

(1976) 04 MAD CK 0041

In the Madras High Court

Case No : T.C. No. 329 of 1971 (Revision No. 217 of 1971)

Deputy Commissioner (C.T.)

APPELLANT

Vs

K. Behanan Thomas

RESPONDENT

Date of Decision : 30-04-1976

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 16, 2, 3, 32, 4

Citation : (1976) ILR (Mad) 365 : (1977) 39 STC 325

Hon'ble Judges : Sethuraman, J;Ismail, J

Bench : Division Bench

Advocate : The Additional Government Pleader No. I, for the Appellant;

Final Decision : Dismissed

Judgement

Sethuraman, J.—This tax revision case arises out of an order of the Sales Tax Appellate Tribunal exempting the turnover in question. Under

the Tamil Nadu General Sales Tax Act, the assessee was finally assessed to tax on a total and taxable turnover of Rs. 1,59,291.31 and Rs.

1,37,880.15 respectively for the year 1967-68 in the assessment proceedings of the Deputy Commercial Tax Officer dated 3rd September, 1968.

On a further scrutiny of the records, the Deputy Commercial Tax Officer, Coimbatore, considered that out of the consideration of Rs. 19,500 for

the transfer of the branch at Ooty, the sum of Rs. 18,929.71 representing sale value of the closing stock held at Ooty branch was wrongly

exempted from payment of tax and that it was not eligible for exemption as it did not come within the scope of the provision of Rule 6(d) of the

Tamil Nadu General Sales Tax Rules. Accordingly, notice was issued to the assessee calling for its objections, if any, to the proposed revision of

assessment. It was contended by the assessee that the business at Ooty branch

as a whole was sold that the branch business was also to be considered as a business as defined u/s 2(d) of the Tamil Nadu General Sales Tax Act, 1959 and that the sale value of the stock held was eligible for the exemption from payment of tax under Rule 6(d) of the Tamil Nadu General Sales Tax Rules, 1959. The Deputy Commercial Tax Officer did not accept this objection, as he was of the view that only the business sold as a whole was exempted from tax. He took a sum of Rs. 18,929.71 as the sale value of the stock and added it to the turnover for the year and assessed sales tax accordingly. He has not set out the provision under which he acted to revise the assessment.

2. On appeal, the Appellate Assistant Commissioner was also of the opinion that the assessee was not eligible for exemption under Rule 6(d) and that even after the sale of the Ooty branch, he was carrying on business in the head office at Coimbatore, so that it could not be considered that the assessee had sold the business as a whole. He confirmed the assessment.

3. On further appeal, the Sales Tax Appellate Tribunal found that the entire business including furniture, fittings and stock-in-trade of the Ooty branch had been transferred and that, in the circumstances, under Rule 6(d), the turnover in question was liable to be exempted. It held also that the assessing officer could not have sat in judgment over his own order, as he had earlier given a finding in favour of the assessee. Aggrieved by this order of the Tribunal, the Deputy Commissioner (C.T.), Coimbatore, has filed this revision.

4. It is not clear under what provision the assessing authority acted to revise the assessment. The assessing authority had in the original assessment referred to the sale of the branch and granted the exemption. If the exemption was later considered to be erroneous, it could have been revised u/s 32 by the Deputy Commissioner. But that was not done. This is not also an error which could have been rectified u/s 55, as the error which could be rectified thereunder could only be an error apparent from the record. The error in this case cannot be said to be an error apparent from the record as would be clear from the discussion that follows. The assessing authority has not also taken action to make an assessment on the escaped turnover u/s 16 of the Act. The assessing authority has no power to review his own order independently of these provisions. We are, therefore, of

the opinion that the order of the assessing authority revising this earlier order is illegal.

5. We would, however, examine the correctness of the order even on its merits. The bona fides of the sale of the branch as running concern is not

in dispute. The point raised for consideration is whether the assessee is liable for exemption under Rule 6(d) of the Tamil Nadu General Sales Tax

Rules. That rule, in so far as it is material, runs as follows:

6. The tax or taxes u/s 3, 4 or 5 shall be levied on the taxable turnover of the dealer. In determining the taxable turnover, the amounts specified in

the following clauses shall, subject to the conditions specified therein, be deducted from the total turnover of a dealer :....

(d) all amounts realised by a dealer by the sale of his business as a whole.

6. The contention urged on behalf of the State is that the assessee had not sold his business as a whole and that, therefore, the deduction available

under the above rule does not apply to the present case. In substance, the contention urged for the State is that the assessee had not gone out of

the business altogether in order to claim the exemption under Rule 6(d). We are not satisfied that this contention is sound having regard to the

language of the rule. The words ""his business"" occurring in the rule do not mean that he must go out of his business altogether. The word ""business

has to be understood in a commercial sense, i.e., in the sense understood by commercial men. The commercial men would understand the word

business"" as a unit which produces profits. The branch in that sense would be a unit of business. It is a separate unit which could be dealt with, as

such, as was done here. When once the Ooty branch is recognised as an independent unit, then vis-a-vis that unit of business, the assessee had

closed down his business as a whole. It is not found by any of the authorities that the assessee retained any part of the business at Ooty, so that it

cannot be treated as a sale of his business in that branch as a whole. In fact, the finding of the Tribunal is that the entire business including furniture,

fittings and stock-in-trade had been transferred. Having regard to this finding, it follows that Rule 6(d) is applicable to the present case.

