IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2836 OF 2021

Piramal Enterprises Limited,)
a Company incorporated under the)
Companies Act, 1956 having its)
registered office at Agastya Corporate)
Park, Kamani Junction, L.B.S. Marg,)
Kurla (W.) – 400 070.) **...Petitioner**

Versus

1. The State of Maharashtra, through)
the Principal Secretary, Revenue and)
Forest Department, Mantralaya,)
Mumbai, Maharashtra – 400 032)

2. The Joint Commissioner of State)
Tax (F-604), LTU 4th Floor, Old)
Building, D-02, Mazgaon,)
Mumbai – 400 010.) **...Respondents**

Mr. Rafique Dada, Senior Advocate with Mr. Rohan Shah, Mr. Mayank Jain, Mr. Srisabri Rajan and Mr. Marmik Kamdar i/b. Khaitan & Co. for Petitioner.
Mr. V. A. Sonpal, Special Counsel with Ms. Jyoti Chavan, AGP for State.

TABLE OF CONTENTS

CORAM : G. S. KULKARNI &
JITENDRA JAIN, JJ.

DATE : 11 June, 2024.

JUDGMENT (Per G. S. Kulkarni, J.):

1. This petition under Articles 226 and 227 of the Constitution of India challenges an order dated 31 March, 2021 passed by respondent no.2-Joint Commissioner of State Tax (for short, "**reviewing authority**") under Section 25 of the Maharashtra Value Added Tax Act, 2002 (for short "**MVAT Act**") exercising the review jurisdiction. By the impugned order, respondent no.2 has reviewed the order dated 16 March, 2015 passed by the assessing officer finalizing the petitioner's assessment for the financial year 2010-11. Consequent to the impugned order, a notice of demand dated 31 March, 2021 is issued to the petitioner under Section 32 of the MVAT Act, which is also assailed by the petitioner.

2. Thus, the primary question which arises for consideration in the present proceedings is as to whether the respondents in the facts of the case could tax sale of the petitioner's 'Base Domestic Formulation Business' as a "going concern" (slump sale) under the provisions of the Maharashtra Value Added Tax Act, 2002.

A. Facts:-

3. The facts as discerned from the petition are:- During the financial year 2010-11, the petitioner entered into a Business Transfer Agreement dated 21 May, 2010 (for short "**BTA**") with one M/s. Abbott Healthcare Pvt. Ltd. (for short "**Abbott Healthcare**") to sell, assign, transfer, convey and deliver to Abbott Healthcare "the Base Domestic Formulations Business" (comprised of Healthcare Solutions business and the mass market branded formulation – (Truecare business) on a "going concern" basis for a total cash consideration of Indian Rupees equivalent of US $ 3.72 billion.

4. Under the BTA, for the limited purpose of adjudication of stamp duty, a bifurcation of the part consideration was provided in terms of Article 3 read with Schedule 3.3 of the BTA.

5. On 08 September, 2010, the petitioner and Abbott Healthcare entered into an amendment agreement to the BTA, to also include remaining tangible and intangible assets, in terms of which the consideration payable for the acquisition of the said business as a going concern, was increased to US $ 3.80 billion.

6. The petitioner was subjected to assessment for financial year 2010-11 under Section 23 of the MVAT Act. An assessment order dated 16 March, 2015 was passed, *inter alia* holding that the transaction contemplated and effected under the BTA, was a transfer of a business "on a going concern basis" and hence, not exigible to the Value Added Tax (for short, "**VAT**") under the MVAT Act. This, according to the petitioner, was after taking into account all relevant aspects concerning the BTA. Accordingly, the consideration received towards the 'sale of the business' was excluded from the turnover of the petitioner, for the purpose of levy of VAT under the MVAT Act.

7. After about two years, the petitioner received a show cause notice dated 06 April, 2017 issued under Section 25 of the MVAT Act read with Rule 30 of the Maharashtra Value Added Tax Rules, 2005 (for short, "**MVAT Rules**") in Form 309 proposing to review the assessment (supra) for the financial year 2010-11, by holding that the business transfer was incorrectly allowed as a slump sale. Such notice was solely on the ground that the allocation of cash consideration for stamp duty purposes was provided in Schedule 3.3 of the BTA, which included consideration for tangible, intangible, movable and immovable assets, which was required to be considered as "turnover" of the petitioner's sales for the said period and

exigible to tax. According to the petitioner, the review was premised only on the basis of the itemized break-up of the total consideration being provided by the parties purely for the stamp duty purposes and as permissible in law, hence, VAT could not be levied on the assets transferred, as a part of the business transfer.

8. The petitioner responded to such notice by its reply dated 05 May, 2017 contesting the revenue's case in the review notice. In its reply, the petitioner *inter alia* contended that the itemized value of assets does not affect the nature of the transaction as a "transfer of business". The petitioner also contended that transfer under BTA was in the nature of "transfer of business" as a going concern would not attract tax under the provisions of the MVAT Act, hence, it was not taxable. There were several other contentions raised on facts and law.

9. On such notice, a personal hearing was held by respondent no.2 on 22 August, 2017 and 22 March, 2021 when the authorized representative of the petitioner made extensive submissions, on the basis of the case as made out in the petitioner's reply. Also, the representative of Abbott Healthcare was heard by teleconference. The petitioner also submitted a synopsis of its case under the petitioner's letter dated 22 March, 2021.

10. It is on such backdrop, respondent no.2 passed the impugned order dated 31 March, 2021 and consequent thereto, issued the impugned notice under Section 32 of the MVAT Act wherein a demand of Rs.2606,79,63,675/- (about Rs. 2606.79 Crs.) (including interest) was confirmed against the petitioner, on the ground that while there has been a transfer of the entire business, there was also a transfer of "right to use" by the petitioner of certain intellectual property rights namely trade name, logo, goodwill etc. for a fixed period of time in the BTA. Respondent no.2 held that the 'right to use' or 'lease' is covered under the definition of sale under the MVAT Act, hence, the said transaction of transfer of rights for a fixed period falls within the scope of the definition of "sale" under the MVAT Act. Accordingly, the Joint Commissioner/respondent No.2 by the impugned order confirmed the notice issued under Section 25 of the MVAT Act and raised the impugned demand notice dated 31 March, 2021.

11. On the above conspectus, the petitioner being aggrieved by the impugned order dated 31 March 2021 and by the impugned demand has filed this petition *inter alia* contending that the impugned order is passed sans jurisdiction, in excess of jurisdiction or on wrongful assumption of jurisdiction and in complete abrogation of principles of natural justice,

resulting in patent violation of the fundamental rights and the constitutional rights enshrined under Article 14, 19(1)(g), 21, 265 and 300A of the Constitution.

B. 1st Affidavit in reply on behalf of the Respondents:-

12. The respondents have opposed the writ petition by filing a reply affidavit of Dr. David Alvares – respondent No.2. At the outset, the affidavit contends that this petition under Articles 226 and 227 of the Constitution is not maintainable as there is no warrant for this Court to exercise its extraordinary jurisdiction. It is contended that the impugned order can be effectively challenged before the Maharashtra Sales Tax Tribunal under Section 26 of MVAT Act, 2002, hence, a writ petition filed without exhausting alternative remedy ought not to be entertained. It is contended that there is mandate of pre-deposit of 10% of the tax before filing an appeal as per the provisions of sub-section (6A) of Section 26 of the MVAT and to avoid such pre-deposit, the petitioner has filed this petition.

13. It is next contended that even otherwise the impugned order of respondent No.2 is purely based on the facts of the case and the applicability of relevant law. It is hence contended that this Court ought

not to entertain the present petition owing to the reason that the petition requires this Court to dwell on the factual controversy, also for such reason, this writ petition ought not to be entertained.

14. On merits of the petitioner's case, it is contended that initiation of an action for review of the assessment order dated 16 March, 2015 by issuing show cause notice and the order passed on the review proceedings and the consequent demand notice, are well within the jurisdiction of respondent No. 2 under the provisions of Section 25 of the MVAT Act, hence, it is not correct for the petitioner to contend that the proceedings are without jurisdiction or in excess of jurisdiction or they are on wrongful assumption of jurisdiction. Also the allegations of the petitioner that the impugned order is in violation of the principles of natural justice, is stated to be too casual for the reason that right from the issuance of show cause notice till the impugned order was passed, the petitioner was heard through its representative on a number of occasions. Hence, as sufficient opportunity of a hearing was afforded not only to the representative of the petitioner but also to the representative of Abbott Healthcare (transferee) whose advocate could not physically attend due to the spread of COVID in Delhi, he was heard on an audio/teleconference as arranged when Abbott's submissions were recorded. Also, sufficient

opportunity to file written submissions was granted to the petitioner, hence, it is not correct for the petitioner to contend that the petitioner was not heard.

15. It is next contended that the purport of the show cause notice was also clear to the effect that respondent No.2 intended to review the assessment order dated 16 March 2015, and the reasons for such review in substance was to the effect that there was no sale of business of domestic and generic formulation that could be allowed as a deduction. It is submitted that the reasons as furnished for reviewing the assessment order if read as a whole, indicate that there was a sale of individual assets and for such reason, a deduction of sale of business was not warranted. It is next contended that the revenue's case as narrated in the show cause notice dated 6 April 2017 does not restrict the reviewing authority to pass an order on facts elicited during the proceedings so as to restrict scope of the review proceedings, especially when ample opportunity of hearing was given to the petitioner right from 2017 to 2021.

16. It is next contended that whether a transaction of sale of business as going concern or otherwise, is a question of fact, hence within the permissible parameters of review. The legal decisions, as referred by the

petitioner to buttress its contention, are on the peculiar facts of individual cases and the principles as laid down in such decisions are not applicable to the peculiar facts of the present case. Further the allegations of the petitioner that there is non application of mind by respondent No.2 in passing the impugned order, merely because some parts of the impugned order are similar to the portions of the show cause notice dated 15 October 2015 issued by the Jurisdictional Service Tax Authorities, is not correct, as the impugned order is independently passed considering all facts and law involved in the present case. It is hence contended that there is no violation of principles of natural justice. The petition is thus not maintainable.

17. In regard to applicability of service tax, it is contended that the applicability of service tax does not in any manner exclude applicability of VAT. It is contended that it is established that the transaction in question is amenable to VAT, as held in the impugned order. The contention of the petitioner to the effect that the impugned order accepts the transaction to be a Business Transfer is denied, in contending that this would amount to an erroneous interpretation of the impugned order by the petitioner. The petitioner's contention that itemized valuation of the assets as transferred would not be relevant, when the sale of business was

as a going concern is alleged to be untenable from the interpretation of legal materials and the reading of the document(s) as a whole. It is next contended that the agreement for sale and clauses therein are not consistent with the transaction of sale of business as a going concern for the reason that there are several clauses which provide for exclusion of assets in sale of business transaction, which according to the Revenue, is inconsistent with the petitioner's claim of the sale of business. Although part of sale of assets is coupled with transfer of right to use, the definition of sale in Section 2(24) includes transfer of 'right to use' as a deemed sale. It is next contended that the petitioner was served with show cause notice which clearly indicated that a deduction of sale of business as slump sale was incorrectly granted. It is stated that the case of the Revenue in the show cause notice and the hearing thereon were always on points of entitlement on a deduction as slump sale in which the petitioner participated. It is, therefore, not correct for the petitioner to state that the scope of review in any manner was restricted by the show cause notice when in fact the petitioner was specifically confronted with the nature of the transactions at the time of hearing, which had led to the impugned conclusion based on facts of the case and written submissions. It is, therefore, submitted that the petition deserves to be dismissed.

C. 2nd Affidavit in Reply on behalf of the Respondents:-

18. There is an additional affidavit filed on behalf of respondent no.1 of Dr. David Alvares dated 14 September, 2022, which *inter alia* reiterates the contentions as raised in the first affidavit, however, some of the contentions as raised in a different form can be noted.

19. It is contended that the initiation of review of the assessment order by issuing show cause notice and thereafter passing of the impugned order in the review proceedings and issuance of the consequent demand notice, are well within the jurisdiction of respondent no.2 as per the provisions of Section 25 of the MVAT Act. It is hence not correct for the petitioner to contend that the proceedings are without jurisdiction or in excess of jurisdiction or of wrongful assumption of jurisdiction. It is further contended that the petitioner's contention that the impugned order is in violation of principles of natural justice is too casual and self serving as right from the show cause notice till the impugned order was passed, the petitioner was heard on number of occasions. Further even the representative/advocate for Abbott Healthcare was also heard. This apart, written submissions were also filed on behalf of the petitioner. Thus the contention that the principles of natural justice are not followed, is not correct.

20. It is next contended that the petitioner's case that the impugned order is beyond the scope of show cause notice is also not well founded for the reason that the show cause notice in clear terms had recorded that the sale of the business of domestic and generic formulation was incorrectly accepted in the assessment order and on such issue and other allied issues, the review proceedings were being initiated. It is next contended that the petitioner's case that the impugned order is beyond the show cause notice cannot be sustained also for the reason that the petitioner had defended action of levy of tax on the transfer of Intellectual Property Rights and other intangible assets as is evident from copy of reply dated 05 May, 2017 and synopsis of submissions dated 22 March, 2021 of the petitioner. It is contended that the petitioner has not been taxed on the entire sale consideration of the business, as tax has been levied only on the value of Intellectual Property, and other intangible assets, for which a separate agreement was entered between the parties i.e. firstly the agreement dated 21 May, 2010 and thereafter the agreement dated 08 September, 2010 titled as 'Registered User Agreement and Trade Mark Licence Agreement'.

21. It is next contended that although the agreement is titled as BTA, however in essence the agreement comprises of transfer of business and an agreement on the transfer of Intellectual Property Rights and other

intangible assets in one agreement only. For such reason, the review authority has not taxed sale consideration on business transfer but the transfer of Intellectual Property and other intangible assets. Hence, contention of the petitioner that the slump sale of business is not taxable is not correct and would not survive.

22. It is next contended that the consideration for transfer of business is lump sum under the guise of 'Business Transfer Agreement', however, certain intellectual properties defined therein, are transferred with several limitations and conditions, some of them for limited period of eight to nine years, namely Corporate Name and Logo. It is, hence, stated that although the BTA and consideration thereof may not be taxable, it does not mean that when there is a separate agreement for transfer of intellectual property rights, the consideration thereof cannot be ascertained from allied documents.

23. It is stated that under the Income Tax law, slump sale is liable for capital gains tax since the transfer of business as a going concern is treated as transfer of capital assets. It is hence contended that for such reason, it may be considered that slump sale is also transfer of goods attracting levy of sales tax although not taxed in the present case. It is hence contended

that the incidence of tax and calculation of value for the purposes of tax are two different areas. It is next contended that the concept of measure of tax cannot be assailed on the ground that it amounts to incidence of tax. It is stated that when the transfer of specific intellectual property is liable to tax, the ascertainment of value thereof, as a measure of tax on the basis of the value offered for stamp duty purposes, cannot be faulted, as merely relying on the value of the items in question for the purpose of stamp duty cannot be equated with the incidence of tax on slump sale.

24. It is next contended that the unique feature of the BTA is that all assets or all liabilities are not transferred. The transfer of business is qualified and limited to 'transferred assets' and 'transferred liabilities' along with 'excluded assets' and 'excluded liabilities'. It is stated that the excluded assets and excluded liabilities are substantial in nature. The following statement in the affidavit needs to be noted:-

> "It is a case of slump sale not liable to tax according to the Petitioner, suffice it to say that the authority has not at all levied tax on the value of consideration for business transfer but levied tax on part of the assets such as intellectual property rights along with other intangible assets separately agreed to be transferred with restrictions and limitations."

25. It is next contended that proposal to levy tax under service tax law or dropping the same partially has no bearing on the taxability under

MVAT Act. In such context, it is contended that under the definition of "business" as defined by Section 2(4) of the MVAT Act and the Explanation (iv) thereto provides that any transaction in relation to the commencement or closure of business shall be deemed to be transaction comprised in business. It is stated that the transfer of business in question is covered under the definition of "business" and liable to tax. That slump sales are not being exempted from tax under the GST regime, it is also liable to be taxed under the MVAT, however, liable to tax at NIL rate which means it is taxable. Illustratively, it is contended that the Tamil Nadu VAT Act provides for sale of business undertaking under Section 2(41) as not liable to be included in turnover, but for such specific exclusion, it was liable to sales tax.

26. It is next contended that the BTA is a camouflage document for transfer of assets under the guise of the transfer of entire business undertaking as although retention of some of the assets or not taking over some of the liabilities does not make the nature of transaction being transfer of business as a going concern. It is stated that what is significant is that substantial part of assets and liabilities are not transferred, and therefore such transfer cannot be treated as transfer of undertaking.

27. It is next contended that as per the settled position in law, form or nomenclature of a document is not germane but the substance of the agreement is determinative of the test for interpretation. It is contended that the decisions cited/referred by the petitioner in the petition are cases where transfer of business undertaking is on "as is where is basis". To avoid prolix, the other details in the affidavit are not being discussed, to be discussed as and when the context arises.

28. There is a rejoinder affidavit filed on behalf of the petitioner to the reply affidavits disputing the case of the respondents on each of the counts.

