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Court : Karnataka

Decided On : Oct-01-2015

Judge : Vineet Saran and B.Manohar

Appeal No. : STRP 384/2014

Appellant : The State of Karnataka

Respondent : M/S United Breweries Ltd

Judgement :

IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE1T DAY OF OCTOBER 2015 PRESENT THE HON'BLE MR.JUSTICE VINEET SARAN AND THE HON'BLE MR. JUSTICE B.MANOHAR STRP Nos. 384/2014 & 01-03/2015 BETWEEN: The State of Karnataka Rep. by the Secretary, Finance Department, Vidhana Soudha, Bangalore - 560001. (By Sri. Shivayogiswamy, AGA) AND: M/s.United Breweries Ltd., Tumkur Road, Bangalore. Petitioner (By Sri. N.Venkataraman, Sr.Adv for Sri.P.Dinesha, Adv.,) Respondent 2 These STRPs are filed U/S231) of the Karnataka Sales Tax Act, 1957, against the order dated 17.1.2014 passed in STA.No.2456 and 2457 of 2012 and cross appeal in STA Nos.1142 and 1143 of 2013, on the file of Karnataka Appellate Tribunal, Bangalore, allowing both the appeals filed U/S22of Karnataka Sales Tax Act, 1957, and dismissing the cross appeals of the State. day, VINEET SARAN J., made the following: These petitions are coming on for admission this

ORDER

These revision petitions are filed by the State of Karnataka, challenging the order dated 17-01-2014 passed by the Karnataka Appellate Tribunal in STA Nos.2456 and 2457 of 2012 and Cross Appeal in STA Nos.1142 and 1143 of 2013 whereby, the respondent- assessee has been exempted from payment of tax for the assessment years 2003-04 and 2004-05.

2. Briefly the facts relevant for the purpose of this case are: The respondent-assessee, United Breweries Limited owns the following brand names related to beer 3 (1) Kingfisher Premium Lager Beer; (2) Kingfisher Super Strong Premium Beer; and (3) Kalyani Black Label Premium Lager Beer. The respondent-assessee also owns the Kingfisher brand of packaged drinking water. Admittedly, in the said assessment years, the assessee did not carry on any manufacturing activity of its own, within the State of Karnataka or outside.

3. The admitted facts in the case regarding manufacture of Beer are that the respondent-assessee had entered into contracts with certain Contract Bottling Units (CBUs for short) for manufacturing beer, in terms of which the assessee was to transfer the know-how for manufacturing beer under its brand name. Such manufacture of beer was to be on behalf of the assessee and supplied only to the assessee or its indentors. No right was given to the CBUs to directly sell the beer to its own customers. In fact, the CBUs 4 were captive manufacturers of beer for the assessee - United Breweries Limited.

4. Under the Brewing and Distribution Agreement entered into between the assessee and the CBUs, the brewing and bottling of the beer was to be done as per the specifications given by the assessee, and by using the trade marks, names and logos of the assessee, made available by it to the CBUs. The entire production, as well as the trade mark, etc., belonged to the assessee and not to the CBUs. The right to use the know-how was given to the CBUs on non-assignable, non- transferable and non-exclusive basis. However, the right to market, sell, distribute and package the beer, according to the know-how and specifications prescribed by the assessee, was to remain under the supervision and control of the assessee, as per a registered user right. Under the agreement, it was specifically provided that the CBUs shall sell the entire 5 beer manufactured

in their jurisdiction to the assessee or its indentors. The agreement also provided that any liability attributable to the CBUs on bulk beer up to the Bright Beer tanks (BBT), was to be of the assessee. Thus, according to the agreement with regard to beer, the CBUs neither had any right over the product, nor did they have any right to sell or exploit the beer so produced, nor fix any price of the produce. It all belonged to the assessee.

5. With regard to Kingfisher packaged drinking water, the agreements with the manufacturers were different than that with the CBUs in the case of manufacture of beer. In the case of manufacture of beer, the beer so manufactured by the CBUs remained to be the sole property of the assessee, whereas it was not so in the case of manufacture of Kingfisher packaged drinking water. For the manufacture of Kingfisher packaged drinking water, the manufacturers 6 were to pay royalty to the assessee for use of brand name/trade name, and were then free to sell the manufactured packaged water to their own customers, and exploit the trade name/brand name, for which they were paying royalty to the respondent-assessee.

