

HONBLE SRI JUSTICE V.RAMASURAMANIAN

AND HONBLE Ms.JUSTICE J.UMA DEVI

Writ Petition No. 2167 of 2017

18-04-2017

M/s. Paradise Food Court, 1/7/186/193, S.D. Road,
Secunderabad, rep. By its Authorized Signatory, Sri
Ali Hemani Petition

The State of Telangana, rep. by Secretary, Revenue (CT),
Secretariat, Saifabad, Hyderabad, and 2 others.

Counsel for the Petitioner: Mr. S.Ravi, Senior Counsel,
representing Mr. Ch.Pushyam Kiran

Counsel for Respondents: Mr.M.Govind Reddy, Senior Standing
Counsel

? Cases referred:

1. 112 STC 1

2. 102 STC 274

3. (1967) 1 SCR 618

4. AIR 1964 Madras 136

5. 65 STC 82

6. (2000) 9 SSC 66

7. (1988) 2 SSC 351

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AND

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Order: (per V. Ramasubramanian, J.)

The petitioner has come up with the above writ petition challenging an order of assessment passed under the Telangana VAT Act, 2005 in respect of the period from 01.02.2014 to 31.03.2015, followed by a notice of penalty.

2. We have heard Mr. S. Ravi, learned Senior Counsel appearing for the petitioner and Mr. M. Govind Reddy, learned Special Standing Counsel appearing for the respondents.

3. As a matter of rule, we would not entertain writ petitions under Article 226 as against the orders of assessment passed under any taxing statute, since any person affected by an order of assessment, will have an effective statutory alternative remedy of appeal. But there are two exceptions to this rule and they are (1) cases where the assessing officer lacks jurisdiction; and (2) cases where principles of natural justice stand violated.

4. In the case on hand the petitioner assails the impugned order on both grounds, viz., lack of jurisdiction and violation of principles of natural justice. For the purpose of convenience let us first take the attack on the ground of lack of jurisdiction.

BRIEF FACTS:-

5. The petitioner is a partnership firm engaged in the business of operating Restaurants, cafes and Bakeries. It is registered as a dealer on the rolls of the Assistant Commissioner (Commercial Taxes) LTU, Begumpet Division.

6. In May, 2014 the petitioner entered into a Business Transfer Agreement with a company by name Paradise Food Court Private Limited, agreeing and undertaking to transfer its entire business as an ongoing concern, in consideration of equity shares and compulsorily convertible preference shares being allotted to the partners of the petitioner-firm. Under the agreement all the tangible and intangible assets and all the rights and liabilities of the

partnership firm were to be transferred to the company as an ongoing concern.

7. Upon coming to know of the Business Transfer Agreement, the 3rd respondent herein issued an intimation of audit visit on 04.11.2016. Accordingly an audit was held on 05.11.2016. The petitioner produced the books of accounts for the years 2013-14 and 2014-15.

8. Thereafter, the 3rd respondent issued a show cause notice dated 07.11.2016 proposing to levy VAT and calling upon the petitioner to file their objections within seven days.

9. The petitioner filed their objections on 11.11.2016. Thereafter, the petitioner was granted a personal hearing on 14.12.2016. The representative of the petitioner participated and opposed the demand.

10. However, the 3rd respondent passed an order dated 29.12.2016. By the said order, the 3rd respondent withdrew the levy of VAT on service tax collections. However, the 3rd respondent confirmed the levy of tax (1) on other income;

(2) on sale of fixed assets; and (3) on sale of goodwill. The 3rd respondent did this, on the ground that there is no provision in the Telangana VAT Act, 2005 which exempts sale of goods, when a business is sold as an ongoing concern. The 3rd respondent came to the conclusion that the position of law remained the same from 01.04.2000, when the word closure was included in the definition of business.

11. Incidentally, the writ petitioner/ dealer claimed exemption invoking Rule 36 of the Telangana VAT Rules. But the assessing officer came to the conclusion that the Rule went beyond the charging provision and other provisions of the Act and that therefore in the light of the judgement of this Court in *Coramandal Fertilisers Limited v. State of A.P. and others*, the Rule cannot be relied upon. Incidentally, the Assessing Officer also held that the pre-conditions for the invocation of rule 36 were not satisfied.

