

Mere bifurcation of consideration cannot change a slump sale transaction to an 'itemised sale' – Bombay HC

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Summary

The Bombay High Court (HC) has held that the mere bifurcation of consideration for a slump sale towards intellectual property rights (IPR) and other assets cannot be construed as 'itemised sale' by vivisectioning the Business Transfer Agreement (BTA). The HC observed that the values were assigned to intangible properties only for the purpose of determining stamp duty, thereby emphasising that the underlying commercial scheme can be discerned only by reading the BTA in its entirety. A holistic reading of the BTA signified the true intention of the transfer of entire business in 'lock, stock and barrel', which constitutes a 'transfer of business' and is not eligible for VAT. The HC emphasised that an artificial vivisection of the BTA to construe an intention contrary to the true intention cannot be permitted. Accordingly, the HC set aside the impugned order and demand notice of approximately INR 2600 crores, for violating the established principles of natural justice and bad in law.

Facts of the case

- Piramal Enterprises Limited (the petitioner) entered a business transfer agreement (BTA) with M/s. Abbott Healthcare Private Limited (AHPL) to sell its 'Base Domestic Formulations' business as a 'going concern' for a total cash consideration of INR equivalent of 3.80 billion USD.
- A bifurcation of the part consideration towards tangible, intangible, movable and immovable property was specified in the BTA for the limited purpose of determining stamp duty.
- After due assessment for the FY 2010-11, the assessment order was passed holding that 'slump sale' of business as contemplated vide the BTA would not be liable to VAT under the Maharashtra Value Added Tax Act, 2002 (MVAT Act).
- However, a show cause notice (SCN) was issued subsequently proposing review of the assessment order premised on the fact that itemised breakup of consideration towards tangible, intangible, movable and immovable property has been incorrectly allowed as transfer of business on 'slump sale' basis, due to which VAT could not be levied.
- Consequently, the demand was confirmed vide a review order (impugned order) on the premise that there has been a transfer of 'right to use' of IPR namely trade name, logo, goodwill etc. for the fixed time period which falls under the ambit of 'sale' which is the taxable event under the MVAT Act. Accordingly, a demand notice seeking to recover INR 2606.79 crores as tax and interest was also issued.
- The aggrieved petitioner has challenged the impugned order and has assailed the demand notice by way of the writ petition before the Bombay HC.

Petitioners' Submissions

- It was submitted that the department had, vide the impugned order, sought to artificially vivisection a business transfer which is impermissible under law thereby, exceeding jurisdiction.
- Furthermore, the transfer of entire business in 'lock, stock and barrel' whereby the seller had completely divested his business and buyer is

completely vested with the business, cannot be construed to be undertaken in the course of business. Accordingly, the transfer of business should not be exigible to VAT.

- Since the petitioner had not conducted such business as a consequence of transferring the business, there cannot be a levy of VAT on such a transaction.
- It was contended that the mere bifurcation of part-consideration solely for the purpose of stamp duty, cannot be construed as itemised sale when the intention is to transfer the business as a going concern.
- It was explained that the transfer of goodwill and brands (patent and trademark) is an essential ingredient of transfer of business as a going concern without which the buyer would not be able to operate the business. Furthermore, permitting temporary use of corporate name and logo for a defined period was only meant to ensure continuity and enable successful transition of the business without prejudicing the public minds considering the pharmaceutical nature of the products. Accordingly, the same cannot be construed to alter the underlying intention of transfer of business.
- Emphasising that taxes are imposed on the true nature of the transaction, it was stated that a composite and integrated contract cannot be vivisected to fasten tax liability.
- It was highlighted that the review was premised on the fact that bifurcation of part-consideration has been wrongly treated as slump sale, while the impugned order was passed holding that IPR have not been transferred permanently. The petitioner argued that the impugned order is in violation of the

principles of natural justice and therefore, stands vitiated.

- The petitioner also highlighted that the allegations raised were copied *verbatim* from the service tax demand notice issued to the petitioner. Considering that the taxability aspects under service tax is different from VAT, the impugned order was passed without application of mind and was therefore, bad in law.

Bombay HC observations and judgement [Writ Petition No. 2836/2021; Order dated 11 June 2024]

- **Underlying intention of the agreement is to transfer the business as a going concern on slump sale basis:** The HC emphasised that the commercial scheme of the BTA along with lump sum consideration received for the transfer of business categorically indicated that the underlying intention was to transfer the business as going concern on a slump sale basis.
- **Business cannot be construed as goods:** Upon a detailed examination of the provisions of MVAT Act, the HC observed that 'business' would not qualify as 'goods', accordingly, sale of business cannot be categorised equivalent to sale of goods.
- **'Pick and choose' approach to vivisect agreement impermissible under law:** The HC opined that dissecting the agreement merely on account of itemised price bifurcation as against the clear purport of slump sale under BTA is fundamentally incorrect and against the object of law. The HC emphasised that intention of the parties and the purpose of the agreement can only be discerned when the agreement is read in its entirety. It was highlighted that the commercial efficacy as well as

the underlying intention would not change merely by assigning values to tangible and intangible assets. Accordingly, the HC held that authority has exceeded its jurisdiction.

- **Impugned order fails to follow basic tenets resulting in prejudice to the parties in violation of principles of natural justice:** The HC observed that on one hand, the SCN recognised the sale under BTA as 'slump sale' and on the other the reviewing authority has held the itemised sale as 'sale of goods' liable to VAT. That HC opined that such an approach of the authority is against the established principles of natural justice thereby vitiating the order.
- **No bar on itemised sale in the context of sale of business as going concern:** The HC asserted that the values of intangible assets were provided merely for the purpose of determining stamp duty which is also recognised as per the provisions of the Income Tax Act. Accordingly, basis the above and the undisputed lump sum consideration the HC held that the taxability does not get triggered under the MVAT Act.
- **Parameters of proceedings of levy of service tax is different from VAT and**

cannot be borrowed: The HC agreed that the impugned order was bad in law being passed without application of mind since the findings and reasons were copied from the service tax demand notice issued to the petitioner. The HC held that the parameters of proceedings of levy of service tax under Finance Act is different from VAT and cannot be borrowed to be made applicable for levy of VAT under the MVAT Act.

Our comments

This is an important judgement which has pertinently emphasised that an itemised breakup of total consideration, purely for the purpose of determining stamp duty, does not take away the true intention of transfer of business as a going concern on a slump sale basis.

The ruling may have a significant impact under GST since transfer of business as a going concern is exempted, whereas an itemised sale of assets is treated as supply of goods liable to GST. Accordingly, the principles established by the HC in this judgement can be relied upon to differentiate between an 'itemised sale' and a 'slump sale'.

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