6. For the relevant assessment years, the Assessing Officer, though did not levy any tax on the transfer of technical know-how, for manufacture of beer, but subjected the assessee to tax for payment of Rs.10/- per case, received by the assessee from CBUs as brand franchise fee, treating it as royalty. In the case of drinking water, the Assessing Officer charged tax on 0.15 paisa per liter on Kingfisher drinking water, which was the royalty paid to the assessee by the manufacturers of the packaged water. As already mentioned above, there is no dispute with regard to tax on transfer of technical know-how, which was exempted by the Assessing Officer. The dispute only remains with 7 regard to taxability on the payment of brand franchise fee/royalty in the case of manufacture of beer, as well as drinking water.

7. Being aggrieved by the order of the Assessing Officer, the respondent-assessee filed an appeal before the Joint Commissioner of Commercial Taxes (Appeals) (hereinafter referred to as the First Appellate Authority) By an order dated 20-10-2012, the First Appellate Authority allowed the appeal with regard to levy of tax,

penalty and interest on the amounts received by the assessee as brand franchise fees from the CBUs in the case of beer, which was set aside and deleted in entirety; whereas the levy of tax, penalty and interest on the amount collected by the assessee as royalty from the licensee dealers engaged in the business of manufacture of packaged drinking water as consideration for transfer of right to use the brand 8 name/trade mark-Kingfisher was upheld for both the assessment years.

8. Aggrieved by the order passed by the First Appellate Authority, the assessee filed an appeal before the Tribunal, challenging that part of the order by which tax, penalty and interest was held to be chargeable on the amount collected as royalty in the case of packaged water; and the Revenue filed an appeal challenging the other part of the order by which the assessee was exempted from payment of tax in the case of beer. The Tribunal, by its order dated 17-01-2014, allowed the appeal filed by the assessee and dismissed the appeal of the Revenue. Aggrieved by the same, these revision petitions have been filed by the Revenue for the relevant assessment years 2003-04 and 2004-05. 9 9. We have heard Sri.N.Shivayogiswamy, learned Additional Government Advocate for the Revision Petitioner-State of Karnataka, as well as Sri.N.Venkataramana, learned Senior counsel appearing along with Sri.P.Dinesh, learned counsel for the respondent-assessee in all the Revision Petitions, and have also perused the records. With the consent of the learned counsel for the parties, these Revision Petitions have been heard and are being finally disposed of at the admission stage itself.

10. The submission of Sri.Shivayogiswamy, learned Additional Government Advocate appearing for the Revision Petitioner is that the Tribunal has wrongly held that no tax would be leviable on brand franchise fees which has been charged by the assessee from the Contract Bottling Units (CBUs) for manufacturing beer under the brand name/trade name of the assessee, as the same amounts to transfer of right to use goods in 10 the form of brand name. It is also submitted that the tax on the royalty paid by the licensee dealers, who manufacture the packaged drinking water by brand name/trade mark Kingfisher on payment of royalty to the assessee, has wrongly been exempted from payment of tax by allowing the licensee dealers to manufacture and sell the water under the

trade mark-Kingfisher, which belongs to the assessee, as there has been transfer of goods as defined under the Karnataka Sales Tax Act.

11. Per contra, Sri.N.Venkataramana, learned Senior Counsel appearing for the respondent-assessee submitted, that for getting the beer manufactured from the CBUs, the know-how and specifications are supplied by the assessee to the CBUs, according to which beer is manufactured on behalf of the assessee, for which, the cost of raw materials and the labour is paid in the account of the assessee. In turn, the CBUs sell the beer 11 on behalf of the assessee, not to the customers of its choice but to the customers so directed by the assessee and also at the price fixed by the assessee, and a fixed amount of brand franchise fees of Rs.10/- per case was paid by the CBUs to the assessee. It is submitted that the exclusive right to use the three brand names (details of which have been extracted hereinabove) remained with the assessee, and it is only the manufacturing part which was carried on by the CBUs on behalf of, and at the expense of, the assessee. It has also been submitted that for the brand franchise fees received by the assessee from the CBUs, the assessee pays Service Tax, as the same is covered under the definition of Service as provided under sub-Section 55(b) of Section 65 of the Finance Act, 1994. It is thus contended that since the payment received from CBUs as brand franchise fees would not be termed as goods within the meaning of transfer of right to use the goods, as such, no tax would 12 be leviable under Section 5-C of the Karnataka Sales Tax Act, 1957 (for short the KST Act).

