IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 28.06.2016

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.21511 of 2016 &
W.M.P.No.18384 of 2016

LEPL Projects Limited
rep. By its General Manager-Finance & Accounts
Shri Balineri Kishorebabu

[PETITIONER]

Vs

The Commercial Tax Officer
Dharapuram Assessment Circle
Dharapuram.

[RESPONDENT]

PRAYER:

Petition filed under Article 226 of The Constitution of India praying for issuance of writ of certiorari to call for the records on the files of the respondent herein Asst.No.33321925371/2013-2014 dated 17.5.2016 received on28.05.2016and quashing the same.

For Petitioner : Mr.N.Prasad

For Respondents : Mr.Manokaran Sundaram
Addl.Government Pleader

O R D E R

Heard Mr.N.Prasad, learned Counsel appearing for the petitioner and Mr.Manokaran Sundaram, learned Additional Government Pleader appearing on behalf of the respondent and with the consent of learned counsel appearing on either side, the writ petition itself is taken up for final disposal.

2.The petitioner is a registered dealer with the respondent under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act). The challenge in this Writ Petition is to an order of assessment dated 17.05.2016, for the assessment year 2013-14. The respondent issued a notice on 15.06.2015, stating that the petitioner has produced Wind Electrical Energy, sold the same to Tamil Nadu Electricity Board and claimed exemption and on verification of Form WW

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along with the Trading Profit and Loss Account of the petitioner's business for the year 2013-14, certain discrepancies were found. Further, it was stated that the petitioner has sold the Wind Mill during the year 2013-14 and not disclosed sale of Wind Mill in the Returns and paid the tax and the sale value of the Wind Mill was assessed and tax was proposed to be assessed at 5% on the said sale value.

3.The petitioner submitted their objections on 19.06.2015, stating that sale of Wind Mill was a 'slump sale' and hence the question of treating the same as a transfer and levying tax does not arise. Apart from that various other factual issues were also pointed out, by relying upon the decisions of the Hon'ble Supreme Court.

4.The petitioner enclosed the copies of the Business Transfer Agreement for transfer of Wind Division to another Company by agreement dated 24.03.2014. On receipt of the said Agreement another notice was issued by the Assessing Officer on 07.12.2015, wherein the respondent has referred to the stand taken by the petitioner that sale of Wind Mill as 'Slump Sale' and after verifying eight copies of sale deeds produced, pointed out that the petitioner has not paid any Stamp Duty for the value of the Wind Mill and they have paid the amount towards Stamp Duty only for the land value and therefore there is nothing to show that the Wind Mill has been sold.

5.Accordingly, one more opportunity was granted to the petitioner to submit their objections. The petitioner submitted their objections and enclosed all the details and reiterated that the sale of Wind Mill was a 'slump sale'. The petitioner also referred to the clarification issued by the Inspector General of Registration dated 19.11.2008, stating that there is no Stamp Duty levyable in respect of the Wind Mill. Inspite of having taken such a stand in their reply dated 28.01.2016, the respondent proceeded to reject the petitioner's contention holding that the dealers have not produced proof for disposal of the Wind Mill.

6.In my view, the Assessing Officer has misdirected himself in not properly appreciating the scope of the documents produced by the petitioner. The petitioner's case is that the sale of Wind Mill is a 'slump sale' based on the Business Transfer Agreement dated 24.3.2014. Therefore, the Assessing Officer has to consider the entire agreement which contains various Schedules and in Schedule No.4 of the agreement, the list of immovable properties have been shown. Similarly, in Schedule-5, the list of Wind Mills have been shown. This Business Transfer Agreement read with Sale Deeds as well as other records would show that the entire establishment has been transferred as such. If that be the case, the petitioner's contention ought to have been accepted.

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7.In VTX INDUSTRIES LTD., v. THE ASSISTANT COMMISSIONER (CT), POLLACHI [W.P.No.25953 of 2014 dt.27.10.2014], I had an occasion to consider the somewhat similar issue, as to whether the business has been sold as a Division or the business has been sold as a whole. At this stage, it would be beneficial to refer to the relevant portions of the order, which reads as follows:

> "4. An identical question came up for consideration before the Division Bench of this Court in which I was a party, in the case of Eicher Motors Limited Vs. The State of Tamil Nadu represented by the Assistant Commissioner (CT), Tax Case (Revision) No.49/13. In the said tax case, the following 3 questions of law were framed for consideration:-
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> > " 1. Whether in the facts and circumstances of the case, the Hon'ble Sales Tax Appellate Tribunal committed an error of law in denying the claim of exemption made by the petitioners under Explanation 3 to Section 2(r) of the Tamil Nadu General Sales Tax Act, 1959 in respect of the transfer of the Genset business, the light engineering component business and the agro engine business made by the petitioners to M/s.Greaves Limited under Business Transfer Agreement dated 15.12.1993 ?
> >
> > 2. Whether the Hon'ble Sales Tax Appellate Tribunal committed an error of law in applying the erroneous, legal test of requiring transfer of all businesses of an assessee as the only circumstance in which there could be exemption under Explanation 3 to Section 2(r) of the Tamil Nadu General Sales Tax Act, 1959 ?
> >
> > 3. Whether the Hon'ble Sales Tax Appellate Tribunal committed an error of law in emphasizing on the retention of a small part of the assets in the course of business succession, while failing to apply the correct legal test, which was to determine whether the retention of the small part of the assets was to continue in the same line of business or was being retained so as not to burden the Transferee of the business?"
>
> The Division Bench, while considering the said question held as follows :-
>
> > "14. We agree with the above submission of learned counsel appearing for the assessee. At the outset, the view of the Sales Tax Appellate Tribunal based on the decision reported in 7 STC 740 in the case of Tools and Machineries

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Ltd., Vs. State of Madras, clearly shows the incorrect approach to the case on hand which is distinguishable from the reported decision. A reading of the decision reported in 7 STC 740 (cited supra) shows that what was contemplated in the decision reported in 7 STC 740 in the case of Tools and Machineries Ltd., Vs. State of Madras was sale of entire stock in trade and the assessee continued to be in business and retained certain assets of the business. In that context the decision was made holding that the sale of stock could not be taken as the sale of the entire business. On the facts, thus, projected, this Court pointed out that the sale of the entire stock-in-trade as such could not be treated as sale of business in entirety. Thus, when the assessee continued to be in business and retained business in those units, the question of exclusion of turnover relating to stock in trade does not arise.

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.

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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.

17. In the decision reported in 112 STC 01 in the case of Coromandal Fertilisers Limits Vs. State of A.P., the Full Bench of the Andhra Pradesh High Court considered a similar question and once again reiterated the law laid down by this Court in the decision reported in 39 STC 325 in the case of Deputy Commissioner (C.T.) Coimbatore Vs. K.Behanan Thomas. The case dealt with by the Andhra Pradesh High Court was similar to the case on hand. The Full Bench of the Andhra Pradesh High Court pointed out that when the division of a company, which is operationally and functionally independent for all practical purposes, could not be treated as a transaction

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in connection with or incidental to running of another independent unit of the company, the transaction relating to the transfer of said business had to be treated as sale of the business as a whole; when there was complete cessation of the business activity in relation to one line of manufacture, then the turnover pertaining to the said line of business could not be included in the turnover of the assessee. ”

The petitioner has raised the above contention before the Assessing Officer, while submitting his reply to the notice dated 31.12.2013 and produced the copy of the decision. However, the Assessing Officer did not consider the same. Though the Assessing Officer did not consider the case of Eicher Motors Limited, reliance was placed on the decision of this Court in the case of The Deputy Commissioner of Commercial Taxes vs. K. Behannan Thomas reported in 1977 (039) STC 325 (MADRAS). In the light of the above decision, even the transfer of one line of business of the petitioner, namely, windmill division amounts to transfer of business as a whole. The transfer of business as a whole is precisely an interpretation given by the Division Bench in the case of Eicher Motors Limited. Therefore, the observation made by the Assessing Officer to that extent, call for interference.

5. Accordingly, the Writ Petition is allowed to the extent mentioned above and the impugned order of Assessment, assessing the Wind Mill Disposal value of Rs.33,32,96,827/- at 4% alone, is set aside. In respect of other demands, it is open to the petitioner to pursue the matter before the competent authority provided under the Act. Consequently, the connected M.Ps are closed. No order as to costs.”

8.The above referred decision clearly shows as to how the Assessing Officer has to consider the matter and complete the assessment. Since the respondent has not done so, the assessment requires to be redone, for which purpose, this Court deems it appropriate to remand the matter for fresh consideration. Furthermore, it is not known as to how the penalty is leviable. Therefore, this Court while quashing the impugned order, remand the matter to the respondent for fresh consideration only with regard to the determination of taxable turnover by taking into consideration the law laid down in the above referred decision. So far as the levy of penalty is concerned, the same is quashed. Accordingly, the respondent is directed to redo the assessment in terms of the above direction.

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The Writ Petition is allowed on the above terms. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

Rpa

To
The Commercial Tax Officer
Dharapuram Assessment Circle
Dharapuram.

1 cc to M/s.N.Inbarajan, Advocate, sr.36175
1 cc to Special Government Pleader, (Taxes), sr.36202

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