

(2023) 08 KL CK 0258

In the High Court Of Kerala

Case No : Other Tax Revision Nos.23, 24, 25, 29, 30, 32, 33 Of 2019

State Of Kerala

APPELLANT

Vs

M/s Sathyam Audios

RESPONDENT

Date of Decision : 24-08-2023

Acts Referred:

Constitution of India, 1950 — Article 366(12), 366(29A)(d)
Kerala Value Added Tax Act, 2003 — Section 6(1)(c), 25(1)

Citation : (2023) 08 KL CK 0258

Hon'ble Judges : Dr.A.K.Jayasankaran Nambiar, J;Mohammed Nias C.P., J

Bench : Division Bench

Advocate : Mohamed Rafiq, K.V.Vimal, Jaikrishna R, Narayani Harikrishnan, Anish P.

Final Decision : Disposed Of

Judgement

Mohammed Nias C.P., J

1. These O.T.Revisions are preferred by the State aggrieved by the common judgment dated 03.10.2018 of the Kerala Value Added Tax Appellate Tribunal, Ernakulam, in T.A.(VAT) No.162/2015 and connected cases.

2. The short facts leading to the filing of the above revisions are as follows:-

The respondent is an assessee on the rolls of the Commercial Tax Officer, Ernakulam. The assessing officer, on scrutiny of the audited statement of accounts and assessment records, noticed that the assessee had received an amount of Rs.3,68,97,749.05/- towards income from the copyright and royalty for the transfer of right to use ringtone for a specific period during the assessment years in question, namely, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010 and 2010-2011 and, finding that the assessee had not declared the said turnover in their monthly/annual return, reopened and completed the assessments under Section 25 (1) of the Kerala Value Added Tax Act, 2003 (hereinafter referred to as 'KVAT Act'). Aggrieved by the order of the

assessing officer, appeals were preferred by the assessee, which were allowed in their favour. The State filed a second appeal before the Tribunal challenging the order of the Appellate Assistant Commissioner, and the same was dismissed by the Appellate Tribunal by Annexure-C order, which is challenged in these revisions.

3. The issue before the authorities was regarding the taxability of receipts towards royalty and the transfer of the right to use intangible property. According to the assessing authority, under Entry 68 of the III Schedule, intangible items such as copyright, patent, etc., are specifically included, and under Section 6(1) (c) of the KVAT Act, 2003, transfer of the right to use any good for any purpose for a specified period is taxable at 4%. The assessing officer held that courts had held that trademark is intangible goods, which can be the subject matter of transfer and royalty received by dealers from franchisees for the use of a trademark is liable to tax, and in the same analogy, royalty received from intangible goods like copyright, patent, etc. is also liable to be taxed as the consideration received for the transfer of the right to use goods under the KVAT Act. In holding so, the assessing officer relied on the judgment of the Supreme Court in *Tata Consultancy Services v. State of Andhra Pradesh* [(2005) 1 SCC 308] and also the decision of the High Court in *Malabar Gold Pvt. Ltd. v. Commercial Tax Officer* [2013 SCC Online Ker 1162] to hold that so as to attract liability on transfer of right to use the goods, the transfer did not have to be to the exclusion of all others and even in the absence of an element of exclusive transfer, a deemed sale could take place. The assessee also had a contention that they are paying service tax and service is rendered as per the provisions of the Central Finance Act and relied on the decision of the Supreme Court in *Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes* [(2008) 12 VST 371 (SC)] to state that VAT and service tax are mutually exclusive. With respect to the assessment year 2005-2006, the assessee contended that the assessment sought is completely barred by limitation by Finance Act 2010; as all assessments pending, including that for 2005-06, were to be completed on or before 31/3/2011 and therefore, the proposed assessment is well beyond the time. The said contentions were not accepted by the assessing authority.

4. In the first appeal filed by the assessee, the Appellate Authority found that the assessee cannot be made liable under the KVAT Act in respect of the royalty received as the same has been subject to the levy of service tax under the Central Legislation. The appellate authority also found that the assessing authority had placed reliance on the decision of the learned single Judge in *Malabar Gold* (supra), which decision was reversed by the Division Bench and therefore, going by the dictum of the Division Bench for there to be a transfer of right to use, the property had to be deliverable, and the transfer had to be to the exclusion of everybody other than the transferee. The Appellate Authority also relied on the judgments in *Bharat Sanchar Nigam Ltd. v. Union of India* [2006] 3 VST 95 (SC)] and *Tata Consultancy Services v. State of Andhra Pradesh* [(2005) 1 SCC 308] for allowing the appeal.