7. The learned Additional Government Pleader pointed out that there was a mistake in the order of the Sales Tax Appellate Tribunal in so far as it

has stated that the Ooty branch had a separate registration certificate and that

the view of the Tribunal was based obviously on this erroneous premise. Even assuming that the Tribunal had committed an error in referring to the existence of a separate registration certificate with reference to this branch and that therefore its finding is vitiated, still we find the following sentence in the order of the Appellate Assistant Commissioner:

There is no dispute about either the closure of business of the branch at Ooty or sale of the business of the branch at Ooty as a whole.

8. This clearly goes to show that the business at Ooty was sold as a whole. On a proper interpretation of Rule 6(d), in our opinion, the sale value

of the closing stock, namely, Rs. 18,929.71, which formed part of the consideration of the sale of the Ooty branch as a whole is liable to be

exempted. In our opinion, for the purpose of application of Rule 6(d), it is not necessary that the assessee should go out of the business altogether,

nor need there be a separate registration certificate with reference to the branch so as to make it a unit of business. Even the sale proceeds of a

branch which is an independent unit by itself would qualify for the exemption. The learned Additional Government Pleader stressed that the

goodwill had not been sold. We are of the view that so long as the bona fides of the transaction is not in question and so long as the business has

been sold as a going concern, the mere fact that the goodwill has not been sold is not material.

9. If the matter can be looked at from another angle, the amount in question will not fall within the scope of the Act at all and, therefore, the

question of either deduction or exemption will not arise. Section 2(d) of the Tamil Nadu General Sales Tax Act, 1959, hereinafter referred to as

the Act, defines the term ""business"" in an inclusive sense. According to that provision, the expression ""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 with a motive to make gain or profit and whether or not any profit accrues from such

trade, commerce, manufacture, adventure or concern ; and

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

10. The expression ""sale"" has been defined as follows in Section 2(n) of the Act:

"Sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge.

Section 2(r) defines the expression "turnover" as meaning the "aggregate amount for which goods are bought or sold, or supplied or distributed, by a dealer, either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, other than tea, grown within the State by himself or on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover".

11. The combined effect of the definition of these expressions will show that for a turnover to come within the scope of the Act, it must be the

aggregate amount for which the goods are bought or sold, that is, bought or sold in the course of business, the business having the meaning as

defined in Section 2(d) of the Act. When a person who is carrying on business sells the entire business or a branch of the business, he sells the

same as a running business or a going concern. The sale proceeds of such a transaction cannot be said to constitute turnover as defined in the Act,

because the sale proceeds are not proceeds of sale of goods made in the course of business as defined in the Act. The closure of a branch by sale

thereof as a running concern to another person, apart from not constituting a sale of goods, cannot also be said to be a transaction in connection

with or incidental or ancillary to such trade, commerce, adventure or concern mentioned in Section 2(d)(i) of the Act. Consequently, such sale

proceeds being totally outside the scope of the Act cannot form part of the turnover as defined in the Act and hence such turnover is not exigible to

tax under the provisions of the Act. If so, the question of such sale proceeds being deducted from the total turnover under Rule 6(d) of the Tamil

Nadu General Sales Tax Rules, 1959, will not arise because that rule contemplates determination of the taxable turnover by deducting the items

mentioned therein from the total turnover of a dealer. Once it is found that the

sale proceeds in question did not form part of the turnover at all,

there is no question of the same being deducted from the total turnover for the purpose of determining the taxable turnover.

12. It is this aspect of the matter which has been pointed out by the Allahabad High Court in *Sri Ram Sahai v. Commissioner of Sales Tax* [1963]

14 S.T.C. 275. In that case, the assessee, a dealer in cloth, closed his business and sold the entire business together with his stock-in-trade for a

lump sum. Though what was sold included some cloth, the price for which the cloth was sold was not shown separately. In that context, the

Allahabad High Court held that the proceeds of the sale of the business of the assessee were not to be included in the turnover over which tax was

payable u/s 3. The Allahabad High Court had to consider Rule 44(f) of the U.P. Sales Tax Rules corresponding to Rule 6(d) of the Tamil Nadu

General Sales Tax Rules, 1959, referred to already. While doing so, the court observed:

If a dealer carrying on a business in certain goods sells the entire business, he has not to rely upon this clause and plead that the proceeds of the

sale are to be "deducted" from the turnover for purposes of taxation ; they are not to be included in the turnover at all. The heading of Rule 44 is

"deductions from turnover"; this means that whatever is to be deducted is a turnover. One cannot deduct from a turnover something which is not a

turnover. Therefore, to say that proceeds of the sale of the dealer's entire business are to be deducted from his turnover is meaningless; they are

not to be included in the turnover because they never came within its meaning.

