

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.07.2016

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.5540 of 2015
and M.P.No.1 of 2015

Witmer Enterprises Pvt. Ltd.,
Represented by its Director Ms.C.R.Hymavathy
Flat No.B1, No.6, Indus Nirvana Apartments,
Venus Colony II Street,
Alwarpet, Chennai - 600 018. ... Petitioner

Vs

- 1.The Assistant Commissioner (CT),
Mylapore Assessment Circle,
No.46, Greenways Road,
Chennai - 600 028.
- 2.Butterfly Gandhimathi Appliances Ltd.,
No.143, Pudupakkam Village,
Vandalur Kelambakkam Road,
Pudupakkam,
Kancheepuram District - 603 103.
- 3.The Assistant Commissioner (CT),
Amaindakarai Assessment Circle,
Chennai - 600 006. ... Respondents

Writ Petition filed under Article 226 of the
Constitution of India, praying to issue a Writ of Certiorari, to
call for the records relating to the order in Rc.1231/2014/
(2012-13) dated 09.01.2015 passed by the respondent, quash the
same as arbitrary and illegal.

For Petitioner : Mr.Joseph Prabakar

For Respondents

R1 & R3 : Mr.S.Kanmani Annamalai
Additional Government Pleader (Taxes)

ORDER

Heard Mr. Joseph Prabakar, learned counsel appearing for the petitioner and Mr. S. Kanmani Annamalai, learned Additional Government Pleader (Taxes) appearing for the respondents 1 and 3 and with their consent, the writ petition is taken up for disposal.

2. The petitioner has challenged the order passed by the first respondent dated 09.01.2015 which is an assessment order for the year 2012-2013 on several grounds and also on the ground that the assessment had been finalized without affording an opportunity of personal hearing. The place of business of the petitioner was inspected by the Enforcement Officers on 11.03.2014 and it was stated that on verification of the records it was noticed that the petitioner has sold the project to M/s. Butterfly Gandhimathi Appliances Private Limited on 21.06.2012 during the year 2012-12. The balance sheet for the relevant year was referred to, which shows deletion of certain items, namely, Electrical equipments, Fire fighting equipments and furniture and fittings. Therefore, it was proposed to levy tax at 14.5% on the entire turnover of Rs. 2,29,22,015.00 since the petitioner has not furnished break-up details for the sale of furniture and fittings. The petitioner submitted their reply stating that the sale of immovable property as a whole along with its fixtures were included in the deletion shown in their balance sheet and it is clear from the balance sheet that for the year 2012-2013 the main source of their income is only building rental on lease and this aspect has not been verified and considered before issuing the pre-assessment notice. Further, the petitioner's specific stand was that they have disposed of immovable properties together with movable assets as a whole to M/s. Butterfly Gandhimathi Appliances Private Limited. The petitioner also placed reliance on the decision of this Court in the case of Arulmigu Dandyuthapani Swami Tirukovil vs. Commercial Tax Officer reported in 108 STC 114 (Madras). The first respondent, however, did not afford an opportunity of personal hearing to the petitioner but completed the assessment and confirmed the proposal stating that the petitioner has disposed of the electrical equipments, fire fighting equipments and furniture and fittings along with the immovable properties sold by them and they have realized sale proceeds on the disposal of the movable properties which falls within the definition of sale as found in Section 2(33) of the TNVAT Act, 2006. Therefore, they have to pay tax at 14.5%.

3. The petitioner's case is that the entire property along with all the movables were sold as a whole and it is a slump sale. Further, the petitioner's contention is that the first respondent has conveniently omitted to note the sale of land and

building which was also shown in the very balance sheet of the petitioner for the year 2012-2013 and if one takes a holistic look at the balance sheet, then it will be amply clear that the petitioner had sold the entire business as a whole. The manner in which the authorities have to consider as to whether the claim of the dealer/assessee is correct when they take a stand that they have sold the business as a whole had come up for consideration on several occasions and I had an occasion to consider this aspect in VTX Industries Ltd., vs. The Assistant Commissioner (CT), Pollachi (W.P.No.25953 of 2014 dated 27.10.2014) and at this stage, it would be relevant to refer the operative portion 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:-

" 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 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. 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 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. "

4.The above being the legal position the first respondent has to examine the aspect as pointed out in the aforementioned decisions. However, the impugned order has been passed in a cryptic manner, that too, without affording an opportunity of personal hearing.

5.In the light of the above, the writ petition is allowed and the impugned order is quashed and the matter is remanded back to the first respondent for fresh consideration, who shall take note of the legal position and thereafter examine the facts that the petitioner may place and peruse all the agreements, sale deeds, etc. and then proceed to complete the assessment in accordance with law after affording an opportunity of personal hearing to the petitioner. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(J)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

To

1.The Assistant Commissioner (CT),
Mylapore Assessment Circle,
No.46, Greenways Road,
Chennai - 600 028.

WEB COPY

2.Butterfly Gandhimathi Appliances Ltd.,
No.143, Pudupakkam Village,
Vandalur Kelambakkam Road,
Pudupakkam,
Kancheepuram District - 603 103.

3.The Assistant Commissioner (CT),
Amaindakarai Assessment Circle,
Chennai - 600 006.

+lcc to Mr.Joseph Prabakar, Advocate sr.40048
+lcc to the Special Government Pleader Sr.40205

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2015
and
M.P.No.1 of 2015

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