IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.06.2016

C O R A M

THE HON'BLE Mr.JUSTICE T.S.SIVAGNANAM

W.P.No.14242 of 2016
and
WMP.Nos.12442 and 16588 of 2016

Preethi Kitchen Appliances (P) Ltd.,
(Represented by its Senior Manager
Sahubar Shathik),
Futura Tech Park, 4th Floor, Q4 Block,
Door No.334, Rajiv Gandhi Salai,
O.M.Road, Sholinganallur,
Chennai - 600 019. ... Petitioner

Vs

Assistant Commissioner (CT)
Sholinganallur Assessment Circle,
Plot No.141, 1st Main Road,
Burma Colony, Perungudi,
Chennai - 600 096. ... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari calling for the records on the files of the respondent herein in TIN.33670927237/2011-12, dated 11.03.2016 quashing the same, in so far as it relates to levy of purchase tax under Section 12 on the alleged purchase of goodwill and brand at the rate of 4%, being tax demand of Rs.23,06,40,000/- and reversal of input tax credit of Rs.94,03,130/-.

For petitioner ... Mr.N.SriPrakash & N.Prasad

For respondent ... Mr.Manokaran Sundaram
Additional Government Pleader

ORDER

The petitioner, a registered dealer under the provisions of the Tamil Nadu Value Added Tax Act, 2006 on the file of the respondent, has filed this writ petition challenging the order of revision of assessment for the year 2011-2012 done by the respondent by order dated 11.03.2016.

2.Though there are several issues involved in the order of assessment, the challenge in this proceedings is only relating to two viz., [i] reversal of ITC on account of cross verification of Annexure - I of the buyer with that of Annexure - II of the seller of other end Rs.94,03,130/- and [ii] regarding levy of tax on intellectual property purchased and used. The above two issues have been dealt with by the respondent in the impugned order as D.No.2 and D.No.3 of the order. With regard to the other issues, it is left open to the petitioner to workout their remedies under the Act.

3.The petitioner was issued a show cause notice dated 31.03.2015 which emanated out of an inspection of the place of business of the petitioner by the Enforcement Officials on 20.01.2015. It was stated in the notice that on verification of the Balance Sheet and Slump Sales Agreement, it was noticed that the petitioner had purchased assets and liabilities of M/s.Maya Appliances Private Limited and thereby Goodwill and Intellectual Property-Brand Name "Preethi and Preet" and purchased for a valuable consideration of Rs.2,85,30,00,000/- and Rs,2,91,30,00,000/- respectively shown in the Balance Sheet for the year 2011-12 as 'addition'. The Assessing Authority opined that the Goodwill and Intellectual property being used are nothing but intangible goods liable to tax at 4%. Further, he stated that in terms of Section 12 of the Act, every registered dealer who in the course of business purchases from a registered dealer or any other person, any goods in circumstances in which no tax is payable by that registered dealer on the sale price of such goods under the Act and either consumes or uses such goods in or for the manufacture of other goods for sale or otherwise is liable to pay tax on the purchase at the rate specified in the schedule to the Act. It is further opined that in the case of the petitioner, the purchase of the Goodwill and Intellectual property was made without payment of tax and are being used to manufacture and sale of the goods by M/s.Preethi Kitchen Appliances Pvt. Ltd., from the date of acquisition of business. Therefore, the respondent proposed that the purchase turnover of Goodwill and Intellectual property is liable at 4% under Section 12 of the Act.

