(2010) 08 KAR CK 0004

In the Karnataka High Court

Case No : S.T.R.P. No. 25 of 2006

State of Karnataka APPELLANT

Vs

Khoday Eshwarsa and Sons RESPONDENT

Date of Decision : 13-08-2010

Acts Referred:

Citation : (2012) 52 VST 204

Hon'ble Judges : N. Kumar, J;H.S. Kempanna, J

Bench : Division Bench

Advocate : T.K. Vedamurthy, High Court Government Pleader, for the Appellant; G. Sarangan, for G. Rabinathan and N. Thirumalesh, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—As the question involved in both these petitions are one and the same, they are taken up for consideration together and disposed of by this common order. In S.T.R.P. No. 48 of 2008, the assessee is a company incorporated under the Companies Act, 1956 and a dealer registered under the Karnataka Sales Tax Act, 1957 and the Central Sales Tax Act, 1956. The assessee/appellant operates three separate divisions, namely, a distillery for manufacture and sale of liquor, a sugar factory for production and sale of sugar and a division of execution of works contracts. The assessee is a flagship company of the Khoday Group of Industries.

2. It is the case of the assessee that, being a flagship company of Khoday Group of Industries, during the year 1994-95, they ran into serious financial difficulties, which compelled the Board of Directors of the group company to explore the several possibilities to tide over the financial difficulties and accordingly, the Board of Directors came out with an idea of sale-cum-lease back of its assets of oakwood barrels and vats with the lease financing companies and raise the required funds. This lead to passing of resolution by the Board of Directors, which provided the necessary authorisation to the assessee to go ahead with this issue. The assessee entered into agreements with five financing companies and

raised invoices on them for sale-cum-lease back of oakwood barrels and vats for value aggregating to Rs. 17,00,34,809.

3. The assessee contended, under those circumstances, there was no actual sale and mere issuance of the sale invoices being paper transactions and in the absence of transfer of property in goods of the said oakwood barrels, there cannot be any sale and as such, no tax can be levied. However, the assessing authority acting on the invoices, which were not in dispute held that, it is sufficient to hold that the goods are sold for a sum of Rs. 17,00,34,809 and assessed the said amount to basic tax, surcharge and turnover tax. ''The appeal preferred by the assessee came to be dismissed by the first appellate authority.

4. The assessee also received a sum of Rs. 4,61,294 from M/s. Bangalore Water Supply and Sewerage Board and further claimed that the consideration was paid only for job-work for laying of water pipes and there was no transfer of property for the goods involved. The said contention of the assessee was negatived by the assessing authority and in appeal the said order of the assessing authority was upheld.

5. In S.T.R.P. 25 of 2006, the facts are as under:

The assessee is a registered dealer under the provisions of the Karnataka Sales Tax Act, 1957, engaged in the manufacture and sale of common pins, gem clips, stapler pins, etc. The assessee has raised invoices for sale-cum-lease of oakwood vats and barrels. Four sale invoices were raised by M/s. Khoday India Limited in the name of the assessee for aggregate sale value of Rs. 5,61,94,630. Again, four sale invoices were raised by the respondent in the joint names of financial institutions and M/s. Khoday India Limited for an aggregate sale of Rs. 5,61,36,377. When a proposition notice was issued, calling upon the assessee to show cause why the said amount would not be brought to tax u/s 5(3A) of the Karnataka Sales Tax Act, 1957, the assessee gave a reply stating that, it is not a first sale but it is a second sale. Accepting the case of the assessee, the assessing authority concluded the assessment reviewing turnover tax u/s 6B of the Karnataka Sales Tax Act, on the sales effected by the assessee on these invoices and also levied penalty u/s 12(4) of the Act. The assessee challenged the said order of the assessment. The appeal came to be dismissed. The assessee preferred an appeal before the Karnataka Appellate Tribunal, which set aside the order of both the parties and remitted the matter back to the assessing authority for fresh consideration. Aggrieved by the said order, the present appeal is filed.

6. The Appellate Tribunal in both the appeals held that, the material on record clearly establishes that there is no sale of goods. It is only a device of a financial arrangement to raise funds. Therefore, unless there is a sale of goods as understood in the context of the Sales Tax Act, the liability u/s 5 of the Act is not attracted. In support of their contention, they relied on a judgment of the apex court in the case of Sundaram Finance Ltd. Vs. State of Kerala and Another,

wherein, the apex court granted the relief to the assessee. Aggrieved by the two orders, the Revenue is in appeal.