D. Submissions on behalf of the petitioner :-

29. Mr. Rafiq Dada, learned senior counsel for the petitioner in support of the reliefs prayed for in the writ petition, has made the following submissions:-

i. The impugned order is passed in excess of jurisdiction as it seeks to artificially vivisect a business transfer which is impermissible in law.

ii. For the levy of MVAT under the charging provision namely Section 3 read with Section 6, the jurisdictional pre-conditions are

required to be cumulatively satisfied which are (a) there should be a "sale" of goods, (b) the "sale" in question was undertaken by a dealer and (c) the "sale" should be "in connection with" or "incidental to" or "in the course of business". Hence, applying the settled law, a transaction whereby the entire business is transferred "lock, stock and barrel", under which the seller is completely divested of the business and the buyer is completely vested with the business would constitute a "transfer of business" and would not be liable to VAT, as such a transaction is not considered as having been undertaken "in the course of business".

iii. In the present case, the petitioner has transferred the pharmaceutical business to Abbott Healthcare and as a consequence thereto, thereafter, has not conducted such business, post the date of the transfer. Since 2010, the buyer alone is conducting such business. Hence, applying the settled principles of law, there can be no levy of VAT in respect of the transaction, subject matter of the agreement. In supporting such submission, reliance is placed on (i) ***Deputy Commissioner (C.T.), Coimbatore vs. K. Behanan Thomas***[1], (ii) ***Commissioner of Sales Tax, Maharashtra State, Bombay vs.***

[1] (1976) SCC OnLine Mad 421

Sundardas Harjiwan[2], (iii) *Premier Automobiles Limited vs. Income-tax Officer & Anr.*[3], (iv) *Coromandal Fertilisers Limited, Sec'bad vs. State of A.P. & Ors.*[4], (v) *Ram Sahai vs. Commissioner S.T*[5], (vi) *Dy. Commissioner of Salestax vs. M.S. Dat Pathe*[6], (vii) *M/s. Paradise Food Court vs, State of Telangana & Ors.*[7] and (viii) *Triune Projects Pvt. Ltd. vs. Dy. Commissioner of Income-tax*[8].

iv. It is submitted that Schedule 3.3 of the agreement is formulated for a limited purpose, solely for the purposes of payment of stamp duty which is a requirement of law, and which does not in any way reflect that the agreement between the petitioner and the purchaser of the business was to effect an itemized sale. Even otherwise, there is no bar on itemized sale if such itemized sale is for transfer of business as a going concern. Lump-sum consideration as a pre-condition itself would not attract the provisions of the MVAT Act, hence, no reference can be made to the aspect of Schedule 3.3 to derogate the agreement in question.

v. As a matter of fact, as evident from the impugned order,

[2] (1986) SCC OnLine Bom 404
[3] (2003) SCC OnLine Bom 1282
[4] (1998) SCC OnLine AP 615
[5] (1962) SCC OnLine All 232
[6] (1985) SCC OnLine Ker. 105
[7] 2017-TIOL-2672-HC-AP-VAT
[8] 2016-TIOL-2960-HC-DEL-IT

(internal page 28 thereof), the respondents have agreed to the factum, that the present case is one of a transfer of business. It is submitted that Schedule 3.3 of the BTA was formulated for a specific reason, that is for the purposes of "allocation of cash consideration for stamp duty purposes". Such allocation did not derogate from the factor that the transaction in question is a transfer of a business as a going concern.

vi. It is submitted that the transfer of goodwill and brands (patent and trademark) are essential to consummate the transfer of business as a going concern otherwise the buyer would not be able to operate the business. Further, as a part of the transitional arrangement, permission for use of Corporate Name or Corporate Logo to the buyer for the temporary period (Corporate Name for a period of 8 years and Corporate Logo for a period of 9 months) also does not derogate from the fact that the business in its entirety has been transferred by the seller; and that permission for temporary use was to ensure continuity of the transferred business in the hands of the buyer.

vii. That there was a clear commercial rationale for allowing temporary / non-exclusive use of the corporate name and corporate

logo, to enable successful transition of the business from seller to buyer. The business sold by the seller alongwith the products, were associated with the seller since many years. After transfer of the business, when the buyer was to sell the acquired products in the market, there would be a likelihood of a doubt in the mind of the public in general on the genuineness of the product and its source. Hence, to avoid such situation in the public mind for the products, that too in pharmaceutical space, there was a compelling need for temporary use of the seller corporate name and corporate logo etc. in connection with the transferred business and the nature of business transaction under the BTA can be taken away or be different because of the mere temporary non-exclusive use allowed to achieve the principal objective of the business transfer.

(viii) Such temporary/non-exclusive use does not derogate the agreement or the treatment of transfer of a business.

(ix) It is submitted that the taxes sought to be imposed under the law are required to be levied on the true nature of the transaction. In such context it is submitted that it is well settled law that a composite and integrated contract cannot be vivisected to fasten a tax liability. In support of his submission, reliance is placed on the decision in

Union of India Vs. Playworld Electronics Pvt. Ltd.[9] and *The Commissioner, Central Excise & Customs, Kerala v. M/s. Larsen & Toubro Ltd.*[10]. The impugned order thus being in excess of jurisdiction, is required to be quashed and set aside. In this context, reliance is also placed on the decision of the Supreme Court in *Whirlpool Corporation vs Registrar Of Trade Marks, Mumbai & Ors.*[11] and the *Assistant Commr.(Ct) Ltu And Anr vs Amara Raja Batteries Ltd.*[12].

(x) It is next submitted that the approach of the parties and the treatment given by the parties to the BTA before the other tax authorities, was to the effect that the BTA brought about a transfer of business on a going concern basis. Such position was also disclosed in the bank accounts of the petitioner as also of the purchaser of the business and with the income tax authorities. It is thus submitted that in the facts of the present case as per the relevant statutory provisions and as per the settled principles of law, the jurisdictional facts for levy of VAT were not satisfied, as there could be no levy of VAT, considering the nature of the transaction under

[9] 1989(41) ELT 368 (S.C.)
[10] 2015(8) TMT 749 (S.C.)
[11] 1998 (8) SCC 1
[12] 2009 (8) SCC 209.

the BTA. For such reason, the levy of VAT, by the impugned order is without the authority of law and in excess of jurisdiction.

(xi) Without prejudice to the aforesaid submissions, it is submitted that the impugned order and the impugned demand notice are patently bad in law as the same are beyond the scope of the show cause notice, more particularly when the impugned order was sought to be passed in exercise of the review powers under the provisions of Section 25 of the MVAT Act. It is submitted that the review power is to be exercised conditional upon the Commissioner serving on the dealer a notice in the prescribed form namely in 'Form 309' as prescribed in Rule 30 of the Maharashtra Value Added Tax Rules, 2005, as Section 25(1) of the MVAT Act mandates that the notice shall be as prescribed under the rules and in Form 309. It is submitted that in the present case, the notice under Section 25 read with Rule 30 was issued to the petitioner being notice dated 06 April, 2017 which had set out the "gist of the order proposed to be passed". This notice recorded that if the petitioner wished to prefer any objection against such order as proposed to be passed, the petitioner could attend a hearing before the relevant officer. It is hence submitted that on a cumulative reading of Section

25 of the MVAT Act with Rule 30 of the MVAT Rules and Form 309, it was explicit that the respondents are required to (i) issue a notice to the affected party and (ii) grant a hearing to the affected party if it has any objections to the proposed order. It is submitted that in the present case, the notice in question forming the basis for review was to the effect that the transaction in question is not a slump sale for the reason that under Schedule 3.3 to the BTA included various assets and allocation of cash consideration for the purpose of stamp duty. The opinion of the department, therefore, was that the petitioner (dealer), had bifurcated the consideration of the different assets and for such reason, although the transaction was not a slump sale, incorrectly the petitioner was granted benefit of a slump sale by the assessing officer. It is for such reason, it was proposed to review the assessment order. On such backdrop, it is submitted that in passing the impugned order dated 31 March, 2021, reviewing the original assessment order, the proposed basis of the review has been completely forsaken and an entirely new basis was adopted. It is submitted that this is clear from the fact that the impugned order proceeds on the basis of some of the intellectual property rights namely corporate name, corporate logo and goodwill

being not permanently transferred, but were transferred only for a certain time period. It is hence submitted that such basis is distinct from the basis proposed in the notice seeking review dated 06 April, 2017. It is thus submitted that the petitioner was never put to a notice of the actual basis as found in the impugned order, (ii) the petitioner never had an opportunity to meet such basis, (iii) the petitioner never had an opportunity of a hearing on such issues which were in fact, alien to the notice. This has resulted in a patent lack of opportunity to the petitioner to defend itself and to have a personal hearing on such issues. Thus, there is a clear breach not only of the statutory provisions but also of the fundamental principles of natural justice. It is submitted that there has been an obstructive violation of the rule of *audi alteram partem*. It is hence submitted that the impugned order would stand vitiated and is unsustainable in law. In support of such a statement, reliance is placed on the decision of the Supreme Court in ***Nawabkhan Abbaskhan vs. State of Gujarat***[13], ***Nuwood Private Ltd. vs. Superintendent of Central Excise***[14], ***CCE vs. Ballarpur Industries***

[13] (1974) 2 SCC 121

[14] 1981 (8) ELT 184 (Mad.)

Limited[15], *Rajmal Lakhichand vs. CC, Aurangabad*[16] and *SACI Allied Products Limited vs. CCE*[17].

30. It is next submitted that the impugned order is barred by limitation as prescribed under the provisions of Section 25 (2)(b) of the MVAT Act, which mandates that no order under this provision be passed after the expiry of 5 years from the end of the year in which the order passed by the subordinate officer has been served on the dealer. It is submitted that in the present case, the relevant assessment order passed by the subordinate officer is dated 16 March, 2015, which was served on the petitioner on 01 April, 2015. It is hence submitted that the impugned order in terms of the said provision ought to have been passed and served on or before 31 March, 2021. It is submitted that the impugned order purports to have been passed on 31 March, 2021 and as the same was served on the petitioner on 08 April, 2021, hence, as per the settled principles of law, it would be required to be considered to have been passed on the day on which it is served on the adverse party. It is thus submitted that the impugned order is barred by limitation. In this context it is submitted that although a specific ground was taken to this effect in the writ petition

[15] 2007 (215) ELT 489 (SC)
[16] 2010 (255) ELT 357 (Bom.)
[17] 2005 (183) ELT 225 (SC)

which has not been dealt in the reply affidavit dated 14 September, 2021 filed on behalf of the respondents, which according to the petitioner is the core issue of the maintainability of the impugned order.

31. It is next submitted that the impugned order and the impugned notice of demand are bad in law on the ground that there is no application of mind by the respondents for many reasons. In this context, it is submitted that the jurisdictional service tax authorities under the Finance Act, 1994 had also raised on the petitioner a service tax demand vide a notice dated 15 October, 2015, on identical issues as raised in the impugned order. The respondent authority had taken recourse to such order passed by the service authorities to the effect that the allegations from the service tax demand notice were verbatim copied as clearly seen from the impugned order. In this regard, a reference is made to paragraphs 13 to 26 and 30 to 31 of the impugned order, which when examined against paragraph 4, 5.1 to 5.4, 6.1 and 10 of the service tax order / demand notice would evidence that the impugned order has merely copied and pasted the findings and reasons from service tax proceedings. A comparative table to that effect is also placed on record to show the copying of the extract from the service tax demand notice. It is, therefore, submitted that the reviewing authority has not applied its mind

and has acted in an arbitrary manner in passing the impugned order which is a quasi-judicial order. It is submitted that for such reason, the entire proceedings are vitiated and bad in law. In this context, it is further submitted that the apparent non-application of mind is also clear from the finding recorded by the reviewing authority that the value of intangible items transferred temporarily by the petitioner is Rs.28.80 Crores only but however, has recorded that the value of non-compete is Rs.513.54 Crores. However, the reviewing authority has taken the value of these items for the purposes of exigibility to tax under the MVAT Act as Rs.17,598 Crores, which sum includes goodwill, brands transferred and software. It is submitted that thus there is *ex facie* non application of mind by the reviewing authority warranting the impugned order to be set aside.

32. It is next submitted that the writ petition on the aforesaid submissions in assailing the impugned order would be maintainable without the petitioner being directed to take recourse to an alternative statutory remedy. This also for the reason that there is palpable failure of the respondents in adhering to the provisions of law in exercising the review jurisdiction, hence, the impugned order and the impugned demand notice would deserve to be quashed. Reliance in this context is placed on the decision of the Supreme Court in ***Godrej Sara Lee Limited vs. Excise***

and Taxation Officer[18] and *Kharghar Co-Op. Housing Societies Federation Ltd. & Ors. vs. Municipal Commissioner, Panvel Municipal Corporation & Ors.*[19]. It is, therefore, submitted that the impugned order be quashed and set aside and the writ petition be allowed.

E. Submissions on behalf of the respondents:-

33. Mr. Sonpal, learned Counsel for the respondent in opposing the petition has made the following submissions:

i. At the outset it is submitted that the petition ought not to be entertained when there is an alternate remedy available to the petitioner to assail the impugned order by way of an appeal before the Maharashtra Sales Tax Tribunal which would be the competent forum to examine all issues as raised by the petitioner. It is submitted that merely making allegations of breach of principles of natural justice are not sufficient to maintain the petition under Article 226 of the Constitution of India. It is submitted that the petitioner intends to avoid pre-deposit of an amount of Rs. 15 crores as against the demand of Rs. 2607 crores. It is, therefore, submitted that the petition be dismissed on this count alone.

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18 2023 (384) ELT 8 (SC)

19 2023(3) BCR 505

ii. On the petitioner's contention that the impugned order is in violation of the principles of natural justice, it is submitted that it is not in dispute that the petitioner was heard by the Reviewing Authority before passing the impugned order. It is submitted that in fact the entire procedure as adopted by the respondent in adjudicating the review proceeding was lawful for the reason that a notice was issued to the petitioner and thereafter an opportunity was granted to the petitioner to respond to the notice, a personal hearing on the notice was given, and thereafter, the impugned order is passed. Hence, the contention that there is breach of principles of natural justice, ought not to be accepted.

iii. On the petitioner's contention that the impugned order is beyond the scope of show cause notice, it is submitted that a plain reading of the show cause notice would demonstrate that the scope of the show cause notice was wide, which was *inter alia* on the incorrect allowing of deduction of value of slump sales and non-consideration of the value of the assets as separately shown under Schedule 3.3 of the BTA. The show cause notice also specifically mentions other allied issues which widened the issue of show cause notice in the widest possible manner. Also the petitioner had ample

opportunity to meet the aspect of taxability. It is submitted that the petitioner also has not averred that the issue of levy of tax on transfer of IPR was not confronted and explained to the petitioner. In such circumstances it cannot be countenanced that the impugned order is beyond the show cause notice. It is next contended that it may be true that the impugned order ought to be within the gist of the show cause notice however while assuming and not admitting, it is submitted that the circumstances warrant that the petitioner meets the department's case of re-hearing of the matter which can be by way of fresh/*de novo* hearing on all the aspects. This would not warrant absolute quashing of the impugned order but requires that the petitioner asserts its stand at a *de novo* hearing. In such context, reliance is placed on the decision of the Supreme Court in the case of **Commissioner of Income Tax, Mumbai Vs. Amitabh Bachchan**[20]. The submission referring to this judgment is to the effect that Section 25 merely mandates issuance of notice as per Rule 30 in Form 309 and does not require or provide confining the review authority to the terms of the notice and in foreclosing consideration of any other issue or question of fact. For such reason the impugned

[20] (2016)11 SCC 748

order cannot be termed to be illegal and contrary to the provisions of Section 25 and Rule 30 of the MVAT Rules.

iv. On the contention of the petitioner that the impugned order is non est and the show cause notice is without authority of law, it is submitted that the respondents have adhered to the mandate of Section 25 of the MVAT Act, and on a proper procedure being followed, the impugned order was passed by the reviewing authority as per law.

v. It is next submitted that the petitioner's contention that VAT is not payable on the BTA on the ground that the reviewing authority was considering the transaction in the manner as considered by the service tax authority, is not tenable. In such context it is submitted that the Supreme Court has held IPR to be goods in ***Vikas Sales Corporation Vs. Commissioner of Commercial Taxes***[21]. Also as per the Entry 39 of Schedule "C" of the MVAT Act, intangible or incorporeal rights as per the notification issued by the State Government are taxable.

vi. It is next submitted that the contention of the petitioner that the transaction cannot be vivisected in regard to its different

[21] (1996) 102 STC 106

components as the transaction under BTA is a slump sale, also ought not to be accepted as levy of tax is on transfer of rights to use intellectual property for a limited period, is a transfer of right to use, which would be deemed to be a sale under the definition of 'sale' as provided under Section 2(24) of the MVAT Act. It is submitted that a levy of tax is on the transfer of rights to use intellectual property for a limited period, hence, it cannot be construed as a vivisection of the transaction, which is deemed to be a "sale" under Section 2(24) of the MVAT Act. The agreement as a whole is to be read and to be interpreted, and if a portion of the transaction is liable to be taxed, there is no illegality in levying tax on that portion.