12. Learned counsel for the parties have relied on certain decisions/case laws, which shall be dealt with at the time of considering their submissions.

13. The relevant provisions of the KST Act, Finance Act, 1994 and the Constitution of India, are reproduced below: includes Section 2(m) of the KST Act: Goods means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and livestock, all materials, commodities and articles (including goods, as goods or in some other form involved in the execution of a works contract or those goods fitting out, improvement or repair of movable property) and all growing crops, grass or things attached to, or forming part of the

land which are agreed to be severed before sale or under the contract of sale. to be used in the 13 Section 5-C of the KST Act: Levy of tax on the transfer of the right to use any goods.-. Notwithstanding anything contained in sub-section (1) or sub- section (3) of Section 5, but subject to sub- section (5) and (6) of the said Section, every dealer shall pay for each year a tax under this Act on his taxable turnover in respect of the transfer of the right to use any goods mentioned in column (2) of the Seventh Schedule for any purpose (whether or not for a specified period) at the rates specified in the corresponding entries in column (3) of the said schedule. Provided that no tax shall be levied under this section if the goods in respect of which the right to use is transferred, have been subjected to tax under Section 5. Sub-Section (55b) of Section 65 of the Finance Act, 1994 : means, - Intellectual property service (55b) (a) transferring, temporarily; or (b) permitting the use or enjoyment of, any intellectual property right. 14 Sub-Section (105) of Section 65 of the Finance Act, 1994: taxable service means any service provided or to be provided, . .. (zzzzj) to any person, by any other person in relation to supply of tangible goods including machinery, and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances. equipment Article 366 of the Constitution of India: Definitions:- In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that to say - (1) .. (2) 29(A) tax on the sale or purchase of goods includes - (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration; 15 in (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved the execution of a works contract; (c) a tax on the delivery of goods on hire- purchase or any system of payment by instalments; (d) a tax on 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; (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred valuable consideration; payment other or (f) a tax on 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 for cash,

deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made; 16 14. There can be no doubt that sale of goods can be taxed under Constitution of India, which would include tax on transfer of right to use any goods for any purpose. The price of such sale is to be taxed. Goods is defined under the KST Act which may be tangible or intangible. In the present case, the transfer of right to use brand name/trade name would be intangible goods.

15. We shall first consider the case relating to the sale of beer. With regard to taxability on the payment of the brand franchise fees received by the assessee in the case of manufacture of beer, with the brand name/trade mark continuing to belong to the assessee, what we have to first consider is, whether there is complete transfer of right to use the said property (being brand name/trade name) in favour of the manufacturer (CBUs) or not?.

16. The manufacturer, as per the agreement, has the right to use the brand name only for, and on behalf of, 17 the assessee, and does not acquire any right over such brand name/trade mark belonging to the assessee, as it is not free to sell the product in the market, to customers of its choice. It is also not disputed that the manufacturing is done as per the specifications given by the assessee. Thus, it can be concluded that the CBU is the captive manufacturer of the assessee, who has to produce the beer in terms of the specifications and other conditions as provided by the assessee. The CBUs cannot sell the beer to customers of its choice, but only to the intended customers of the assessee at the price fixed by the latter. In return, the manufacturer is given the price of the raw material and the labour charges. Since the produce is to be transferred by the CBUs on behalf of, and at the price fixed by the assessee, to the intended customers of the assessee, after deducting the price of raw material and other variable costs plus the labour cost, the remainder of the amount so received by the manufacturer is given to the assessee, which is split 18 as brand franchise fees and other surplus profit of the assessee. Such brand franchise fee in the present case is Rs.10/- per case. It is this amount which the Revenue contends that it should be subjected to tax.

