

HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

W.P.No.7417 of 2006

Between:

Bharatiya Vidya Bhavan's Residential Public School
(Sponsored by Bharatiya Vidya Bhavan, Mumbai)
Vidyashram – Pedatadepalli (P.O),
Tadepalligudem – 534 203,
West Godavari District.

Rep. by its Honorary Secretary, Sri B.V. Seshagiri Rao

.. Petitioner

And

The State of Andhra Pradesh,
Rep. by the Secretary to Government,
Commercial Taxes,
Secretariat, Hyderabad & another

.. Respondents

DATE OF JUDGMENT PRONOUNCED: 30.01.2023

SUBMITTED FOR APPROVAL:

**HON'BLE SRI JUSTICE U. DURGA PRASAD RAO
HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO**

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No
2. Whether the copies of judgment may be marked to Law Reporters/Journals? Yes/No
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? Yes/No

U. DURGA PRASAD RAO, J

T. MALLIKARJUNA RAO, J

***HON'BLE SRI JUSTICE U.DURGA PRASAD RAO
AND
HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO**

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Vs.

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.. Respondents

<GIST:

>HEAD NOTE:

! Counsel for petitioner : Sri R. Sudheer

^Counsel for Respondents : Government Pleader for Commercial
Taxes

< Gist:

> Head Note:

? Cases referred:

1. MANU/UP/0242/1974
2. AIR 1999SC22 = MANU/SC/0664/1998

**HON'BL SRI JUSTICE U. DURGA PRASAD RAO
AND
HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO**

W.P.No.7417 OF 2006

ORDER: *(Per Hon'ble Sri Justice U. Durga Prasad Rao)*

Petitioner seeks writ of mandamus declaring the action of respondents in directing the petitioner's school to obtain dealer registration under Andhra Pradesh Value Added Tax (AP VAT) Act, 2005 and their action in assessing the petitioner's school under the said Act for the period 01.04.2005 to 31.12.2005 vide order dated 08.03.2006 is arbitrary, illegal and violative of Articles 14, 19, 21A and 265 of the Constitution of India and to set aside the same and pass such other orders.

2. Petitioner's case succinctly is thus:

(a) Petitioner is Bharatiya Vidya Bhavan's Residential Public School located at Vidyashram, Pedatadepalli (PO), West Godavari District. The Bharatiya Vidya Bhavan is a public trust registered under Bombay Public Trust Act bearing Registration No.F-358 (Bom). The petitioner's school was established in the year 1983 with

an object to provide education on non-profit basis. It was established by the Philanthropists for development of society. The petitioner's school is run on non-profit basis. The school offers courses from LKG to 10th standard as is recognized by Central Board of Secondary Education (CBSE), New Delhi. As on the date of writ petition, the petitioner's school has 832 students and 70 staff members of both teaching and non-teaching category. A number of schools were sponsored by Bharatiya Vidya Bhavan in the State of Andhra Pradesh and petitioner's school is one among them.

(b) The further case of the petitioner is that the Government of India having recognized services of Bharatiya Vidya Bhavan, notified the society as an educational institution of national eminence for the purpose of Section 80(g)(1) of the Income Tax Act, 1962 (for short 'I.T. Act'). As a result, the funds and donations received by the society and the institutions sponsored by it are eligible for exemption U/s 80 (g)(1) of the I.T Act. The petitioner's school is being run from out of the donations received by it. Apart from the donations, petitioner's school collects nominal fees and mess charges from the students. During the financial year 2004-05, the petitioner's

institution had a surplus of Rs.2.87 lakhs which was remitted to Bharatiya Vidya Bhavan Society. The petitioner's school does not retain any surplus amounts with it. Petitioner's accounts are audited by the auditors appointed by the Bharatiya Vidya Bhavan Society. All these facts would manifest that petitioner's school is a non-profit entity engaged in dissemination of knowledge in the spheres of culture, arts and science. It is further submitted that the maintenance of hostels by the petitioner's school is incidental, ancillary and connected with the main object and activity of imparting education.