vii. It is next submitted that sale of business as going concern is not taxable under the MVAT Act, as contended by the petitioner, is not tenable. In this context, it is submitted that the BTA as a whole is required to be read and interpreted to know the nature of actual transaction and the interpretation of an agreement cannot depend solely on the basis of the words and language used but on the basis of intention of the parties. The language used in the BTA is in regard to the transfer of business which comprises transfer of assets. It is submitted that in Section 2.1 of the BTA, there is a clear

description of various assets which are sought to be transferred and also there is exclusion of certain assets. It is not the fact that the valuation of the individual assets for stamp duty purpose was a factor leading to levy of tax but enumeration of several assets clearly shown in the BTA as also exclusion of certain assets, was a reason to levy tax. It is a settled principle of law that levy of tax and measure of tax are different subjects. Further Section 2.2 spells out exclusion of several assets which shows the intention of the parties to transfer the assets alongwith the business of pharmaceutical products. There is transfer of certain liabilities and exclusion of specific liabilities. Also as seen from Section 2.3, 2.5 and Section 4 specific intellectual properties are separately transferred for limited period of 8 years or for 9 months. It is further submitted that there is a separate agreement titled "Trade Mark Agreement and Registered Users Agreement" which although not annexed to the petition, and if the business transfer on lock, stock and barrel was intended, in such event there was no need for separate agreement or enumeration of assets. This would indicate that business as a whole is not transferred and in fact, there is a transfer of certain business assets, hence, it is a case of sale of assets alongwith the licence to business

and not a transfer of business with the assets and liabilities.

viii. It is next submitted that even otherwise the argument that the petitioner's sale of business is not outside the "course of business", for the reason that the business itself is an asset of the petitioner and it is a valuable property. It is not an immovable property which is fastened to the land and/or attached to the earth, it is an intangible and incorporeal property, covered by the definition of 'goods' as defined under Section 2(12) of the MVAT Act. As per Section 3 of the MVAT Act, the petitioner is a dealer and would be liable to pay tax till the petitioner's business certificate/licence is cancelled, as for a transaction of sale is liable to be taxed. Since on the date of the BTA, the certificate of the petitioner was not cancelled.

ix. It is submitted that the case of the petitioner that the transaction of transfer is not in the course of business, it is submitted that since as per Section 2(4) and Explanation (iv) below it, any transaction in connection with the commencement or closure of business shall be deemed to be a transaction comprised in a business. In this context, it is submitted that in the Tamilnadu Value Added Tax Act, the definition of "turnover" under

Explanation (iii) excludes any amount realized by a dealer by way of sale of business as a whole, as it is not to be included in the turnover. However, in the MVAT there is no such exclusion. Further under the Income Tax Act, slump sale is liable to tax and treated as transfer of assets under Section 50B of the Income Tax Act as capital gains, arising from the transfer of long term capital assets. For such reason slump sale in question is liable to be taxed.

x. It is next submitted that the case of the petitioner that change of opinion cannot entitle the respondent to prejudice the petitioner, in the facts of the case, is not a valid argument. In this context, it is submitted that the provisions of Section 25 under which the impugned review order is passed is based on examination of record, in forming an opinion by the Commissioner that the Assessing Officer was not correct in taking the view that the BTA was not liable to be taxed. However, qua such decision the jurisprudence on reopening of assessment under Section 147 and 148 of the Income Tax Act would not have any application in the Commissioner exercising powers under Section 25 of the MVAT Act. The Commissioner has accordingly formed an appropriate opinion.

xi. On the petitioner's contention that the impugned order is passed without application of mind, it is submitted that the impugned order is a well reasoned order and has considered all aspects of case, hence, it cannot be said that the impugned order is passed without application of mind. It is also not a non-speaking order considering all submissions of the petitioner.

xii. In regard to the petitioner's contention that the impugned order levies VAT contrary to Section 3 of the MVAT Act, is also urged to be not correct. In this context, it is submitted that as per Section 3 of the MVAT Act, the dealer is liable to pay tax till his business certificate or licence is cancelled. For this reason, as on the date of the BTA the certificate of the petitioner was not cancelled, it would be required to be attributed to the BTA, to tax the BTA, considering the provisions of Section 2(24), 2(25), 2(29) and 2(33) of the MVAT which which defines "Sale", "Sale Price", "Tax" and "Turnover of sales" respectively.

xiii. It is submitted that the petitioner's transaction fulfills all such requirements/criteria hence the BTA was liable to tax.

xiv. It is next submitted that the petitioner's contention that the show cause notice itself was vague is not tenable, as it was clear that

the claim of the petitioner of a slump sale was incorrectly accepted and the turnover of sales being not brought to tax by the assessing officer was the issue called upon to be answered by the petitioner. It is submitted that the petitioner has not contended in the reply to the show cause notice that it has not understood the nature of the notice and in fact the petitioner at all material times was aware of such notice, hence, the show cause notice could not have been said to be a vague show cause notice.

xv. In support of the above submissions, reliance is placed on the decision of the Supreme Court in the case of ***Vikas Sales Corporation Vs. Commissioner of Commercial Taxes*** (supra), a decision of the Bombay High Court in ***M/s Mestra A G Switzerland vs The State Of Maharashtra & Ors.***[22] and ***Hal Offshore Ltd vs The State Of Maharashtra***[23];

34. We have heard learned counsel for the parties and with their assistance, perused the record.

F. Analysis and Conclusion:-

35. As seen from the foregoing paragraphs, the case revolves around the

[22] Writ Petition No.12297 of 2021 (Aurangabad Bench) decided on 16/02/2022

[23] Writ Petition No.202 of 2020 decided on 15/06/2022

BTA dated 21 May, 2010 entered by the petitioner to sell its domestic pharmaceutical business to Abbott Healthcare. Under the BTA, the petitioner had desired to sell, assign, transfer, convey and deliver to Abbott Healthcare the said business which comprised of the 'transferred assets' as a "going concern" on a 'slump sale basis' as defined under Section 2 (42C) of the Income Tax Act, on terms and conditions as set out under the BTA. It is not in dispute that under the MVAT Act an assessment was undertaken for the financial year 2010-11 being the period during which the BTA was executed between the petitioner and Abbott Healthcare. An assessment order dated 16 March 2015 came to be passed under Section 23 of the MVAT Act, under which the assessing officer held that the BTA is a case of transfer of 'entire business' on a 'slump sale basis', along with all assets and liabilities and therefore, is not exigible to tax under the MVAT Act. The relevant observations of the assessing officer are required to be noted which read thus:-

> "In response to notice in form 301 Shri. Girish Guna, Manager, attended from time to time and produced books of accounts and related details maintained under SAP system.
>
> Dealer is a manufacturer in medicines, plant at Mahad, dist. Raigad, Vitamins and animal feed at Thane plant, lab eqpts and reagents at Panvel New Mumbai plant and cosmetics mainly lacto calamine manufactured by third party. Dealer has separately identified plant wise sales and purchases bifurcation of tax free sales. Taxable sales and brach Transfer from each unit is maintained by dealer. Sales of scrap and Assets are identified.

> Dealer has included such sales in his turnover in form 704. **During this period there is transaction of entire sale of business of domestic formulation/generic formulation business to M/s. Abbott Healthcare and Labourites on slump sale basis along with all assets and liabilities.**
>
> **Dealer has submitted a detailed letter in this regard I have gone through his submissions and conclude that is a slump sale and does not fall under the definition of sale hence not Taxed.** ….."
>
> (emphasis supplied)

36. Such assessment order continued to operate for a period of two years. Thereafter the respondents invoked the provisions of Section 25 of the MVAT Act and initiated proceedings to review the assessment order dated 16 March, 2015, by issuing a notice under Section 25 read with Rule 30 of the MVAT Rules *inter alia* setting out the gist of the order proposed to be passed against the petitioner. As such notice has a significant bearing on the proceedings and as to what was called upon to be answered/replied by the petitioner, it may be necessary to extract the "Gist of the order proposed to be passed", which reads thus:-

> " <u>Gist of the order proposed to be passed</u>
>
> GIST
>
> While scrutinizing assessment record for F.Y. 2010-11 assessing authority has allowed transaction of sale of business of domestic and generic formulation to M/s. Abott Healthcare as slump sale along with assets and liabilities. **However after perusal of business transfer agreement in general and Schedule 3.3 in particular it is noticed that the allocation of cash consideration for stamp duty purpose includes various types of assets as referred in schedule 3.3 annexed to the agreement.**

> **The dealer has bifurcated the consideration for Tangible immovable assets, Trademark & Associate Rights, brandwise breakup, rights under exclusive distribution agreement, Trademark Licences, Business Transfer Agreement and nonstampable assets.**
>
> **Thus I have reason to believe that the claim of sale of business of domestic and generic formulation to M/s. Abott Healthcare as slump sale is incorrectly granted by assessing authority and such Turnover of sale has not been brought to tax and Liability to tax is understated.** Hence I propose to review assessment for F.Y. 2010-2011 u/s. 25 of MVAT Act, 2002 for the issue raised above and other allied issues as revealed form the business transfer agreement."
>
> (emphasis supplied)

37. It can thus be seen from the gist of the order proposed to be passed in the review proceedings, that the reviewing authority, on a perusal of the BTA in general and more particularly Schedule 3.3, noticed that the allocation of cash consideration for stamp duty purpose of the items as contained in Schedule 3.3 of the BTA included various types of assets. He stated that the petitioner (dealer) had bifurcated the consideration of the tangible immovable assets, trademark and associate rights, brandwise breakup, rights under exclusive distribution agreement, trademark licences, business transfer agreement and non-stampable assets. Accordingly, the show cause notice recorded that there was reason to believe, that the claim of sale of business of domestic and generic formulation to Abbott Healthcare as slump sale, was incorrectly granted by the assessing authority by not bringing to tax, such turnover of sales as

also the liability to tax was understated. It is for such reason, the reviewing authority proposed to review assessment for the financial year 2010-11 in exercise of the powers under Section 25 of the MVAT Act.

38. The petitioner replied to the review notice received under Section 25 of the MVAT Act by its detailed letter dated 05 May, 2017 addressed to the reviewing authority. In the reply, the petitioner contended that it was not liable to pay any tax on any of the reasons/ allegations as set out in the review notice. It was stated that such reasons were clearly based on erroneous appreciation of the factual scenario and incorrect interpretation of the legal provisions. It was stated that the allegation of understatement of liability on the ground that assets transferred under the slump sale are liable to be taxed as sale of goods, for the reason that Schedule 3.3 of the BTA contained separate valuation of assets, was wholly unfounded and made on surmises and fallacious presumptions, without appreciating the factual and legal position qua the nuances of the slump sale. The following primary contentions were raised by the petitioner alongwith supporting decisions, in its reply to the show cause notice to contend that sale of business as a going concern was not taxable under the MVAT Act:-

(i) sale of business does not fall within the definition of 'goods';

(ii) sale of business is distinguishable from 'sale in the course of business';

(iii) the petitioner (noticee) does not qualify as a 'dealer' as defined under Section 2(8) of the MVAT Act qua the sale under the BTA;

(iv) there is a clear distinction between 'transfer of business' *vis-a-vis* 'closure of business';

(v) transfer under the BTA was in the nature of 'transfer of business as a going concern' hence, it cannot fall under the definition of "turnover of sales";

(v) that the itemized value of assets and liabilities as set out in the BTA does not affect nature of transfer of business as a going concern.

39. It is on the above premise, a hearing was held before the reviewing authority on the review proceedings. The petitioner was represented at such hearing, as also the representative of Abbott Healthcare appeared by teleconferencing. The petitioner also submitted a synopsis of its submissions, reiterating its contentions. The reviewing authority accordingly proceeded to pass the impugned order dated 31 March, 2021. In the impugned order, the basic premise on which it was decided to

partly tax the sale of business under the BTA, was sought to be reached, was on two issues as set out at internal page no.13 of the order which reads thus:-

> "1) Transfer of IPR rights by the seller M/s. PHL to the purchaser M/s. AHPL, allowing the purchaser to use their fixed period of time. For the said purpose, other two ancillary agreements (I) REGISTERED USER AGREEMENT and (ii) TRADEMARK LICENSE AGREEMENT both dated 08.09.2010, were entered into between the seller M/s. PHL, their group holding company M/s. PEL and the purchaser M/s. AHPL.
>
> 2) Non-competition & Non-solicitation clause of the BTA to be observed by the seller and their affiliates, as mentioned in Section 10.6 of the BTA in terms of sale of their business to M/s. AHPL."

40. In regard to the aforesaid issues, considering the clauses of the BTA and more particularly section 2.1 (purchase and sale), section 2.2 (excluded assets), section 2.5 (intellectual property) and its sub-clauses, the reviewing authority held that these sections of the BTA clearly established and confirmed, that the right to use "seller's corporate name" and "seller's corporate logo" are transferred to the purchaser (Abbott Healthcare) temporarily for a fixed period, further considering the Registered User Agreement dated 08 September, 2010 entered between the parties in relation to the transfer of IPR rights to Abbott Healthcare. In respect of the registered trademark of the petitioner, it was observed that the right to use the trademarks and trade name of the petitioner and

their affiliates have been transferred to Abbott Healthcare and their affiliates temporarily for a fixed period, without any limitation on the seller or their affiliates to use the trademarks. Similar observations were made in respect of the 'trade name' and 'logo' of the petitioner of having been transferred temporarily for a fixed period. It was observed that the intellectual property rights transferred under the BTA included the goodwill of seller and its affiliates solely with respect to the business and the transferred assets ('the goodwill') as mentioned under Section 2.1(xxii) of the BTA. It was also observed that under Section 10.6(n) of the BTA, Abbott Healthcare was described as 'purchaser of the goodwill', hence, as set out in the BTA, the intangible properties transferred by the seller (petitioner) to the buyer (Abbott Healthcare), included the petitioner's goodwill. For such reasons as along with the other rights namely permitting the use of the petitioner's corporate name and logo, the petitioner's goodwill having been transferred to Abbott Healthcare temporarily for a fixed period, it amounted to sale of goods so as to be included in the sales turnover of the petitioner for the financial year in question.

41. Insofar as the second issue in regard to non-competition and non-solicitation clause of the BTA to be observed by the petitioner and its

affiliates, as contained in Section 10.6 of the BTA, it was observed that the scrutiny of the BTA revealed that the agreement *inter* alia included non-competition and non-solicitation clause for a period of 8 years from the date of closure of agreement, it is not a case of sale of business as a slump sale. Further considering that the petitioner had maintained that the transaction involved under the BTA was a 'transfer of business' and not a sale of goods and that the term 'transfer of business' was not defined under the MVAT Act, therefore, the principles/criteria defining a transfer of business would be required to be culled out from various decisions which are dealt with the subject. Accordingly, considering the decisions of ***IBP Company Limited vs. Asstt. Commissioner Commercial Taxes***[24] ***State of Tamilnadu vs. TMT Drill Pvt. Ltd.*** as also the decision of the Kerala High Court in ***Zacharia vs. State of Kerala***, the reviewing authority observed that the petitioner/dealer although transferred its entire business to the other party (Abbott Healthcare) and even if the BTA is a slump sale under the Income Tax Act, however, in case of intellectual property rights (trade name, logo, goodwill etc.) by transferring the assets for a limited period and by keeping the ownership rights with the petitioner, hence although the petitioner has not sold the goods *per se*, but had allowed the

[24] 118 STC 33

purchasing party (Abbott Healthcare) to use the goods for a fixed period of time as per the BTA, which would stand covered under the definition of 'sale under MVAT Act' as it would amount to 'right to use'. In this regard, the relevant observations as made in the impugned order are required to be noted, which read thus:-

> " In the present case under consideration, it is observed that the dealer has no doubt transferred his entire business to the other party and may be he has qualified for the purpose of slump sale under the IT Act, but, in case of intellectual property rights (trade name, logo, goodwill etc.,) by transferring the assets for a limited period and by keeping the ownership rights with self, has not sold the goods per se but has allowed the purchasing party the right to use the goods for a fixed period of time as entered in the BTA. Such event of 'right to use' or 'lease' is covered under the definition of sale under the MVAT Act. Let us observe S.2(24) of the MVAT Act ….."
>
> (emphasis supplied)

42. Thus, the reviewing authority considering the clauses in regard to the intellectual property rights (trade name, logo, goodwill, etc.), has held that the transaction was a sale within the meaning of Section 2(24) of the MVAT Act. In this regard, the following observations were made:-

> " Here, we can observe that
>
> (i) There is sale – as the contingency of allowing 'the right to use' is covered under the definition of sale under the MVAT Act as per S.2(24) quoted as above.
>
> (ii) There is 'goods' – as the intellectual property rights for which ownership rights are retained by the seller, is covered as 'goods' as per Schedule Entry C-39 of the MVAT act, which reads, "Goods of intangible or incorporeal nature as may be notified,

from time to time, by the State Government in the Official Gazette." Also, with the intention to take back the proprietary rights after 9 months and 8 years, probably the dealer wants to continue in the business. (and has continued as PEL). Ideally, if the transfer of a business meets the conditions to be a Transfer of On Going Concern (TOGC), the seller may be required to deregister for VAT if it is no longer making any taxable supplies.,

(iii) There is sale 'in the course of business', as the proprietary rights intended to be kept as such, the transaction of sale of 'right to use of goods' is 'in connection with' or 'incidental to' or 'in the course of' business.