4.With regard to issue No.2 regarding the reversal of ITC on account of cross verification of Annexure I of the seller, the authority stated that the bills for the turnover of Rs.25,65,486/- has not been produced for which the tax implication is Rs.10,300/- and proposed reversal of the amount of Rs.94,03,130/-. With regard to issue No.3, i.e., D.No.3 in the impugned order, the petitioner in their reply dated 25.08.2015 stated that they entered into business transfer agreement and referred to Clause 2.1.1 and Clause 2.2 of the agreement and submitted that the subject matter of transfer is the business as a whole; the contract is for transfer of business; there is no conduct of sale for any asset or goods. The attention of the respondent was invited to the definition of turnover as defined under Section 2(41) of the Act and stated that any amount realised by a dealer by way of sale of his business as a whole, shall not be included in the turnover. To support their contention, the petitioner referred to the decisions in the case of (i) Deputy Commissioner (CT) Vs. K.Behanan Thomas, 39 STC 325 (Mad); (ii) Monsanto Chemicals of India Vs. The State of Tamil Nadu, 51 STC 278; (iii) Eicher Motor Limited - TC (R) 49/13 dated 06.11.2013. Further, it was stated that for the purpose of valuation, a certain value is indicated in the books as value of 'goodwill' and 'brand'. However, the contract remains one for transfer of business as a whole. The decision in the case of Coromandel Fertilizers Limited V. State of A.P., 112 STC page 1 was relied on to support their contention that merely because the schedule to the business transfer agreement set out a value for the purpose of valuation, it does not mean that the sale is in respect that asset which is valued. But the sale continues to be one of business. Therefore, it was submitted that Section 12 of the Act would have no application. Without prejudice to the said submission, it was stated that even assuming Section 12 stood applicable, goodwill or brand cannot be stated to be consumed or used in manufacture and they are not inputs for manufacturing activity. Reference was also made to the decision of the Hon'ble Supreme Court in Rustom Cavasjee Cooper V. Union of India, AIR 1970 SC 564 for their contention that a business is not goods. With the above submission, the petitioner requested to drop further proceedings, pursuant to the show cause notice.

5.So far as the issue No.2 is concerned, a detailed explanation was submitted and the decisions in the case of (i) Sri Vinayaga Agencies V. Assistant Commissioner, Vadapalani Assessment Circle, Chennai and another, 60 VST 283; (ii) Infinity Wholesale Ltd., W.P.No.9265/2013 dated 06.11.2014; (iii) Tulsyan NEC - W.P.No.21453/08 dated 09.01.2015, were referred to and they requested the proceedings be dropped.

6.That apart, a representation was sent on 11.03.2016 stating that calling upon the petitioner to produce the purchase invoices all of a sudden is a herculean task and they have requested the authority to grant 15 days time to produce those records. In the light of the stand taken by the respondent with regard to issue No.3 relating to the levy of tax on intellectual property, the authority was bound to consider as to whether the transaction was one of transfer of the business as of whole at this being a specific case of the petitioner. The decision in the case of Deputy Commissioner CT, Coimbatore V. K.Behanan Thomas, 39 STC 325, has pointed out that when the assessee sold the branch as of whole, consequent on which the branch itself was closed thereafter, the sale proceeds in question would not be taken as a part of the turnover. Further, it was pointed out that the sale of stock-in-trade for the purposes of closing down the business is different from the sale of the business as a whole as running concern; the sale of business, lock, stock and barrel, was not incidental or ancillary to the carrying on of a business so as to be taxable under the Act. This decision was followed by the Division Bench in the case of Eicher Motors Limited, Thiruvotriyur High Road, Chennai - 600 019 V. The State of Tamil Nadu, Rep. By the Assistant Commissioner (CT) Zone VII, Chennai, Tax Case (Revision) No.49 of 2013 dated 06.11.2013, wherein, in paragraph 15 & 16, it was held as follows:

> "15. In contrast to this is the decision reported in 39 STC 325 (Deputy Commissioner CT, Coimbatore Vs. K.Behanan Thomas), we find the facts therein was that the assessee sold the branch at Ooty as a whole, consequent on which the Branch itself was closed thereafterwards. Thus, on the closure of a branch by sale thereof as a running concern, this Court held that the sale proceeds in question could not be taken as a part of the turnover, consequently, the question of denying the exemption to the assessee did not arise. This Court pointed out that the sale of stock-in-trade for the purposes of closing down the business is different from the sale of the business as a whole as running concern; the sale of the business, lock, stock and barrel, was not incidental or ancillary to the carrying on of a business so as to be taxable under the Act. Thus, this Court held that the transaction in question would not fall within the scope of the Act at all, consequently, the sale proceeds would not form part of the turnover as defined under the Act. This Court further pointed out that when there was a transfer of the business as a whole or as a going concern, in both the cases, there would be transfers of certain materials. However, when it is a composite sale, the question of bifurcating certain turnover as related to the goods sold for the purposes of assessability did not arise. Pointing out to the distinction arising in the case reported in (1977) 39 S.T.C. 317 in the case of State of Tamil Nadu Vs Thermo Electrics, this Court pointed out that where the assessee retained certain assets and continued the business as a

whole, the assessee could not claim the benefit of exemption under the provisions of the Act.

16. The decision reported in 39 STC 325 in the case of Deputy Commissioner (C.T.) Coimbatore Vs. K.Behanan Thomas once again came up for consideration in the decision reported in 51 STC 278 in the case of Monsanto Chemicals of India Ltd., (P) Limited Vs. The State of Tamil Nadu, wherein, this Court pointed out that where under the agreement, the assessee sold to another company certain lines of business as a whole, the question of inclusion of the consideration into turnover of the assessee as incidental or ancillary to the carrying on business did not arise. This Court pointed out that a person may carry on several lines of business and each line of business would be a unit of business by itself; if there is a sale of that unit of the business as a whole, then the assessee would not be liable to be taxed either on the general principle that there is no sale in the course of business, since closure of a line of business could not be incidental or ancillary to its carrying on or on the alternative basis of application of Rule 6 (d) of Tamil Nadu General Sales Tax Rules, 1959. Thus, on facts once again, this Court held that the assessee was eligible for exemption in respect of the turnover."

7.Therefore, the respondent was required to examine that the said issue, peruse the business transfer agreement and if necessary call for other records to find out as to whether it was the case of transfer of business as a whole. However, on a perusal of the impugned proceedings, it is evidently clear that such exercise has not been done. Therefore, the necessarily the finding recorded by the respondent so far as the finding in D.No.3 requires to be set aside and remanded for fresh consideration. With regard to finding in D.No.2 is concerned, once again it appears that there was no sufficient opportunity granted to the petitioner, since after the receipt of the notice dated 29.01.2016 the petitioner sought for time atleast of 15 days and this has not been either accepted or rejected. Further, the petitioner, in their reply to the show cause notice, had referred to the decision of this Court in the case of Sri Vinayaga Agencies, Infinity Wholesale Ltd., and Tulsyan NEC (referred supra) and necessarily the respondent had to consider the effect of those decisions on the facts of the case. Therefore, the finding rendered in D.No.2 of the impugned order also calls for interference and remitted for fresh consideration.

8.Accordingly, the Writ Petition is allowed and the finding recorded by the impugned order at D.No.2 and D.No.3 alone are set aside and the matter is remanded to the respondent for fresh hearing and disposal. The respondent shall afford an opportunity of personal hearing to the petitioner, in which the petitioner is permitted to place all documents and after hearing the petitioner, the respondent is directed to take fresh decision on merits and in accordance with law. With regard to the decision on the other issues as set out in the impugned order, it is open to the petitioner to work out their remedies available to them under the Act, if so advised. No costs. Consequently, connected Miscellaneous Petitions are closed.

-s/d-
Assistant Registrar(CSIII)

True Copy

Sub-Assistant Registrar

sgl
To
Assistant Commissioner (CT)
Sholinganallur Assessment Circle,
Plot No.141, 1st Main Road,
Burma Colony, Perungudi,
Chennai - 600 096.

+1 cc to Special Government Pleader(Taxes)sr.29933
+1 cc to N.Inbarajan Advocate sr.29889

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