

(2018) 06 MP CK 0143

In the Madhya Pradesh High Court

Case No : Writ Petition No.5175 Of 2015, 1925, 4189 Of 2017

Tripti Alcobrew Pvt. Ltd & Anr

APPELLANT

Vs

State Of Madhya Pradesh & Others

RESPONDENT

Date of Decision : 28-06-2018

Acts Referred:

Constitution of India, 1950 — Article 248, 366
Madhya Pradesh Excise Act, 1915 — Section 62(2), 62(1)
Value Added Tax Act, 2002 — Section 2(m), 2(u)(vi), 18(4), 19, 20, 20A(2), 46
Registration Act, 1908 — Section 2(6), 17(1)(b)
Central Excise Act, 1944 — Section 2(d), 3

Citation : (2018) 06 MP CK 0143

Hon'ble Judges : ASHOK KUMAR JOSHI, J; SANJAY YADAV, J

Bench : Division Bench

Advocate : Rakesh Khanna, Puneet Agrawal, Deepak Thackur, Sameer Kumar Shrivastava, Aditya Khanna, Praveen Newaskar, Praveen Surange, Harshwardhan Topre

Final Decision : Disposed Off

Judgement

Sanjay Yadav, J.

(1) These petitions are directed against the assessment order pertaining to assessment year 2012-2013, 2013-2014 and 2014-2015 whereby the

petitioner has been assessed to and levied Sales Tax on lease rent on Plant and Machinery forming part of Composite lease of Brewery at the rate of

13%.

(2) The facts not in dispute are that the petitioner is a Private Limited Company having its manufacturing Unit situated at Village Mahatoli, Banmore

476444, District Morena, Madhya Pradesh. The petitioner is registered under VAT Act, 2002 and bears TIN Registration No.230 25305515. The

petitioner inter-alia is engaged in the manufacturing of Beer under B-3 Licence issued by the Excise Commissioner of Madhya Pradesh, under the provisions of Madhya Pradesh Beer and Wine Rules 2002 framed by the State Government of Madhya Pradesh in exercise of the powers conferred by sub-section (1) and clause (a), (d), (e), (f), (g) and (h) of sub-section (2) of Section 62 of the Madhya Pradesh Excise Act, 1915. It is also a matter of record that during the period under consideration with SKOL Breweries Ltd. SAB Miller India Limited the petitioner entered into a license agreement on 30.1.2010 for the endorsement/sub-licencing of the petitioner's brewery license in favour of SKOL against the stipulated consideration of Rs.4,14,00,000/- per annum as license endorsement for a period from 1.2.2010 to 30.1.2014. And the lease deed dated 29.4.2010, for the lease of the petitioner's manufacturing Unit situated in District Morena, Madhya Pradesh. It is stated that the lease deed was a composite lease for the land, building plant, machinery and equipment where the Unit was situated for an annual lease rent of Rs.2,07,00,000 (incorrectly stated as Rs.1,80,00,000 in paragraph 6.3b of Writ Petition No.1925/2017). The prominent features whereof being (i) transfer of right to use the license for the purpose of manufacturing beer; and (ii) the composite renting of immovable property along with the buildings and plant and machinery thereupon.

(3) This aspect i.e. the prominent feature of the lease agreement is not disputed by the State of Madhya Pradesh as evident from the averments in paragraph 8 of the counter affidavit wherein it is stated that "In the document submitted by the petitioner Plant and Machinery and any other goods lease amount is not separately mentioned. In the Audit report submitted by the petitioner total fixed assets shown is Rs.411767104/- out of which land of Rs.3502418/-, Building Rs.62475177/- and Plant and Machinery is shown Rs.345789509/-. There is no denial of these averments in the rejoinder.

(4) It is also a matter of record that the balance sheets for the period 2012-2013, 2013-2014 and 2014-2015 reflects the lease rented income which is bifurcated into "lease rent" and "license endorsement fee". The petitioner paid 'License Endorsement fees' as per the provisions of the VAT Act. The petitioner paid service tax on the amount shown against the 'lease rent'.