Hence, all the essential conditions as pointed out by the dealer in his submissions are met.

Whereas it appears that the provisions of Income Tax act, providing privileges to an assessee, not to declare the value of individual assets transferred in case of slump sale, is applicable only for observing other different provisions of the said Act only. The said taxation Act or any other such Act does not debar an assessee to follow the provisions of other taxation Acts. Accordingly, the Income Tax Act and the MVAT Act, 2002, being two different and independent taxation Acts, have separately their own provisions and they do not have any provision to allow an assessee to ignore or disobey the provisions of the other Acts. It appears that the assessee has simply attempted to take shelter of the said provision of the Income Tax Act, declaring the subject-transaction a slump sale and thereby not declaring the individual value of the properties transferred, to escape from payment of MVAT. In view of all the above deliberations, I have no doubt in concluding that the transaction of transfer of rights for a fixed period falls within the scope of the definition of "sale" under the Maharashtra Value Added Tax Act, 2002.

From the scrutiny of the BTA, it was also observed that the said BTA has allocation of the cash consideration of USD 3.80 billion, received by M/s PHL form M/s AHPL, for the sale of their Domestic Pharmaceutical Business, as reproduced below. ..."

43. Also the total expenses incurred by Abbott Healthcare for the purchase of domestic pharmaceutical business from the petitioner under

BTA as recorded in the balance-sheet was extracted on internal page 31 of the order to which the petitioner has raised an objection that it is a copy cut paste from the order passed by the service tax authorities.

44. It is on the basis of such observations, the reviewing authority issued the notice of demand uner Section 30 of the MVAT Act upon the petitioner to pay the tax (VAT) of Rs. 26,06,79,63,675/- which included the VAT amount of Rs.8,79,93,12,633/- and interest under Section 33(3) of Rs.17,26,86,51,042/- to be deposited by the petitioner within 30 days of the order. The said notice reads thus:-

"SALES TAX DEPARTMENT
Government of Maharashtra

NOTICE OF DEMAND
(Under Section 32 of the Maharashtra Value Added Tax Act, 2002)

To,
M/s. PIRAMAL ENTERPRISES LIMITED.
TIN NO. 27130000022V

1. Take notice that the total amount including tax, interest and penalty payable by you for the period from 01-April 2010 to 31-Mar-2011 has been determined by undersigned as per the Order No. B-3413 dated 31.03.2021 at Rs.26067963675.00 as shown in the table below:-

	Description	Amount in Rs.
i)	Balance Amount of VAT payable	8799312633.00
ii)	Balance Amount of VAT Refundable	00.00
Iii)	Interest payable 30(3)	17268651042.00
iv)	Penalty payable	00.00

v)	Amount forfeited if any	00.00
vi)	Total Amount payable	00.00
Vii)	Refund admissible	00.00
Viii)	Refund already granted	00.00
ix)	Balance refund admissible	00.00
x)	Add: Interest u/s.52, if any	00.00
xi)	Net balance dues, if any	26067963675.00
xii)	Net refund, if any	00.00

2. Total amount of Rs. 2606,79,63,675.00 should be paid into Government Treasury at MUMBAI within 30 days from the date of service of this Demand Notice.

3. If you do not pay the amount by the date specified above, the amount will be recoverable as an arrears of land revenue under section 32(5) of the Maharashtra Value Added Tax Act, 2002.

4. Total amount of Rs. 0 refundable.

5. Any appeal against the order must be presented to the Joint Commissioner of State Tax (Appeal-4)-6 GST Office, BKC Bandra, Mumbai – within the time and in the manner laid down in section 26 of Maharashtra Value Added Tax Act, 2002."

45. On such conspectus, the petitioner is before the Court assailing the impugned review order passed by the respondents under Section 25 of the MVAT Act on the contentions as already noted by us. The primary contention as urged on behalf of the petitioner is to the effect that the impugned order is passed in excess of jurisdiction, as it seeks to artificially vivisect a business transfer which according to the petitioner, is impermissible in law, as also, on the ground that the impugned demand notice is illegal and the same is well beyond the notice and the provisions

of the law. There are also issues on limitation in passing of the impugned order. Further a challenge is also mounted on the ground of non-application of mind and breach of principles of natural justice in passing the impugned order, as noted by us hereinabove.

46. Considering the impugned order and the rival contentions as urged on behalf of the parties in the facts and circumstances of the case, the following issues would arise for our consideration:-

i. Whether the slump sale under the BTA would amount to sale of goods within the purview of the MVAT Act so as to be taxed, as held by the impugned order ?

ii. Whether the Reviewing Authority was within its jurisdiction under Section 25 of the MVAT Act to vivisect the BTA ?

iii. Whether the impugned order would stand vitiated or rendered illegal when tested on the provisions of law and the grounds as raised by the petitioner ?

47. Before we proceed to examine the above questions, it would be appropriate to note in some detail the relevant contents of the BTA, so as to appreciate the basic nature of the transaction between the parties.

G. Relevant extract of the Business Transfer Agreement:-

"WHEREAS, Seller desires to sell, assign, transfer, convey and deliver to Purchaser, and Purchaser desires to purchase and acquire from Seller the Business comprised of the Transferred Assets as a going concern on a slump sale basis (as defined in Section 2(42C) of the Tax Act) and in connection therewith Purchaser is willing to assume the Assumed Liabilities, all upon the terms and subject to the conditions set forth in this Agreement;

WHEREAS, the Promoter Group has agreed to vote at the shareholders' meeting of Seller contemplated by Section 7.5(c) all of the shares of Seller owned by the Promoter Group in favor of the entry into this Agreement by Seller and the transactions contemplated hereby and to be bound by the terms of the no negotiation and non-compete covenants set forth in Sections 7.6 and 10.6 of this Agreement;

WHEREAS, the Guarantor has agreed to guarantee the performance of all of Purchaser's obligations pursuant to this Agreement and to be bound by the terms of Section 7.18 of this Agreement; and

WHEREAS, concurrently with the execution of this Agreement, Piramal Enterprises Limited, an Indian private limited company, has executed and delivered to Purchaser the Piramal Group Undertaking set forth on Exhibit C pursuant to which the Piramal Enterprises Limited guarantees the performance of the obligations of Seller and its Affiliates pursuant to this Agreement and the Ancillary Agreements.

…..

ARTICLE 1
DEFINITIONS AND CONSTRUCTION

…. …. …

"**Business**" means the business of researching, developing, formulating, manufacturing, selling, marketing, distributing, importing or exporting generic pharmaceutical products in finished form (including the Products and the R&D Products) and related services of the base domestic formulations and mass market branded formulation (Truecare™) businesses of Seller and PHL Pharma Private Limited (including the divisions set forth on Exhibit E), as such businesses are conducted in India and any Emerging Market by Seller and PHL Pharma Private

Limited immediately prior to the date of this Agreement (subject to any changes prior to the Closing permitted in accordance with Section 7.2), but specifically excluding the Other Businesses. It is agreed and understood that the Business does not include any Excluded Assets or Excluded Liabilities;

….

"**Intellectual Property**" means all of the following anywhere in the world and all legal rights, title or interest in, under or in respect of the following arising under applicable Law, whether or not filed, applied for, perfected, registered or recorded and whether now or later existing, filed, issued or acquired, including all renewals: (a) all Patents; (b) all copyrights, including copyrights in Software, copyright registrations and copyright applications, copyrightable works; (c) all mask works, mask work registrations and mask work applications; (d) all Trademarks; (e) all Internet addresses and domain names and web page content relating to the foregoing; (f) all inventions (whether patentable, patented or unpatentable and whether or not reduced to practice); (g) all know-how that is proprietary and confidential and which is not known within the wider pharmaceutical industry, including technical know-how, process know-how, technology, technical data, trade secrets, confidential business information, manufacturing and production processes and techniques, regulatory requirements and information, clinical data and protocols, research and development information (including all research and development data, experimental and project plans and pipeline product information) which in each case is not known within the wider pharmaceutical industry; (h) all rights in databases, data collections and data exclusivity; and (i) all copies and tangible embodiments of any of the foregoing (in whatever form or medium); including in each the right to sue for past, present or future infringement, misappropriation or dilution of any of the foregoing;

….

"**Owned Intellectual Property**" means all Purchased Intellectual Property owned by Seller;

"**Patents**" means all national, regional and international patents, patent applications, patent disclosures, utility models, utility model applications, petty patents, design patents and certificates of inventions, and all related re-issues, re-examinations, divisions, revisions, restorations, renewals, extensions, provisionals, continuations and continuations in part, and all registrations and

applications for registration of any of the foregoing;

….

"**Trademarks**" means (other than Seller Corporate Name or Seller's corporate logo) all trade dress, trade names, brand names, common law trademarks, logos, trademarks and service marks and related registrations and applications, including any intent to use applications, supplemental registrations and any renewals or extensions, and other identifiers of source or goodwill, all other indicia of commercial source or origin and all goodwill associated with any of the foregoing;

… … …

ARTICLE 2
AGREEMENT TO SELL AND PURCHASE

Section 2.1 Purchase and Sale. At the Closing and subject to the terms and conditions of this Agreement, Seller shall sell, convey, assign, transfer and deliver to Purchaser free and clear of all Encumbrances, and Purchaser shall purchase and acquire, the Business comprised of the Transferred Assets. As used in this Agreement, the term "Transferred Assets" means:

(a) the Baddi Manufacturing Plant;

(b) the Leased Business Real Property;

(c) all of the assets, rights and properties of Seller of every kind and description, located anywhere in the world, whether tangible or intangible, real, personal or mixed, in each case (except as otherwise expressly set forth in this Agreement or the Ancillary Agreements), to the extent such assets, rights and properties are used in or held for use in the Business or any Transferred Asset as of the Closing Date, including the following:

(i) (A) all inventories, including all semi-finished and finished goods, work in process, raw materials, samples, packaging materials and all other materials and supplies to be used in the production of finished products of the Business, wherever located, including at the Baddi Manufacturing Plant, Seller's plant located in Mahad Industrial Area, Thane in Maharashtra, India, hubs, warehouses, customs depots or under the control of any carrying and forwarding agent of the Business and (B) all inventories of API to be used in the production of finished products of the Business that as of the Closing Date (1) have

passed all quality inspection tests and (2) have been released for transfer to the Baddi Manufacturing Plant or any other location designated by Seller, in each case, (A) and (B), which are reflected in line items on the Final Statement of Closing Net Working Capital (the inventories described under clauses (A) and (B), collectively, "Inventory");

(ii) all third party Accounts Receivable;

(iii) all rights in and to the products of the Business, including the Products;

(iv) all rights in and to the products of the Business under research and development, including the R&D Products;
Return
(v) the furniture, fixtures, office equipment and laboratory equipment located at the Baddi Manufacturing Plant and any Leased Business Real Property;

(vi) all other movable assets, properties, resources, facilities, utilities and services, including machinery, equipment, systems, implements, apparatus, instruments, mechanical and spare parts, fixtures, trade fixtures, tools, tooling, dyes, production supplies, storage tanks, pipes and fittings, utilities, utensils, furniture and fixtures, office equipment, communication facilities and capital work-in-progress, training materials and equipment, supplies, owned and leased motor vehicles, laptops, mobile phones and personal digital assistants used by the Transferred Employees, and other tangible property of any kind;

(vii) except as set forth in Section 2.2(e) and subject to the provisions of Section 10.14, all rights under all Contracts (other than the Indebtedness Contracts and the In-License Agreements), including those listed on Schedule 2.1(c)(vii):

(viii) subject to the provisions of Section 10.14, all rights under the in-license Contracts listed on Schedule 2.1(c)(viii) (the "In-License Agreements");

(ix) the rights granted to Purchaser under the Sanofi Sub-License Agreements;

(x) all Registrations supported by and including: (A) the product dossiers and all original documents and all related data, records, and correspondence under the possession of Seller (or that are accessible to Seller using commercially reasonable efforts)

evidencing the Registrations issued to Seller by a Governmental Authority, in each case to the extent assignable with or without the Consent of the issuing Governmental Authority; and (B) all related Registration applications, product dossiers, clinical research and trial agreements, data results and records of clinical trials and marketing research, design history files, technical files, drawings, manufacturing, packaging and labeling specifications, validation documentation, packaging specifications, quality control standards and other documentation, research tools, laboratory notebooks, files and correspondence with regulatory agencies and quality reports, and all relevant pricing information and correspondence with Governmental Authorities with respect to such pricing matters;

(xi) all product labeling, advertising, marketing and promotional materials and all other printed or written materials;

(xii) all Intellectual Property (other than Software) that is used primarily in the Business and is owned by or licensed to Seller at the Closing (collectively, the "Purchased Intellectual Property");

(xiii) the rights granted to Purchaser to the Seller Mixed-Use Intellectual Property pursuant to Sections 2.5(a), (c) and (g);

(xiv) (A) SAP IT platform Software, the Advance Planner Optimization Software for supply chain management and the i2 system Software for forecasting sales demand; and (B) all other Software owned or licensed (to the extent assignable, with or without the Consent of any third Person) to Seller that is used by Seller or its Affiliates primarily in the Business at any time prior to the Closing Date, (the "Purchased Software");

(xv) all Governmental Authorizations, in each case to the extent assignable with or without the Consent of the issuing Governmental Authority,

(xvi) all books, records, files, studies, manuals, reports and other materials (in any form or medium), including all advertising materials, catalogues, price lists and cost information, business and marketing plans, advertising and promotional materials, customer, distributor, third party manufacturer and supplier lists and information, mailing lists, distribution lists, client and customer lists, referral sources, supplier and vendor lists, purchase orders, sales and purchase invoices, correspondence, clinical data and protocols, production data, purchasing materials and records, research and development files, records, data books, Intellectual Property disclosures and records, manufacturing and

quality control records and procedures, product shipping or storing requirements and information, service and warranty records, equipment logs, operating guides and manuals, product specifications, product processes, engineering specifications, financial and accounting records, litigation files, personnel and employee benefits records to the extent transferable under applicable Law, and copies of all other personnel records to the extent Seller is legally permitted to provide copies of such records to Purchaser,

(xvii) all claims, rights, credits, causes of actions, defenses and rights of set-off of any kind, in each case, whether accruing before or after the Closing, and including all attorney work-product protections, attorney-client privileges and other legal protections and privileges to which Seller may be entitled in connection with the Business or any of the Transferred Assets or Assumed Liabilities that are not excluded under Section 2.2(i) or Section 2.2(i):

(xviii) all claims or benefits in, to or under any express or implied warranties, guaranties, indemnities or other contractual obligations or assurances from manufacturers or suppliers of goods or services relating to Inventory or other Transferred Assets sold or delivered to Seller prior to the Closing;

(xix) copies of Tax Returns which relate in whole or in part to the Business; provided, however, that Seller may redact any information to the extent used in, or related to, the Excluded Assets or the Other Businesses from Tax Returns conveyed pursuant to this Section 2.1(c)(xix); provided, further, that such redaction shall not materially prejudice any information related to the Business contained in such Tax Returns;

(xx) all indirect Tax credits (including value added Taxes) of Seller which are unutilized at Closing to the extent attributable to the Business and all Governmental Authorizations related to the Tax holiday granted to Seller in connection with the Baddi Manufacturing Plant;

(xxi) all rights relating to deposits (including security deposits) and prepaid expenses of the Business, claims for refunds and rights of offset of the Business that are not excluded under Section 2.2(i) or Section 2.2(i):

(xxii) the goodwill of Seller and its Affiliates solely with respect to the Business and the Transferred Assets (the "Goodwill"); and

(d) the Contracts, Registrations, Intellectual Property rights and all other assets, rights and properties which Seller acquired from Hoechst Marion Roussel Limited related to the research, development, formulation, manufacture, sale, marketing and distribution of Haemaccel solely within India, Nepal and Sri Lanka.

Notwithstanding the foregoing, the transfer of the Transferred Assets as a going concern on a slump sale basis pursuant to this Agreement does not include the assumption of any Liability related to the Transferred Assets and/or the Business unless Purchaser or one or more of its Affiliates expressly assumes that Liability pursuant to Section 2.3.

