



## 'Business transfer' as a going concern is not subject to VAT

### ***Piramal Enterprises Ltd. v. The State of Maharashtra & Ors<sup>1</sup>***

In the case of Piramal Enterprise Ltd. (the 'Petitioner'), the Bombay High Court (the 'Court') dismissed a review order passed by the Joint Commissioner of State (VAT Act) (the 'respondent') demanding VAT on the sale of a 'business transfer', treating it as a 'sale of individual business assets'

#### **Facts of the case**

- In May 2010, the Petitioner entered into a Business Transfer Agreement ('BTA') with Abbott Healthcare Pvt. Ltd. to sell their Base Domestic Formulations Business on a going concern basis. The BTA included bifurcation of the consideration for tangible and intangible assets for stamp duty purposes.
- VAT assessment for F.Y 2010-11, which concluded on March 16, 2015, determined that the said transaction was a 'going concern' and therefore, not subject to VAT under the Maharashtra Value Added Tax Act, 2002 ('MVAT Act').
- However, on April 6, 2017, the respondent issued a Show Cause Notice ('SCN') to the Petitioner proposing to review the said assessment order, arguing that the tangible and intangible assets listed

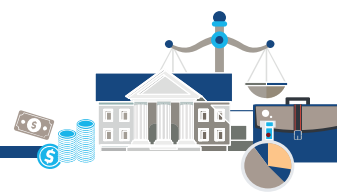
in the BTA should be included in the Petitioner's turnover and be subjected to VAT.

- In response to the said SCN, the Petitioner contested that the itemised value of assets was intended solely for stamp duty purposes, and it did not alter the nature of the transaction as a 'business transfer'.
- However, an order confirming the demand of Rs.2,606.79 Crores (including interest) was passed by the respondent, alleging that the said transfer included the transfer of 'right to use' Intellectual Property Rights ('IPR') (trade name, logo, goodwill etc.) for a fixed period, which constitutes 'sale' under the MVAT Act, making it a taxable transaction.
- Aggrieved by the order, the Petitioner filed a writ petition on the grounds of lack of jurisdiction and violation of principles of natural justice.

#### **Petitioner's Contention**

- Providing right to use rights, such as corporate name, logo and other intangibles, even for a limited duration, are essential for business transfer as a going concern so as to enable the buyer to maintain operational continuity; this does not negate the fact that the business has been transferred in its entirety.

<sup>1</sup>2024-VIL-432-CAL



- Taxes must be levied based on the true nature of the transaction. A composite contract cannot be split to impose tax liability. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of **Union of India v. Playworld Electronics Pvt. Ltd.**<sup>2</sup> and **The Commissioner, Central Excise & Customs, Kerala v. M/s. Larsen & Toubro Ltd.**<sup>3</sup>
- Moreover, for levy of MVAT, the pre-conditions under the charging provision should be cumulatively satisfied: (a) there should be 'sale' of goods; (b) sale to be undertaken by a dealer; (c) sale should be 'in connection with', 'incidental to' or 'in the course of business'. However, complete transfer of business cannot be considered as having been undertaken 'in the course of business' and is thus not liable to VAT.

#### Respondent's Contention

- As per Entry No 39 of Schedule C to the MVAT Act, intangible rights are taxable. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of **Vikas Sales Corporation v. Commissioner of Commercial Taxes**<sup>4</sup>, wherein it was held that IPR are goods.
- Further, the contention of the Petitioner that BTA cannot be split to impose tax is untenable as the tax is demanded on the transfer of right to use IPR and other intangible assets included in the BTA.
- Despite the form and nomenclature of the BTA, the substance indicated a selective transfer and not a complete business undertaking, i.e., certain assets were excluded. If the complete business was transferred, enumeration of assets was not required. This indicates that the business as a whole was not transferred, but in fact certain assets were transferred.
- Moreover, the Petitioner's contention that 'transfer of business' cannot be said to have been undertaken 'in the course of business' cannot be accepted

because 'business' itself is an intangible asset covered by the definition of 'goods' as defined under Section 2(12) of the MVAT Act.

