

(2011) 06 KL CK 0031

In the High Court Of Kerala

Case No : ST. Rev. No. 55 of 2010 and W.P. (C) No. 8969 of 2011

State of Kerala

APPELLANT

Vs

S.D. Pharmacy
 S.D. Pharmacy Vs Fast Track Adalath
Team and Another

RESPONDENT

Date of Decision : 27-06-2011

Acts Referred:

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

Citation : (2013) 58 VST 504

Hon'ble Judges : C.N. Ramachandran Nair, J;B.P. Ray, J

Bench : Division Bench

Advocate : Mohammed Rafiq, Government Pleader, for the Appellant; Anil D. Nair, J.R. Prem Navaz and Smt. Nivedita and A. Kamath, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The question raised in the sales tax revision case filed by the State and in the writ petition filed by the assessee is one and the same, i.e., whether the assessee is liable to pay tax as brand name holder on the sale of products made under brand name/trade mark/logo u/s 5(2) of the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the Act", for short). We have heard learned counsel appearing for the assessee and learned Government Pleader for the State.

2. The assessee with 70 years of track record is a big name in ayurvedic medicines and products which are marketed within the State and in other parts of the country under the name and style S.D. Pharmacy. The assessee is a partnership concern engaged only in wholesale marketing of the products, which are manufactured by two sister concerns, namely, M/s. SD Pharmacy Pvt. Ltd. and M/s. Oriental Extractions Pvt. Ltd. There is no dispute that these private limited companies are under the control of same persons, who constitute the assessee, which is a partnership firm. The ayurvedic products marketed by the assessee-firm are manufactured by these two private limited companies with the

name and logo of the assessee conspicuously printed on every product in the following style S.D. Pharmacy.

3. The entire products manufactured by the sister concerns above stated are first sold to the assessee-firm, which in turn sells the products to their franchisees at wholesale price. The assessee's case is that since they have purchased the items from the sister concerns, sales made by them are second sales which are exempt from tax as the products are taxable at the point of first sale in the State. However, the case of the Department is that real sale is the sale made by the assessee-firm under the brand name to the franchisees, which is the deemed first sale by virtue of section 5(2) of the Act.

4. For deciding the case, the scope and application of section 5(2) of the Act have to be considered and therefore, we extract hereunder the said section for easy reference:

5. (2) Notwithstanding anything contained in this Act, in respect of manufactured goods other than tea, which are sold under a trade mark or brand name, the sale by the brand name holder or the trade mark holder within the State shall be the first sale for the purposes of this Act.

5. Even though constitutional validity of the above section was challenged in this court, this court in the decision in *Bechu and Company Vs. Asst. Commissioner (Assessment)*, not only rejected the same but also held that even registration of trade mark, logo or brand name under the Trade and Merchandise Marks Act is not compulsory for application of section 5(2) of the Act.

6. When the assessment was taken up for the year 2003-04, the assessing officer rejected the second sale exemption claimed by the assessee and made assessment treating the assessee's sales in brand name as the first sales u/s 5(2) of the Act. Even though the first appeal was dismissed, the Tribunal on second appeal held that since the amendment by the Kerala Finance Act, 2004 adding the term "brand name" under clause (viaa) to section 2 of the Act came into force only in the next year (i.e. 2004-05), assessment for the year 2003-04 is not tenable. It is against this order of the Tribunal, the State has filed this revision case contending that assessment for 2003-04 is sustainable under sub-section (2) of section 5 of the Act as originally introduced in 1998 and the amendment made by the Finance Act, 2004 is only clarificatory. Their further contention is that "trade mark" is an independent word covered by the original section and therefore, sale under trade name justifies assessment for the year 2003-04. Even though the assessee did not file a revision against the Tribunal's order, wherein the Tribunal held that the assessee's sales will be covered by section 5(2) of the Act for the year 2004-05 onwards, the assessee has challenged directly the assessment for that year by filing the writ petition for a declaration that no assessment u/s 5(2) of the Act is permissible even for the subsequent years. Even though the assessee has not produced the Tribunal's order or challenged the same in the WP(C), during hearing learned counsel

sought our permission to challenge the findings rendered by the Tribunal with reference to the year 2004-05 while disposing of the appeal for the assessment year 2003-04, which is the subject-matter of the tax revision case filed by the State. For easy reference, we extract hereunder the term "brand name" introduced to section 2 of the Act under clause (viaa) by the amendment made by the Finance Act, 2004 with effect from April 1, 2004.

(viaa) "Brand name" means a name or trade mark whether registered or not registered under the Trade Marks Act, 1999 (Central Act 47 of 1999) and includes a name or mark such as symbol, monogram, label, signature or intended words or any writing which is used in relation to a product for the purpose of indicating or so as to indicate, a connection in the course of trade between the product and a dealer using such name or mark with or without any indication of the said dealer.

7. The learned Government Pleader referred to the recent judgment rendered by us in S.T. Rev. No. 67 of 2011 (Elite Foods (P.) Ltd. Vs. State of Kerala,), wherein we have held that the purpose of section 5(2) itself is to derecognize sales among group concerns for the purpose of levy of tax, and to levy tax on sales made to the market, which invariably is wholesale to distributors, franchisees, etc., which are treated as deemed first sales u/s 5(2) of the Act. Applying the ratio of this judgment, learned Government Pleader contended that sales between the manufacturing private limited companies and the assessee, which is a partnership firm controlling the manufacturing companies, should be ignored and the assessee's sales which are wholesales exclusively to franchisees in the State should be treated as the first sales. Since the assessee is the exclusive owner of the brand name and trade mark and logo, which are conspicuously inscribed on every product pack in red-ink with decoration as shown above, the assessee's sales are rightly assessed by the assessing officer as first sales u/s 5(2) of the Act is the contention of the State.