… … …

(d) all rights to the products set forth on Exhibit I and Exhibit J;

(e) the Contracts, Registrations, Intellectual Property rights and all other assets, rights and properties which the Affiliates of Seller (NPIL Pharmaceuticals (UK) Limited and NPIL. Holdings (Suisse) S.A.) acquired from DeltaSelect GmbH, AltaSelect S.r.1., TheraSelect GmbH and NovaSelect S.p.A. related to the research, development, formulation, manufacture, sale, marketing, distribution, importation and exportation of Haemaccel in certain countries outside of India, Nepal and Sri Lanka;

(f) original copies of all minute books, records, stock ledgers, Tax records and other materials that Seller is required by applicable Law to retain;

(g) all certificates for insurance, binders for insurance policies and insurance, and claims and rights thereunder and proceeds thereof;

(h) subject to Section 2.1(c)(xx), all claims for refund of Taxes and other governmental charges of whatever nature arising out of Seller's operation of the Business or ownership of the Transferred Assets prior to the Closing;

(i) all rights, title and interest of Seller and its Affiliates to assets used in connection with the Other Businesses, except to the extent that such assets are included in the Transferred Assets;

(j) all intercompany Contracts between Seller and any of its Affiliates;

(k) all rights of Seller or its Affiliates under confidentiality agreements to which Seller or its Affiliates is a party relating to the direct or indirect sale of the Business (or any part thereof) to any Person other than Purchaser or any of its Affiliates;

(l) the Sanofi In-License Agreement and the Roche In-License Agreement;

(m) the Distribution and Promotion Agreement entered into and effective as of March 19, 2010 by and amont, on the one hand, MSD Pharmaceuticals Pvt. Ltd., Merck Sharp & Dohme Asia Pacific Services Pte. Ltd, and on the other hand, Seller; and

(n) all rights of Seller and its Affiliates arising under this Agreement, the Ancillary Agreements or from the consummation of the transactions contemplated hereby or thereby.

Section 2.3 Assumed Liabilities. Subject to the terms and conditions of this Agreement, at the Closing, Purchaser shall assume and pay or perform when due only the following Liabilities to the extent relating to the Business (collectively, the "Assumed Liabilities"):

(a) all trade accounts payable to third party creditors of the Business for goods and services purchased, ordered or received by the Business and which are reflected as line items on the Final Statement of Closing Net Working Capital;

(b) all Liabilities of Seller arising on or after the Closing under the Contracts included in the Transferred Assets (including pursuant to the provisions of Section 10.14) or that are entered into by Seller after the Effective Date in accordance with Section 7.2 (including pursuant to the provisions of Section 10.14) (except, in each case, to the extent of any Liability arising out of or relating to: (i) any breach of, or failure to comply with, prior to the Closing, any covenant or obligation in any such Contract; (ii) any event that occurred prior to the Closing which, with or without notice, lapse of time or both, would constitute such a breach or failure; or (iii) any obligation which was required to be fulfilled by Seller prior to the Closing);

(c) all Liabilities assumed by Purchaser under Section 7.8 relating to Mixed Contracts and Mixed Accounts;

(d) all Transferred Employment Liabilities; and

(e) all Liabilities arising out of acts, omissions or events, or relating to, or occurring in connection with, the operation of the Business or the Transferred Assets or otherwise on or after the Closing, or based upon the acts or omissions of Purchaser and its Affiliates occurring on or after the Closing.

…. …. … ..

Section 2.5 Intellectual Property

(a) Excluding any use in respect of the Other Businesses, effective as of the Closing, Seller shall grant (to the extent Seller has rights to) to Purchaser and its Affiliates a perpetual, irrevocable, worldwide, exclusive (even with respect to Seller and its Affiliates solely with respect to the products of the Business) and royalty-free right and license (with the right to grant sublicenses and covenants not to sue) to use the Seller Mixed-Use Intellectual Property for purposes of making, having made, using, selling, offering to sell, importing or exporting pharmaceutical products in finished form.

(b) Seller shall have the first right, but not the obligation, to commence, prosecute and defend any Proceedings involving Seller Mixed-Use Intellectual Property. Purchaser and its Affiliates shall be entitled to, but not obligated to, join in any such Proceeding at their own expense. Each Party shall be entitled to retain any and all amounts awarded to it in any such Proceeding. Seller hereby acknowledges and agrees that Purchaser shall have the right to file the present license with any registries in India or in any other country in order to preserve all rights and remedies available to Purchaser under applicable Law.

(c) Effective as of the Closing, Seller, on behalf of itself and its Affiliates, shall grant to Purchaser and its Affiliates for a fixed-term of eight (8) years, an irrevocable, exclusive (even with respect to Seller and its Affiliates) and royalty-free right and license (with the right to grant sublicenses to distributors, agents and wholesalers (but only to the extent necessary to distribute pharmaceutical products on behalf of Purchaser), and to third party manufacturers (but only to the extent necessary to manufacture on behalf of Purchaser)) to use the Seller Corporate Name for purposes of making, having made, using, selling, offering to sell, importing or exporting generic pharmaceutical products in finished form in India, Nepal and Sri Lanka;

provided, however, that the present license shall not be construed to limit the right of Seller and its Affiliates to use the Seller Corporate Name in the Other Businesses. Seller hereby acknowledges and agrees that Purchaser shall have the right to become the registered user of the Seller Corporate Name within India, Nepal and Sri Lanka and accordingly the Parties hereto shall make the necessary applications to the registrar of Trademarks under the (Indian) Trade Marks Act, 1999 and similar applicable Laws in Nepal and Sri Lanka for and to the intent that Purchaser shall be registered as registered user in respect of the Seller Corporate Name for the purposes contemplated by this Section 2.5(c). Any use by Purchaser or its Affiliates of the Seller Corporate Name is subject to their use of the Seller Corporate Name with the standards of quality in effect for the Seller Corporate Name as of the Closing Date. Any goodwill from the use of the Seller Corporate Name by Purchaser and its Affiliates shall inure solely to the benefit of Seller. Purchaser and its Affiliates shall indemnify and hold harmless Seller and its Affiliates for any Losses arising from or relating to the use by Purchaser or any of its Affiliates of the Seller Corporate Name.

(d) ……

ARTICLE 3
PURCHASE PRICE

Section 3.1. Consideration

(a) Subject to the terms and conditions set forth in this Agreement, Purchaser shall pay to Seller, in consideration for the sale, assignment, conveyance, transfer and delivery of the Business comprised of the Transferred Assets to the Purchaser and the assumption by Purchaser of the Assumed Liabilities, the Indian Rupee equivalent of Three Billion Seven Hundred Twenty Million Dollars (USD 3,720,000,000) (the "Cash Consideration") exclusive of any Transfer Taxes, which shall be payable in accordance with Section 10.1.

(b) Subject to Section 11.5 in relation to the Annual Installment Payments, Purchaser shall pay the Cash Consideration to Seller as follows:

(i) At Closing, the Indian Rupee equivalent (calculated pursuant to Schedule 3.1(b)) of Two Billion One Hundred Twenty Million Dollars (USD 2,120,000,000) ("Initial

Cash Consideration");

(ii) On the first (1st) anniversary of the Closing Date, the Indian Rupee equivalent (calculated pursuant to Schedule 3.1(b)) of Four Hundred Million Dollars (USD 400,000,000) (the "First Annual Installment Payment");

(iii) On the second (2nd) anniversary of the Closing Date, the Indian Rupee equivalent (calculated pursuant to Schedule 3.1(b)) of Four Hundred Million Dollars (USD 400,000,000) (the "Second Annual Installment Payment");

(iv) On the third (3rd) anniversary of the Closing Date, the Indian Rupee equivalent (calculated pursuant to Schedule 3.1(b)) of Four Hundred Million Dollars (USD 400,000,000) (the "Third Annual Installment Payment"); and

(v) On the fourth (4th) anniversary of the Closing Date, the Indian Rupee equivalent (calculated pursuant to Schedule 3.1(b)) of Four Hundred Million Dollars (USD 400,000,000) (the "Fourth Annual Installment Payment", and together with the First Annual Installment Payment, the Second Annual Installment Payment and the Third Annual Installment Payment, the "Annual Installment Payments", and each an "Annual Installment Payment").

(c) Purchaser shall use commercially reasonable efforts to explore the possibility of entering into a foreign exchange transaction or other similar hedging transaction for purposes of covering Seller's potential exchange rate exposure resulting from the Annual Installment Payments (a "Hedging Transaction"); provided, however, that Purchaser must obtain Seller's written consent prior to entering into such Hedging Transaction and further provided, that Seller shall fully reimburse and indemnity Purchaser for all Hedging Obligations and Losses related to or arising out of such Hedging Transaction.

… … …

"Section 3.3 Allocation of Cash Consideration for Stamp Duty Purposes.

Following the Effective Date, but prior to the Closing Date, Purchaser shall deliver to Seller a schedule setting forth the allocation of the Cash Consideration among the Transferred Assets for purposes of calculating the stamp duty payable on the transfer of those Transferred Assets which are subject to stamp duty, which such schedule shall be attached hereto as Schedule 3.3. The Parties shall treat the transactions contemplated by this Agreement in all filings with Governmental Authorities for all

stamp duty purposes consistent with the allocation set forth on Schedule 3.3."

Schedule 3.3
Allocation of Cash Consideration for Stamp Duty Purposes

Sr. No.	Type of Asset	Allocation Amount (in USD)
1.	Tangible Immovable – Baddi Plant	$35,475,041
2.	Tangible Immovable – Baddi Ash Disposal Site	$61,603
3.	Tangible Immovable – Baddi Housing Colony	$881, 261
4.	Trademarks and Associated Rights	$1,778,000,000
5.	Novation – Pierre Fabre	$85,000
6.	Novation – Pierre Fabre: Navelbine	$33,000
7.	Novation – Pierre Fabre: Avene	$5,000,000
8.	Novation – Intek	$10,000,000
9.	Novation – AstraZeneca	$40,000,000
10.	Novation – Allergen	$4,000,000
11.	Novation – Novartis	$20,000,000
12.	Novation – Virchow	$2,000,000
13.	Novation – Imagenot	$6,000,000
14.	Sanofi Sublicense - Group A	$20,000,000
15.	Sanofi Sublicense - Group A, B	$608,000,000
16.	Roche Sublicense	$32,000,000
17.	Rights under Exclusive Distribution Agreement	$395,000
18.	Trademark License – Seller Corporate Name	$6,000,000
19.	Business Transfer Agreement between AHPL and PHL Pharma Private Limited	$57,000
20.	Business Transfer Agreement between ATPPL and PHL Pharma Private Limited	$3,545,000
21.	Non-stampable Assets	$1,228,467,095
	Total	$3,800,000,000

48. On a careful perusal of the BTA and the specific clauses which we have noted hereinabove, the commercial scheme of the BTA is abundantly clear that what was intended between the parties, is the wholesome sale of

the basic domestic formulation business as described in the agreement as a going concern on a slump sale basis. The slump sale "to be understood as defined under Section 2(42C) of the Income Tax Act". The parties have specifically defined the business and all its material ingredients including the tangible and intangible assets as extracted by us hereinabove. Article 2 of the BTA under Section 2.1 specifically records the agreement between the parties that the petitioner/seller shall sell, convey, assign, transfer and deliver to the purchaser (Abbott Healthcare) free and clear of all encumbrances and the purchaser shall purchase and acquire the business comprised of transferred assets as defined under the agreement as transferred assets. We have also noted that Section 2.5 of the BTA extensively dealt with the intellectual property and for a specified period. Further under article 3 of the BTA, the parties have provided for the purchase price being a consideration of Indian Rupee equivalent of 3 Billion 720 Million Dollars (USD 3,720,000,000) (being the cash consideration) payable in accordance with Section 10.7 of the BTA. Further under Section 3.3 of the BTA, the parties have provided for allocation of cash consideration for stamp duty purposes and in such context, have provided for allocation of cash consideration for stamp duty purposes in Schedule 3.3 which we have extracted hereinabove. Thus, the

intention of the parties in attributing allocation of the amounts is purely in the context of what has been agreed to in schedule 3.3 i.e. for stamp duty purposes only, as itself seen from the title of schedule 3.3. Applying the settled principles of law, the BTA being a commercial document, would be required to be understood in the manner and intention the parties have desired and as reflected and indicative of in the various clauses (sections). It would be thus difficult for any authority or even for the Court to attribute a different intention not only to the clauses of the BTA, but also in regard to the lump sum consideration in regard to the transfer of the said business as agreed between the parties. Thus, necessarily section 3.3 would be required to be read along with schedule 3.3 of the BTA and attributed a meaning as conferred by the parties, failing which it would amount to misreading of the BTA and/or its purport.

49. On the conspectus of the aforesaid discussion on the implications brought about by the BTA, we now proceed to examine the above questions.

50. At the outset, it would be necessary to note the relevant provisions of the MVAT Act which are as under:-

H. Relevant provisions:-

"**Section 2. Definitions** :- In this Act, unless the context otherwise requires,-

……..

(4) "**business**" includes, -

(a) any service;

(b) any trade, commerce or manufacture;

(c) any adventure or concern in the nature of service, trade, commerce or manufacture;

whether or not the engagement in such service, trade, commerce, manufacture, adventure or concern is with a motive to make gain or profit and whether or not any gain or profit accrues from such service, trade, commerce, manufacture, adventure or concern.

Explanation.– For the purpose of this clause,-

(i) the activity of raising of man-made forest or rearing of seedlings or plants shall be deemed to be business;

(ii) any transaction of sale or purchase of capital assets pertaining to such service, trade, commerce, manufacture, adventure or concern shall be deemed to be a transaction comprised in business;

(iii) sale or purchase of any goods, the price of which would be credited or, as the case may be, debited to the profit and loss account of the business under the double entry system of accounting shall be deemed to be transactions comprised in business;

(iv) **any transaction in connection with the commencement or closure of business shall be deemed to be a transaction comprised in business;**

……...

(8) "**dealer**" means any person who, for the purposes of or consequential to his engagement in or, in connection with or incidental to or in the course of, his business buys or sells, goods in the State whether for commission, remuneration or otherwise and includes,-

(a) a factor, broker, commission agent, del-credere agent or any other mercantile agent, by whatever name called, who for the purposes of or consequential to his engagement in or [in connection with or incidental to or] in the course of the business, buys or sells any goods on behalf of any principal or principals whether disclosed or not;

(b) [an auctioneer who sells or auctions goods whether acting as an agent or otherwise or, who organises the sale of goods

or conducts the auction of goods whether or not he has the authority to sell the goods] belonging to any principal whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal;

(c) a non-resident dealer or as the case may be, an agent, residing in the State of a non-resident dealer, who buys or sells goods in the State for the purposes of or consequential to his [engagement in or in connection with or incidental to or in the course of, the business],

(d) any society, club or other association of persons which buys goods from, or sells goods to, its members;

Explanation.— For the purposes of this clause, each of the following persons, bodies and entities who [sell any goods] whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration shall, notwithstanding anything contained in clause (4) or any other provision of this Act, be deemed to be a dealer, namely:-

(i) Customs Department of the Government of India administering the Customs Act, 1962;

(ii) Departments of Union Government and any Department of any State Government;

(iii) Local authorities;

(iv) Port Trusts;

[(iv-a) Public Charitable Trust;]

(v) Railway Administration as defined under the Indian Railways Act, 1989 and Konkan Railway Corporation Limited;

(vi) Incorporated or unincorporated societies, clubs or other associations of persons;

(vii) Insurance and Financial Corporations, institutions or companies and Banks included in the Second Schedule to the Reserve Bank of India Act 1934;

(viii) Maharashtra State Road Transport Corporation constituted under the Road Transport Corporation Act, 1950;

(ix) Shipping and construction companies, Air Transport Companies, Airlines and Advertising Agencies;

(x) any other corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority.

(12) "**goods**" means every kind of movable property not being newspapers, actionable claims, money, stocks, shares, securities or lottery tickets and includes live stocks, growing crop, grass and trees and plants including the produce thereof including property in such goods attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

(24) "**sale**" means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation.— For the purposes of this clause,-

(a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956 (74 of 1956);

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

(ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a 13[14[works contract including], an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;]

(iii) a delivery of goods on hire-purchase or any system of payment by instalments;

(iv) 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;

(v) the supply of goods by any association or body of persons incorporated or not, to a member thereof for cash, deferred payment or other valuable consideration;

(vi) 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 made or given for cash, deferred payment or other valuable consideration;

(33) "**turnover of sales**" means the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period after deducting the amount of
-

(a) sale price, if any, refunded by the seller, to a purchaser, in respect of any goods purchased and returned by the purchaser within the prescribed period; and

(b) deposit, if any, refunded in the prescribed period, by the seller to a purchaser in respect of any goods sold by the dealer.

Explanation I.— In respect of goods delivered on hire-purchase or any system of payment by instalment or in respect of the transfer of the right to use any goods for any purpose (whether or not for a specified period) the amounts of sale price received or receivable during a given period shall mean the amounts received or as the case may be, due and payable during the said period;

[(Explanation II) * * *]

Explanation III.— Where the registration certificate is cancelled, the amounts of sale price in respect of sales made before the date of the cancellation order, received or receivable after such date, shall be included in the turnover of sales during a given period;

Section 3. Incidence of Tax :-

(1) Every dealer, who, immediately before the appointed day, holds a valid or effective certificate of registration or licence under any of the earlier laws or, who is liable to pay tax under any of the earlier laws, in the year ending immediately before the appointed day shall, if his turnover of sales or purchases has, in the said year under any of such earlier laws, exceeded rupees 1[five lakh], or, as the case may be, who was an importer in the said year 2[and his turnover of sales or purchases in the said year had] exceeded rupees one lakh, be liable to pay tax, with effect from the appointed day, in accordance with the provisions of this Act, till his certificate or licence is duly cancelled under this Act.

