KAIL LTD. (FORMERLY KITCHEN APPLIANCES INDIA LTD.) A

v.

STATE OF KERALA
REPRESENTED THRGH. JT. COMMR. (LAW)

(Civil Appeal Nos. 4283-4284 of 2013) B

OCTOBER 26, 2016

[SHIVA KIRTI SINGH AND R. K. AGRAWAL, JJ.]

Kerala General Sales Tax Act, 1963 – s.5(2) – Levy of tax on sale of goods – Sale of home appliances by appellant company under brand name 'S' – Appellant company purchased products from company 'V', holding company which brings the goods to the State on stock transfer and sell entire goods to its subsidiary, appellant company – Claim of second sale exemption by appellant – Case of the appellant-Company that it is not the holder of the brand name 'S' – Assessing authority held that appellant company is the brand name holder of 'S' and thus, turnover of items sold under 'S' brand name to be treated as first sale u/s. 5(2) – Tribunal held in favour of the appellant company, whereas High Court upheld the order passed by the Assessing Authority – On appeal, held: Under s. 5(2) if the conditions are satisfied that sale of the manufactured goods is under a trade mark or brand name and is within the State, the sale by the brand name holder or the trade mark holder shall be the first sale for the purposes of the KGST Act – Objective of s. 5(2) is to assess the sale of branded goods by the brand name holder to the market and the inter se *sale between the brand name holders is not intended to be covered by s. 5(2) – When the goods are sold under the brand name, necessarily, it has to assume that the marketing company is the holder of the brand name or has the right to market the products in the brand name because, it is the first company introducing the products in the market – On facts, marketing is actually done by fully owned subsidiary and/or a group company of the holding company, which was allowed to use the brand name 'S' – Thus, tax invoking s. 5(2) rightly levied on the appellant-Company for the relevant period since it is proved beyond reasonable doubt that the appellant-Company is the brand name holder of "S" – Order passed by the High Court upheld.* C D E F G H

A Dismissing the appeals, the Court

HELD: 1.1 It is clear from the language of s. 5(2) of the Kerala General Sales Tax Act, 1963 that in order to attract sub-Section (2) of Section 5, the following conditions are to be satisfied: (i) Sale of manufactured goods other than tea; (ii) Sale B of the said goods is under a trade mark or brand name; and (iii) The sale is by the brand name holder or the trade mark holder within the State. If all the said conditions are satisfied, the sale by the brand name holder or the trade mark holder shall be the first sale for the purposes of the KGST Act. Applying the conditions to be satisfied to attract section 5(2), to the facts of the instant C case, it is an admitted fact that the goods sold by the appellant-Company are manufactured goods other than tea. The first condition is satisfied. The next condition to be satisfied is that the sale of goods is under a trade mark or brand name. It is an undisputed fact that the manufactured goods sold by the appellant-D Company were home appliances under the brand name "S". Thus, the second condition is also satisfied. The last condition to be satisfied in order to attract section 5(2) of the KGST Act is that the sale is by the brand name holder or trade mark holder within the State and whether the appellant-Company is a holder of the brand name "S". [Paras 9, 10] [871-F-G; 872-A-C]

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1.2 When a product is marketed under a brand name, the Assessing Authority is entitled to assume that the sale is by the holder of the brand name or by a person, who is entitled to use the brand name in India. Apart from this, in the instant case, the marketing is actually done by fully owned subsidiary and/or a F group company of the holding company, which was allowed to use the brand name "S". Brand name has no relevance when the products are manufactured and sold in bulk by the holding company to its subsidiary company for marketing. However, the brand name assumes significance when goods are marketed with G publicity in the market. Moreover, when the goods are sold under the brand name, necessarily, it has to assume that the marketing company is the holder of the brand name or has the right to market the products in the brand name because, it is the first company introducing the products in the market. The objective of Sec 5(2) of KGST Act is to assess the sale of branded goods by the brand

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name holder to the market and the inter se sale between the brand name holders is not intended to be covered by Sec. 5(2) of the KGST Act. However, if the sale between the holding company and the subsidiary company, both having the right to use the same brand name, is at realistic price and the marketing company namely, the appellant-Company charged only usual margins in the trade, then there is no scope for ignoring the first sale, particularly, when the first seller was also the holder of the brand name and was free to market the products in the brand name. However, the evidence on record shows that the margin charged by the appellant-Company while making the further sale of product is unusually high. So the inter se sale between the groups of companies under the control of the same family was only to reduce tax liability and was rightly ignored by the assessing officer by levying tax under Section 5(2) of the KGST Act. [Paras 13, 14, 15] [875-A-F]