(5) It is the case of the petitioner that since renting of an immovable property is not goods, the Finance Act, 1994 has defined the transaction under the

lease deed as 'Service', which led the petitioner to pay service tax under the Contract Act. The grievance raised by the petitioner that though

VAT is not leviable on the lease rent; the Assessing Officer vide assessment order levied the VAT @ 13 % on renting of plant and machinery under

the lease deed, treating it to the renting of goods. It is contended that though in common parlance, the plant and machinery are goods, as they are not

immovable property, but their characteristic changes once they are embedded to earth, metamorphosing as an immovable property. It is urged that the

assessing authority in purported exercise of his powers under section 20 of the VAT Act encroached the exclusive domain and jurisdiction of the

Central Govt. to impose service tax, under the garb of VAT on the transaction which otherwise is not sale, thus has committed a jurisdictional error. It

is urged that the assessing authority by vivisectioning plant and machinery from the land and imposing tax @ 13% tax on such plant and machinery

committed gross error of law. Consequently, imposing interest and the penalty there is also suffers the vice of jurisdictional error, is illegal, erroneous

and unconstitutional.

(6) It is accordingly contended that, there being a composite and indivisible transaction of leasing of brewery of the petitioner as a whole and on 'as is

whereis basis', for a lump sum lease rent, without assigning any individual values to any components and lease of immovable property pure and simple,

the State has no legislative competence to enact a law and charge tax under entry 54, list II of the Seventh Schedule of the Constitution. That the

transaction falls within the domain of Union Parliament under Article 248 read with Entry 97, list I of Seventh Schedule and the exclusive transaction

being subject to service tax, the VAT, which is a provincial tax is mutually exclusive, beyond the competence of State under Entry 54 Part II Seventh

Schedule.

(7) In the alternative, it is submitted that even if Plant and machinery are not treated as immovable property then also, the State has no competence to

charge VAT on the transaction in question as the assessee has not assigned individual values to each components and has charged lump sum annual

lease rent for lease of brewery, as a whole.

(8) It is further contended that as to the procedure also, since there is complete absence of any method, manner, basis for computing the value of

goods, the whole process is rendered wholly arbitrary, unreasonable, amounting to restriction to right to do business. It is urged that the case of the

petitioner was never selected for the purpose of making re-assessment as prescribed under Section 20 A (2) of VAT Act. And that the notice under

Section 19 of the VAT Act is no notice in the eyes of law. That no notice having been issued under Section 20 of VAT Act the entire assessment is

without jurisdiction.

(9) On these grounds, it is submitted on behalf of the petitioner that there exist no VAT liability on a composite indivisible transaction of lease of entire

brewery and the Revenue having failed to discharge the onus that the plant and machinery specially designed for permanent beneficial enjoyment of

the brewery are immovable in nature, the entire levy of VAT, of interest and of penalty being without jurisdiction deserves to be quashed.

(10) The State of Madhya Pradesh has filed the return and has contradicted the stand of the petitioner that the State lacks competency in imposing the

VAT on the goods under entry 54 of list II of Seventh Schedule on that, the Sales Tax/Value Added Tax is mutually excluded on the goods alleged to

be indivisible from the lease of land taxed as service under the Finance Act, 1994. It is urged that the petitioner is a private limited company having its

manufacturing unit at village Mahatoli; Banmore, District Morena. It is registered under VAT Act and bears TIN registration No.23025305315. The

petitioner is engaged in manufacturing of Beer and possesses a B-3 license for manufacturing issued by the Commissioner, Excise, State of Madhya

Pradesh. It is urged that during period 2012-2013, 2013-2017 and 2014-2015, the petitioner entered into a lease agreement with the SKOL Breweries

Limited (SAB Miller India Ltd.) and received following lease rent:

2012-13: Rs.2,07,00,000/-

2013-14: Rs.2,07,00,000/-

2014-15: Rs.2,37,33,333/-.

