

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

**BEFORE
HON'BLE SHRI JUSTICE RAVI MALIMATH,
CHIEF JUSTICE
&
HON'BLE SHRI JUSTICE ANAND PATHAK**

ON THE 17th OF OCTOBER, 2022

WRIT PETITION No. 936 of 2008

BETWEEN:-

**S.M. DYECHEM LTD. (A COMPANY REGISTERED
UNDER COMPANIES ACT), REGISTERED OFFICE
RAMPART BUSINESS CENTER 16/24 BAKE HOUSE
MASTER NAGIN DAS ROAD EXTENSION FORT
MUMBAI THROUGH POWER OF ATTORNEY HOLDER
SHRI PRAKASH CHAND TIWARI S/O LATE SHRI M.P.
TIWARI R/O E-7/832, ARERA COLONY, BHOPAL (M.P.)**

.....PETITIONER

(BY SHRI SIDDHARTH SHARMA - ADVOCATE)

AND

- 1. STATE OF MADHYA PRADESH, THROUGH
PRINCIPAL SECRETARY, MINISTRY OF
REVENUE DEPARTMENT, COMMERCIAL TAX,
VALLABH BHAWAN, BHOPAL (M.P.).**
- 2. STATE LEVEL COMMITTEE, TAX BENEFIT
SECTION THROUGH, INDUSTRIES
COMMISSIONER, VINDYACHAL BHAWAN,
BHOPAL (M.P.)**
- 3. ASSISTANT COMMISSIONER, COMMERCIAL TAX
DEPARTMENT, DIVISION NO.1 BHOPAL (M.P.)**

.....RESPONDENTS

***(SHRI ANKUR MODY –ADDITIONAL ADVOCATE GENERAL FOR
RESPONDENTS NO.1&2)***

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This petition coming on for hearing this day, Hon'ble Shri Justice Ravi Malimath, Chief Justice passed the following:

ORDER

This petition is filed challenging the order dated 14.01.2008 (Annexure P/1) passed by the Assistant Commissioner, Commercial Tax, Bhopal in Case No.261 of 2005 and the order dated 29.08.2008 (Annexure P/1-A) passed by the Additional Commissioner, Commercial Tax, Bhopal in Revision No.160/Bhopal/07-08.

2. The case of the petitioner is that it is a Company registered under the Companies Act, 1956. A notice was issued by the respondents vide Annexure P/3 to the effect that the sale which has been effected in the name of Satya Sai Agroils for purposes of sale of land including the plant and machineries gets attracted for the liability of Commercial Tax at the rate of 9.2%.

3. After receipt of the said notice, the petitioner brought to the notice of respondents that it is not liable to pay any turnover tax under the Madhya Pradesh Vanijyik Kar Adhiniyam, 1994 (for short "the Adhiniyam"). It is intimated to them that the company has been declared as a sick company in terms of order vide Annexure P/4. A scheme was also formulated under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The assets of the company were taken over by the Banker namely the Indian Bank. In spite of the reply being furnished, the respondents proceeded further and have passed the impugned order vide Annexure P/1 demanding Rs.80.04 Lakhs as commercial tax at the rate of 9.2% under the Adhiniyam. Questioning the same, the instant petition is filed.

4. Learned counsel for the petitioner contends that the impugned order passed by the respondents is bad in law and therefore liable to be set aside.

The impugned order vide Annexure P/1 is an order passed under Section 28(1) of the Adhiniyam. Such section is with reference to the assessment of turnover, which has escaped assessment. The primary plea of the petitioner is that charging section itself is erroneous and the question of assessment of turnover does not arise in the instant case. Admittedly, the petitioner has been declared as a sick company much before the proceedings have been initiated. The properties are being sold as a consequence of petitioner being declared as a sick company. Therefore, the nexus with the turnover could not arise for consideration. Hence, it is stated that the impugned order suffers from lack of authority and hence it requires to be set aside.

5. The same is disputed by the respondents/State through their return filed by them. It is pleaded that the objection of petitioner to the notice vide Annexure P/3 was considered and it was found by the respondents that the property having been sold for a sum of Rs.8.70 Crores attracts commercial tax @ 9.2% amounting to Rs.80.04 Lakhs, therefore, the imposition of commercial tax is justified by law. Therefore, the proceedings initiated under Section 69 of the Adhiniyam are justified. Against the order of initiation, the petitioner preferred a revision before the Additional Commissioner and vide order dated 29.08.2008 the same was rejected. The fact of filing the revision before the authority has not been brought to the notice of the Court. Even otherwise, it is contended that the action of respondents is just in law and liable to be sustained and hence no interference is called for.

