

## UNITED MOTORS LTD.

v.

## MINISTER OF FINANCE AND PLANNING

SUPREME COURT,

RATWATTE J., VICTOR PERERA J.,

AND SOZA J.

S.C. 49/82, C.A. 46/82,

C.A. APPLICATION 2301/80.

*Acquisition under the Business Undertakings (Acquisition) Act No. 35 of 1971 - Regulation made by the Minister - Committee to ascertain assets and liabilities - Date of vesting - Payments to be made after deductions.*

This is an appeal by the petitioner - appellant from an order of the Court of Appeal refusing an application for a writ of certiorari and mandamus to quash the orders made by the 1st respondent and to direct the 1st respondent to make payment in respect of the Business Undertaking vested in the state under the provisions of the Business Undertakings (Acquisition) Act No.35 of 1971. The petitioner continued as a company though the business undertaking was acquired by or vested in the Government.

When the Government takes over the business undertaking of a person or company it takes over the undertaking with its subsisting assets and liabilities as a going concern and thereafter continues to manage and administer the affairs of that undertaking. All rights and liabilities under any contract

or agreement which relates to the purposes of that undertaking and subsisting at the date of vesting become the rights and liabilities of the Government. Thereafter payments are made to the proprietor out of the consolidated fund and the Minister is empowered to make regulations to give effect to the business undertaking so vested. Regulation (2) provided for a Committee to examine and report on the assets and liabilities, of the undertaking. Regulation 4 required the Committee to ascertain the reasonable value of the undertaking. Regulation 5 empowered the Committee to ascertain any payments due to any Government Department or other State Institution and loss sustained by any statutory board or Corporation due to the activities of the undertaking, and regulation 7 required a report on the assets and liabilities and the Committee's recommendation in regard to the payments that may be due in respect of the undertaking.

The term payment contemplated the assessment thereof to be made after examining the assets and liabilities specifically referred to in clause 5 and payments must necessarily be for the balance of the assets after deducting the liabilities vested.

After submitting the report the Minister made his order to deduct the amounts due as liabilities of the business undertaking on the date of vesting.

The question that arose was whether the deductions should be made from the vested assets of the business undertaking as on the date of vesting or whether these should be from the balance found to be due with accrued interest at the time and date of payment. The petitioners contention was that none of the items could be deducted as they were not liabilities which were vested on the date of vesting, as commission and professional charges were incurred by the State after the date of vesting and outstanding Income Tax and Business Turnover Tax were not the liabilities of the vested

business undertaking but were statutory levies payable by the proprietor or company to the State.

Held:

The 1st respondent had erred in making an order deducting all these items from the balance assets with accrued interest for which the payment is due to the petitioner by reason of the vesting order.

Income Tax and Business Turnover Tax were the liabilities of the owner of the business and not the liabilities of the business undertaking, since the petitioner has defaulted, this amount would be a first charge on the sum payable to him.

A writ of certiorari to issue quashing the orders made by the 1st respondent, and to make payments to the petitioner after deducting professional charges and Taxes.

*S.J.Kadiragamer*, Q.C. with *K. Nadarajah* and *K. Thevarajah* for the Petitioner-Appellant.

*M.S.Aziz*, Deputy Solicitor General, with *K. Sripanvan*, State Counsel, for the Respondents..

*Cur. adv. vult.*

July 20, 1983.

VICTOR PERERA, J.

This is an appeal by the petitioner-appellant from an order of the Court of Appeal dated 15th July 1982 refusing an Application for a Writ of Certiorari and Mandamus to quash the orders made by the 1st respondent and to direct the 1st respondent to make payment in the manner indicated in the petition in respect of the business undertaking vested in the State under the provisions of the Business Undertakings (Acquisition) Act No. 35 of 1971. The petitioner had made this application in

respect of the business undertaking carried on by the petitioner Company known as 'United Motors Ltd.' in C.A. Application No.2301/80.

The said petitioner, a duly incorporated Company, was admittedly the 'proprietor' of the said business undertaking. The term 'proprietor' according to the Act (Section 17) when used in relation to a business undertaking means the owner of that undertaking or any other person authorised by the owner to enter into contracts for the purpose of that undertaking.