7. The learned counsel for the Revenue assailing the impugned order of the Tribunal, contended that, the material on record shows that, these invoices are raised for sale of these oakwood vats and barrels for a consideration. Corresponding entries were made in the account books showing the receipt of consideration. Further, admitting the ownership of transfer of the very same materials have been taken on lease by executing lease deeds, agreeing to pay rent. There is a provision for renewal of lease also. The recitals in the lease deed make it clear that the goods, which are subject-matter of the sale were delivered to the purchasers and the purchasers in turn has leased the said property to the assessee. In the other case, the assessee has categorically admitted that, it is not a case of first sale but it is a case of second sale and therefore, the liability to pay turnover tax arises. In view of these undisputed facts, which are supported by documentary evidence, the Tribunal was not justified in following the judgment of the apex court, which has no application to the facts of this case. The Tribunal was not justified in arriving, at a conclusion that, there was no actual sale of goods and it is only a financial arrangement, as such, no tax is liable to be paid under the Act. In so far as works contract is concerned, when once the assessee opted for concession of tax u/s 17(6) of the Act, he is liable to pay tax, whether there is any sale or not and even on labour charges, which fact had not been properly appreciated by the Tribunal and therefore, he submitted that, viewing from any angle, the order of the Tribunal is liable to be set aside.

8. Per contra, the learned counsel appearing for the assessee contended that the material on record in both the cases clearly demonstrates that the first purchaser and the second purchaser were not carrying on the business of distilleries and beverages. One is a financier and another is a manufacturer of common pins, gem clips, stapler pins, etc. Absolutely, they have not used all these materials, which were purported to have been sold to them. Moreover, the consideration paid for the same does not represent the actual value of the property at all. The agreements that entered into between M/s. DLF Industries Limited, Delhi and the assessee were to take back the oakwood barrels and vats on lease basis for periods ranging from three to five years and to pay lease rentals. Though it is a case of sale-cum-lease, in substance, it is a loan transaction and as a security for the repayment of loan, a document came into existence and what is paid to the financier is nothing but the interest on amount, and not the rent. The facts and the law in the aforesaid judgment of the apex court squarely applies to the facts of the case. The Tribunal was justified in granting the relief to the assessee relying on the judgment, which is the law of the land. In so far as non-payment of the tax on the works contract is concerned, the material on record clearly establishes that the Bangalore. Water Supply and Sewerage Board supplied the labour. Unless, there is a liability to pay tax u/s 5B, section 17(6) has no application. In both the cases, labour charges received are not taxable under the Act. Therefore, the Tribunal was justified in granting the relief to the assessee.

9. In the light of the aforesaid material on record and the rival contentions, it emerges that the assessee, M/s. Khoday India Limited incorporated under the Companies Act and the dealer registered under the provisions of the KST and CST Act and it is carrying on the business of distilleries for manufacture and sale of liquor. It is a flagship company of Khoday Group of Industries. In reply to an endorsement issued by the Department calling upon the companies to substantiate their claim, the assessee has set out his case in the reply, which is as under:

During the year 1994-95, the flagship company was facing severe financial problems and was required to raise funds by entering into lease-cum-sale agreements with the financial companies. In order to enter into the above type of financial transactions, the assessee was asked to file sales bills issued by a third party in respect of the fixed assets already hold by it. The company therefore, passed two entries in its books of account and issued the sales bills in favour of their group companies in respect of oakwood vats. Following the said entry, the appellant issued the bill in favour of the assessee, passing necessary entries in the books of accounts in respect of oakwood vats. Similar entries were also made in respect of purchase and sale of oak-wood barrels also. These entries have been made and the bills were issued only for the purpose of availing of the financial assistance and the property and the goods always remained with Khoday Industries Limited, as these items are essential and required in the day-to-day running of the distilleries. These are only book entries based without effecting actual sales/purchases, these transactions cannot be called as ''sales'' defined under the Act. They relied on a judgment reported in 1966 and [1953] 4 STC 296 (Jagat Pictures v. State of Mysore) in support of their case. They also relied on a judgment of this court, where it is held that the transaction is treated as a loan and endorsement is discharged, the transaction cannot be treated as a sale. They also contended that the subject-matter of sale is immovable property and sale of such immovable property would not fall within the Act.

10. The apex court in the case of Sundaram Finance Ltd. Vs. State of Kerala and Another, had an occasion to consider similar question, which is held as under: (pages 501 and 502 in 17 STC)