#### Discussion and Findings

- The Court observed that on a careful perusal of BTA, it is evident that the sale is intended as a transfer of business as a "going concern" on a slump sale basis, defined under Section 2(42C) of the Income Tax Act, 1962.
- Sale of business on a slump sale basis is to be treated as the sale of a single asset, meaning thereby individual assets within the business are not to be taxed separately. Reliance is placed on the decision of **CIT v. Mugneeram Bangur & Co.**<sup>5</sup>, **Deputy Commissioner (C.T.), Coimbatore v. K. Behanan Thomas**<sup>6</sup>, **Premier Automobiles Ltd. v. Income Tax Officer, M/s. Paradise Food Court v. State of Telangana**<sup>7</sup> etc.
- Moreover, treating slump sale as a sale of goods would require dissecting the entire transaction into its constituent assets and liabilities, which contradicts the very nature of a slump sale.
- The BTA should be read as a whole and should be interpreted based on the parties' intention, as reflected in its clauses.
- Further, the Court observed that the scope of 'goods' under the MVAT Act does extend to incorporeal or intangible items, as per Schedule 'C'; however, the comprehensive nature of a business transfer, as executed in the BTA, suggests a transaction more complex than the sale of individual goods.
- Also, the allocation of the purchase price in the BTA for stamp duty purposes should not be misconstrued as redefining the transaction's nature for VAT purposes.

<sup>2</sup> 1989(41) ELT 368 (S.C.)

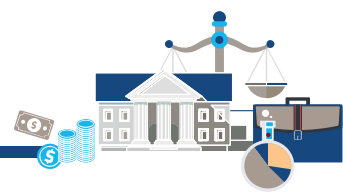
<sup>3</sup> 2015(8) TMT 749 (S.C.)

<sup>4</sup> (1996) 102 STC 106

<sup>5</sup> (1965) 57 ITR 299 (SC)

<sup>6</sup> (1976) SCC OnLine Mad 421

<sup>7</sup> 2017-TIOL-2672-HC-AP-VAT



- Further, the temporary use of the Petitioner's corporate name and logo by the buyer was essential for maintaining market credibility post-sale, underscoring the comprehensive nature of the business transfer. Respondent's failure to recognise the integral role of intangible assets in the business transfer has led to an erroneous classification of the transaction under the MVAT Act.

### Judgement

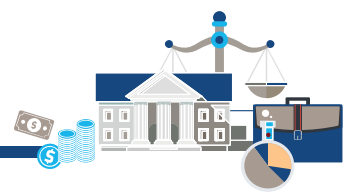
- Considering the aforementioned observations, the Court set aside the impugned order and issued a writ of Certiorari, stating that mere availability of an alternative remedy of appeal and revision does not oust the jurisdiction of the High Court or render a writ petition non-maintainable.

### Dhruva Comments

The judgement reiterates the conclusion by various judicial precedents pertaining to the erstwhile Sales Tax and VAT regime, which have held that the business transfer as a going concern is to be treated as a slump sale and cannot be vivisected to tax the business assets individually. The Court clearly turned down the department's action of dissecting the agreement and subjecting the value of IPR to VAT by considering the intent of the transacting parties and the nature of the transaction, i.e., transfer of business as a whole.

Under the Goods and Services Tax ('GST') legislation, transfer of a business on a going concern is exempted vide entry no. 2 to the notification no. 12/ 2017 – Central Tax.

The principles laid down under the subject ruling and the previous rulings under the Sales Tax and VAT regime on taxability of transfer of business may be evaluated under the context of the GST legislation to determine whether such transactions qualify as 'supply' *per se* and therefore, exigible to GST, thus rendering the exemption entry redundant.





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