12. After the issue of the order of assessment, the 3rd respondent also issued a notice of penalty on 02.01.2017 forcing the petitioner to come up with the above writ petition.

Whether The Assessing Officer Had Jurisdiction: -

13. The jurisdiction of the assessing officer is assailed primarily on three grounds, viz., (a) that the species of business transfer or a slump sale or sale as an ongoing concern, continue to remain outside the purview of taxation even after the insertion of clause (c) under Section 2(6) of the Act; (b) that there could be no sale without a consideration being paid in cash and (c) that an officer discharging the functions conferred by the statute and the Rules is not competent to decide whether a Rule is ultra vires the Act or not.

14. In order to test the correctness of the above contentions, let us now have a look at the relevant provisions of the Act. Section 4(1) of the Act obliges every dealer to pay tax on every sale of goods. Therefore, the liability to pay tax will arise only when there is (1) a sale and (2) of goods.

15. The expression sale is defined in Section 2(28) of the VAT Act, to mean every transfer of property in goods by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration and it includes even the transfer of the right to use. Similarly, the expression goods is defined in Section 2(16) to mean all kinds of movable properties other than newspapers, actionable claims, stocks, shares and securities and includes all materials, articles and commodities involved in the execution of works contract.

16. Two important things are to be noted from the definition part of the Statute.

(i) The first is that the sale of a business as such, is not covered either by the charging Section, viz., Section 4(1) or by the definition of the expression goods. While the sale of a business may necessarily include a sale of the assets (as well as liabilities) of the business, the expression business is not included in the definition of the expression goods under Section 2(16).

(ii) The second important aspect to be noted is that to be a sale within the meaning of section 2(28), a transfer of property in the goods or the transfer of the right to use, should take place in the course of trade or business.

17. Therefore, it should be understood at the outset that when a business is transferred in entirety as a going concern, with all the rights and liabilities, (i) there is no sale of any taxable goods and (ii) that even if there is a deemed sale of goods, as understood in common parlance, it does not take place in the course of trade or business, to come within the definition under section 2(28). No business can be transferred in the course of trade or business, unless a person is in the very business of buying and selling business houses. Therefore, unless a sale takes place in the course of trade or business, it is not covered by the Act.

18. Interestingly, the word trade is not defined in the Act, though the word business is defined. The word business is defined in Section 2(6) of the Act as follows:

Business includes:

(a) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues there from;

(b) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern; and

(c) any transaction in connection with commencement or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern;

Explanation:- For the purpose of this clause,

(i) the activities of raising of man made forests or rearing of seedlings or plants shall be deemed to be business;

(ii) any transaction of sale or purchase of capital goods pertaining to such trade, commerce, manufacture, adventure or concern shall be deemed to be business;

(iii) A sale by a person whether by himself or through an agent of agricultural or horticultural produce grown by himself or grown on any land whether as owner or tenant in a form not different from the one in which it was produced, save mere cleaning, grading or sorting does not constitute business;

19. What the assessing officer has done in this case is to take the consideration fixed under the Business Transfer Agreement for every item of asset, as the sale of individual items of goods including goodwill and confirmed the demand made in the show cause notice. Therefore, it is clear that even the Assessing Officer could not regard the transfer of business as a sale, but split such transfer as involving the sale of individual items.

20. But a careful look at the Telangana State VAT Act, 2005 would show that

(1) every sale of goods is made chargeable to tax under Section 4(1);

(2) every purchase of taxable goods in the course of business, is made chargeable to tax under Section 4

(3) every works contract is made chargeable to tax, to the extent of the value of the goods at the time of incorporation of such goods in the works or on the total value of the works contract by way of composition under

Section 4(7);

(4) every transfer of right to use goods is made taxable under Section 4(8); and (5) every packing material is made chargeable to tax under Section 6.

But, the sale of business, by itself has not been made chargeable to tax under any of the provisions of the VAT Act, 2005. It is only the sale of goods either per se or as part of works contract and not the sale of business, which is made chargeable to tax under the Act.

21. One more aspect to be taken note of is that section

4(1) which deals with sale of goods, does not use the expression in the course of business. But section 4(4) which deals with purchase of goods uses 2 expressions namely

(i) in the course of business and (ii) taxable goods. Therefore, the words in the course of business used in specific places in the statute, including in the definition of the word sale assumes significance.