1.3 The tax invoking Section 5(2) of the KGST Act was rightly levied on the appellant-Company for the relevant period as it is proved beyond reasonable doubt that the appellant-Company is the brand name holder of "S". The decisions rendered by the High Court in revision petition and review petition are upheld. [Para 16] [875-G]

Cryptm Confectioneries (P) Ltd. v. State of Kerala **(2015) 13 SCC 492 – referred to.**

Case Law Reference

(2015) 13 SCC 492	**referred to**	**Para 13**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 4283-4284 of 2013.

From the Judgment and Order dated 25.05.2010 in Sales Tax Revision No. 36 of 2007 and 16.08.2011 in R. P. No. 337 of 2011 in S. T. Rev. No. 36 of 2007 of the High Court of Kerala at Ernakulam.

C. A. Sundaram, Sr. Adv., Manu Nair, Tanuj Bhushan, S. S. Shroff, Ishan Gaur, Zafar Inayat, Ms. Rohini Musa, Abhishek Gupta, Advs. for the Appellant.

K. Radhakrishnan, Sr. Adv., Jogy Scaria, Mrs. Beena Victor, Reegans B., Advs. for the Respondent.

A The Judgment of the Court was delivered by

R.K. AGRAWAL, J. 1. Challenge in the above said appeals is to the legality of the impugned judgments and orders dated 25.05.2010 and 16.08.2011 in ST REV No. 36 of 2007 and RP No. 337 of 2011 respectively rendered by a Division Bench of the High Court of Kerala B at Ernakulam.

2. Factual position in a nutshell is as follows:-

a) The above said appeals relate to the assessment under the Kerala General Sales Tax Act, 1963 (in short 'the KGST Act') for the year 1999-2000. KAIL Ltd.-the appellant-Company is a dealer in home C appliances at Ernakulam having registered office at Bangalore.

b) The issue is with regard to the tax under Section 5(2) of the KGST Act on sales turnover of home appliances for Rs. 27,27,20,230/- on the ground that the appellant-Company had sold the home appliances under the brand name "Sansui". To put it more clear, the Assessing D Authority- the respondent-State, while scrutinizing the second sale exemption as claimed by the appellant-Company, found that it is the brand name holder of "Sansui" and hence the turnover of the items sold under "Sansui" brand name will be treated as first sale under Section 5(2) of the KGST Act.

E c) The appellant-Company was served with a show cause notice dated 15.02.2004 by the Office of the Assistant Commissioner (Assmt.), Ernakulam against which a reply was filed on 15.03.2004 denying the averments of the notice stating that the appellant-Company is not the holder of the brand name "Sansui" indicating that the said brand name is owned by M/s Sansui Electric Co. Ltd. Japan. The Assessing Authority, F vide order dated 22.03.2004, dismissed the claim of the appellant-Company with regard to the brand name holder. Aggrieved by the order dated 22.03.2004, the appellant-Company went in appeal before the Deputy Commissioner (Appeals), Ernakulam along with an application for stay. The Deputy Commissioner (Appeals), vide order dated 30.09.2004, G dismissed the appeal filed by the appellant-Company being Sales Tax Appeal No. 530 of 2004.

d) Aggrieved by the order dated 30.09.2004, the appellant-Company approached the Kerala Sales Tax Appellate Tribunal (in short 'the Tribunal') by filing T.A. No. 736 of 2004 which was decided in favour of H the appellant-Company vide order dated 12.04.2006.

e) The respondent-State, aggrieved by the abovesaid order, preferred a revision petition being ST REV No. 36 of 2007 before the Kerala High Court. A Division Bench of the High Court, vide order dated 25.05.2010, allowed the revision filed by the respondent-State holding that the appellant-Company is the brand name holder of "Sansui". Feeling aggrieved, the appellant-Company filed a Review Petition being No. 337 of 2011 before the High Court which was dismissed vide order dated 16.08.2011. A B

f) Aggrieved by the judgments and order dated 25.05.2010 and 16.08.2011, the appellant-Company has preferred these appeals by way of special leave before this Court. C