……

Section 6. Levy of sales tax on the goods specified in the Schedules:-

(1) There shall be levied a sales tax on the turnover of sales of goods specified in column (2) in Schedule B, C, D or, as the case may be, E, at the rates set out against each of them in column (3) of the respective Schedule.]

(2) Notwithstanding anything contained in sub-section (1), there shall be levied a sales tax, in addition to the sales tax leviable

under sub-section (1), on the sales of any motor spirits specified in Schedule D at such rate per litre, if any, as may be set out from time to time against each of the Motor spirits, in column (3) of the said schedule.]

23. Assessment :- [(1) Where a registered dealer fails to file a return in respect of any period by the prescribed date, the Commissioner may assess the dealer in respect of the said period to the best of his judgment without serving a notice for assessment and without affording an opportunity of being heard:

Provided that, if after the assessment order is passed, the dealer submits the return for the said period alongwith evidence of payment of tax due as per the return or submits evidence of return for the said period having been filed before the passing of the assessment order along with evidence of payment of tax due as per the return, then the Commissioner shall cancel, by order in writing, the said assessment order and after such cancellation, the dealer may be assessed in respect of the said period under the other provisions of this section:

Provided further that, such cancellation shall be without prejudice to any interest or penalty that may be levied in respect of the said period:

Provided also that, no order under this sub-section shall be passed after three years from the end of the year containing the said period.]

……

24. Rectification of mistakes :- (1) The Commissioner may, at any time within two years from the end of a financial year in which any order passed by him has been served, on his own motion, rectify any mistake apparent on the record, and shall within the said period or thereafter rectify any such mistake which has been brought to his notice within the said period, by any person affected by such order.

……..

25. Review :- [(1) After any order including an order under this section or any order in appeal is passed under this Act, rules or notifications, by any officer or person subordinate to him, the Commissioner may, of his own motion or upon information received by him, call for the record of such order and examine whether,—

(a) any turnover of sales or purchases has not been brought to tax or has been brought to tax at lower rate, or has been

incorrectly classified, any claim is incorrectly granted or that the liability to tax is understated, or

(b) in any case, the order is erroneous, in so for as it is prejudicial to the interests of revenue, and after examination, may, by serving on the dealer a notice in the prescribed form, pass an order to the best of his judgment, where necessary.

(2) (a) For the purpose of the examination and passing of the order, the Commissioner may require, by service of notice in the prescribed form, the dealer to produce or cause to be produced before him such books of accounts and other documents or evidence which he thinks necessary for the purposes aforesaid.

(b) No order under this section shall be passed after the expiry of five years from the end of the year in which the order passed by the subordinate officer has been served on the dealer.

(c) Where in respect of any order or part of the said order passed by the subordinate officer, an order has been passed by any appellate authority including the Tribunal, or such order is pending for decision in appeal, or an appeal is filed, then, whether or not the issues involved in the examination have been decided or raised in appeal, the Commissioner may within five years of the end of the year in which the said order was passed by the subordinate officer has been served on the dealer, make a report to the said appellate authority including the Tribunal regarding his examination or the report or the information received by him and the said appellate authority including the Tribunal shall thereupon, after giving the dealer a reasonable opportunity of being heard, pass an order to the best of its judgment, where necessary. For the purposes of section 26, such order shall be deemed to be an order passed in appeal.]

(3) If the State Government or the Commissioner has initiated any proceeding before an appropriate forum, against a point which is decided against the State by a judgment of the Tribunal, then the Commissioner may, in respect of any order, other than the order which is the subject matter of the judgement, call for the record, conduct an examination as aforesaid, record his findings, call for the said books of accounts and other evidence, hear the dealer and pass an order as provided for under this section as if the point was not so decided against the State, but shall stay the recovery of the dues including interest, penalty or amount forfeited, in so far as they relate to such point until the decision by the appropriate forum and after such decision may modify the order of review, if necessary, after giving the dealer a reasonable opportunity of being heard.

(4) No proceedings under this section shall be entertained on any application made by a dealer or a person."

"SCHEDULE C

(See sections 2(26), 5 and 6)

List of goods for which the rate of tax is [2% or 3% or 4% or 5%]

Note. - The abbreviation "%" in relation to the rate of tax indicates that tax on goods to which the entry relates shall be charged on the basis of the sale price, the tax being equal to such percentage of the sale price as is indicated against the respective goods

Sr. No. (1)	Name of the commodity (2)	Rate of Tax (3)
1	…….	
2	…….	
3	……..	
…	……	
39	Goods of intangible or incorporeal nature as may be notified from time to time, by the State Government in the Official Gazette.	[5%]

51. A perusal of the aforesaid definitions as contained under the MVAT Act would indicate that the statute has provided distinct definitions to the term 'business', 'goods', 'sale', 'turnover of sales' which are relevant in the present context. Further Section 3 is the charging section which provides for 'incidence of tax'. Section 6 provides for levy of sales tax on the turnover of goods specified in the schedules B, C, D or, as the case may be, at the rates set out against each of them in column (3) of the respective schedule. Section 24 providing for 'rectification of mistakes' which is a power conferred on the Commissioner to be exercised within two years

from the end of a financial year in which any order passed by him has been served, on his own motion, *inter alia* rectifying any mistake apparent on the record. Section 25 is the provision for review under which the impugned order has been passed, which *inter alia* provides that after any order which would include an assessment order is passed under the MVAT Act, by any officer or person subordinate to him, the Commissioner may, of his own motion or upon information received by him, call for the record of such order and after examining whether any turnover of sales or purchases has not been brought to tax or has been brought to tax at lower rate, or has been incorrectly classified, any claim is incorrectly granted or that the liability to tax is understated, or in any case, the order is erroneous, insofar as it is prejudicial to the interests of revenue, the Commissioner may, after a notice to the dealer in the prescribed form, pass an order to the best of his judgment, where necessary. Sub-section (2)(a) provides for issuance of notice in the prescribed form. Sub-section (2)(b) provides that no order under such provision shall be passed after the expiry of five years from the end of the year in which the order passed by the subordinate officer has been served on the dealer. Schedule 'C' of the MVAT Act provides for list of goods for which the rate of tax is 2% or 3% or 4% or 5%. As noted above item

no.39 of Schedule 'C' provides for 5% tax on goods of intangible or incorporeal nature as may be notified from time to time, by the State Government in the Official Gazette.

52. Thus, on the applicability of Section 25 in the context of the assessment order dated 16 March 2015 is concerned, the scope of jurisdiction of the Commissioner would be two fold, firstly to examine whether any turnover or sale or purchase was not brought to tax or was brought to tax at a lower rate or was incorrectly classified and/or whether any claim was incorrectly granted or that the liability to tax was under stated, or in any case the order was erroneous insofar as it was prejudicial to the interest of the revenue.

53. As Section 25 would take into its ambit the turnover of sales which is not brought to tax, it would be required to note that Section 2(33) which defines 'turnover of sales' defines it to mean the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period as ordained by Section 2(33). Further as turnover of sales is defined under Section 2(33) to include sale of goods, the definition of the terms namely "business", "goods" and "sales" as defined under Sections 2(4), 2(12) and 2(24) of the MVAT Act are also relevant and are required to be considered. Section 2(12) which

defines 'goods' to mean every kind of movable property not being newspapers, actionable claims, money, stocks, shares, securities or lottery tickets and includes live stocks, growing crop, grass and trees and plants including the produce thereof including property in such goods attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. It is also relevant to note that Section 2(4) has independently defined 'business' to include any service, any trade, commerce or manufacture, any adventure or concern in the nature of service, trade, commerce or manufacture. Section 2(24) has defined "sale" to mean a sale of goods made within the State.

54. On a cumulative reading of the definition 'business' under Section 2(4), 'goods' under Section2(12) and the definition of 'turnover of sales' as defined under Section 2(33), it can be seen that neither the term 'sale of business' nor the term 'business' has been explicitly included under the definition of 'goods'. It also cannot be said that 'business' *per se* would amount to goods hence, it is difficult to conceive that sale of business can be categorized as any sale of goods so as to fall within the meaning of 'turnover of sale' as defined under Section 2(33). There cannot be turnover of sale of businesses.

55. Having said so, we may observe that the reviewing authority has not disputed the position that what has been undertaken by the petitioner under the BTA is sale of business. However, the Reviewing Authority having examined various clauses of the BTA and purportedly to give effect to item 39 of Schedule 'C', has included the items (intangible assets) as contained in Schedule 3.3 of the BTA namely the heads of intellectual property (trade name, corporate logo, goodwill, etc.) to be goods as defined under Section 2(12) of the MVAT Act, so as to be included within the definition of 'turnover of sales' as defined in clause 2(33).

56. No doubt that incorporeal rights are considered to be goods, which ought not to be in dispute [see ***Vikas Sales Corporation Vs. Commissioner of Commercial Taxes*** (supra) and ***Mahyco Monsanto Biotech (India) Pvt. Ltd. vs. Union of India & Ors.***[25]], however, the question is whether considering the complexion and the nature of the agreement between the parties as contained under the BTA, the reviewing authority could have at all adopted such approach. As noted above, the contention of the petitioner is that such approach of the reviewing authority not only amounts to misreading of the BTA, but also not recognizing the correct position in law. We find ourselves in agreement with such contentions of

[25] 2016 SCC OnLine Bom 5274

the petitioner for more than one reason.

57. The first and foremost reason is to the effect that in doing so, the reviewing authority has adopted a pick and choose approach in dissecting the agreement and more particularly Section 3.3 read with Schedule 3.3 to give a different meaning to such part of the BTA dealing in regard to the intellectual property rights, so as to construe the same to be not part of a slump sale underlying the agreement. In other words, it can be said that the reviewing authority has formed an opinion that qua the items as contained in Schedule 3.3 and in relation to the value of these items in terms of money, as indicated therein, the parties have a different intention, namely of not considering these items to form an integral part of the sale of business in its entirety under the BTA. In our clear opinion, this is a fundamental error and a legal perversity on the part of the Reviewing Authority, not only in relation to the overall facts and the clear purport of the agreement between the parties, but also an apparent illegality when tested in law. We say so for the reason that neither the assessing officer nor the reviewing authority exercising the review powers under Section 25 of the MVAT Act would have jurisdiction to read the agreement in a manner which would in fact be contrary to the intention of the parties as discerned from the holistic reading of the BTA. It is not permissible for

the authorities to do so and more particularly when the parties are not only clear in regard to the terms and conditions of the BTA, as already implemented and acted upon, that what was meant to be transferred was the business as a whole in its entirety as a slump sale.

58. In our opinion, the reviewing authority was required to consider the effect of these clauses of the BTA, as persons of commerce would consider, appreciate and understand such clauses in terms of their commercial efficacy, even in applying the provisions of the MVAT Act. This more particularly when the parties in relation to a slump sale were permitted under one of the legislations namely under the Income Tax Act, to attribute values to different tangible assets and intangible assets and for such reason, Schedule 3.3 along with specific clauses in regard to intellectual property came to be incorporated under the BTA. Hence, providing of such values to the intangible assets as objected by the reviewing authority could never have changed the intention of the parties, that qua such items the parties have a different intention and/or were not intending to transfer the business in its entirety as a slump sale, including on such items of tangible and intangible assets.

59. Thus, on a reading of the impugned order, it is abundantly clear that while forming an opinion different from what has been formed by the

Assessing Officer, such opinion of the reviewing authority has travelled beyond the contours of the BTA. In exercise of the review jurisdiction, the reviewing authority has intended to attribute a different meaning to Section 3.3 read with Schedule 3.3 when he discusses the effect of the said clauses when tested on the touchstone of his jurisdiction under Section 25 of the MVAT Act. The jurisdiction of the reviewing authority was to confine himself to the provisions of Section 25 in undertaking review of the assessment order. He could have re-examined the agreement only in the context of what has been provided by sub-sections (a) and (b) thereof and not otherwise, however, the reviewing authority exercising the review jurisdiction has travelled far beyond such explicit jurisdiction when he vivisects the BTA to take a view to levy tax on the BTA forming an untenable opinion on reading of Schedule 3.3. The review jurisdiction cannot be a jurisdiction under which the reviewing authority would intend to tax something which on a holistic reading of the BTA was *per se* not taxable under the MVAT Act. Such position would be clear from the following discussion.

60. The grounds on which the review jurisdiction was to be exercised by the reviewing authority as informed to the petitioner was confined to what was set out in the review notice under the heading "Gist of the order

proposed to be passed", which was on the fundamental premise that from Schedule 3.3 of the BTA, it was noticed by the reviewing authority that allocation of cash consideration for stamp duty purposes for various types of assets and more particularly, bifurcation of the consideration of tangible immovable assets, trade mark and associate rights, brandwise break up rights under exclusive distribution agreement, trade mark licence, would amount to turnover of sale which has not been brought to tax, and that the liability to tax was understated in the context of slump sale, which is alongwith the assets and liabilities. It is thus clear that the show cause notice setting out gist of the order on one hand, recognizes that the sale under BTA was 'slump sale' and on the other hand, the reviewing authority by the impugned order has regarded these items as contained in Schedule 3.3, as 'sale of goods' to be considered as turnover of sales of petitioner. Thus the opinion of the department that the petitioner had bifurcated the consideration of its assets sought to be transferred as per the value as indicated in schedule 3.3 was forsaken in passing the impugned order when the reviewing authority has observed that the intellectual property rights being not permanently transferred and being transferred for a limited period, would amount to sale of goods. This infers that although the petitioner was required to respond to a version/opinion of

the reviewing authority, as put and intimated to the petitioner in the show cause notice, however, what has actually being done by the reviewing authority, is different from such version in the show cause notice. The petitioner therefore would be correct in its contentions that such approach of the reviewing authority has resulted in a defective hearing being granted to the petitioner resulting in breach of the principles of natural justice. This also for the reason that it is well settled that the principles of natural justice would postulate that the revenue sets out the entire case point wise to the petitioner and invite the petitioner's version on each of such aspects. It cannot be a situation that a decision is rendered by a quasi-judicial authority on the issues which were not posed/confronted in a precise, clear and unambiguous manner to the noticee in the perspective, such issues were intended to be comprehended by the authority. In our opinion, failure to follow such basic tenets would certainly result in a prejudice to the parties resulting in breach of principles of natural justice, thereby vitiating the order being passed. The principles of law in this context are well settled in catena of decisions of the Supreme Court, as also relied upon on behalf of the petitioner. However, we would not burden the judgment in discussing such well settled position in law.

61. Be that as it may, what was necessary for the reviewing authority, was not to deviate itself from the well accepted norms and approach of a holistic reading of such commercial document to ascertain as to what was the real intention of the parties in entering the BTA, and what is the cumulative and commercial effect of different clauses of the agreement when tested on the anvil of the provisions of the MVAT Act, to ascertain whether schedule 3.3 read with the other clauses of the agreement would amount to sale of goods, so as to fall within the definition of turnover of sales under the MVAT Act. On a holistic reading of the agreement, it was clear that what was intended between the parties was a lock, stock and barrel transfer of the pharmaceutical business on slump sale basis to Abbott Healthcare.

62. Insofar as Section 3.3 of the BTA is concerned, it clearly provides for allocation of cash consideration for stamp duty purpose. Section 3.3 reads thus:-

> **"Section 3.3 Allocation of Cash Consideration for Stamp Duty Purposes.**
>
> Following the Effective Date, but prior to the Closing Date, Purchaser shall deliver to Seller a schedule setting forth the allocation of the Cash Consideration among the Transferred Assets for purposes of calculating the stamp duty payable on the transfer of those Transferred Assets which are subject to stamp duty, which such schedule shall be attached hereto as Schedule 3.3. The Parties shall treat the transactions contemplated by this Agreement in all filings with Governmental Authorities for all

stamp duty purposes consistent with the allocation set forth on Schedule 3.3."

63. The reviewing authority thereafter has applied Section 2.5 of the BTA pertaining to intellectual property and more particularly, Section 2.5(c) to hold that the petitioner granting a fixed term of eight years to the purchaser as an irrevocable, exclusive and royalty free licence, to use the petitioner's corporate name for the purpose of, *inter alia*, making, using, selling, offering to sell, importing or exporting genuine pharmaceutical products in finished form in India as provided under the said clause would make the BTA liable to be taxed. In this context, it would be imperative to note the provision of Section 2.5 of the BTA to ascertain the effect of the said clause on the transfer of business as intended by the parties, in regard to the use of the intellectual property rights in favour of the purchaser for such limited period. Section 2.5(c) reads thus:

"**2.5 Intellectual property:**

… …. …

(c) Effective as of the Closing, Seller, on behalf of itself and its Affiliates, shall grant to Purchaser and its Affiliates for a fixed-term of eight (8) years, an irrevocable, exclusive (even with respect to Seller and its Affiliates) and royalty-free right and license (with the right to grant sublicenses to distributors, agents and wholesalers (but only to the extent necessary to distribute pharmaceutical products on behalf of Purchaser), and to third party manufacturers (but only to the extent necessary to manufacture on behalf of Purchaser)) to use the Seller Corporate Name for purposes of making, having made, using, selling, offering to sell, importing or exporting generic pharmaceutical products in finished form in India, Nepal and Sri Lanka; provided, however, that the present

> license shall not be construed to limit the right of Seller and its Affiliates to use the Seller Corporate Name in the Other Businesses. Seller hereby acknowledges and agrees that Purchaser shall have the right to become the registered user of the Seller Corporate Name within India, Nepal and Sri Lanka and accordingly the Parties hereto shall make the necessary applications to the registrar of Trademarks under the (Indian) Trade Marks Act, 1999 and similar applicable Laws in Nepal and Sri Lanka for and to the intent that Purchaser shall be registered as registered user in respect of the Seller Corporate Name for the purposes contemplated by this Section 2.5(c). Any use by Purchaser or its Affiliates of the Seller Corporate Name is subject to their use of the Seller Corporate Name with the standards of quality in effect for the Seller Corporate Name as of the Closing Date. Any goodwill from the use of the Seller Corporate Name by Purchaser and its Affiliates shall inure solely to the benefit of Seller. Purchaser and its Affiliates shall indemnify and hold harmless Seller and its Affiliates for any Losses arising from or relating to the use by Purchaser or any of its Affiliates of the Seller Corporate Name."