(c) While so, the 2nd respondent visited the petitioner's school on 10.12.2005 and inspected the records. Thereafter he issued a notice dated 30.12.2005 and called for the sales turnover for the period up to 30.12.2005 along with the Form-100 and directed the petitioner to obtain registration under the provisions of AP VAT Act, 2005. Subsequently 2nd respondent issued notice of assessment under AP VAT Act,2005 on 17.02.2006 proposing to levy VAT for the period 01.04.2005 to 01.01.2006 amounting to Rs.3,67,050/- on the ground that the petitioner's school sells the food items and thus treated the activity of the petitioner in providing food as a business of

running restaurant / hotel for the purpose of the AP VAT Act, 2005. The said act of 2nd respondent is arbitrary, illegal and unconstitutional.

(d) For the purpose of AP VAT Act a dealer is one who carries on the business of buying, selling, supplying or distributing goods for cash or deferred payments and includes any person who in the course of business of running a restaurant or eating house or hotel, sells or supplies by way of or as a part of any service, goods being food or any other article for human consumption. Therefore, for the purpose of bringing any person within the fold of Section 2(10) i.e., the definition of dealer under the AP VAT Act, the said person shall have to carry on the business of buying, selling of goods and in the course of a person selling or supplying food or any other article for human consumption, the same will have to be made in the course of business of running a restaurant or eating house or hotel. The petitioner is concerned, it is engaged in the activity of providing education to the children in the age group of 3+ to 15 years. The activity of providing education will not qualify to be an activity connected with trade, commerce or manufacture and as such the petitioner cannot be termed

as a dealer for the purpose of APGST and VAT Acts and the provisions of those enactments are not applicable to the petitioner institution. The supply of food by the petitioner's school to its students is not being made in the course of business and running restaurant, eating house or hotel. Whereas, Section 2(10(d) of the VAT Act specifically refers to only a restaurant, eating house or a hotel. Hence the said act has no application to the petitioner.

Hence the writ petition.

3. The 1st respondent filed counter and opposed the writ petition contending thus:

(a) The petitioner got alternative efficacious remedy by way of an appeal against the impugned order and hence the writ petition is not maintainable. It is submitted that the petitioner is an educational institution imparting education to the students of various classes. Apart from imparting education, the petitioner is running hostel for boarders supplying food for valuable consideration. After advent of AP Value Added Tax Act, 2005 w.e.f 01.04.2005, a similar petitioner made an application U/s 67 of the said Act seeking clarification from Advance Ruling Authority under the AP VAT Act (i) as to whether

their line of activity would come within the meaning of business and whether the hostel run by them is liable for registration under the VAT Act, (ii) If the hostel is maintained by students themselves, whether registration is required under VAT Act and (iii) Whether G.O.Ms.No.1036 C.T.II, Department, dt: 20.10.1989 issued under the APGST Act granting exemption to the educational institutions would apply even to the VAT Act. The Advance Ruling Authority vide its proceedings dated 11.11.2005 and clarified that in view of explanation V to Section 2(28) of the VAT Act, the supply of food and beverages by the petitioner is liable for registration U/s 17 of VAT Act and also liable to tax U/s 4(9) of the VAT Act. It was further clarified that in view of Article 366 Claus 29 A (f) of the Constitution, Section 2(10) of AP VAT Act prescribes any association which distributes goods to its members, any incorporated body or unincorporated body is also liable to tax. Thus the Advance Ruling Authority clarified that G.O.Ms.No.1036 has no application to the VAT Act. The said ruling is binding on all the officers of Department except the Commissioner (CT). Ergo, the 2nd respondent issued notice dated 30.12.2005 requiring the petitioner to file VAT -

100 Form for the purpose of registration under the AP VAT Act, 2005 within 7 days. However, the petitioner failed to get himself registered. However, the petitioner submitted a broucher and computer extract of the ledger for the period 01.04.2005 to 30.11.2005 which would show, the petitioner received the mess income of Rs.28,18,950/-, out of which Rs.23,49,125/- is attributable to the sale value of the food and beverages supplied to the students in the hostel. This amount is proposed for assessment U/s 21 of AP VAT Act, 2005. Accordingly, show cause notice was issued proposing tax @ 12.5% on the above turnover. Receiving the notice, the petitioner did not file objections. Hence the assessment order was passed on 08.03.2006 raising demand of Rs.2,93,640/- with penalty of Rs.73,410/- . Hence the writ petition is not maintainable and same is liable to be dismissed.

4. Heard argument of Sri R. Sudheer, learned counsel for the petitioner and learned G.P. for Commercial Taxes representing respondents.