The petitioner paid service tax thereon @ 12.30%. It is urged that in the audit report submitted by the petitioner, the fixed asset valued by the

petitioner for respective year is :

2012-2013: Rs.41,17,67,104/-

2013-2014: Rs.41,17,67,104/-

2014-2015: Rs.41,17,67,104/-

It is further contended that out of total value of the said fixed asset, the petitioner bifurcated the same as under :

Â Land :Â Â Â Â

2012-13: Rs.35,02,418/-

Â 2013-14: Rs.35,02,418/-

2014-15: Rs.35,02,418/-

Â Building:

2012-13: Rs.6,24,75,177/-

Â 2013-14: Rs.6,24,75,177/-

Â 2014-15: Rs.6,24,75,177/-

Â Plant and Machinery:

2012-13: Rs.34,57,89,509/-

Â 2013-14: Rs.34,57,89,509/-

2014-15: Rs.34,57,89,509/-

Â It is contended that the total lease rent received by the petitioner as under :

2012-13: Rs.2,07,00,000/-

2013-14: Rs.2,07,00,000/-

2014-15: Rs.2,37,33,333/-

Â The percentage as per audit report comes to :

Â 2012-13 : 2013-14 2014-15

1. Land : 0.92% 0.92% 0.92%

2. Building : 16.47% 16.47% 16.47%

3. Plant & Machinery : 83.97% 83.97% 83.97%

(11) It is urged that the rent paid for land and building was allowed to be deducted being not â??goodsâ? under the VAT Act. And the tax was

imposed on lease rent on plant and machinery as under:

2012-13 2013-14 2014-15

Rs.22,23,035/- Rs.22,23,035/- Rs.22,23,035/-

(12) It is contended that since the assessee during the period under assessment has belatedly paid the tax and the remaining amount of tax is not paid,

the interest under Section 18 (4) of VAT Act is imposed as also the penalty placing reliance on section 2 (u) (vi) of VAT Act, it is urged that the transfer of right to use any goods including leasing thereof is sale and the plant and machinery being not an immovable property nor cannot it be said to be attached to earth, VAT is approximately levied. It is further contended that while issuing notice, the issue of availability of alternative remedy under section 46 of the VAT Act has been left open. On these contention, respondents no.1 to 4 seeks dismissal of petition.Â Â

(13) Considered the rival submissions.

(14) At the outset, it needs a mention that against the impugned order of assessment petitioner has a remedy of appeal under Section 46 of the VAT Act, 2002. But since the petitioner has raised a jurisdictional issue that it is beyond the competence of the State to levy VAT on the plant and machinery by vivisecting composite transaction we intend to examine the same.

(15) Evidently, the Assessing Officer has construed the â??plaint and machineryâ? as â??goodsâ? as defined under Section 2(m) of the VAT Act, 2002 and its transfer on lease as â??Saleâ?? defined under Section 2(u)(vi) thereof.

(16) Power of the State to impose tax on sale or purchase of goods, other than newspaper, emanates from Entry 54 of List II of Schedule VII of the Constitution. Whereas, the power of Union of India to tax can be traced to Entry 92C and 97 of list I of Schedule VII of the Constitution.

(17) Parliament amended the Constitution to insert Clause (29-A) in Article 366 of the Constitution, sub-clauses (a) to (f) were added, which read thus:

â??366 (29-A) tax on the sale or purchase of goods includes

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;

(c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other

valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other

valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human

consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply

and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

(18) In BSNL Vs. Union of India : (2006) 3 SCC 1, Three Judges Bench of the Supreme Court, dwelling briefly into the legal history of Article 366

(29-A) of the Constitution (Please see paragraphs 35,36, 37, 38, 39, 40) observed as to scope of sub-clause (d) of clause (29- A) of Art.366:

“41.Similarly the title to the goods under sub-clause (d) remains with the transferer who only transfers the right to use the goods to the

purchasers. In other words, contrary to A.V. Meiyappan decision [(1967 20 STC 115 Mad.) a lease of a negative print of a picture would be a

sale....”

