

(2009) 10 KL CK 0017

In the High Court Of Kerala

Case No : S. T. Rev. No's. 445, 448, 449, 450 and 453 of 2006, 1 and 40 of 2007

State of Kerala

APPELLANT

Vs

Oxford Mouldings (P) Ltd. and Others

RESPONDENT

Date of Decision : 27-10-2009

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 5(2)

Citation : (2011) 44 VST 181

Hon'ble Judges : V.K.Mohan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Mohammed Raffiq, Government Pleader, for the Appellant; Santhosh P. Abraham, Smt. S.K. Devi, M. Raj Mohan, Santhosh P. Abraham, Frankur D. Jayan and Shanmugham D. Jayan, for the Respondent

Final Decision : Allowed

Judgement

C. N. Ramachandran Nair, J.—Connected revisions are filed by the Revenue against the common orders of the Tribunal holding that the respondent is not liable to pay sales tax u/s 5(2) of the Kerala General Sales Tax Act on the resale of plastic moulded chairs under the brand name "Regal" which the respondent got manufactured by an SSI unit in Kerala.

2. We have heard the learned Government Pleader appearing for the petitioner and Sri Santhosh P. Abraham, the counsel appearing for the respondent.

3. The case has a history because after introduction of section 5(2) of the KGST Act providing for sales tax on commodities sold under "brand name" at the point of sale by brand name holder, the respondent-assessee filed O. P. No. 1144 of 2002 stating that the brand name used by them is not registered. They therefore sought declaration from this court that section 5(2) cannot be made applicable for sales under brand names which are not registered under the Trade and Merchandise Marks Act, 1958. However, a Division Bench of this court in the decision in Bechu & Company v. Assistant Commissioner (Assessment) 2003 132

STC 68 held that a product can be taxed at the point of sale by brand name holder irrespective of whether such brand name is registered or not. The respondent-assessee got the plastic moulded chairs manufactured by a small-scale industrial unit in Kerala by name "Family Plastics and Thermowares Limited", purchased the same, fixed rubber bushes to the chairs, affixed their brand name "Regal" and thereafter sold in the said brand name. Even though originally second sale exemption was granted, when inspection was conducted in the business premises of the assessee, it was found that the plastic moulded chairs purchased were sold after affixing rubber bushes and brand name, and, so much so, the same attracts tax u/s 5(2) of the KGST Act. Even though the first appeals were dismissed, the Tribunal, on second appeal allowed the assessee's contention by holding that the manufacturer which is the SSI unit in Kerala was also the holder of the brand name used by the respondent. However, during the course of hearing, the Government Pleader produced copy of the O. P. filed by the assessee earlier in this court and the original records. On facts, we find that irrespective of whether the brand name "Regal" was there in the moulding or not, it is clear that the respondent-assessee was affixing sticker containing brand name "Regal" and sold the chairs only after fixing rubber bushes also. In fact, it is seen from the assessment order that the respondent itself has accounted purchase of rubber bushes and stickers bearing brand name "Regal" from a concern in Bombay. Even though the Tribunal was misled to believe that the manufacturer in Kerala also had right to use brand name, "Regal", there is no evidence and the respondent-assessee had no case before lower authorities that the manufacturer was producing and selling chairs in the market with the same brand name "Regal" which is the case put up by the assessee for the first time before the Tribunal. Further, the respondent published pamphlets with details of the range of products with same brand name numbering serially which would show that the brand name holder is the respondent and nowhere the name of manufacturer in Kerala is seen mentioned. It is common practice that brand name holders arrange with manufacturers for production of goods for them which may be with or without brand name shown in the product. The brand name holder then makes bulk purchases and sell the goods after affixing brand name if it is not already printed or engraved on the product. However, in such cases, the purchase from manufacturer by brand name holder is not under a brand name. The purpose of section 5(2) is to levy tax at market value or real price which is obtained only at the point of sale by brand name holder. This court has in the decision in *State of Kerala v. Maaks Cream Holdings (P) Ltd.* 2009 26 VST 443; *State of Kerala Vs. Maaks Cream Holdings (P) Ltd.*, held that holder of the brand name need not be its owner. Therefore, the respondent's contention raised by its counsel that the respondent is not a brand name holder and some other person is the brand name holder also need not be considered by us. The agreement produced before the Tribunal by the respondent and relied on by the Tribunal does not exonerate the respondent from liability because facts found during inspection prove that the manufacturer in Kerala was not the brand name holder of "Regal" and in fact they have no right to produce and market "Regal" brand

plastic chairs in the market. There is nothing to indicate in the agreement that the manufacturer in Kerala was entitled to produce and market plastic chairs in the brand name "Regal" which was the brand name exclusively used by the respondent, and that is the reason why they got stickers printed with brand name affixed on the chairs before marketing the same. In fact, not only brand name was affixed but rubber bushes were also fixed to the chairs after purchase by the respondent. Obviously, the respondent wanted to maintain a distinct quality for the product sold under their brand name and that is why improvements were made like fixing of rubber bushes to the chairs before sale by them. We are therefore of the view that after being unsuccessful in challenge against statutory provisions, the respondent distorted the facts and misled the Tribunal to get favourable orders. We there fore, allow the S. T. Revisions filed by the State by reversing the order of the Tribunal and by restoring the assessment confirmed in first appeal.