3. We have heard learned counsel for the parties and perused the records.

4. Learned senior counsel for the appellant-Company contended before this Court that the appellant-Company purchased the entire goods from Videocon International Ltd., Kochi Branch, after paying tax under the KGST Act. The appellant-Company is only the second seller of the goods and the Assessing Authority ought to have noted that the appellant-Company is eligible for rebate of tax under Rule 32(13B) of the Kerala General Sales Tax Rules, 1963 (in short 'the Rules'). There is no material on record for the respondent-State to contend that the appellant-Company has any brand name rights to treat them as the seller of the goods under the brand name "Sansui" in India. In other words, the short contention of learned senior counsel for the appellant-Company is that Videocon International Ltd. itself, which brought the manufactured goods to Kerala, was the brand name holder and their sale was the first sale as well as the sale falling under Section 5(2) and so much so the second sale exemption was rightly claimed by the appellant-Company. D E F

5. *Per contra*, learned senior counsel for the respondent-State submitted that the appellant-Company could not produce any valid evidence to substantiate the contention that M/s Videocon International Ltd. is the brand name holder during the relevant year. The assessing authority has rightly established by giving legitimate reasoning that the appellant-Company is the brand name holder of "Sansui" goods. Also from the facts and materials on record and from the observations of the assessing authority, it could be easily gauged that during the relevant year, the appellant-Company has marketed the products under the brand name "Sansui". G H

A 6. The appellant-Company is a registered dealer under the KGST Act in Kerala, engaged in marketing products like television, washing machine etc. manufactured under the brand name "Sansui". The entire products are purchased by the appellant-Company from Videocon International Ltd. In fact, Videocon International Ltd., the holding company, brings the goods to Kerala on stock transfer and the entire B goods were sold to its subsidiary, the appellant-Company, for marketing in Kerala. Even though Videocon International Ltd. returned the entire sales as first sales on which they have collected tax from the subsidiary company, the appellant-Company was assessed for sales tax by the Assessing Officer while scrutinizing the second sale exemption as C claimed by the appellant-Company and found that the goods in respect of which second sale exemption was claimed by the appellant-Company were goods sold under brand name "Sansui" and so much so, tax under Section 5(2) is payable by the appellant-Company. The appellant-Company opposed the same by stating that the brand name "Sansui" is D owned by Sansui Electric Ltd., Japan and is not at all related to the appellant-Company. During the course of proceedings, the Assessing Officer found that the correspondence sent to the Department was in the letter head with the trademark, logo and brand name of "Sansui". Since the products were sold under the brand name "Sansui", assessment was made under Section 5(2) of the KGST Act after disallowing second E sale exemption as claimed by the appellant-Company.

7. For deciding the controversy in issue, it would be appropriate to reproduce Section 5(2) of the KGST Act (as it stood at the relevant time) which reads as under:-

F **Levy of tax on sale of goods.-**

"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 purpose of the Act."

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However, what is opposed by the appellant-Company is that it is not the "holder" of the brand name in respect of the "Sansui" products sold by it.

8. Whether the appellant-Company is the holder of the brand name H in respect of the "Sansui" products sold by it or not, it would be appropriate

to quote certain paragraphs of the revision petition decided by the High Court which are as under:- A

> "Government Pleader produced before us the files, which show the respondent's correspondence even with the Department with letter head printed in the name of Sansui with their logo and trademark. He has further produced cuttings from Financial Express published on 25.1.2000 wherein, the newspaper has reported that Kitchen Appliances Ltd., a wholly owned subsidiary of Videocon International Ltd. has acquired manufacturing facility from Philips India Ltd., Calcutta. During the previous postings, we requested the company to produce annual report, memorandum of articles etc. only to verify whether the case of the State that respondent is a subsidiary of Videocon International Ltd. is correct or not. However, no document is produced to demolish the State's claim that respondent is a subsidiary of Videocon International Ltd. Going by the evidence on record, we have to only hold that the respondent is only a subsidiary of Videocon International Ltd., which marketed the entire products through the respondent in Kerala. Further, from the terms of the agreement between the respondent's holding company and Sansui Electric Ltd., Japan, extracted in Tribunal's order, we notice that Videocon International Ltd. and their subsidiary companies are allowed to use the trademark and brand name of Sansui in India. So much so, Videocon International Ltd., which made the first sales to the appellant, is also the holder of the brand name "Sansui" in India."
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> **(emphasis supplied by us)**