It further held that :

“42. All the sub-clauses of Article 366 (29-A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the

Sale of Goods Act, 1930 are absent, within the ambit of purchase and sales for the purpose of levy of sales tax....

50. What are “goods” in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would

have to be ad idem as to the subject-matter of sale or purchase. The Court would have to arrive at the conclusions as to what the parties had intended

when they entered into a particular transaction of sale, as being the subject matter of sale or purchase. In arriving at a conclusion the Court would

have to approach the matter from the point of view of a reasonable person of average intelligence.

75. In our opinion, the essence of the right under Article 366 (29-A)(d) is that it

relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable.....â? (Please see Aggarwal Bros. Vs. State of Haryana (1999) 9 SCC 182: for an authority that there was intention to transfer, the right to use ; as in the case at hand, wherein the lessor transferred the right in land, building, brewery including plant and machinery with right to use Plant and Machinery.)

(19) Furthermore, in concurring view Dr. A.R. Laxshman J (as His Lordships then was) specified following parameters to constitute a transaction for the transfer of the right to use the goods:

â??97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:

- (a) there must be goods available for delivery;
- (b) there must be a consensus ad idem as to the identity of the goods;
- (c) the transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permission or licences required therefor should be available to the transferee;
- (d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor- this is the necessary concomitant of the plain language of the statute viz. a â??transfer of the right to useâ?? and not merely a licence to use the goods;
- (e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.â??

(20) In the case at hand, in our considered opinion these attributes are present in relationship between the lessor and the lessee.

(21) In *Imagic Creative (P.) Ltd. V. Commissioner of Commercial Taxes and others* : (2008) 2 SCC 614, it is held:

â??29....A distinction must be borne in mind between an indivisible contract and a composite contract. If in a contract, an element to provide service is contained, the purport and object for which the Constitution had to be

amended and Clause 29A had to be inserted in Article 366, must be kept in mind.

32. Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contra distinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy.â??

(22) In view whereof, in the given facts of present case wherein the Assessing Officer has levied VAT on transfer of plant and machinery being covered by sub-clause (d) of Clause (29-A) of Article 366 of the Constitution it is difficult to accept the submissions on behalf of the petitioner, that it

was beyond his competence to levy VAT on transfer of plant and machinery. The decision in *State of Madras Vs. Gannon Dunkerley & Co. (1958) 9*

STC 353 (SC), *Fortis Health Care Limited Vs. State of Punjab, 2015 SCC Online P & H 2018* and *Tata Main Hospital Vs. State of Jharkhand and*

others, 2008 (2) JCR 174 (Jhr.), Commissioner, VAT, Trade and Taxes Department *Vs. International Travel House Ltd, 2010 (16) STJ 129* relied on

by the petitioner are thus of no assistance to the petitioner.

(23) The petitioner has also placed reliance on the decision in *Triveni Engineering & Industries Ltd. Vs. Commissioner of Central Excise and another,*

(2000) 7 SCC 29; *C.T.O. Sriganganagar Vs. M/s Sadulshahar Krai Vikrai Sahakari Samiti, 2003 SCC Online Rajasthan 374*; *Mohammed Ibrahim Vs.*

Northern Circars Fibre Trading Co., AIR 1944 Madras 492; *M/s Kranti Steel Pvt. Ltd Vs. Chief Controlling Revenue Authority, 2014 SCC Online All*

6017; *Commissioner of Sales Tax Vs. Bombay Sound Service, 1999 STC (112) 290*; *Deputy Commissioner of Sales Tax Vs. Bobby Rubber*

Industries, 1998 STC (108) 410 to bring home the submissions that when the object of annexation is for permanent enjoyment of property; then the

â??plant and machineryâ?? is immovable property.