64. Thus, the question is also as to whether by providing Section 2.5 read with Section 3.3 and Schedule 3.3 in the BTA, the parties at all intended that the transaction under BTA would take away much less bring about a different intention qua the transfer of business. The parties provided values *inter alia* to these intangible assets as set out in Schedule 3.3 for the purpose of stamp duty and as recognized under Section 2(42C) of the Income Tax Act, however, this would bring about a different consequence in regard to the transfer of business, and/or that this would in any manner amount to a sale of these intangible assets so as to be regarded and included within the ambit of sale of goods falling within the 'turnover of sales'. We are not shown any bar on itemized sale when such sale is in

the context of sale of a business as a going concern. It is not in dispute that the parties had agreed for a lump sum consideration. If that be so, as to how the provisions of the MVAT Act as referred by us hereinabove would get attracted, is not understood. Thus, in our opinion, the answer would be certainly in the negative as seen from the reading of the BTA and the intention of the parties it depicts.

65. In our opinion, Section 2.5 read with Section 3.3 and Schedule 3.3 if is read in the manner as set out in the impugned order, would lead to a patent absurdity, so as to negate the intention of the parties, to have a outright sale of pharmaceutical business in its entirety. Such reading of the BTA would not only be against the intention of the parties as reflected from various clauses of the BTA as also it would amount to do a damage to what was realistically intended by the parties and acted upon. In the facts of the case, such selective vivisection of the agreement was certainly not permissible.

66. We may observe that the petitioner in fact had furnished an effective explanation in its reply to the show cause notice issued by the reviewing authority when the petitioner contended that sale of business as a going concern, was not taxable under the MVAT Act, and more particularly when the petitioner's business was being sold as a going

concern. The petitioner had appropriately stated as to why itemized value of the assets and liabilities set out in Schedule 3.3 would not affect the nature of the transaction which was to transfer the on-going business to Abbott Healthcare. It was clearly stated that the itemized lists of assets and liabilities were provided only for the purpose of computation for the purpose of stamp duty in respect of such transfer and which very well fell within the acceptability of a formed slump sale as permitted under Section 2(42C) of the Income Tax Act (as it stood at the relevant time) read with explanation (2) thereof, the relevant extract of which reads thus:-

> "Section 2 (42C) - Slump Sale means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales. …..…."

Explanation 2 to Section 2(42C) of the Income Tax Act reads thus:-

> "For the removal of doubts, it is hereby declared that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities."

67. On reading of the aforesaid provision, for the purposes of the Income Tax Act, if the value of assets and liabilities is determined for sale of stamp duty, registration fees or any other similar taxes or fees, the same

shall not be regarded as assigning of values to individual assets and liabilities. Thus, in the context of such provision, mere assigning of such values could have never affected the slump sale and would not affect the transaction of sale of the petitioner's business as a going concern. If this be the position as to how the reviewing authority could consider the determination of such value to be a sale of goods even applying the provisions of the MVAT Act cannot be understood. It was imperative for the reviewing authority to consider that the intangible assets were integral and inextricable elements in the transfer of business as contemplated by the parties under the BTA, and the same were required to be transitioned on well accepted commercial rationale and the market/commercial norms, so as to achieve a gradual and complete transfer of business as designed by the parties. Thus, the petitioner permitting Abbott Healthcare to assign "a particular period" to use the corporate name and logo as a part of the transitional arrangement certainly could not be construed to mean that the business in its entirety was not being transferred by the petitioner. Although such position was explicitly pointed out to the reviewing authority alongwith the relevant decisions in that regard, the reviewing authority has failed to consider the true nature of the transaction under the BTA and that it was a composite transaction in taking the view as

reflected by the impugned order. It was not permissible for the reviewing authority to vivisect the agreement in such manner to come to a conclusion different from what was intended by the parties in agreeing for transfer of entire business under the BTA.

68. We may observe that the petitioner, in canvassing the perspective of non-taxability of the BTA under the MVAT Act, as observed by us, had categorically set out the commercial rationale for allowing temporary / non exclusive use of corporate name and logo to enable successful transition of the business from the petitioner to Abbott Healthcare. It was informed to the reviewing authority that the business sold by the petitioner was alongwith the products which were associated with the petitioner since many years and that after the transfer of business, Abbott Healthcare was required to sell the acquired products in the market and such situation ought not to be of any doubt in the minds of public on the genuineness of the products and its source. Hence, to avoid such situation in the public mind qua the products, that too in pharmaceutical sphere, it was explained that there was compelling need for use of seller's corporate name and corporate logo etc. in the transfer of the business under the BTA. Although such explanation was offered, it is seen that there is no discussion whatsoever, in this regard, in the impugned order. This shows

complete non application of mind to the material aspects of the BTA as urged by the petitioner, and which was not only from what could be derived from the BTA and the effect schedule 3.3 read with Section 3.3 of the BTA had created in regard to the transfer of business.

69. The aforesaid discussion would lead us to arrive at a conclusion that the jurisdictional facts for the levy of VAT were certainly not satisfied in the review authority passing the impugned order. Thus, the reviewing authority has acted in excess of jurisdiction in exercising its powers under Section 25 of the MVAT Act in vivisecting the BTA. It is also clear to us that as *per se* slump sale under the BTA would not amount to sale of goods within the meaning of the MVAT Act, the reviewing authority could not have dissected or attempted to reconstruction of the BTA in the manner as done in the impugned order.

70. We are also in agreement with the contention as urged on behalf of the petitioner when the petitioner urges that the impugned review order is bad in law for the reason that there is non-application of mind by the reviewing authority in passing such order on another aspect. In this regard we find that when the reviewing authority intended to confine itself to the value assigned to the intangible assets as contained in Schedule 3.3 read with Section 3.3 and Section 2.5, the same has been borrowed / copied

from the service tax demand notice in ad-verbatim manner. This is clear from the comparative extracts of the service tax demand notice and the extract of the impugned order and more particularly from perusal of paragraphs 13 to 26 and 30 to 31 of the impugned order when examined against paragraph 4, 5.1 to 5.4, 6.1 and 10 of the Service Tax demand notice, where the impugned order has clearly copied and pasted the findings and reasoning as contained in the service tax demand notice issued to the petitioner in regard to BTA. In this context we may also observe that the parameters of proceedings for levy of service tax, as it then stood under the provisions of the Finance Act,1994, could not have been borrowed to be made applicable for levy of VAT under the MVAT Act. We hence, wonder as to how the Reviewing Authority could verbatim borrow / copy the contents of the notice issued by the Service Tax Authority.

71. Even considered from the perspective of the Income Tax Act,1961 which under Section 2(42C) defines 'Slump sale', we may observe that such clause defining 'Slump sale' was inserted by the Finance Act,1999 with effect from 1 April 2000 which was explained in Board Circular No.779 dated 14 September 1999. The relevant part of which is extracted in the commentary of the learned authors **"Chaturvedi & Pithisaria"** -

Income Tax Law, Eighth Edition needs to be noted which reads thus:

> **56.** *Business re-organization-extensive amendments in relation to amalgamation, demerger and slump sale.* **56.1** The business and economic environment of the country has thrown up the need for simplification and rationalization of laws relating to business re-organization for rationalization of the production system and better utilization of resources which have become necessary with a view to enabling the Indian industry to restructure itself to become globally competitive. It was in this background that the tax concessions to conversion of firms into companies or proprietary concerns into companies were provided in the Finance (No. 2) Act, 1998, and were widely welcomed. Following this up, the Finance Act, 1999, has carried out a number of amendments for the entire gamut of business reorganization. These include rationalization of the existing provisions relating to amalgamation of companies, new provisions relating to demerger of companies and sale or transfer of business as a going concern through slump sale.
>
> **56.2** Amalgamation in relation to the companies has been defined under the existing provisions of the Income-tax Act to mean the merger of one or more companies with another company or the merger of two or more companies to form one company. There are a number of provisions in the Income-tax Act having bearing on amalgamation. Demerger is relatively a new phenomenon in the Indian corporate sector. A demerger is a reorganization of a company where all the existing assets and liabilities are divided into one or more additional entities leading to resulting companies. While there are no specific provisions under the Companies Act governing demergers, some transactions of this nature do take place through schemes of compromise or arrangement under sections 391 to 394 of the Companies Act and these are sanctioned by the High Courts. A slump sale is a form of reorganization where an undertaking or a division is transferred from one person to another for a lump sum consideration without values being assigned to the individual assets and liabilities transferred.
>
> **56.3** *Extensive amendments in the Income-tax Act have been carried out on the basis of the following broad principles:*
>
> (a) The restructuring shall not attract additional liabilities to tax and also not result in the withdrawal of relief and concessions available to the existing unit.

(b) The tax benefits and concessions available to an undertaking of a company shall continue to be available to the undertaking on transfer of the same while concessions and benefits that are available to the transferor company as an entity and not to the undertaking of the company proposed to be transferred, should remain with the transferor-company.

(c) Tax benefits to such business reorganizations should be limited to the transfer of business as a going concern and not to the transfer of specific assets which would amount to sale of assets and not a business reorganization.

56.4 *(vii)* A new clause (42C) has been inserted in section 2 of the Income-tax Act to define the expression "slump sale". Slump sale shall mean the transfer by way of sale of one or more undertakings for a lump sum consideration without assigning values for individual assets and liabilities. *Explanation I* to the clause follows the meaning of "undertaking" given in clause (19AA) of section 2. *Explanation 2* to the clause has clarified that the determination of the value of an asset or a liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities. [*Clause (h), Section 3*]

56.5 These amendments will take effect from 1st day of April, 2000 and will, accordingly, apply to the assessment year 2000-01 and subsequent years. [*Section 58*]'.

… …"

72. Learned Authors **Sampath Iyengar** in their celebrated commentary '**Law of Income Tax' 13th Edition**, referring to the decision of the Supreme Court in ***CIT Vs. Mugneeram Bangur & Co.***[26] have observed that after the decision of the Supreme Court in the said case, it was always understood that in the case of sale of a business as going concern, there would not be

[26] (1965)57 ITR 299(SC)

any liability with reference to the assets comprised therein and that liability for capital gains can be computed by treating the business as a whole and as a single asset distinguishing it from a severable or item-wise sale. It is stated that such principle was observed in the Sales Tax cases, so that no sales tax liability is incurred in sale of business as a whole. It would be profitable to extract the relevant part from the commentary, which reads thus:

> "2. Slump sale.-After the decision of the Supreme Court in *CIT v Mugneeram Bangur & Co'*, it was always understood that in the case of sale of a business as a going concern, there can be no liability with reference to any asset comprised therein and that liability for capital gains has to be computed by treating the business as a whole and as a single asset distinguishing it from a severable or item-wise sale. Such a view had been followed in a number of cases ruling out any withdrawal of depreciation under section 41(2), so that the entire surplus was treated as long-term capital gains[2]. Similarly, stock- in-trade, it had been held, cannot also be separately considered, so that what would have been business profits on sale of stock-in-trade has to be construed as part of capital gains. The principle was applied in sales tax cases, so that no sales tax liability, was inferred in such sale of business as a whole. In a slump sale, the seller cannot withdraw any asset from the business sold and the purchaser cannot reject any asset or liability comprised in the business. …. … .. ."

73. It is thus clearly seen that although parties have set out the value to the assets in Schedule 3.3, applying the aforesaid principles as recognized under the Income Tax Act, the transfer of business in question under the BTA cannot be regarded as any item wise sale but necessarily would be required to be treated as a sale of a business as a going concern, not

attracting any VAT liability under the provisions of the MVAT Act. In any event, the slump sale and/or transfer of business as a whole cannot be read differently than what has been intended by the parties, even as applicable to the provisions of different laws namely Income Tax Act, Service Tax Law, Maharashtra Value Added Tax Act or any other law, although the effect of each of such statute on such transaction would be required to be tested considering the specific provision of each of these statute.

74. For such reason we are in agreement with the contention as urged on behalf of the petitioner that the impugned order demonstrate patent non application of mind on such aspects of the matter.

75. We now discuss the principles of law as laid down in the decisions rendered by the Courts in the context of taxability of a slump sale of business.

76. In **Deputy Commissioner (C.T.), Coimbatore Vs. K. Behanan Thomas** (supra), the Court was concerned with the Tamil Nadu General Sales Tax Act, wherein the assessee was finally assessed to tax on a total taxable turnover of Rs. 1,59,291.31 and Rs.1,37,880.50 respectively for the year 1967-68 by the Deputy Commercial Tax Officer/Assessing

Officer. On further scrutiny of the records, the Assessing Officer noted that out of the consideration of Rs.19,500/- for the transfer of its Ooty branch, a sum of Rs.18,929.71 representing the sale value of the closing stock held at Ooty branch was wrongly exempted from payment of tax, hence the assessee was not eligible for exemption under the Sales Tax Rules. Accordingly, notice was issued to the assessee calling for its objections to the proposed revision of assessment. The assessee responded to the notice by contending that the business at Ooty branch as a whole was sold and that the branch business was also to be considered as a business as defined under Section 2(d) of the Tamil Nadu General Sales Tax Act, 1959, and that the sale value of the stock held was eligible for the exemption from payment of tax under Rule 6(d) of the Rules. The Assessing Officer did not accept this objection, as he was of the view that only the business sold as a whole was exempted from tax. He accordingly considered a sum of Rs.18,929.71 as the sale value of the stock and added it to a turnover for the year and assessed sales tax accordingly. The Assessee's appeal against the said order did not succeed. On a further appeal, before the Sales Tax Appellate Tribunal it was found that the entire business including furniture, fittings etc., had been transferred. The tribunal was held that the turnover in question was liable to be exempted.

It is against such decision, the revenue was in a revision before the High Court. It is in such context, the Court examined the revenue's contentions and the principles of law in that regard. The Court examined the definition of turnover and held that the sale in such case was of a running business as a going concern for a consideration of Rs.19,500/-. It was observed that the sale of the stock-in trade for the purpose of closing down the business was different from the sale of the business as a whole as a running concern. It was observed that sale of a business, lock, stock and barrel was not incidental or ancillary to the carrying on of a business so as to be taxable under the Act. The relevant observations can be found in paragraphs 12, 15 & 16 of the report which reads thus:-

> "12. The combined effect of the definition of these expressions will show that for a turnover to come within the scope of the Act, it must be the aggregate amount for which the goods are bought or sold, that is, bought, or sold in the course of business, the business having the meaning as defined in section 2(d) of the Act. When a person who is carrying on business sells the entire business or a branch of the business, he sells the same as a running business or a going concern. The sale proceeds of such a transaction cannot be said to constitute turnover as defined in the Act, because the sale proceeds are not proceeds of sale of goods made in the course of business as defined in the Act. The closure of a branch by sale thereof as a running concern to another person, apart from not constituting a sale of goods, cannot also be said to be a transaction in connection with or incidental or ancillary to such trade, commerce, adventure or concern mentioned in section 2(d) (i) of the Act. Consequently, such sale proceeds being totally outside the scope of the Act cannot form part of the turnover as defined in the Act and hence such turnover is not exigible to tax under the provisions of the Act. If so, the question of such sale proceeds being deducted from the total turnover under rule 6(d) of the

Tamil Nadu General Sales Tax Rules, 1959, will not arise because that rule contemplates determination of the taxable turnover by deducting the items mentioned therein from the total turnover of a dealer. Once it is found that the sale proceeds in question did not form part of the turnover at all, there is no question of the same being deducted from the total turnover for the purpose of determining the taxable turnover.

15. The above decision of the Allahabad High Court was followed by the Kerala High Court in C.M Hamsa Haji,… v. Sales Tax Officer, Tirur,…., Tirur. In that case, a person transferred his business or stock- in- trade to a firm of which he was a partner as contribution of his capital therein. The Kerala High Court held that such a transaction did not amount to a sale of goods in the course of trade or business as a dealer within the meaning of the Kerala Sales Tax Act, 1963, since such a transaction did not involve any sale of goods and the transferor did not part with the property of goods, but only shared his rights therein with the other partners under the contract of partnership. The court also held that even assuming that there was a sale, it was not a sale in the course of trade or business nor was it a transaction by a dealer as defined in the Act.