5. The State had challenged the orders of the Deputy Commissioner (Appeals), and all the appeals were heard and considered jointly by the Appellate Tribunal. The State essentially contended that under Entry 68 of the Third Schedule, intangible items like copyright, patent, etc., are specifically included, and under Section 6(1)(c) of the KVAT Act, transfer of right to use for any purpose, taxable at the rate of 5%. The State also contended that trademark is intangible goods that can be transferred, and the royalty received is liable to tax. It also argued that the decision of the Division Bench in *Malabar Gold* (supra) was not applicable and relied on the following judgments before the Tribunal.

(1). *Kream Foods Pvt. Ltd. v. State of Kerala* (24 VST 333)

(2). *Mechanical Assembly System (India) Pvt. Ltd. v. State of Kerala* (144 STC 536 Ker.)

(3). *Nutrine Confectionery Company Pvt. Ltd. v. State of Andhra Pradesh* (40 VST 327 A.P.)

(4). *Tata Sons v. State of Maharashtra* (80 VST 173)

6. The assessee contended before the Tribunal that the arguments of the State could not stand in view of the decision of the Supreme Court in

BSNL and Malabar Gold, cited supra, and also argued that the decision in *Tata Consultancy Services* (supra) relied on by the assessing authority was rendered before the Supreme Court decided the *BSNL* case. It was their contention that they had entered into an agreement for playing cinematographic and other music works, which, according to them, was done on a revocable licence that was not exclusive to the transferee. Thus, it was argued that there were no elements of a sale. It was also argued that they were paying service tax, and in view of the judgment in *Imagic Creative Pvt. Ltd.* (supra), which held that VAT and service tax are mutually exclusive, they cannot be made liable to pay sales tax. The Tribunal considered the question as to whether the transaction in issue amounts to a transfer of right to use goods under Section 6(1)(c) of the KVAT Act and, therefore, liable to tax under the said Act. The Tribunal found fault with the assessing authority stating that the analogy drawn by the assessing authority with trademark was wrong and that going by the judgment of the Division Bench in *Malabar Gold*, it has been held that there is no transfer as the assessing authority could not hold that the ringtone was given exclusively to the transferor. Further, they found that the assessee had only given the licence to use the goods, which is not a transfer of the right to use the goods. Taking the said view, the order of the Appellate Authority was confirmed, and the appeals preferred by the State were dismissed.

7. We have heard Sri. Mohammed Rafiq, the learned Special Government Pleader, and Sri. Jaikrishna R., the learned counsel for the respondent-assessee.

8. Sri. Mohammed Rafiq argued that the Tribunal has clearly erred in law in not finding that the assesseees were liable to pay sales tax, despite the finding that

what was transferred was the right to use goods. The Tribunal went wrong in finding fault with the assessing authority, which had correctly construed the matter in the light of the principles of law, and those findings were erroneously reversed by the Appellate Authority relying on the judgment of the Division Bench in *Malabar Gold* (supra). After having found that a ringtone satisfied the definition of goods, the Tribunal erred in considering whether there was a "transfer of goods" when, as a matter of fact, it should have considered whether there was a "transfer of the right to use goods". He also argued that the Division Bench decision in *Malabar Gold* (supra) had not attained finality as it is under appeal before the Supreme Court. He finally argues that the issue is covered in his favour by the judgment in *Commissioner Service Tax, Delhi v. Quick Heal Technologies Ltd.* [(2023) 5 SCC 269] and that the revision petitions are liable to be allowed.

9. Per contra, Sri. Jaykrishna argued that there had been no exclusive transfer and that what has been granted is only a licence, and the same is evident from the agreements executed between them and those who used the same subject to the conditions therein. It is also argued that this position of law is clearly stated by the Madras High Court in the judgment reported in *AGS Entertainment Pvt. Ltd. v. Union of India* [(2013) 65 VST 88]. He also argued that on the basis of the various sections in the Copyright Act, he could not have sold the same exclusively, and in the absence of an exclusive sale, no sales tax could have been levied. It is also his argument that the transaction is covered by the provisions of the Central Service Tax Act and going by the decision in *Imagic Creative Pvt. Ltd.* (supra) that held that VAT and service tax are mutually exclusive, the levy of sales tax by the State Government is clearly barred.