22. As we have stated earlier, the Act seeks to define the word business under Section 2(6), for the simple reason that in a few specific places, such as Section 2(28), section 4(4) and Section 13(1), the Act uses the expression in the course of business and for use in the business. Therefore, it must be made clear at the outset that what is sought to be charged under the Act is only the sale of the goods or transfer of right to use the goods in the course of business and not the sale of business itself as a whole.

23. In *Coromandal Fertilisers Limited v. State of A.P. and others*, a Division Bench of this Court, which doubted the correctness of the decision of another Division Bench in *Coramandal Lubricants v. Commissioner*, referred the following question for consideration by a Full Bench of this Court:

Whether in a transaction of sale of an undertaking as a going concern with all assets and liabilities for a lump sum without stipulating any price for individual items, the assessing authority could consider that there was a sale of goods within the meaning of Section 2(n) read with Sections 2(h) and 2(s) for charging the same to tax under Section 5 of the APGST Act.

24. Though the Full Bench of this Court was concerned in that case with the provisions of the A.P. General Sales Tax Act, 1957, the question nevertheless revolved around the definition of the expression business appearing in Section 2(1)(bbb) of the APGST Act. The definition of the expression business in Section 2(1)(bbb) contained two clauses which are exactly in pari materia with clauses (a) and (b) of Section 2(6) of the Telangana VAT Act, 2005.

25. Therefore, after noting that the interpretation given by the Supreme Court in *State of Gujarat Vs. Raipur Manufacturing Co. Ltd.*, to the word business, underwent a change after the insertion of the definition under Section 2(1)(bbb) by way of amendment with effect from 01.04.1966, the Full Bench of this Court took into account various decisions and eventually came to the conclusion that the transfer of entire business undertaking together with the movable properties, even if it involves sale of goods, cannot be regarded as a sale in the course of business by the dealer.

26. After the decision of the Full Bench in *Coromandal Fertilisers Limited*, the State Government brought an amendment under Amendment Act No. 19/2000 with effect from 01.04.2000. By the said Amendment sub-clause (iii) was inserted under Section 2(1)(bbb) of the APGST Act, 1957. This section 2(1)(bbb) of the A.P. General Sales Tax Act, 1957, as it stood before Amendment Act 19/2000 and as it stood after the Amendment Act 19/2000 is reproduced in a tabular column as follows.

Section 2(1)(bbb) before 01.04.2000

Section 2(1)(bbb) after 01.04.2000

(i) Business includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues therefrom; and Business includes, -

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues therefrom; and

(ii) any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern;

(ii) any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern;

(iii) any transaction in connection with or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern;

27. Therefore, the contention of Mr. M. Govind Reddy, learned Special Standing counsel for the department is that the declaration of law by the Full Bench in Coromandel Fertilisers cannot be pressed into service anymore in view of the amendment to the definition of the word business.

In other words, his contention is that with the insertion of sub-clause (iii) under Section 2(1)(bbb) in the Andhra Pradesh General Sales Tax Act, 1957, the basis on which the Full Bench of this Court held a transfer of the entire business undertaking not to be a sale in the course of business, stood removed. Since the amended definition of the expression business under Section 2(1)(bbb) of the A.P. General Sales Tax Act has been adopted under the Andhra Pradesh Value Added Tax Act, 2005, it is the contention of the Special Standing Counsel that unless the transfer results in the closure of trade, commerce, manufacture or adventure, the same cannot escape the charging provisions of the State.

28. Drawing our attention to the decision of the Full Bench of the Madras High court in S.V. Natesa Mudaliar Vs. Sri Dhanapal Bus Service Private Ltd., Mr. Govind Reddy contended that when an amending Act alters the language of the statute, the alteration must be taken to have been made deliberately.

29. But the above contention loses sight of one important aspect. As we have pointed out earlier, sale of business as a whole is not made taxable even now under the charging provision. It is only the sale of goods which is chargeable

under Section 4(1). The definition of the expression sale would apply to a case only if the sale takes place in the course of trade or business, as per section 2(28). A business in entirety, cannot be sold in the course of trade or business, as there will be no business left thereafter, to deal with.

Therefore, the amendment brought forth to the definition of the expression business could not have changed the dynamics of the game, when the charging provision and the definition of the expression sale remained the same. Hence the reliance placed upon the decision of the Full bench of the Madras High court in Natesa Mudaliar, is completely misplaced.

