to do was to proceed by issuing a notice only in the trade name. It is in this context that the Division Bench held that Laxmi Stores was merely a trade name of an individual and it was not by any means a person within the meaning of the law. The person involved was

late Basantlal. M/s. Laxmi Stores cannot be said to be a person. It is that fundamental fact which had not been properly grasped and that is why the Division Bench concluded that the notice in the name of Laxmi Stores cannot be the basis for initiation of the proceedings and therefore, the entire proceedings deserve to be quashed.

17) The Tribunal should have noted the basic facts in this case the context and the backdrop in which the Division Bench concluded that the notice issued under the trade name would not suffice. Pertinently, the Division Bench does not hold that the sole proprietor or the business carried out by sole proprietor is incapable of being brought to tax nor does it hold that the sole proprietor cannot be termed as a dealer though carrying on business of buying and selling of goods. The Division Bench does not hold, as in the instant case, that the definition of the term “person” will not include or take within its import a sole proprietor or a sole proprietary business. The notice ought to be and is to the sole proprietor. Its contents or any alleged misdescription or absence of particulars therein was not an issue in the case of *Shankar Dhawan* (supra) at all. That was a case of no notice and not a defective notice. The reliance by the Tribunal on the Division Bench was thus entirely misplaced. It could not

have reached the conclusion that it reached on the basis of the Division Bench judgment.

18) As a result of the above discussion, we answer the question referred for opinion of this court in favour of the Revenue and against the dealer. However, the appeals of the dealer have not been decided by taking into consideration his other grounds raised therein. The Tribunal has allowed the appeals only on one ground and by holding that the orders of the Commissioner are without jurisdiction.

19) It would be, therefore, in the interest of justice that the Second Appeals are restored to the file of the Tribunal for decision on other points and in accordance with law. We clarify that we have expressed no opinion on the other contentions. Reference is answered accordingly.

(A.A.SAYED, J.)

(S.C.DHARMADHIKARI, J.)