6. Heard learned counsels.

7. The impugned order Annexure P/1 is issued under the powers conferred to the authority under Section 28 of the Adhiniyam. The same is with reference to escaped assessment of turnover. "Turnover" has, in fact, been defined as levy of tax governed by Section 9 of the Adhiniyam, which

refers to the tax payable by a dealer which has been levied on the taxable turnover relating to the goods specified in Schedule II etc. “Taxable turnover” has once again been defined in terms of Section 2(w) of the Adhiniyam, which reads as follows:

“2(w) “Taxable turnover” in relation to any period means that part of a dealer’s turnover for such period which remains after deducting therefrom-

- (i) the sale price of goods declared tax free under Section 15 or exempted in whole under Section 17;
- (ii) the sale price of goods mentioned in part-II to VII of Schedule-II which are in the nature of tax paid goods in the hands of such dealer;
- (iii) the sale price of unginmed cotton as specified in part-I of Schedule –II and such other goods in the said part as the State Government may from time to time, by notification, specify, sold to a registered dealer who has declared in the prescribed form that the goods are for resale or for use by him in the manufacture of goods for sale by him;
- (iv) the sale price of goods specified in Part-I of Schedule –II other than those referred to in sub-clause (iii), sold to a registered dealer who has declared in the prescribed form that the goods are for resale by him;
- (v) the amount arrived at by applying the following formula:-

$$\frac{\text{rate of tax X aggregate of sale prices}}{100 + \text{rate of tax}}$$

Provided that no deductions on the basis of the above formula shall be made if the amount by way of tax collected by a registered dealer, in accordance with the provisions of this Act has been otherwise deducted from the aggregate of sale prices.

Explanation.- Where the turnover of a dealer is taxable at different rates, the aforesaid formula shall be applied separately in respect of such part of the turnover liable to a different rate of tax under sub-section (1) of Section 9;

(vi) *such other deductions as may be prescribed*”

8. Admittedly, in the instant case, there is no turnover that the company is effecting after it has been declared as sick. Even before it was declared as a sick company, the petitioner had ceased to perform any production activities. Therefore, the turnover tax is always relatable to the turnover of the company that it generates on regular basis. In the instant case, it cannot be said that there was any turnover which was effected to by the petitioner which attracts the turnover tax. In fact, the sale of the property was one of the measures in order to clear part of the debts of the company. It cannot be construed as a turnover. Section 28 of the Adhiniyam is referable only to those cases where there has been a failure to tax turnover. That very assessment filed by the petitioner does not include the turnover as done by the company. It is on those events that the respondents are entitled for a reassessment so far as turnover tax is concerned. In the instant case, since the very factum of an absence of turnover exists, the levy of turnover tax on the petitioner, in our considered view, may not be appropriate. The turnover tax is applicable only in those cases where the petitioner is actually undergoing the turnover on a day-to-day basis. Since this is a one-off transaction of sale of plant and machinery in distress due to being declared as a sick company, therefore, we are of the view that the impugned order becomes unsustainable.

9. With reference to the definition of “Taxable turnover”, the same is in relation to that period of a dealer’s turnover as defined in Section 2(w). The “Dealer” is defined in terms of Section 2(h), which reads as follows:

“2(h). “Dealer” means any person who carries on the business of buying, selling supplying or distributing goods directly or otherwise, whether for cash, or for deferred payment or for commission, remuneration or other valuable consideration and includes –

- (i) *a local authority, a company, an undivided Hindu family or any society (including a co-operative society), club, firm or association which carries on such business;*
- (ii) *a society (including a co-operative society), club, firm or association which buys goods from, or sells, supplies or distributes goods to, its members;*
- (iii) *a commission agent, a broker, a del-credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of the principal.*
- (iv) *any person who transfers the right to use any goods for any purpose, (whether or not for a specified period) in the course of business to any other person]*

Explanation:- (a) *Every person who acts as an agent of a non-resident dealer, that is an agent on behalf of a dealer residing outside the State and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as –*

- (i) *a mercantile agent as defined in the Indian sale of Good Act, 1930 (III of 1930), or*
- (ii) *an agent for handling goods or documents of title relating to goods; or*
- (iii) *an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or payment, and every local branch of a firm or company situated outside the State, shall be deemed to be dealer for the purpose of this Act.*

(b) *The Central or a State Government or any of their departments or offices which, whether or not in the course of business, buy, sell, supply or distribute goods, directly of otherwise, for cash or for deferred payment, or for commission, remuneration or for other valuable consideration, shall be deemed to be dealer for the purpose of this Act.”*

10. The facts of the present case would indicate that petitioner does not fall even within the definition of a “dealer”. We say so in view of the fact, that the petitioner being declared as a sick company and has ceased to conduct any manufacturing activities much prior to the declaration of it

being declared as a sick company under the Adhinyam. Therefore, the question of holding the petitioner to be a dealer, now, in our considered view, is misconceived. The “dealer” is only that person who carries on the business of buying, selling and supplying etc. In the instant case, since there is a cessation of industrial activities by the petitioner, hence, even the definition of “dealer” would not stand applicable to the petitioner.

11. Consequently, the petition is allowed. The impugned orders dated 14.01.2008 (Annexure P/1) and dated 29.09.2008 (Annexure P/1-A) are quashed. Rule made absolute.

(RAVI MALIMATH)
CHIEF JUSTICE

(ANAND PATHAK)
JUDGE

Anil*