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[2024] 163 taxmann.com 358 (Andhra Pradesh)[08-05-2024]

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**GST : Writ petition challenging GST liability for alleged business transfer dismissed, directing exhaustion of statutory appeal remedy before judicial review**

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[2024] 163 taxmann.com 358 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

JR Metal Chennai Ltd.

v.

Assistant Commissioner of Central Tax\*

RAVI NATH TILHARI AND SMT. KIRANMAYEE MANDAVA, JJ.

WRIT PETITION NO. 11176 OF 2024

MAY 8, 2024

**Transfer of business - Liability to pay tax - Purchase of assets - Assessee contended purchase of plant, machinery, land and building from Venkatasai Ispat Industries Pvt. Ltd. did not amount to transfer of business - Assessee liable under Section 85 of CGST Act treating transaction as transfer of ownership of business - HELD: Writ petition dismissed on ground of availability of statutory alternative remedy - Question of whether transaction amounted to transfer of business is factual issue to be determined based on evidence - Appellate authority can consider this issue - Impugned order not without jurisdiction on face of it - Matter left open for assessee to avail statutory appeal if so advised [Section 85 of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017] [Paras 10-12] [In favour of revenue]**

#### CASE REVIEW

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*State of Karnataka v. Shreyas Papers (P.) Ltd.* [2006 taxmann.com 1848 \(SC\)](#); *Krishna Lifestyle Technologies Ltd. v. Union of India* [\[2010\] 25 STT 148 \(Bom.\)](#) and *Sri Jayajothi Co Ltd. v. CCE 2010 SCC Online Mad 6002* (para 10) followed.

#### CASES REFERRED TO

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*State of Karnataka v. Shreyas Papers (P.) Ltd.* [2006 taxmann.com 1848 \(SC\)](#) (para 7), *Krishna Lifestyle Technologies Ltd. v. Union of India* [\[2010\] 25 STT 148 \(Bom.\)](#) (para 8) and *Sri Jayajothi Co Ltd. v. CCE 2010 SCC Online Mad 6002* (para 9).

**Anup Koushik Karavadi**, counsel for the Petitioner. **Santhi Chandra**, counsel for the Respondent.

#### ORDER

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1. Heard Sri B.Satish Sundhar, Senior Counsel, representing Sri Anup Koushik Karavadi, counsel for petitioner; and Mrs. Santhi Chandra, Junior Standing Counsel for CBIC, appearing for the respondents.
2. A preliminary objection has been raised by the Junior Standing Counsel that the impugned order is appealable under statute and in view of statutory alternative remedy of appeal the writ petition deserves not to be entertained.
3. Learned counsel for petitioner does not dispute the remedy of appeal but he submits that the writ petition is entertainable as the impugned order dt. 16.04.2024 is passed without jurisdiction by the Assistant

Commissioner, CGST, Anantapur Division holding that there was transfer of ownership of business by M/s. Venkatasai Ispat Industries Pvt. Ltd. In favour of petitioner. He submits that the petitioner has purchased, *vide* Sale Deed dt. 17.02.2021, plant & machinery, land and building etc. but not the business. So the finding that there was transfer of ownership of business within meaning of section 85 of the Central Goods and Services Tax Act, 2017 (for short, 'the CGST Act') is not correct. Section 85 of the CGST Act was not applicable.

4. We have considered the submissions advanced by learned counsels for the parties.

5. Section 85 of the CGST Act as under:

"85. Liability in case of transfer of business.— (1) Where a taxable person, liable to pay tax under this Act, transfers his business in whole or in part, by sale, gift, lease, leave and license, hire or in any other manner whatsoever, the taxable person and the person to whom the business is so transferred shall, jointly and severally, be liable wholly or to the extent of such transfer, to pay the tax, interest or any penalty due from the taxable person upto the time of such transfer, whether such tax, interest or penalty has been determined before such transfer, but has remained unpaid or is determined thereafter."

6. Section 85(1) of the CGST Act uses the expression 'transfers his business' .

7. Learned counsel for the petitioner placed reliance in the case of *State of Karnataka v. Shreyas Papers (P) Ltd.* (2006) 1 SCC 615/2006 taxmann.com 1848 (SC). The Hon'ble Apex Court in the context of Section 29(2) of the State Financial Corporations Act, 1951 (SFC Act) and Section 15(1) of the Karnataka Sales Tax Act, 1957, (KST Act), held that the transfer of "ownership of business" required that the business be sold as a going concern. It was observed that the mere transfer of one or more species of assets did not necessarily bring about the transfer of the "ownership of business" which was much wider than mere ownership of discrete or individual assets. It was held that Section 15(1) of the KST Act would apply when there is complete transfer of ownership of business so as to render the transferee as a successor-in-interest of the transferor.

8. In *Krishna Lifestyle Technologies Ltd. v. Union of India* 2008 SCC Online Bom 137/[2010] 25 STT 148 (Bom.), the Bombay High Court, held as under:

"38. From the above discussions, we are of the opinion that though assets were sold, sale of assets by itself would not be transfer of business in whole or in part. There must be material on record to show that the business has been transferred to the petitioner and consequent thereto the petitioner has succeeded in said business. Respondent Nos.2 and 3 on the facts of this case have not proceeded under the proviso to Section 11 of the Central Excise Act."

9. In *Sri Jayajothi Co. Ltd. v. CCE* 2010 SCC Online Mad 6002 , the High Court of Madras in the context of Section 11 of the Central Excise Act, 1944, observed as follows in Para 9.

"9. A close reading of the above provision would make it abundantly clear that only in a case where the transfer or otherwise disposal of the business or trade in whole or in part effects any change in the ownership thereof, in consequence of which the transferee succeeds in such business or trade, such person, who succeeds in the business, is liable to pay the dues. xxxxxxxxxxxx."

10. There cannot be any dispute on the proposition of law, as laid down in the judgments (*supra*). But, the crucial question is whether there is transfer of business or not, which basically is a question of fact, and requires determination based on evidence or material to arrive at a definite finding. The impugned order records that there was transfer of business. We are of the view that such a question can well be determined by the appellate authority. It is not such a ground that cannot be taken before the appellate authority.

11. We are not convinced with the submission that the impugned order is without jurisdiction. The reason is that the order on the face of it cannot be said to be without jurisdiction. It is not the argument of the learned counsel for petitioner that the authority passing the impugned order inherently lacked jurisdiction. We, in the exercise of the writ jurisdiction, at this stage do not consider it appropriate to enter into the disputed question of fact.

12. Therefore, leaving it open to the petitioner to avail the statutory alternative remedy, if so advised, this Writ Petition is dismissed only on the ground of statutory alternative remedy. There shall be no order as to costs.

13. As a sequel, interlocutory applications pending, if any, shall also stand closed.

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\*In favour of revenue.