17. The Apex Court, in the case of State of Andhra Pradesh and another V/S Rashtriya ISPAT Nigama Limited (2002) 126 STC114 has held that in the case of tangible goods, even though delivery or possession of the machinery may have been given to the contractor, yet when the effective control of the machinery remained with the respondent, it would not attract Sales Tax because no transfer of right to use takes place. The Constitutional Bench of the Apex Court, in the case of 20th Century Finance Corporation Limited and Another V/S State of Maharashtra (2000) 119 STC182has, after considering Article 366 (29A)(d) of the Constitution of India, held that the said provision shows that levy of tax is not on use of goods 19 but on transfer of right to use the goods. The right to use goods accrues only on account of transfer of right. In other words, right to use arises only on transfer of such right and unless there is transfer of right, the right to use does not arise. Therefore, only when there is transfer of right to use the brand name/trade mark belonging to the assessee, without any restriction, then alone it could be a case of transfer of right to use the intangible goods, which would be the brand name/trade mark. However, if no such right to use is given to the manufacturer, it would not amount to transfer of right.

18. In the case of manufacture of beer, the amount paid towards brand franchise fees is to the assessee, and admittedly the assessee, has not transferred any right to the manufacturer of beer to exploit the brand name for its own use. The manufacturers (CBUs) do not get effective control of the brand name for full commercial exploitation. As such, it cannot be 20 considered as sale of intangible goods by the assessee, which would be subject to Sales Tax under the KST Act. It is also noteworthy that, for the amount received by the assessee as brand franchise fees from the CBUs, admittedly, the assessee is paying Service Tax, as the same is covered as Intellectual Property Service under sub-Section 55(b) of Section 65 of the Finance Act, 1994.

19. The law is well settled that double taxation on the same goods is not permissible. The Apex Court in the case of Bharath Sanchar Nigama Limited V/S Union of India (2006)2 STR161(S.C.) has held that the transaction can be either covered under the Sales Tax or Service Tax, but not both, as the same would be mutually exclusive of each other.

20. The Tribunal, while dealing with this issue, has held that the Brand Franchise Fees, technical fees realized by the assessee from the CBUs are not 21 transactions in the nature of transfer of right to use brand name/trade mark and the same would purely be service simpliciter which falls outside the purview of Section 2(1)(t)(iv) of the KST Act. The Tribunal has, further, recorded a finding of fact that CBUs have no independent voice or rights so far as the purchase of materials and sales of manufactured beer are concerned. All the brewing operations are to be carried out by the CBUs as per the directions and control of the appellant (assessee herein). In this process, the CBUs have to affix the labels of the brand names of the appellant since the entire product brewed has to be marketed on behalf of the appellant only. Thus, the use of brand name is not independent of the main contract and there is no exclusive transfer of right to use such branch name to any of the CBUs. At all times, the ownership of the brand name always wrests with the appellant only. 22 21. On such finding of fact, we are of the opinion that levy of tax, penalty and interest, in the case of manufacture of beer, on the amount received by the assessee as brand franchise fees from CBUs for the assessment years in question, cannot be justified in law.

22. Coming to the next issue of Kingfisher packaged drinking water, the question is regarding the levy of tax on the amount collected by the assessee as royalty from the licensee dealers, engaged in the business of manufacturing packaged drinking water as consideration for transfer of right to use brand name/trade mark-Kingfisher. In our opinion, since it is not disputed that under the agreement, the trade mark-Kingfisher is transferred to the licensee dealers, with a right to use the trade mark and exploit the same for commercial use, which was on payment of royalty to the assessee, the same would amount to transfer of 23 right to use the intangible goods, being the trade mark- Kingfisher, which would thus be subject to tax under KST Act. It is not disputed that in case of drinking water-Kingfisher, the effective control over the brand name is transferred to the licensees to use and exploit the brand name for commercial use, which would amount to transfer of right to use goods, liable to tax under the KST Act. As such, the finding recorded by the First Appellate Authority in this regard, is confirmed and the order of the Tribunal with regard to this issue, is set aside.

23. For the foregoing reasons, the revision petitions stand partly allowed. It is directed that no Sales Tax would be leviable on the assessee for the assessment years 2003-04 and 2004-05 on the amounts received by the assessee as brand franchise fees from the CBUs in the case of manufacture of beer. The assessee shall, however, be liable to pay tax on the royalty received 24 from the licensee dealers, who have been transferred the right to use brand name/trade mark-Kingfisher packaged drinking water. The matter is thus, remitted to the Assessing officer to assess the tax and the penalty, if any, to be imposed in the light of the observations/directions given hereinabove. No order as to costs. mpk/-* Sd/- JUDGE Sd/- JUDGE

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