B C D E

9. As is clear from the language itself that in order to attract sub-Section (2) of Section 5, the following conditions are to be satisfied F

(i) Sale of manufactured goods other than tea;

(ii) Sale of the said goods is under a trade mark or brand name; and

(iii) The sale is by the brand name holder or the trade mark holder within the State. G

If all the aforesaid conditions are satisfied, the sale by the brand name holder or the trade mark holder shall be the first sale for the purposes of the KGST Act. H

10. Applying the aforementioned conditions to the facts of the present case, it is an admitted fact that the goods sold by the appellant-Company are manufactured goods other than tea. The first condition is satisfied. The next condition to be satisfied is that the sale of goods is under a trade mark or brand name. It is an undisputed fact that the manufactured goods sold by the appellant-Company were home appliances under the brand name "Sansui". Thus the second condition is also satisfied. Now the last condition to be satisfied in order to attract section 5(2) of the KGST Act is that the sale is by the brand name holder or trade mark holder within the State and whether the appellant-Company is a holder of the brand name "SANSUI".

11. On 25.01.2000, a newspaper report was published in the Financial Express stating that Kitchen Appliances Ltd. now KAIL is a wholly owned subsidiary of Videocon International Ltd. and has acquired manufacturing facility from Phillips India Ltd., Calcutta. The position got more clear from the affidavit filed in the High Court by Shri Venugopal Dhoot, a family member of the Dhoot family, who holds a controlling interest in the appellant-Company as well as in M/s Videocon International Ltd., wherein he honestly admitted that Dhoot family, directly or indirectly, is having shareholding control in the appellant-Company and Dhoot brothers are also the promoters of Videocon International Ltd. The relevant paragraphs of the said affidavit are as under:-

> "I, Venugopal S/o. Late Shri Nandlal Dhoot, Age 60 years, Occ. Industrialist, R/o. 221, Fort House, 2nd Floor, Dr. D.N. Road, Fort, Mumbai, do hereby state on solemn affirmation as follows:
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> 1. That I am filing this affidavit as per directions of this Hon'ble Court as per order dated 24/06/2011. I have been director in the respondent company since 30/12/1998 till this date...
>
> 2. This Hon'ble Court has directed any of the director member of Dhoot family to file an affidavit explaining relationship between Videocon International Ltd. and Kitchen Appliances (India) Ltd. and about control of Dhoot family over these two companies. Accordingly, I am clarifying the position. I say and submit that Kitchen Appliances (India) Ltd. now name changed to KAIL Ltd., is a public limited company and **Dhoot family, directly or indirectly, through various group companies are having shareholding control in respondent company** as per the facts and various filings with the Regulatory Authorities. **However,**

the powers of the management are vested with the Board of Directors "Director Board") of the company and I am one of the directors of the said respondent company..... A

3. I respectfully say and submit that **at that time**, as per the facts and various filings, **Videocon International Ltd. was having 15.31% shareholding in the respondent company and various other companies of Videocon Group were holding remaining equity share capital of the respondent company. We, Dhoot Brothers are promoters of respondent company. It is closely held company.** B

5. I further say that **Dhoot Brothers are also promoters of Videocon International Ltd.** and based on the facts and the filings made by the company, from time to time, with the Stock Exchanges, the promoters together with various Videocon Group Companies were holding 35.11% of equity shares in Videocon International Ltd. as on 31/3/0000. Copy of shareholding pattern of Videocon International Ltd as on 31/3/2000 is produced herewith and marked as Annexure R-1 (G). C D

6. I respectfully further say and submit that at no point of time the respondent company was a subsidiary of Videocon International Limited. The same is evident from various filings made by Videocon International Limited and the respondent company. **Videocon International Limited and, KAIL Limited were/are part of Videocon Group.** E

Affiliated Group

"The principal operating companies in the Wider Videocon Group outside the Videocon Group, including: Videocon Appliances Limited, Videocon Communication Limited, Applicomp India Limited, Kitchen Appliances India Limited, Millennium Appliances (India) Limited and their consolidated subsidiaries." F

In this context, other related/relevant definitions are:-

Dhoot Family

Mr. V.N. Dhoot, Mr. P.N. Dhoot, Mr. R.N. Dhoot and their blood and marital relations and companies or other entities outside the Wider Videocon Group owned and/or controlled directly or indirectly by all or any such persons. G

Wider Videocon Group

The affiliated Group and Videocon Group H

A **Videocon Group**
Videocon Industries Limited, and where the context permits, its subsidiaries...."

