(2011) 06 MAD CK 0347

In the Madras High Court

Case No : Writ Petition (MD) No. 8835 of 2008

Craze (India) Private Limited — APPELLANT

Vs

The Assistant Commissioner (CT) and The Deputy Commissioner (CT) — RESPONDENT

Date of Decision : 27-06-2011

Acts Referred:
Tamil Nadu General Sales Tax Act, 1959 — Section 24(3)

Citation : (2011) 06 MAD CK 0347

Hon'ble Judges : B. Rajendran, J

Bench : Single Bench

Advocate : C. Asai Thambi, for the Appellant; V. Rajasekaran, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

B. Rajendran, J.—The Petitioner originally was known as M/s. Meenakshi Foods (India) Private Limited and has been granted eligibility certificate to avail deferral of sales tax. Based on the eligibility certificate, an agreement was also made with the Department on 23.02.2001. According to the Petitioner, subsequently, there was a change in the constitution of the company. According to the Petitioner, Mr. Ravikumar and his wife R. Amirthavalli were inducted as Directors of the company and Mr. Sandeep Manghat continues to be the Director of the company and as Mr. Sandeep Manghat could not perform day to day affairs of the company, Mr. Ravikumar has taken over the management of the company. But their only contention is that Mr. Sandeep Manghat continues to be the Director of the company and at the same time, the execution of the eligibility certificate with the Department one Seethalakshmi Achutan was also a non executive Director but subsequent to the death of her husband in the year 2007, suddenly, she has lost her interest in the business and has resigned from the directorship and despite their resignation of Seethalakshmi and induction of Ravikumar and his wife R. Amirthavalli, the company continued to run in the same constitution as a

Private Limited Company.

2. The company has availed IFST loan and Mr. Sandeep Manghat representative of the company has signed as Director and the company had neither disposed or alienated the assets of the company nor removed the fixed assets from the unit''s premises. As a matter of fact, by the change in the constitution, the original objectives of the company came to be fulfilled completely. Further, they only contend that the company is a juristic personality and merely because there is a change in the constitution, the company does not seized to exist. But without taking into consideration the above aspects, the first Respondent, the Assistant Commissioner issued a show cause notice stating that the Petitioner has violated the deferral condition by selling the company to third parties and therefore, the deferral loan needs to be cancelled and further directed to repay the deferral loan amount of sales-tax so far as availed by them with interest u/s 24(3) of the TNGST Act, 1959.

3. Subsequently, a revision was filed by the Petitioner and the same was allowed on 11.12.2007 by the Deputy Commissioner setting aside the order and the agreement was restored. Consequently, by proceedings of the Assistant Commissioner, dated 02.04.2008, the agreement was restored in implementation of the order of the Deputy Commissioner. Inspite of this order, once again, the Assistant Commissioner issued another notice on 16.06.2008 stating that there is a violation of condition stipulated in the agreement and hence, it was decided to cancel the agreement with immediate effect and he was given 15 days time for giving his objection for which the Petitioner submitted objection on 26.06.2008. Ultimately, instead of the Assistant Commissioner being the revisional authority, the Deputy Commissioner, by his proceedings dated 22.08.2008, cancelled the deferral agreement which was entered with formerly M/s. Meenakshi Foods (India) Private Limited, now Crace (India) Private Limited and directed the Petitioner to pay the entire arrears in one lumpsum along with interest u/s 24(3) of the TNGST Act.

4. Aggrieved over the same, the present writ petition has been filed on the ground that the order passed by the authority is without jurisdiction and that there was no sale at all in respect of the company and the company is still in existence and that there is no violation of the deferral agreement.

5. The department has filed a detailed counter affidavit stating that as per the deferral agreement, dated 23.02.2001, they should not stop production for more than six months and that they should not transfer or sell the assets to another without prior permission of the Government. In fact, as per the eligibility certificate and IFST deferral agreement, the company is empowered to collect sales tax and utilize that sales tax for the purpose of working capital etc., which is repayable after 9 years during the corresponding months and the Company has collected sales taxes for the period between 2000-01 to 2004-2005 to the tune of Rs. 76.75 lakhs from the public and utilised it for their own business purpose. But they have stopped production for more than six months from

August 2005. Therefore, initially a notice was issued proposing to cancel the deferral agreement in the proceedings, dated 12.09.2007. Against which, they preferred a revision and ultimately, the revision was allowed on 02.04.2008. Subsequently, it came to the knowledge of the Respondents that the company itself sold the company through a memorandum of understanding, dated 17.12.2006 along with their shares, assets and liabilities to the Petitioner of Pondicherry. As such the directors have sold the company without prior permission from the Government. Again, a show cause notice was issued calling upon their explanation for which they have also submitted their explanation and as it was not satisfactory, ultimately, a detailed order has been passed.