16. The sale in the present case is of a running business as a going concern for a consideration of Rs. 19,500. It is the assessing authority which had taken the sale value of the closing stock as Rs. 18,929.71 and it is not as if the assessee himself sold the said closing stock for that price. The sale of the stock-in-trade for the purpose of closing down the business is different from the sale of the business as a whole as a running concern. **The sale of a business, lock, stock and barrel, is not incidental or ancillary to the carrying on of a business so as to be taxable under the Act.** Thus, from this point of view, the transaction in question will not fall within the scope of the Act at all and, therefore, the sale proceeds will not constitute a turnover as defined in the Act. If so considered, the question of neither exemption nor deduction can arise. We are reaching this conclusion independently of the conclusion we have arrived at with reference to rule 6(d) of the Tamil Nadu General Sales Tax Rules. As a matter of fact, this conclusion is only alternative to the said conclusion and is really based on considerations totally different from the considerations applicable to rule 6(d)." (emphasis supplied)

77. A Division Bench of this Court in **Premier Automobiles Ltd. Vs.**

Income Tax Officer and Anr. (supra), was considering the assessee's appeal under Section 260A of the Income Tax Act, 1961 against the orders passed by the Tribunal holding that the transaction of sale of Kalyan business was not a slump sale. The Court in such context, considered the question *inter alia* whether there was a slump sale or a sale of itemized assets. The Court held that as the entire Kalyan business has been sold by the assessee to one PPL as a going concern, the intention of the parties in the commercial sense was to transfer the business as a whole for a lump sum consideration and that the parties did not intend to make a sale of itemized assets. It was observed that the purchaser never intended to purchase individual items and that apart from land, building, plant and machinery, the assessee had transferred business advantages like licenses, quotas, permission to use the corporate logo and a trade name. The Court observed that it was a case of a slump sale. Referring to the decision in **CIT Vs. Narkeshari Prakashan Ltd.**, it was observed that mentioning of value / consideration in respect of land or building will not *per se* take the transaction out of slump sale. The nature of the BTA is not different from what was being considered by the Court in this case. Hence, the observations and conclusion on the principle of law that such transaction would be in the nature of a slump sale, is squarely applicable in the facts of

the present case.

78. In *Coromandal Fertilisers Ltd., Secunderabad Vs. State of A.P. and Ors.* (supra), a Full Bench of the Andhra Pradesh High Court was considering a reference made to it by a Division Bench doubting the correctness of an earlier decision in *Coromandal Lubricants Vs. Commissioner of Commercial Taxes*[27], the following was the question which was answered by the Full Bench.

> "Whether in a transaction of sale of an undertaking as a going concern with all assets and liabilities for a lump sum without stipulating any price for individual items, the assessing authority could consider that there was a sale of goods within the meaning of Section 2(n) read with Sections 2(h) and 2(s) for charging the same to tax under Section 5 of the APGST Act."

The Full Bench considering several decisions on such issue observed that the question which would be required to be asked is whether there was an integral or even incidental connection between the transaction evidenced by the agreement and the carrying on of the business. The Court observed that when the assessee effects a sale not for the purpose of continuing the business, but for the purpose of putting an end to the business, such sale could not be sale in the course of business. The relevant observations are required to be noted :-

[27] A.P. 102 STC 274

"52. That apart, the elements of frequency, continuity of the transactions of sale and purchase which were stressed by Privy Council in Shaw Wallace case (supra) and reiterated by the Supreme Court in Raipur case (supra) and in Ansari's case (supra) are conspicuously lacking in the transfer of goods effected under the terms of the Business Sale Agreement. Ansari's case (supra) has firmly laid down the proposition that these tests cannot be abandoned even after the new definition of business. Here is a case in which the goods which would not have been disposed of while carrying on its normal business activity were "sold out" if that expression is appropriate, in furtherance of its scheme to close the business undertaking once and for all. Such an activity of sale marks the end point of the business of the assessee and it is not an event of frequent occurrence - not even capable of being ever repeated. We are therefore of the view that the assessee M/s. Spectra Bottling Co., effecting the sale of goods in the course of business or carrying on the business intended to be pursued or continued, does not arise. In coming to this conclusion, we are eschewing from consideration whether or not the assessee was prompted by a profit motive in undertaking the sale of business as a whole and the sale of goods in particular.

53. The learned Government Pleader time and again stressed that the sale of this nature can be regarded as a sale incidental to the assessec's business. In other words, the sale of goods effected in furtherance of the object of disposing of the entire business falls within the second part of the definition of 'business', according to the learned Government Pleader. We find it difficult to accept this contention. **When the entire movable property including plant, machinery, equipment and other capital assets are transferred together with its immovable and intangible assets, the assessee goes out of business. How can it be said that such a step is incidental to or connected with the manufacturing, trading or other business activity the assessee was hitherto carrying on? A step to close down and dispose of the entire business is obviously not incidental or complimentary to the business, that is to say, the manufacturing or trading activity which the assessee was carrying on. Hence, in our considered view, the second part of Section 2 (bbb) does not come into play at all.** The second part of definition has art inextricable link with the first part. The transaction contemplated by second part should be some thing which takes place in the process and in the context of continued business activity and having the effect of aiding or promoting such business. That is not the case here. The second part has definitely no application to the case of Spectra Bottling Co.

> 68. The Rule was framed on the assumption that in a case of sale of business as a whole, the proceeds of sale may be taxable. It is axiomatic that the Rule cannot go counter to the charging provision and other provisions of the Act. **If there is no sale within the meaning of Section 2(n) of the Act read with the definition of 'business' and 'dealer', the liability to tax cannot arise from the operation of this Rule, nor has it got the effect of bringing within the sweep of taxation transactions which are otherwise not exigible to tax. The Rule cannot be so construed as to derogate from the scheme of the Act.** But, it is only intended to provide a limited relief to those who are otherwise liable to pay tax. If the tax is not liable to be paid under the main provisions of the Act, the question of resort to the Rule does not arise. Nor does the understanding of the rule-making authority control the meaning to be assigned to the concepts of 'sale' and 'business'. As Sethuraman, J., observed in DIT v. K. Behanan Thomas (supra), "If the amount in question will not fall within the scope of the Act at all, the question of either deduction or exemption will not arise". Rule 6(h) does not therefore, render any assistance to the case of the respondents. With great respect, the learned Judges who decided Coromandal Lubricants case (supra) were not right in reinforcing their view point by reference to Rule 6(h).
>
> 69. **We therefore hold that the transfer of entire business undertaking together with the movable properties, even assuming to involve sale of goods, cannot be regarded as a sale in the course of business by the dealer."**
>
> (emphasis supplied)

79. A similar view was taken by a Division Bench of the Allahabad High Court in the case of **Ram Sahai Vs. Commissioner of Sales Tax** (supra), in which Court has observed thus:-

> "15 It was contended that when a dealer sells his business there may be some stock-in-trade which is sold along with the goodwill and that there is no reason why proceeds of the sale of the stock-in-trade should not be included in his turnover even though proceeds of the sate of the goodwill are excludes. It may be accepted that when a business is sold along with stock-in-trade, that is, the goods remaining unsold, proceeds of the sale of the latter should be included in the turnover, in the present case though the assesses has sold some stock-in-trade along with its

> business, the amount of the proceeds of the sale of it is not shown separately from the amount of the proceeds of the sale of the goodwill etc., and it is not possible to say that a particular portion of the proceeds of the sale of the business should be included in the turnover. Our reply to the question is that proceeds of sale of the business sold by the assessee are not to be included in the turnover over which tax is payable under Section 3 of the U.P. Sales Tax Act and that no question of goods being single point goods or multiple point goods can possibly arise. Further Rule 44(f) is of general application and applies in all cases regardless of the question of goods being single point goods or multiple point goods. We direct that copies of this judgment shall be sent under the seal of the Court and the signature of the Registrar to the Judge (Revisions) sales Tax and the Commissioner of Sales Tax, U. P., as required by Section 11 (6). We further direct that the commissioner of sales tax will get his costs or this reference, which we fix at Rs. 100/-."

80. The Full Bench of the Kerala High Court in the case of **Deputy Commissioner of Sales Tax Vs. M/s. Dat Pathe** (supra), examined as to what would attract a tax in a sale of goods by dealer in the course of business. The Court held that when a business is sold as a going concern the buyer might in his turn sell the goods in the course of his business and such sale would be exigible to tax. The relevant observations reads thus :-

> "What attracts tax is the sale of goods by a dealer in the course of business. It would be illogical and fallacious to equate that for the purpose of Rule 9(g) with the sale of a particular business conducted by the assessee as a going concern. True it is, in the case of sale of business as a whole also there might be transfer of property in the goods in which the assessee is a dealer. The value of such goods is not always separately estimated or fixed. The percentage of the value of such goods in relation to the total amount realised by the sale of the business as a whole could vary from case to case. **When we bear in mind the definition of the expressions "business", "turnover", "total turnover" and "taxable turnover" contained in the Act, we could find that the taxable**

> **event is the sale or purchase of the goods by the dealer in the course of business. When a business is sold as a going concern, the buyer might in his turn, sell the goods in the course of his business, and such sale would be exigible to tax ; if at the time of the sale of the business as a whole and also at the later stage, when the buyer from the assessee sells the goods, tax is levied or collected, the effect would be that the goods are being subjected to double taxation.** The Legislature presumably wanted to avoid such an anomaly and be fair and reasonable."
>
> (emphasis supplied)

81. In **M/s. Paradise Food Court Vs. State of Telangana** (supra), a Division Bench of the High Court of the State of Telangana and Andhra Pradesh at Hyderabad, held the writ petition under Article 226 to be maintainable by holding that it was a case where the assessing officer had lacked jurisdiction as also that the principles of natural justice had stood vitiated. The Court was dealing with a case of business transfer or a slump sale as an ongoing concern and that a Business Transfer Agreement was entered into by the assessee with the company. The Court held that the assessing officer had taken the consideration fixed, under the Business Transfer Agreement for every item of assets as the sale of individual items of goods including goodwill and confirmed the demand made in the show cause notice. The Court observed that the assessing officer was completely wrong in thinking that the sale of business as a whole was taxable simply because such a sale also involved a sale of several items used in the course of business. The relevant observations reads thus:

> "32. **Therefore, we are of the considered view that the Assessing officer was completely wrong in thinking that the sale of a business as a whole is taxable simply because such a sale also involves a sale of several items used in the course of business.**
> … …. ….
>
> 45. In the case on hand, another important feature is that the petitioner which is a partnership firm, sought to transfer the entire business as a going concern under a business transfer agreement to a private limited company of which the partners of the petitioner were the shareholders. In consideration of the transfer of the business as a whole, the partners of the petitioner were allotted equity shares and preferential shares in the company. Therefore, to treat the same as a sale of goods merely on the ground that all the assets of business are individually mentioned in the Schedule together with their value, is completely contrary to the Statutory prescription. **Therefore, the impugned order has been passed on an assumed jurisdiction, where none exists. The impugned order has been passed on a complete misunderstanding of the purport of the decision of the Full Bench in Coromandal Fertilisers Limited, the effect of Section 2(6) read with Section 2(28) and Rule 36.** It is not the case of the respondent that the petitioner had claimed Input Tax Credit under Section 13(5)(b) so as to treat the case as not one of transfer of business as a whole."
>
> (emphasis supplied)

82. In view of the above discussion, we are unable to agree with the submissions of Mr.Sonpal that the BTA would attract tax as held by the impugned order relying on the decision in ***Vikas Sales Corporation Vs. Commissioner of Commercial Taxes*** (supra). As noted hereinabove, no doubt incorporeal rights are considered as goods by the Supreme Court in this decision, however, the context in which this was held cannot be applied to the facts of the present case, as the question before the Court was not the question which is posed for our consideration in the present

proceedings. The question was whether the transfer of an Import License namely R.E.P. Licence/Exim Scrip by the holder thereof to another person constitutes a sale of goods within the meaning of and for the purposes of the Sales Tax enactments of Tamil Nadu, Karnataka and Kerala and in such context, the Court observed that the expression "movable property" would include corporeal as well as incorporeal property and that patents, copyrights and other rights in rem would also stand included within the meaning of movable property. However, in the present case, in the context of the BTA, it was not correct for the reviewing authority to include such property as enlisted in Schedule 3.3, so as to be included in the turnover of sale of the petitioner. The amounts qua each of such intangible items as specified in Schedule 3.3 certainly could not have been regarded as the itemized amounts of sale price received by the petitioner on sale of goods, as would be understood in the usual course of business, much less considering that it is the sale of business in its entirety as comprehended under the BTA. For such reason, it was completely a flawed approach on the part of the reviewing authority to tax such part of the BTA considering the same to be petitioner's sales/turnover of sales, for the financial year 2010-11 qua the amounts of the intangible assets as set out in schedule 3.3 of the BTA. Thus, in the context of the BTA, the

reviewing authority could not have regarded such intangible items to be in any manner "sale of goods", so as to fall within the petitioner's turnover of sales. We may also observe that merely for the reason that schedule 'C' of the MVAT Act under item 39 provides for "goods of intangible or incorporeal nature" that would not mean that *de hors* the context the BTA intended to achieve, the reviewing authority could not have arbitrarily singled out and/or picked up Schedule 3.3 and tax the items in question as contained therein to be the petitioner's turnover of sales for the said financial year. It would not be permissible for the reviewing authority to disintegrate the BTA and to attribute a different effect to the BTA which was far from realistic and in fact destructive of the BTA.

83. We, accordingly, answer the questions as encased hereinabove in paragraph 46 to hold that in the facts of the present case slump sale under the BTA would not amount to sale of goods within the purview of the MVAT Act, attracting any tax in the manner as held in the impugned order. We further hold that the reviewing authority acted in excess of jurisdiction in passing the impugned order. We also hold the impugned order to be vitiated and illegal even on the other issues as discussed hereinabove.

84. Mr. Sonpal's contention is also to the effect that there is no prohibition in the statute that the reviewing authority ought not travel beyond the show cause notice so as to render the show cause notice bad in law. Referring to the decision of the Supreme Court in **Commissioner of Income Tax, Mumbai vs. Amitabh Bachchan** (supra), we may observe that such decision is rendered in the context of the revisional powers under Section 263 of the Income Tax Act, 1961. It is in such context, the Supreme Court has observed that as far as section 263 is concerned, what has to be seen is the satisfaction that an order passed by the authority under the Act is erroneous and prejudicial to the interest of the revenue, is the basic condition for exercise of such jurisdiction under the said provision. It was observed that once such satisfaction is reached, jurisdiction to exercise the power would be available subject to the principles of natural justice which has been observed to be implicit in the requirement casts by the Section to give the assessee an opportunity of being heard.

85. Insofar as the respondent's contention that the petition ought not to be entertained as the petitioner has an alternate remedy of assailing the order in review by taking recourse to the remedy of an appeal, in our

opinion, is not tenable in the present facts. We may observe that once the impugned order is passed in excess of jurisdiction or in improper exercise of jurisdiction when it brings about severe civil consequences, it cannot be accepted as an absolute proposition, that merely as an alternate remedy is available to the petitioner, the petitioner cannot approach the High Court so as to seek a relief under the provisions of Article 226 of the Constitution and if he approaches the High Court would not entertain his writ petition. The law in this regard is well settled. We may refer to a recent decision of the Supreme Court in ***Godrej Sara Lee Limited*** (supra) wherein the Supreme Court has held that the mere fact that the petitioner before the High Court in a given case has not pursued the alternate remedy available to him, cannot mechanically be construed as a ground for its dismissal. It was held that High Courts bearing in mind, facts of each particular case, have the discretion whether to entertain the writ petition or not, this being one of the self imposed restrictions evolved through judicial precedents namely that the High Courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available and that mere availability of an alternative remedy of appeal and revision would not oust the jurisdiction of High Court and render a writ petition not maintainable. Such principles are borne in mind

and applied by us in exercising the Court's discretion to entertain the present writ petition and for the reasons which we have adverted in detail hereinabove.

86. The petitioner has also mounted a challenge to the impugned order being barred by limitation as noted by us hereinabove, however, considering the view as taken by us, we do not intend to delve on such issue.

87. Before parting we may observe that to avoid prolix, we have adverted only to relevant decisions and the other decisions on similar issues, have been avoided to be discussed as the principles of law as laid down in the said decisions are well settled. Such principles have already found a reference in our discussion.

88. For the aforesaid reasons, we are of the clear opinion that the impugned order is illegal and cannot be sustained, it is accordingly required to be set aside. The consequent demand notice is also required to be held to be illegal and the same would be required to be set aside. We accordingly allow the petition by the following order:-

ORDER

(i) Writ Petition is allowed in terms of prayer clause (a) which reads thus:-

> "a) That this Hon'ble High Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari any other writ, order or direction and calling for the records of the case of the Petition and thereafter, quash the Impugned Order No.JC/LTU-04/Review/Piramal Ent. Ltd./20-21/B-3413 Mumbai dated 31.03.2021 (Exhibit 'A' hereto) and Impugned Notice (Exhibit 'B' hereto) passed by Respondent No.2."

(ii) Parties to bear their own cost.

[JITENDRA JAIN, J.] [G. S. KULKARNI, J.]

11 June, 2024