5. It is the contention of learned counsel for petitioner that predominantly the activities of petitioner's educational institution are

in the nature of furtherance of objects of Bharati Vidya Bhavan which is a public trust and is undertaking several philanthropic activities one of which is imparting education on non-profit basis. Therefore, petitioner's educational institution shall, by no stretch of imagination, be treated as a 'dealer' within the mischief of Section-2(10) of AP VAT Act, 2005 since there is no element of business, trade or commerce undertaken by the petitioner's educational institution. So far as supply of food items and beverages to the students in the hostel by collecting mess charges is concerned, the said activity is only incidental, ancillary and auxiliary to the main function of the petitioner's institute, which is obviously imparting education and as such the supply of food articles and collection of nominal charges from the boarders cannot be treated as an independent business activity *dehors* the main function of purveying education with a non-profit attitude. He would thus perore that the 2nd respondent's decision to assess petitioner's educational institution to tax under AP VAT Act in respect of the mess income of the institute treating the same as sale value is wholly illegal and beyond the scope of the provisions of the AP VAT Act, besides being unjust. He placed

reliance on the decision **The Indian Institute of Technology vs. State of U.P**¹.

6. Per contra, learned Government Pleader for commercial Taxes while opposing the writ petition would argue that the writ petition is not maintainable in view of the availability of efficacious of alternative remedy of appeal. Nextly, regarding the merits of petitioner's case, learned Government Pleader, though not specifically denied either in his counter or in his argument that petitioner's educational institute was sponsored by its parent society i.e., Bharatiya Vidya Bhavan to impart education through its various educational institutions as a philanthropic measure and on a non-profit basis, however, would argue that the petitioner institute maintains hostel for its boarders and sells food items and beverages and collects charges from them which activity squarely comes under the term 'business', inasmuch as, the supply of food articles is not a free service but sale of goods and therefore the income earned out of sale of food stuff is exigible to tax under the provisions of AP VAT Act. He further argued that a similar petitioner has already sought for

¹ MANU/UP/0242/1974

clarification from the Advance Ruling Authority and the learned ARA clarified that any association, incorporated body or unincorporated body which supplies food and beverages is liable to tax U/s 4(9) of the VAT Act. As such, on the same analogy the petitioner institute is also liable for tax. He thus prayed to dismiss the writ petition.

7. The point for consideration is whether the petitioner's educational institution imparts education on non-profit motive but not on commercial basis and if so, it is exempted from tax under AP VAT Act, 2005?

8. Regarding the nature of petitioner's educational institution, as already observed supra, the respondent did not dispute that the petitioner institute was founded by M/s.Bharatiya Vidya Bhavan, Mumbai, a Public Trust. It is also not disputed that the said trust was established with philanthropic philosophy for the development of the society and one of its objects is to establish educational institutions and disseminate knowledge without commercial or lucrative attitude. The copy of certificate of registration filed along with material papers by the petitioner shows that Bharatiya Vidya Bhavan was registered

under the Societies Registration Act vide Registration No.946/1939-1940. Then the notification dated 12.04.2001 issued by the Director General of Tax (Exemptions), Calcutta, a copy of which is filed by the petitioner, shows that Bharatiya Vidya Bhavan, Mumbai, was recognized as Educational Institution of National Eminence under Section 80(g)(2)(iii)(f) of the Income Tax Act, meaning thereby all the donations made to the Bhavan are wholly deductible for income tax purposes. Then, the copies of the letter heads of the petitioner's educational institute shows that the same is mentioned as Bharatiya Vidya Bhavan's residential public school. Therefore, there can be no demur that petitioner's educational institution comes under Bharatiya Vidya Bhavan's public trust and its activity of imparting education is not in commercial lines and on profit motive. In this backdrop, it has now to be seen whether the petitioner institute is exigible to tax under A.P. VAT Act.

9. (a) A.P. VAT Act, 2005 is a consolidated law relating to levy of value added tax on sale or purchase of goods in the state of A.P. and for matters connected therewith and incidental thereto. Section 4(1) lays down that every dealer registered is liable to be

registered as a VAT dealer shall be liable to pay tax on every sale of goods in the State at the rate specified in the schedules.

(b) Section 4(4) lays down that every VAT dealer who in the course of his business purchases any taxable goods from a person or a dealer not registered as a VAT dealer or from a VAT dealer in circumstances in which no tax is payable by the selling VAT dealer, shall be liable to pay tax.