6. It is further stated that earlier, the Petitioner himself has given a statement that due to financial problems, the six shareholders of the company decided to sell the company and they found Mr. R.V. Ravikumar, Pondicherry, i.e., the Petitioner who took over the company during July 2006 and they sold the company as per the terms and conditions listed out in the memorandum of understanding, dated 17.12.2006. Thus, the reasons for the change of the constitution of the company is, purchase of the company through the Bank and shares of the six shareholders along with assets and liabilities of the company. Here, the change in the constitution means "sale of business as a whole'' irrespective of the fact that the company continues to run by the new directors namely by R.V. Ravikumar and his wife Amirthavalli. In fact, they have also alleged that no document has been produced to show that Sandeep Manghat continues to be the Director of the company. In fact, the memorandum of understanding also speaks that the liability including the deferral loan has been taken over by the new management. So, they were also aware even at the time of memorandum of understanding. Regarding the deferral loan and the right, they have not obtained the permission of the Department, therefore, they will disentitle them from getting any benefit from the authorities and hence rightly, the impugned order has been passed cancelling the deferral scheme.

7. Heard the submissions made by the learned Counsel on either side and perused the materials available on record.

8. After the arguments were over and when the matter was posted for orders, the learned Counsel appearing for the Petitioner brought to the notice of this Court a new development took place during the pendency of the writ petition, which was not informed till now to the Court that on 31.03.2011, the Petitioner sought permission from the Assistant Commissioner of Commercial Tax to pay the balance amount of Rs. 47,73,449/- in one lump sum and thereafter, by letter dated 21.04.2011, they had paid totally a sum of Rs. 1,82,04,151/- being the total arrears, the break-up of which is as under:

Total tax due 47,35,63924(3) penalty balance due 41,97,735Approximate 24(3) penaltyon payment of balance tax 92,70,783on 21.04.2011 But, this amount has been paid without prejudice to the writ petition and the Petitioner has also specifically stated in the letter that they will abide by the result in the writ petition and they have also reserved the right to claim refund of a sum of Rs. 1,38,00,160/- in the event of Court deciding in their favour. They have also produced a demand draft for payment of the above said sum. Subsequent to this, the department has also issued No Due Certificate to the Petitioner. Therefore, the Petitioner would only now contend that inasmuch as they have paid the entire amount without prejudice and they are aggrieved insofar as the actual amount tax payable as well as interest but only the penalty could be waived by the Government, even in the event of this Court coming to the conclusion that this writ petition is not maintainable. This argument was also put forward by the learned Counsel for the Petitioner.

9. Before dealing with the new development, let us analyse the case first.

10. The writ Petitioner has first of all challenged the first show cause notice, dated 16.06.2008 issued by the first Respondent as well as the proceedings of the second Respondent, dated 22.08.2008 cancelling the deferral agreement, dated 22.02.2001. The Petitioner would mainly contend that the company was originally known as M/s. Meenakshi Foods (India) Private Limited and they availed deferral of sales tax as per the eligibility certificate during the period from 30.12.1999 to 29.12.2008. Based on this deferral scheme an agreement was made by the department as early as on 23.02.2001. As per the agreement, it is very clear that the Petitioner during the deferral scheme cannot sell or transfer their interest in the company to any third parties without prior approval of the Government and if there is any violation of the condition stipulated in the agreement, deferral loan will be cancelled.

11. With this background, when we analyse the case now the Petitioner states in the affidavit that originally Mr. Sandeep Manghat and Mrs. Seethalakshmi were the Directors of the company. Now they would contend that there is a change in the constitution of the company whereby one Mr. R.V. Ravikumar and his wife R. Amirthavalli were inducted as Directors of the company and that Mr. Sandeep Manghat continues to be the Director of the company and now Mr. Sandeep Manghat is not a full time Director and the management has now vested with Mr. R.V. Ravikumar.