8. The learned counsel appearing for the assessee submitted that ayurvedic products are prepared by applying a standard formula and products are sold in generic names like Dasamoolarishtam, Chyavanaprasam, Pippalyarishtam, etc. The contention raised by the learned Government Pleader is that though the products are general products prepared in accordance with the ayurveda system of medicines what is important is the identification of the product with the brand name holder, which vouches for its quality by marketing it in that name.

9. We are completely in agreement with the contention of the learned Government Pleader that the very same products are sold by all the ayurvedic product manufacturers in the trade names developed by them, For example Chyavanaprasam is manufactured and marketed by all the ayurvedic product manufacturers like the assessee, Kottakkal Arya Vaidyasala, Vaidyaretnam and by public limited companies like Dabour India Limited. The customers go by the reputation of the manufacturers and the only way for them to identify the products with the manufacturers is the trade name and logo. It is only to help

consumers to identify the products with the manufacturers trade mark and logo are inscribed on every product pack. Therefore the use of generic name does not stand in conflict with the use of brand name. For example, consumer who wants Chyavanaprasam made by Dabour India Limited will ask for Dabour Chyavanaprasam and consumer who wants Chyavanaprasam made by the assessee, will ask for SD Pharmacy Chyavanaprasam. The assessee also has no case that trade mark or brand name has no relevance because ayurvedic products are marketed by the assessee through its exclusive franchisees in the State and every product label affixed on the packets or bottles is printed with the trade name SD Pharmacy with the design and get up as shown above. The purpose is only to relate the products with the assessee, which has declared in the trade name itself that it has 70 years of rich experience in the field of manufacturing and marketing of ayurvedic products.

10. In our view, the scope and meaning of brand name or trade mark, use of either of which attracts liability on sale of products u/s 5(2) of the Act, have to be considered keeping in mind the purpose of introduction of the section to the statute. It is common knowledge that when sales are made between the related concerns within the same group beneficiaries are one and the same, and so much so, the price shown has no significance for the beneficiaries except to serve their own purposes. Obviously, the products which are made in the brand name by the manufacturing companies, which are sister concerns of the assessee-firm, are not sold by those manufacturing companies to the market. On the other hand, the manufacturing companies under the control of the partners of the assessee-firm manufacture and sell the entire products to the assessee-firm, which introduces the products in the market by selling the same to franchisees for retail sales. Therefore, real wholesale at market price is made by the assessee-firm, which is intended to be assessed as deemed first sales only to levy tax on real first sale turnover. Even though the assessee's counsel contended that only a normal trade margin of 20 per cent is charged by the assessee after purchasing from the sister concerns, we do not think we should look into it because in the decision above referred in S.T. Rev. No. 67 of 2011 (Elite Foods (P.) Ltd. Vs. State of Kerala,) we have held that deemed first sale, i.e., the sale assessable u/s 5(2) of the Act does not take any inter-group sale between or among related persons, who control the seller and the buyer, and on the other hand, it is the sale to the market at real price. There is no dispute that the two manufacturing companies named above which manufacture and supply the products to the assessee-firm are private limited companies exclusively under the control of the partners constituting the assessee-firm.

11. The learned Government Pleader also relied on a Division Bench judgment of this court presided over by the then honourable Chief Justice H.L. Dattu, in T.R.C. No. 414 of 2002 dated October 22, 2007 (A. Baiju, Shaju Bakery v. State of Kerala) wherein the use of brand name "SB" for sale of bread was held to be a brand name attracting liability u/s 5(2) of the Act.

12. Going by our above findings, we hold that the sales made by the assessee-firm is deemed to be the first sales assessable u/s 5(2) of the Act. We are also not able to uphold the order of the Tribunal that with the amendment of the definition clause introducing section 2(viaa) by the Finance Act, 2004, the assessee is liable for tax u/s 5(2) of the Act only from 2004-05 onwards. What we notice from the definition clause is that it only expanded the meaning of "brand name", which in our view is only clarificatory. Use of trade mark is sufficient to attract liability u/s 5(2) of the Act; and on going through the definition of brand name what we notice is that the Legislature has in fact clarified/expanded the meaning of trade mark as well. In our view, even without any definition clause, the normal meaning of brand name or trade mark is to be understood with reference to the trade practice of the manufacturers. The Legislature probably wanted to avoid litigations for which a detailed definition was introduced to the term brand name contained in section 5(2) of the Act, which in our view does not give any additional meaning to charging section 5(2) as it originally stood. We therefore hold that the amendment to section 2 introducing "brand name" under clause (viaa) is only explanatory or clarificatory to the term "brand name" contained in section 5(2) which was there in the statute from 1998 onwards. We, therefore, allow the revision case by reversing the orders of the Tribunal and by restoring the assessment order. Consequently, the WP(C) filed by the petitioner-assessee will stand dismissed.

13. Even though the assessee's counsel contended that the assessee is entitled to rebate of tax under rule 32(13B) of the KGST Rules, learned Government Pleader referred to the findings of the assessing officer that the manufacturers have not collected any tax on the sales made to the assessee and so much so, the assessee is not entitled to rebate under rule 32(13B). This of course is a matter for verification. However, if manufacturers were claiming exemption as SSI units and were not collecting tax, there is no scope for rebate under rule 32(13B) of the KGST Rules. The sales tax revision case is allowed and the WP(C) is dismissed as above.