30. Another important aspect to be noted is that any dealer who sells goods is also entitled to Input Tax Credit.

It is only because of the fact that the transfer of business as a whole does not attract the charging provision that the law makers were careful to provide in Section 13(5)(b) that no Input Tax Credit will be available in the case of transfer of business as a whole. Therefore, the amendment brought forth to the definition of the expression business has not altered the scenario.

31. Reliance is placed by Mr. M.Govind Reddy, learned Special Standing Counsel, upon the decision of the Orissa High Court in State of Orissa v. Raja Stores, to drive home as to what would constitute a transfer of business as a whole. But we do not know why this decision is relied upon. In the case before the Orissa High Court, Section 19 of the Orissa Sales Tax Act, 1947, which made a transferee of a business undertaking liable to pay the dues of the transferor fell for consideration. Therefore, the said case has no application to the case on hand. If the charging section makes even the transfer of business as a whole chargeable to tax or if the definition of the word sale does not use the expression in the course of trade or business, we would have had no difficulty in upholding the levy. But it is not so.

32. Therefore, we are of the considered view that the Assessing officer was completely wrong in thinking that the sale of a business as a whole is taxable simply because such a sale also involves a sale of several items used in the course of business.

33. That takes us to the next contention revolving around Rule 36. Insofar as the reliance placed upon Rule 36 of the Telangana Value Added Tax Rules, 2005, is concerned, the contention of the Department is two-fold namely (i) that even as per the ratio laid down in Coromandal Fertilisers Limited, the rule cannot go contrary to the charging provision and (ii) that in any case, unless the conditions stipulated in the rule are satisfied, a dealer will not be entitled to exemption.

34. In other words, the exemption available under Rule 36 of the Rules is denied to the petitioner on two grounds, namely, (a) that the rule cannot go contrary to the provisions of the Statute and (b) that the pre-conditions laid down in Rule 36 are not satisfied.

35. Let us now examine the 1st contention with regard to the validity of the rule. The Telangana VAT Rules, 2005 were apparently issued by the Government in exercise of the power conferred by Section 78 read with Clause 21 of Section 2 of the Telangana VAT Act, 2005. Sub-section (2) of Section 78 lists out the matters in respect of which a provision may be made in the Rules. Therefore, the fact that the rule was validly issued in exercise of a power conferred by statute, cannot be denied.

36. A careful look at the reason for Rule 36 being inserted, which cannot be correlated to anyone of the matters enumerated in Clauses (a) to (r) of sub-section (2) of Section 78, will show that in the entire Telangana VAT Act, 2005, the only place where a transfer of business as a whole is spoken about, is Section 13(5)(b).

Under Section 13(5)(b) of the Act, no Input Tax Credit shall be allowed on the transfer of a business as a whole. Therefore, this is an indication to the fact that the transfer of a business as a whole is not chargeable to tax under Section 4(1) merely on the ground that a transfer of business would naturally involve the sale of goods of the business. It is only with a view to keep the transfer of a business as a whole, out of the purview of the charging provision that input tax credit is denied under section 13(5)(b) and Rule 36 has been issued. Therefore, it is futile to contend that Rule 36 goes contrary to the Statutory prescription.

37. On the question of non-compliance with the requirement of Rule 36(b), it is rightly contended by the petitioner that this was not raised in the pre-assessment notice issued on 07-11-2016 in Form 305A. Therefore, it is clear that the denial of the benefit of the exemption under Rule 36, is unfair.

38. As we have indicated earlier, the transfer of business as a whole is not per se included in the charging provision. It is only by virtue of a logic that every transfer of business would also include a sale of goods of the business that the charging provision is sought to be invoked. When the transfer of business by itself is not made chargeable to tax and when the definition of the word sale would apply only when there is a sale in the course of business or trade, the very nomenclature given in Rule 36 as though the transfer of business is exempt from VAT, is redundant.

39. Rule 36 of the Telangana VAT Rules, 2005, reads as follows:

36. Conditions for Transfer of a Business:--

The transfer of a business from one VAT dealer to another VAT dealer is exempt from VAT subject to the following conditions, namely:-

(a) the business must be transferred as an ongoing concern and continue trading under the new ownership;

(b) the VAT dealer transferring the business shall notify the authority prescribed of the transfer of the business

within ten days of the date of the transfer;

(c) the VAT dealer transferring the business shall apply for cancellation of his registration, if warranted and shall comply with the provisions of Rule 14.