The petitioner continued as a Company though the business undertaking was acquired by or vested in the Government. Under Section 17 of the term 'business undertaking' means any undertaking of a commercial, industrial, agricultural or professional nature and includes:-

(i) all property, movable or immovable, which was used for the purposes of the undertaking on the day immediately preceding the date of transfer or the primary vesting date and which may be specified by the Minister of Finance in the primary vesting Order;

(ii) *subject to the provisions of this Act*, all rights, powers, privileges and interests arising in or out of such property or business and *all the liabilities of the undertaking*;

(iii) all books, accounts and documents relating or appertaining to the business undertaking or any property of that undertaking.

The Business Undertakings (Acquisition) Act No. 35 of 1971 provided for the acquisition for the Government, whether by agreement or compulsorily of any business undertaking by requisitioning or com-

pulsory acquisition of any property necessary for the purpose of that undertaking and for matters connected therewith or incidental thereto.

Section 4 makes special provisions relating to the rights and liabilities of any 'business undertaking' acquired or vested in the Government. This section is fully comprehensive and clearly spells out rights and liabilities that vest in the Government when a business undertaking is acquired. It reads as follows:-

"4(1) Subject to the provisions of sub-section (2) where any business undertaking is acquired by or vested in the Government, all the rights and liabilities under any contract or agreement which relates to the purposes of that undertaking and which subsists on the date of transfer or on the primary vesting date of that undertaking shall vest in the Government.

(2) The Minister of Finance may at any time repudiate the liabilities under any contract or agreement referred to in sub-section (1) if he is of opinion that such liabilities were incurred mala fide, dishonestly or fraudulently. Notice of the repudiation shall be given by the competent authority to the parties to the contract or agreement.

(3) Where the Minister of Finance under sub-section (2) repudiates the liabilities under any contract or agreement such liabilities shall be deemed never to have vested in the Government.

(4) For the purposes of this section, 'liabilities' shall not include any loan repayable to a director of any business undertaking which is acquired by or vested in the Govern-

ment or to any member of the family of such Director."

It is clear from this Act that when the Government takes over the business undertaking of a person or Company, it takes over the undertaking with its subsisting assets and liabilities as a going concern and in terms of Section 5 it thereafter continues to manage and administer the affairs of that undertaking. In terms of Section 4 all rights and liabilities under any contract or agreement which relates to the purposes of that undertaking and subsisting at the date of vesting, become the rights and liabilities of the Government, but the other rights and liabilities of the Company do not pass on to the Government. It is possible to visualise many such rights and liabilities which do not vest. The Act had made provisions to make 'payments' to the proprietor of the undertaking out of the consolidated Fund (Section 17) and the Minister of Finance was empowered to make regulations in terms of Section 12 for the purpose of carrying out or giving effect to the principles and provisions of the Act in relation to the business undertaking so vested. Section 12(c) provided for regulations for the payments to be made in respect of any business undertaking or property acquired and in any matter regarding the assessment of the amount of the payments and the mode of making payments. The term 'payments' contemplated the assessment thereof to be made after examining the assets and liabilities specifically referred to in Section 5 and payments must necessarily be for the balance of the assets after deducting the liabilities vested.

By Business Undertakings (Acquisition) Amendment Act No. 21 of 1980, a new section was added after Section 12 as 12A which reads as follows :-

"12A. Payments to be made in respect of -

(a) any business undertaking acquired by or vested in the Government; or

(b) any property vested in, or requisitioned by, the Government, for the purpose of any undertaking,

shall be considered as accruing due from the date on which such business undertaking or property, as the case may be, was transferred to, or vested in, or requisitioned by, the Government. Interest at the prescribed rate shall be paid on every such payment from the date on which it accrues due until the date of payment."

This Section makes it clear beyond any doubt that the payments were to be made in respect of the business undertaking and property acquired or vested and that the relevant date was the date of vesting for the purpose of the assessment of the amount of the payment. Thus any liability which related to the said business undertaking coming into existence after the relevant date cannot be taken into consideration nor can any liabilities of the proprietor other than the liabilities specifically contemplated by Section 5 as having vested be taken into consideration.