10. After hearing the learned counsel on either side, we are of the view that the State is entitled to succeed in these revisions for the reasons to follow:- The principles of law as regards the requirements of a transaction to qualify as a deemed sale in cases of transfer of the right to use goods were listed out in the judgment in *Quick Heal Technologies* (supra), after referring to previous judgments of the Supreme Court, and the same is extracted hereunder:-

"54. From the judicial decisions, the settled essential requirement of a transaction for the transfer of the right to use the goods are:

54.1. It is not the transfer of the property in goods, but it is the right to use the property in goods.

54.2. Article 366(29-A)(d) read with the latter part of clause (29-A) which uses the words, "and such transfer, delivery or supply"... would indicate that the tax is not on the delivery of the goods used, but on the transfer of the right to use regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use.

54.3. In the transaction for the transfer of the right to use goods, delivery of the goods is not a condition precedent, but the delivery of goods may be one of the

elements of the transaction.

54.4. The effective or general control does not mean always physical control and, even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods.

54.5. The approvals, concessions, licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods.

54.6. During the period of contract exclusive right to use goods along with permits, licences, etc. vests in the lessee."

11. A reading of the above judgment clearly shows that the issue is not whether there is a transfer of property in goods but if there is a transfer of the right to use the property in goods. The first Appellate Authority and the Tribunal essentially held that there is no exclusive transfer of the goods and that the decision of the Division Bench in Malabar Gold regarding the trademark would come to the rescue of the assessee. As noted above, the judgment in Malabar Gold (supra) has not become final as it is challenged before the Supreme Court. That apart, it cannot be held that it is a requirement of law that there should be a transfer of the entire right to the exclusion of the transferor for there to be a transfer of the right to use. The transfer of the right to use goods is distinct and separate from the transfer of goods. The Tribunal has clearly erred in considering the question as to whether there is a transfer of the property in goods. It has clearly misdirected itself in not finding out whether there has been a transfer of the right to use goods, and if it is answered in the affirmative, surely the activity is exigible to sales tax. The Appellate Authority, as well as the Tribunal, was carried away by the judgment of the Division Bench in Malabar Gold (supra), the principle laid down in which has to be held to be doubtful after the judgment in Quick Heal Technologies (supra). The Tribunal rightly found that the goods were involved in the transaction in question but still found that they were not exigible to value added tax. It will be profitable to extract the relevant portion of the judgment in Associated Cement Companies Ltd. v. Commissioner of Customs [(2001) 4 SCC 593], which was relied on by the Supreme Court in Tata Consultancy Services (supra) as well.

"42. Associated Cement Companies Ltd. v. Commr. of Customs, was heavily relied on by this Court. It was held: (TCS case, SCC pp. 329-30, paras 27-29).

"27. In our view, the term "goods" as used in Article 366(12) of the Constitution and as defined under the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies. A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies

are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes."

12. In the light of the above, it has to be held that in a contract for the transfer of the right to use the goods, the taxable event is the execution of the contract for delivery of the goods, and if that has taken place, it was immaterial whether the transfer was exclusively or to the exclusion of all others. In the instant case, the transferee obtained a legal right to use the goods for the period during which he had such legal rights, which had to be to the exclusion of the transferor. We hold that the Tribunal has clearly gone wrong in law while dismissing the appeals preferred by the State. The order of the Tribunal impugned before us is set aside.

13. Regarding 2005-2006, OTR 23/2019, we note that there is a plea of limitation raised by the assessee. Accordingly, we remit OTR 23/2019 back to the assessing officer to consider the question afresh and pass a speaking order dealing with the contentions of the assessee.

The questions of law are answered in favour of the State and against the assessee. All the other O.T. Revisions are allowed by setting aside the order of the Tribunal impugned before us. The order of the assessing authority, except for the year 2005-2006, (challenged in OTR 23/2019), will stand restored.

The O.T. Revisions are disposed of as above.