Though that case dealt with the sale of the entire business and not of a branch of the business, still that decision illustrates the point we are dealing

with.

13. The above decision of the Allahabad High Court was followed by the Kerala High Court in *C.M. Hamsa Haji v. Sales Tax Officer, Tirur*

[1967] 20 S.T.C. 470. In that case, a person transferred his business or stock-in-trade to a firm of which he was a partner as contribution of his

capital therein. The Kerala High Court held that such a transaction did not amount to a sale of goods in the course of trade or business as a dealer

within the meaning of the Kerala Sales Tax Act, 1963, since such a transaction did not involve any sale of goods and the transferor did not part

with the property of goods, but only shared his rights therein with the other partners under the contract of partnership. The court also held that even

assuming that there was a sale, it was not a sale in the course of trade or business nor was it a transaction by a dealer as defined in the Act.

14. The sale in the present case is of a running business as a going concern for a consideration of Rs. 19,500. It is the assessing authority which

had taken the sale value of the closing stock as Rs. 18,929.71 and it is not as if the assessee himself sold the said closing stock for that price. The

sale of the stock-in-trade for the purpose of closing down the business is different from the sale of the business as a whole as a running concern.

The sale of a business, lock, stock and barrel, is not incidental or ancillary to the carrying on of a business so as to be taxable under the Act. Thus,

from this point of view, the transaction in question will not fall within the scope of the Act at all and, therefore, the sale proceeds will not constitute

a turnover as defined in the Act. If so considered, the question of neither exemption nor deduction can arise. We are reaching this conclusion

independently of the conclusion we have arrived at with reference to Rule 6(d) of the Tamil Nadu General Sales Tax Rules. As a matter of fact,

this conclusion is only alternative to the said conclusion and is really based on considerations totally different from the considerations applicable to

Rule 6(d).

15. The learned Additional Government Pleader placed considerable reliance on a decision of this court in *State of Tamil Nadu v. Thermo*

Electrics Tax Cases (Revisions) Nos. 287 and 439 of 1974 decided on 2nd March, 1976 (Madras High Court) to which one of us was a party. In

that case, the question as to whether certain sale proceeds were not liable to tax had to be considered in the light of the following facts. The cases

of two assessees were considered in that judgment: one related to *Thermo Electrics* dealing in heating mantles. The assessee was also

manufacturing and selling certain standard cells. Under an agreement, the assessee agreed to give the knowhow of manufacturing the standard cells

to another manufacturer in consideration of a 10 per cent royalty on the net sale price marketed by the new manufacturer. As part of the agreement

the assessee sold all the raw materials in her hands for the price mentioned therein and also the semi-finished products and finished products. The

finished products did not exhaust the stocks which she held. In other words, she retained some part thereof for the purpose of sale in other States

to which the agreement to give the knowhow did not relate. The contention of the assessee was that the sum of Rs. 1,59,753.85 realised from

those sales represented sale of the business as a whole and that the sale was also not in the course of carrying on her business, but in the winding

up of the manufacturing unit. The Sales Tax Appellate Tribunal had accepted the assessee's claim for exemption. The second of the cases dealt

with was that of Burmah Shell, which was taken over and designated as Bharat Refineries Limited. The assessee closed down or wound up certain

storing stations due to shrinkage of business and sold the various tanks, pumps and scraps of those stations. The contention of the assessee was

that these sales were not effected in the course of business and that the sales were not also incidental or auxiliary to that business. The Sales Tax

Appellate Tribunal rejected the respective assessee's claim. On revision, this court held that the claim of exemption by the respective assessee was

not liable to be entertained. In the course of the judgment dealing with the claim for exemption under Rule 6(d), the court observed as follows:

The assessee also could not rely on Rule 6(d) as that provision provided for a deduction only if the amounts realised by the dealer was by the sale

of his or her business as a whole. In this case, the business had not been sold as a whole. The assessee could still carry on the business of

manufacture and sale of standard cells in the areas other than the four States in respect of which the right was conferred on them (new

manufacturer). Further, in our view, Rule 6(d) contemplates the transfer of the business as a going concern and not a case of transfer of some of

the assets alone.

16. The above passage clearly goes to show that that was not a case where there was a transfer of the business as a whole or as a going concern.

In both the cases, there were only transfers of certain materials. With reference to one of them, part of the materials had been retained. Based on

these distinguishing features it had held that the exemption under Rule 6(d) did not apply. That is not the position in the case before us. We have

already extracted the finding of the Appellate Assistant Commissioner and it is clear therefrom that the business in Ooty was sold as a whole. It

was also sold as a going concern. Consequently, the above decision has no application to the present case.

17. In the result, the tax revision case is dismissed. No costs.