(24) Evidently, in *Duncans Industries Ltd. (supra)* the issue centered around the scope of Section 2(6) and Section 17(1)(b) of the Registration Act,

1908; wherein, in the context thereof their Lordships were pleased to observe that it is the intention of the contracting parties which is paramount for

ascertaining whether the plant and machinery can be treated to be one embedded in earth. In *Triveni Engineering & Industries Limited (supra)* the

scope of Section 2(d) read with Section 3 of Central Excise Act, 1944, was under consideration which is not the case at present.

(25) In *M/s Kranti Steel Pvt. Ltd.* (supra), the controversy cropped up under the Stamp Act, 1899. Whereas, in the case at hand, as evident, we are

concerned with the composite renting of immovable property along-with the buildings, plant and machinery. And the prominent feature of the lease

agreement reflects the transfer of right to use plant and machinery for cash, which are "goods" as defined under Section 2(m) of VAT Act, 2002.

(26) In *Sunrise Associates vs. Govt. of NCT of Delhi and Others* [(2006) 5 SCC 603], it is held:

35. The word 'goods' for the purposes of imposition of sales tax has been uniformly defined in the various sales tax laws as meaning all kinds of

movable property. The word "property" may denote the nature of the interest in goods and when used in this sense means title or ownership in a thing.

The word may also be used to describe the thing itself. The two concepts are distinct, a distinction which must be kept in mind when considering the

use of the word in connection with the sale of goods. In the Dictionary of Commercial law by A.H. Hudson (1983 Edn.) the difference is clearly

brought out. The definition reads thus:

'Property'. -In commercial law this may carry its ordinary meaning of the subject-matter of ownership. But elsewhere, as in the sale of goods it

may be used as a synonym for ownership and lesser rights in goods".

Hence, when used in the definition of "goods" in the different sales tax statutes, the word "property" means the subject-matter of ownership.

The same word in the context of a "sale" means the transfer of the ownership in goods.

36. We have noted earlier that all the statutory definitions of the word "goods" in the State sales tax laws have uniformly excluded, inter alia,

actionable claims from the definition for the purposes of the Act. Were actionable claims etc., not otherwise includible in the definition of "goods"

there was no need for excluding them. In other words, actionable claims are "goods" but not for the purposes of the Sales Tax Acts and but for

this statutory exclusion, an actionable claim would be "goods" or the subject-matter of ownership. Consequently, an actionable claim is movable

property and "goods" in the wider sense of the term but a sale of an

actionable claim would not be subject to the sales tax laws.â??

(27) In view whereof even the decisions in M/s Kranti Steel Pvt. Ltd. (supra), Bombay Sound Service (supra) and Bobby Rubber Industries (supra)

are also of no assistance to the petitioner. As these decisions treat property in question therein as â??subject matter of ownershipâ? and a â??lesser

rights in â??goodsâ? â?. The decision in these cases apparently, gloss over the â??cautionâ? in BSNL(supra) that the word â??propertyâ? may

denote the nature of the interest in goods and when used in this sense means title or ownership in a thing. The word may also be used to describe the

thing itself. The two concepts are distinct, a distinction which must be kept in mind when considering the use of the word in connection with the sale of

goods.â??

(28) On the basis of above analysis, it is held that it being within the competence of the State and its functionaries in vivisecting the composite lease

rent and levying VAT on the transfer of plant and machinery. The challenge as to the jurisdiction of State functionaries in levying VAT is negated.

(29) Since we have held that it is within the competence of the State and its functionaries to levy VAT on the transfer of plant and machinery, the

petitioner is set to avail the remedy of Appeal under Section 46 of VAT Act, 2002, against the assessment order. In case, an Appeal is preferred

within a period of 30 days from the date of communication of this order, the Appellate Authority shall consider the same on merit, rather throw it

overboard on the ground of limitation.

(30) Petitions are disposed of finally in above terms. There shall be no costs.