In terms of Section 12, the Minister of Finance made Regulations dated 9th April 1975 published in the Gazette No. 158/8 of 10th April 1975. It is necessary to examine all the regulations so made in order to appreciate the respective functions of the Committee appointed by the Minister of Finance and the duties of the Minister who has to make order after the receipt of a report from the Committee and to see whether they have enlarged in any way the scope of Section 4. Regulation (2) provides for the Minister of Finance to appoint a Committee to examine and report to him on the

assets and liabilities of the specified undertaking and not of the proprietor. Regulation (4) requires the Committee to ascertain the reasonable value of that undertaking. Regulation (5) reads as follows:-

"5(1) For the purposes of arriving at the valuation of the specified undertaking, the Committee may take into consideration the value at par of any shares, holdings, investments or other interests, subject, however, to profits earned, market conditions or other causes.

(2) For all purposes of arriving at a valuation of the property, including plant, machinery and other equipment of the specified undertaking, the committee may take into consideration the purchase price or the market price at the time of purchase of such property, and deduct therefrom such amount as may appear reasonable on account of depreciation, market conditions or other causes.

(3) For all the purposes of arriving at the valuation of the liabilities of the specified undertaking, the Committee may take into consideration, inter alia, any outstanding contractual or other lawful obligations, bona fide transactions with any recognised financial or commercial institutions or other persons excluding any member of the Board of Directors of the specified undertaking, payments due to any Government Department or other State institution and any loss sustained by any statutory board or corporation due to the activities of the specified undertaking."

This regulation clearly defines the duties of the Committee under three specified categories.

Regulation 5(3) has not enlarged the ambit of Section 4 of the Act and has limited the powers of the Committee to ascertain the payments if any due by the said business undertaking to any Government Department or other State institutions and any loss sustained by any Board or Corporation due to the activities of the specified undertaking. Regulation 7 requires the Committee to appoint to report to the Minister of Finance on the assets and liabilities of the specified undertaking together with their recommendation thereon in regard to the payments that may be due in respect of the specified undertaking. After the amendment to the Act in 1980 the Minister made a further regulation which was published in the Government Gazette Extraordinary No. 92/4 dated 10th June 1980 specifying the rates of interest payable on any payment.

At the hearing of this application in the Court of Appeal the learned Deputy Solicitor General who appeared for the respondents had made available to that Court and to the Counsel for the petitioner the Report submitted by the Committee to the Minister of Finance. According to the figures set out in the said report, the following amounts had been ascertained :-

Valuation of Assets	Rs. 5,875,861.83
Valuation of liabilities	Rs. 2,002,216.66
Amount payable on this basis	Rs. 3,873,645.17

Interest was on this account according to the regulations

at 4 1/2 percent from 8.3.72 - 31.3.75  
at 5 1/2 per cent from 1.4.75 - 30.9.77  
at 7 1/5 per cent from 1.10.77-31.3.80 and at  
10 per cent from 1.4.80 - 31.12.80 and there-  
after till the payment was made.

The Report, however, disclosed the following liabilities of the petitioner Company and had recommended that they should be deducted, namely -

(1) Commission	Rs.	33,700.63
(2) Professional charges	Rs.	80,511.28
(3) Outstanding Income Tax, Business Turn Over Tax & Penalties		Rs. 3,162,739.00

The question that arises is whether these deductions should be made from the vested assets of the 'business undertaking' as at the date of vesting or whether these should be from the balance found to be due with accrued interest at the time and date of payment.

The Minister of Finance when he made his order after the Report was received by him purported to deduct the amounts due on the said three items as liabilities of the Business Undertaking due on the date of vesting. The petitioner's contention was that none of the said three items could be so deducted as they were not liabilities which were vested on the 8th March 1972, the date of vesting, as the first and second items had been incurred by the State after the date of vesting and as the third item, namely, Income Tax and Business Turn-over Tax were not the liabilities of the vested business undertaking but were statutory levies payable by the proprietor or Company to the State. In the Court of Appeal it was conceded by the Deputy Solicitor General that the first item Rs. 33,700.63 claimed as commission was not a liability and should not have been taken into the reckoning. In regard to the second item of Rs. 80,511.28, though he did not make the same concession, he had passed it over and confined his submissions to the third item only. At the hearing before us as the petitioner filed an affidavit dated 13th December 1982 (P10) in which he had set out the fact that

long after the vesting in or about June 1974, the petitioner had some litigation in the District Court of Colombo and that the State claimed to have incurred Rs. 80,511.28 in that litigation. The Deputy Solicitor General conceded that this item could not be deducted. The contention therefore was confined to the third item, Income Tax, Business Turnover Tax and the penalties.