(d) the VAT dealer acquiring the business shall account for tax on the stock and assets acquired, at the time of their sale.

(e) the VAT dealer acquiring the business shall retain all the tax records related to that business for a period of not less than six years as specified in sub-section (4) of Section 42 after the end of the year in which the business was acquired.

(f) the dealer, acquiring the business, shall be eligible to claim the Input Tax Credit, available to such business transferred as an ongoing concern. The Input Tax Credit can be claimed in the return, filed for the month, in which the business is transferred.

40. As a matter of fact, it may not be open to the Department to claim that a Statutory Rule goes contrary to the provisions of the Act. The law in this regard is well settled by a decision of a 3-member **聽** Bench of the Supreme Court in Commissioner of Sales Tax v. Indra Industries . In the said case, the sales tax authorities raised a contention that a Circular issued by the Commissioner was contrary to law.

But the Supreme Court rejected the said contention in paragraph-3 of its judgement, as follows:

3. A circular by tax authorities is not binding on the courts. It is not binding on the assessee. However, the interpretation that it thereby placed by the taxing authority on the law is binding on that taxing authority.

In other words, the taxing authority cannot be heard to advance an argument that is contrary to that interpretation.

41. But it is contended by Mr. M. Govind Reddy, learned Special Standing Counsel appearing for the Department, that if a Circular is contrary to the provisions of the Statute, the Statute will prevail and that the Departmental authorities cannot go beyond the Statutory prescription. In support of this contention, the learned Special Standing Counsel relied upon a series of decisions, which we shall advert to now.

42. In General Officer Commanding-in-Chief v. Subhash Chandra Yadav , the Supreme Court pointed out that before a rule can have the effect of a Statutory provision, two conditions must be fulfilled, namely

(1) it must conform to the provisions of the Statute under which it is framed and

(2) it must also come within the scope and purview of the rule making power of the authority.

43. Similarly, in UCO Bank v. Commissioner of Income Tax , it was pointed out that a Circular cannot alter the provisions of the Act. Likewise, it was held by the Constitution Bench of the Supreme Court in Commissioner of Central Excise v. Ratan Melting & Wire Industries that when the Supreme Court or the High Court declare the law on the question arising for consideration, it would not be appropriate for the Court to direct that the Circular should be given effect to.

44. But we do not know of what purport the above decisions are. Rule 36 on the face of it, does not appear to be contrary to law. This Rule has been enacted in exercise of the power conferred by Section 78. The intention behind this Rule is to indicate what cases are covered by Section 13(5)(b) and to ensure that under Section 13(5)(b), no Input Tax Credit is allowed on the transfer of a business as a whole.

As we have repeatedly pointed out, the transfer of business as a whole is not charged to tax per se. Therefore, to think that Rule 36 travels beyond the Act is quite obnoxious.

45. In the case on hand, another important feature is that the petitioner which is a partnership firm, sought to transfer the entire business as a going concern under a business transfer agreement to a private limited company of which the partners of the petitioner were the shareholders.

In consideration of the transfer of the business as a whole, the partners of the petitioner were allotted equity shares and preferential shares in the company. Therefore, to treat the same as a sale of goods 聽 merely on the ground that all the assets of business are individually mentioned in the Schedule together with their value, is completely contrary to the Statutory prescription. Therefore, the impugned order has been passed on an assumed jurisdiction, where none exists. The impugned order has been passed on a complete misunderstanding of the purport of the decision of the Full Bench in Coromandal Fertilisers Limited, the effect of Section 2(6) read with section 2(28) and Rule 36. It is not the case of the respondent that the petitioner had claimed Input Tax Credit under Section 13(5)(b) so as to treat the case as not one of transfer of business as a whole.

46. Therefore, we are of the considered view that the impugned order was without jurisdiction. Hence, the writ petition is allowed and the impugned order is set aside.

The miscellaneous petitions, if any, pending in this writ petition shall stand closed. No costs.

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V.RAMASUBRAMANIAN, J.

J.UMA DEVI, J.

18th April, 2017