(c) Section 4(7) lays down that every dealer executing works contract shall pay tax on the value of the goods at the time of incorporation of such goods in the works executed at the rates applicable to the goods under the Act.

(d) Then, Section 4(9) lays down that every dealer running any restaurant, eating house, catering establishment, hotel, coffee shop, sweet shop or any establishment by whatever name called and any club, who supplies by way of or as a part of any services or in any other manner whatsoever of goods being food or any other article for human consumption or drink, shall pay tax.

10. Thus, Section 4 delineates that different categories of persons such as sellers, purchasers, persons executing works contracts and persons running restaurants, eating houses, hotels etc., shall be liable to pay A.P. VAT Tax. Now, the question is whether the petitioner can be termed as a dealer for sale of goods or a dealer running restaurant, eating house, hotel etc., to come within the purview of A.P. VAT Act.

11. Section 2(10) defines the term ‘dealer’ which means any person who carries on the business of buying, selling, supplying or distributing goods or delivering goods on hire purchase or on any system of payment by instalments, or carries on or executes any works contract involving supply or use of material directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration. The definition includes certain category of persons enumerated in the explanations.

(a) Be that as it may, the qualifying phrase for a dealer is “who carries on the business of”. Therefore, in order to be christened as a dealer within the purview of this Act, he shall carry on the activity of

business. The word 'business' is also defined under Section 2(6), which reads thus:

(a) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues there from;

(b) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern; and

(c) any transaction in connection with commencement or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern;

Explanation: - For the purpose of this clause —

(i) the activities of raising of manmade forests or rearing of seedlings or plants shall be deemed to be business;

(ii) any transaction of sale or purchase of capital goods pertaining to such trade, commerce manufacture, adventure or concern shall be deemed to be business; (iii)

a sale by a person whether by himself or through an agent of agricultural or horticultural produce grown by himself or grown on any land whether as owner or tenant in a form not different from the one in which it was produced, save mere cleaning, grading or sorting does not constitute business;

12. Thus, a conjunctive study of above provisions pellucidly explains us that at the first instance, the activity of a person must be a trade, commerce or manufacture so as to bring such activity as "business". If such business is carried out for buying, selling,

supplying or distribution of the goods, such person who is involved in that business shall be regarded as “dealer” and under Section 4 of A.P. VAT Act, such dealer shall be excisable to tax. In the instant case, as rightly submitted by the counsel for petitioner, the fundamental or principal activity of the petitioner’s educational institution is not that of buying, selling, supplying or distribution of the goods rather its function is to impart education that too on a non-profit motive. The petitioner in its hostel supplies food to the students but the said activity is not done in the course of business of running restaurant, eating house or a hotel. As rightly submitted by the learned counsel for the petitioner, section 2(10) (d) of the VAT Act specifically refers to only a restaurant or eating house or a hotel but the word ‘hostel’ is not specifically included therein. Therefore, the inclusion of the petitioner’s institution in the category of dealer for the purpose of AP VAT Act, 2005 and assessing the same to tax U/s 21 of AP VAT Act is not correct. In **Indian Institute of Technology’s** (supra 1) case the Indian Institute of Technology, Kanpur was served with notices by the Sales Tax Officer for assessing the institute under UP Sales Tax Act. The petitioner sent a

reply *inter alia*, asserting that the petitioner was not a dealer within the meaning of the definition of that term under UP Sales Tax Act and as such the notices were misconceived. Again there was second round of exchange of notices. Thereafter the representative of petitioner appeared before the Sales Tax Officer (STO) and tried to explain that the petitioner was not a dealer. However, the STO did not satisfy with the reply and passed an ex parte order of assessment and initiated proceedings even for penalty. Aggrieved, the petitioner institute filed the writ petition before High Court of Allahabad. The petitioner's case was that the fee charged from the visitors of the hostel is not the actual price of the food consumed by them and the principle of charging the fee is the same as in the case of other hostels where students reside and that a fixed fee is charged for tea, breakfast, lunch and dinner and the same has no relation to the actual consumption and the charges paid by the residents have really a very remote relation to the actual value of the food stuffs consumed by them. Thus, according to petitioner, the transaction of supplying food stuffs to the residents of the hostel cannot be termed as 'sale' nor can the petitioner be said to be 'carrying on business of buying or selling

goods' within the meaning of UP Sales Tax Act. The respondent however contended that the petitioner charges price of foodstuffs supplied to the visitors separately in the bills and that the customers of the petitioner include all and sundry. The division bench of High Court of Allahabad observed that the petitioner is under statutory obligation to maintain a hostel such as the visitors hostel and its activity in supplying foodstuffs to the occupiers of the hostel is an integral part of the objects of the petitioner's institute. It ultimately held thus:

“20. Reverting to the facts of the instant case, it is clear that the petitioner is essentially a residential institution where all students, research scholars and research fellows have to reside in the halls of residence and hostels built by the Institute and, in that connection, it has to supply foodstuffs to the inmates of the hostels as also incidentally to the relatives of the inmates and other persons who come and stay in the hostel in connection with the activities of the Institute. It is further clear from annexure H to the writ petition that the charges for foodstuffs are paid to the petitioner on the basis of fixed fee for tea, breakfast, lunch and dinner, which has no relationship to the actual quality or quantity of the foodstuffs consumed. Accordingly, it cannot be said that the petitioner's principal activity is doing business in a commercial way of buying and selling foodstuffs. On the other hand, it is apparent that the principal activity of the petitioner is predominantly academic and the

supply of foodstuffs in the manner stated above is minor, subsidiary and incidental to the principal activity and is an integral part of its academic activity. Consequently, the petitioner cannot be dubbed as a "dealer" within the meaning of Section 2(c) of the U. P. Sales Tax Act. The Sales Tax Officer had accordingly no jurisdiction to initiate proceedings for levy of sales tax on the petitioner. (Emphasis Supplied)

21. In the result, the writ petition succeeds and is allowed, the order of assessment for the year 1968-69 (annexure G to the writ petition) as also the notices dated 3rd February, 1973 (annexures C-1 to C-4 to the writ petition), and the direction contained in the letter dated 14th March, 1973 (annexure F to the writ petition), are quashed, and respondent No. 2 is prohibited from continuing the assessment proceedings initiated in pursuance of the aforesaid notices and letter. The petitioner will be entitled to its costs.”

13. Needless to emphasize that the ratio in the above decision applies with all its fours to the present case, inasmuch as, in the instant case also the principal function of petitioner is to impart education with a non-commercial motive and running of the hostel is incidental to the main activity and as such, though subsidized prices are charged from the students for supply of the food items and beverages, the transaction cannot be treated as ‘sale of goods’ to bring the activity within the mischief of AP VAT Act.

14. The contention of the respondents that the writ petition is not maintainable in view of availability of alternative remedy is concerned, we find no much force in it. It must be reiterated that mere availability of alternative remedy is not an embargo to entertain the writ petition, rather, constitutional Courts observe judicial restraint and discipline and generally desist from entertaining writ petitions when alternative remedy is available in a given case. That does not mean they lack jurisdiction. Even in cases where alternative efficacious remedy is available, still the constitutional Courts can entertain the writ jurisdiction in certain occasions. In **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai**² the Hon'ble Apex Court enumerated such occasions and held as follows:

“**15.** Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the

² AIR 1999SC22 = MANU/SC/0664/1998

order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.”

15. As can be seen, the above decision expostulates that when the impugned order is passed by an authority without having jurisdiction, the writ petition can be entertained in spite of availability of alternative efficacious remedy. In the instant case the 2nd respondent has passed the impugned assessment order though the petitioner under law does not come under the purview of “dealer” as per the provisions of AP VAT Act, 2005. Therefore, the impugned order can be said to be passed wholly without jurisdiction and hence the writ petition is maintainable.

16. In the result, the writ petition is allowed and action of the 2nd respondent in directing the petitioner school to obtain registration as a dealer under AP VAT Act, 2005 and the further action of respondents in assessing the petitioner’s school to VAT under the provisions of AP VAT Act, 2005 for the period from 01.04.2005 to 31.12.2005 vide order dated 08.03.2006 is held as illegal, arbitrary and contrary to provisions of AP VAT Act, 2005 and accordingly the said order is set aside and if any amount is deposited by the petitioner in respect of

the above assessment order, the same shall be refunded to the petitioner. No costs.

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

U.DURGA PRASAD RAO, J

T. MALLIKARJUNA RAO, J

30.01.2023
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**HON'BL SRI JUSTICE U. DURGA PRASAD RAO
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