The change in management according to them took place by virtue of agreement or a memorandum of understanding entered into between the parties. In this connection, if we refer the order, dated 22.08.2008, in which the letter is extracted, dated 04.10.2007 which was sent to the Commissioner of Commercial Taxes by the said R.V. Ravikumar, the present Managing Director, is as follows:

In May 2006 the Bankers issued notice to the company to repay the loan amount. In these circumstances, the management decided to sell the company and they found Mr. R.V. Ravikumar, Pondichery. He took over the company through the Bank on July 2006. The new management was not awareofthisliabilities.

ii)The memorandum of understanding dated 17.12.2006 was madebetweenthefollowingforthesaleofequityshares:a)Mr. SandeepManghatb)Mrs. SeethalakshmiAchuthanc)M/s. Cookies(India)Pvt.,Limitedd)Mr.T. Vijayakumare)Dr.T. Unnikrishnanf)Mrs. JayanthiManghatand ... GroupAa)Mr.R.V. Ravikumar,S/o.S. Ramalingam, Pondichery ... GroupB Accordingly, the entire equity shares were purchased by Thiru.R.V. Ravikumar as no person of Group A was willing to purchase the other member shares and they collectively agreed to offer the equity shares to persons other than the present members.

iii)The sale of equity shares of Group A has also been approved by the Board of Directors of M/s. Craze India Private Limited vide resolution dated01.06.2006.

iv)The Group B has accepted the offer and agreed to purchase the 100% shareholding of the companyheldbyGroupA.

v)It is also seen from Memorandum of Understanding that the sale of the company was recorded with the terms and conditions and responsibilities mentioned in Clause from (h) to (p) of Memorandum of Understanding.

vi)In respect of transfer of title deeds to the Group B in the Memorandum of Understanding it has been categorically mentioned as below:

a)Group B has done preliminary review of the present status of the company, the conditions and nature of its assets of the company and also of the liabilities of the company.

b)Obligation of Group A (Class (C) & (d) & (f): Group A agrees to handover all books, records, registers, title deeds pertaining to the company in the possession of the Board of Directors. Group A agrees and understands that the valuation of shares is made and consideration is arrived at after taking into account only the assets and liabilities as specified in Section "B" Group "A" agrees that it shall settle all the liabilities out of their reserves and release the company from all the liabilities other than those specifies.

12. A mere reading of the this letter would go to show that the said Ravikumar has categorically stated that the earlier management has decided to sell the company and he has taken over the company through the bank but he would contend that he was not aware of the liabilities. It is also clearly stated that the present directors have taken over the company with all the liabilities including that they are not specified but in the Schedule B it is very clearly stated that IFST loan for a total sum of 76.60 lakhs. Therefore, when the memorandum of understanding itself clearly states that they have taken over the IFST loan, it cannot be now stated as if they were not aware of the IFST loan. The IFST loan would clearly denote before any transfer, there should be a specific approval of the Government is necessary. Unfortunately, it has not been done so.

13. Further, as rightly pointed out, till date, they have not produced any document to show that the erstwhile Sandeep Manghat still continues to be the Director of the Company. Therefore, the Company sold equally with the full knowledge, the present directors had taken over the management including the

liabilities. Once there is a violation of such condition naturally, the Respondents are at liberty to take action. In this case, as rightly pointed out that originally a show cause notice was issued and subsequently after the explanation was offered, a detailed order has been passed.

14. The question now raised by the Petitioner is that the order is passed by the Deputy Commissioner instead of the Assistant Commissioner only the higher authority has passed the order by itself will not vitiate the order passed by the authority. Further, he did not object to the same, they have given the explanation, participated in the proceedings and hence, they have not questioned the jurisdiction at the earliest point of time. The Petitioner is not able to pin point any infirmities in the impugned order.

15. Even though this Court has also categorically held that the transfer made is only a sale and not a continuation, taking into consideration the subsequent development especially, when the Petitioner has paid the entire amount including the penalty amount though under protest, the request made by the Petitioner is that earlier, there was a Samadhaan Scheme and even in the Samadhaan scheme, the entire penalty is waived and in interest also concession was given if the actual tax is paid.

Even taking into consideration that aspect, they can always seek remedy before this Court seeking a direction to the Government to consider waiver of the penalty alone.

But, as far as waiver is concerned, it is a prerogative right of the Government. The Court can only say representation of the Petitioner if any seeking waiver of the penalty could only be considered by the Government and appropriate orders passed thereon on merits and in accordance with law.

16. Giving that option the Writ Petition is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