The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In such case, the court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents. An owner of goods who purports absolutely to convey or acknowledges to have conveyed goods and subsequently purports to hire them under a hire-purchase agreement is not estopped from proving that the real bargain was a loan on the security of the goods. If there is a bona fide and completed sale of goods, evidenced by documents, anterior to and independent of a subsequent and distinct hiring to the vendor, the transaction may not be regarded as a loan transaction, even though the reason for which it was entered into was to raise money. If the real transaction is a loan of money secured by a right of seizure of the goods, the property ostensibly passes under the documents embodying the transaction, but subject to the terms of the hiring agreement, which become part of the buyer''s title, and confer a licence to seize. When a person desiring to purchase goods and not having sufficient money on hand borrows the amount needed from a third person and pays it over to the vendor, the transaction between the customer and the lender will unquestionably be a loan transaction. The real character of the transaction would not be altered if the lender himself is the owner of the goods and the owner accepts the promise of the purchaser to pay the price or the balance remaining due against delivery of goods. But a hire-purchase agreement is a more complex transaction. The owner under the hire-purchase agreement enters into a transaction of hiring out goods on the terms and conditions set out in the agreement, and the option to purchase exercisable by the customer on payment of all the instalments of hire arises when the instalments are paid and not before. In such a hire-purchase agreement there is no agreement to buy goods; the hirer being under no legal obligation to buy, has an option either to return the goods or to become its owner by payment in full of the stipulated hire and the price for exercising the option. This class of hire-purchase agreements must be distinguished from transactions in which the customer is the owner of the goods and with a view to finance his purchase he enters into an arrangement which is in the form of a hire-purchase agreement with the financier, but in substance evidences a loan transaction, subject to a hiring agreement under which the lender is given the licence to seize the goods.

11. Though the apex court was dealing with a case of hire-purchase agreement, the principle laid down in the aforesaid judgment equally apply to the facts of this case. As stated therein, the true effect of a transaction has to be determined from the terms of the agreement considered in the light of the surrounding circumstances. Unless prohibited by statute, the court has the power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents, notwithstanding the contents of the document, which speak of the transaction in a particular manner. It is open to the owner to demonstrate what exactly the real transaction between the parties. The law prohibits only leading of evidence contrary to the contents of the document, but it is open to the person to admit the document and to lead evidence to show what exactly the nature of the transaction in which event, if he is able to establish the said transaction, the transaction recorded in the agreement has no value. In this background, if we look at the facts of the case, in one case, the sale is in favour of a financier who is at Delhi. In another case, sale is in favour of a group company. The goods that are sold are oakwood, vats and barrels, which are of no use to the financier as well as the other group companies, which is not in the business of liquor. The value of the goods when compared to the consideration purported to have been paid under the said document makes it clear that it is a financial transaction for sale of a property,

which is not worth a few lakhs in one instance, Rs. 17 crores and odd is a consideration and in another instance, Rs. 5 crores and odd is a consideration. It is not disputed after the so-called sale, the very properties are taken on lease. The manufacturing activities by the assessee is not even hampered for a day. There was no handing over of the goods and receiving back the goods under the lease deed. It is in this context, the case pleaded by the assessee is more probable. In view of the financial constraint, when they were unable to raise funds, they raised the invoices in the names of the financial institutions and banks as the lessors/hirers, after obtaining permission from the Board of Directors. In substance, it is a financial arrangement entered into between the assessee and financier and yet another group company to raise the requisite funds for carrying on the business and therefore, there is no sale of any goods. If there is sale of goods, there is no liability to pay tax under the Sales Tax Act. It is true that an invoice is raised. It is also disclosed that, sale was inclusive of all taxes. A lease agreement has come into existence, which clearly disclosed the lessor is the absolute owner of these goods. He has leased the same to the assessee for consideration and what is to be paid is rent and not interest. The lease deed also contains a clause for renewal of lease. When admittedly, there is no demise of the property, no lease in the eye of law can arise. It is in this context, if we look into the entire circumstances surrounding sale transaction, the intention behind this transaction and the way the documents have come into existence and subsequent conduct of the parties, it is abundantly clear, it is not a genuine sale transaction at all. It is a device adopted by the parties to raise requisite finance. It is a financial arrangement. The Tribunal on proper consideration of the entire material rightly held that, there is no sale, setting aside the orders passed by the authorities who appeared to have been carried away by the contents of the documents and the circumstances under which, the documents came into existence. The judgment of the apex court clearly applies to the facts of this case and as long as there is no prohibition under law in entering into such transaction, the assessee cannot be found fault with. Therefore, we do not see any justification to interfere with the said finding recorded by the Tribunal.

12. In so far as the tax payable on the works contract is concerned, the liability to pay concession tax arises only after tax is liable to be paid u/s 5B. No tax is liable to be paid u/s 5B of the works contract, when there is no sale of goods. Therefore, the contention of the Revenue is that even though there is no sale of goods, when the assessee opt for concession of tax, the tax payable even on the labour works contract is unsustainable in law. The liability to pay tax is as clear from the words of section 76. Therefore, the Tribunal was justified in granting exemption in this regard also. For the aforesaid reasons, we do not find any infirmity in the order of the Tribunal, which calls for interference in this case. Accordingly, both the appeals are dismissed. No costs.