12. Similarly, paragraph 6 of the same affidavit shows that Videocon International Ltd and KAIL Ltd are part of Videocon group. It also shows that during 1999-2000, the appellant-Company had manufactured 2057 colour television sets and 961 black and white television sets in SANSUI brand at Calcutta factory. Furthermore, at page Nos. 109-110 of the website publication produced by learned senior counsel for the appellant-Company in the High Court shows that as on 30.06.2006, 100% shares of Kitchen Appliances India Ltd. were held by Dhoot family. The given evidences are sufficient enough to show that the appellant-Company is a subsidiary and/or a group company of M/s Videocon International Ltd and hence, is also allowed to use the brand name SANSUI. Further, evidence on record shows that even the letter head used by the appellant-Company for correspondence is printed with the name of SANSUI with their logo and trademark.

13. In ***Cryptm Confectioneries (P) Ltd.*** vs. ***State of Kerala*** (2015) 13 SCC 492, this Court while dealing with exactly similar incidence of tax held as under:-

"**9.** In order to attract Section 5(2) of the Act, the following conditions are to be satisfied:

(i) Sale of manufactured goods other than tea;

(ii) Sale of the said goods is under a trade mark/brand name; and

(iii) The sale is by the brand name holder or the trade mark holder within the State.

If the above three conditions are satisfied, the sale by the brand name holder or the trade mark holder shall be the first sale for the purpose of the Act.

10. The aforesaid sub-section commences with a non obstante clause i.e. irrespective of Section 5(1) of the Act or any other provision under the Act. The said sub-section speaks of a sale made by a brand name holder or the trade mark holder within the State. The legislature deems that such a sale by the brand name holder or the trade mark holder shall be the first sale within the State. In our opinion this is the only possible construction that can be given to sub-section (2) of Section 5 of the Act."

Further, we are of the view that when a product is marketed under a brand name, the Assessing Authority is entitled to assume that the sale is by the holder of the brand name or by a person, who is entitled to use the brand name in India. Apart from this, in this case, the marketing is actually done by fully owned subsidiary and/or a group company of the holding company, which was allowed to use the brand name "Sansui". A B

14. Brand name has no relevance when the products are manufactured and sold in bulk by the holding company to its subsidiary company for marketing. However, the brand name assumes significance when goods are marketed with publicity in the market. Moreover, when the goods are sold under the brand name, necessarily, it has to assume that the marketing company is the holder of the brand name or has the right to market the products in the brand name because, it is the first company introducing the products in the market. The objective of Sec 5(2) of KGST Act is to assess the sale of branded goods by the brand name holder to the market and the *inter se* sale between the brand name holders is not intended to be covered by Sec. 5(2) of the KGST Act. C D

15. However, if the sale between the holding company and the subsidiary company, both having the right to use the same brand name, is at realistic price and the marketing company namely, the appellant-Company charged only usual margins in the trade, then there is no scope for ignoring the first sale, particularly, when the first seller was also the holder of the brand name and was free to market the products in the brand name. However, the evidence on record shows that the margin charged by the appellant-Company while making the further sale of product is unusually high. So the *inter se* sale between the groups of companies under the control of the same family was only to reduce tax liability and was rightly ignored by the assessing officer by levying tax under Section 5(2) of the KGST Act. E F

16. In view of the foregoing discussion, we are of the opinion that the tax invoking Section 5(2) of the KGST Act was rightly levied on the appellant-Company for the relevant period as it is proved beyond reasonable doubt that the appellant-Company is the brand name holder of "Sansui". We uphold the decisions rendered by the High Court in revision petition and review petition and no interference is warranted into it. G

17. Above being the position, the appeals are dismissed with no order as to cost.

Nidhi Jain Appeals dismissed. H