In regard to Income Tax, in this case the tax was imposed under the provisions of the Inland Revenue Act No.4 of 1963. In terms of this Act income tax is imposed in respect of the *profits and income* from any person including a Company and profits and income mean profits from any trade, business, profession or vocation and the several items enumerated in Section 13 of that Act. There is no doubt that a business is treated as a separate entity in order to ascertain its profits therefrom, but the liability is that of the proprietor or Company. In regard to Business Turnover Tax, the tax is imposed under the Finance Act No.11 of 1963 and the business turnover tax is levied from a person (including a Company) in respect of the turnover made by that person from that business in terms of Section 118. The mode of recovery of the business turnover tax by any person in default as provided for in Section 145. It is therefore clear that these taxes were the liability of the owner of the business and not the liability of the business undertaking. This concept of a 'business undertaking' referred to the Act No. 35 of 1971 is a new concept. It provides for the Government taking over of the business undertaking, and the vesting or acquisition is limited to the rights and liabilities under a contract or agreement of that undertaking. The Company continues in existence and all other rights and liabilities, not covered by any contract or agreement continue to be the rights and liabilities of the Company including any liabilities repudiated in terms of Sections 4(2), 4(3) and

excluded in terms of Section 4(4). In this view of the matter, the Minister of Finance in making his order under Regulation 7 on receipt of the Report from the Committee appointed by him under the Act, has to make order that the payment due to the proprietor shall be the amount of assets as assessed deducting the assessed contractual liabilities that subsisted at the date of vesting, in terms of Section 4 of the Act.

However, having examined the report of the Committee the Minister is entitled to make an order in regard to the payment for balance assets so assessed with the interest accruing thereon. In so making his order the Minister is entitled to order the set off of moneys due to the State on any other liability not covered by Section 4 from the amount ultimately payable to the proprietor. In terms of Section 109(1) of the Inland Revenue Act of 1973 tax in default is a first charge on the assets of the defaulter and in this instance will be on the balance assets (with accrued interest). In this case the petitioner had defaulted and the amount due from him as tax would be a first charge on the sum so payable to him.

The Minister, the 1st respondent, had therefore erred in deducting the three items from the balance assets (with accrued interest) for which the payment is due to the petitioner by reason of the vesting of its business undertaking on 8. 3. 72. In view of the fact that the Deputy Solicitor General conceded that the petitioner was not liable to pay Rs.33,700.63 by way of commission this item will have to be struck off. In view of Counsel for the petitioner agreeing to have the sum of Rs. 80,511.28 deducted as expenses incurred by the Government though not strictly deductible and conceding that the petitioner-Company was liable to pay the outstanding income tax and penalties

therein amounting to Rs. 3,162,739.00, the 1st respondent is entitled to make order for the appropriation of the said sums of Rs.80,511.28 and Rs.3,162,739.00 only from the amount ultimately payable, namely Rs. 3,873,645.17 with interest at the aforesaid rates until payment. It was submitted that the petitioner had been paid a sum of Rs. 2,054,809.00 out of this sum about January 1981 on account.

I therefore direct a mandate in the nature of a Writ of Certiorari to issue quashing the orders dated 12th March 1979 and 1st September 1980 made by the 1st respondent, the Minister of Finance, and that a Writ of Mandamus do issue to the 1st respondent to pay the petitioner the sum of Rs. 3,873,645.17 with interest thereon in terms of Regulation dated 4th June 1980 made by the 1st respondent with a direction that the 1st respondent shall be entitled to deduct and appropriate the following sums only from this amount:

- (1) Rs. 80,511.28 (professional charges)
- (2) Rs. 3,162,739.00 (outstanding income tax and business turnover tax together with penalties)

and any amounts paid to the petitioner on account up-to-date. The petitioner will be entitled to costs in the Court of Appeal and in this Court.

RATWATTE, J., - I agree.

SOZA, J., - I agree.

*Appeal allowed.*