WHIRLPOOL OF INDIA LTD., BANGALORE (KARNATAKA) A

v.

THE DEPUTY COMMISSIONER OF COMMERCIAL TAXES
(INTELLIGENCE 3) SOUTH ZONE, BANGALORE (KARNATAKA)

NOVEMBER 22, 2006 B

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Sales Tax:

Appellant-dealer, a registered user of trade mark "Whirlpool", was getting certain goods manufactured by another dealer under the said trade mark—Sale by other dealer to Appellant was exempted from tax in view of Government Notification—Sale transaction between appellant and the other dealer—Held, fails under the Third proviso to s.5(3)(a) and not under Sixth Proviso read with Explanation III to s.5(3)(a) —Appellant not entitled to any credit in respect of sales tax that would have been paid by the other dealer for goods sold by it to Appellant—Sale by the other dealer does not give any benefit of reduction in tax to Appellant—Karnataka Sales Tax Act, 1957—Section 5(3)(a)— 'Third and Sixth proviso; Explanation III' & Section 19C. C D E

Appellant, a registered dealer under the Karnataka Sales Tax Act, 1957, is a licensee and registered user of the trade mark "Whirlpool" in terms of an agreement executed between it and M/s. Whirlpool Corporation, USA, the proprietor and owner of the said trade mark. Appellant was getting certain goods manufactured by another dealer, namely, M/s. Applicomp, on Original Equipment Manufacture basis under the said trade mark. F

In view of a notification issued by the State Government under Section 19C of the Act, no tax was payable under the said Act by M/s Applicomp on sale of furnished goods manufactured by it and consequently sales by M/s Applicomp to appellant were exempted from payment of any tax under the Act. G

In appeal to this Court it is contended by the appellant, that the transaction between M/s. Applicomp and the Appellant falls under the Sixth Proviso read with Explanation III to Section 5(3)(a) of the Act, by virtue of which credit has to be given to the Appellant in respect of sales tax that would

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A **have been paid by M/s 'Applicomp' for the branded goods sold by it to the Appellant.**

Rejecting the contention of the Appellant and thereafter dismissing the appeal, the Court

B **HELD: 1.1. It is the Third Proviso and not the Sixth Proviso which applies in this case because the goods are manufactured by the dealer (Applicomp) using the branded name of another dealer (appellant). These goods are not used as raw materials, components or packing materials. Hence the sale by Applicomp to the appellant cannot be deemed to be the sale by the first dealer liable to tax under this Section, but it is the subsequent sale of such** C **goods by the dealer having the right either as proprietor or otherwise (appellant) which has to be deemed to be the first sale liable to tax under this Section. The incidence of tax on the first sale would therefore be on the appellant and not on Applicomp. [310-D, E, G]**

D **1.2. Moreover, a reading of the agreement between the appellant and Applicomp makes it clear that Applicomp is neither a registered user nor a licensee of the trade mark. Thus it is not selling the goods as either a trade mark holder or as one having any rights as the proprietor of the trade mark or otherwise. The sales made by M/s. Applicomp to the appellant, are not sales to the exclusive marketing agent or distributor or wholeseller or any other** E **dealer but are only sales of manufactured branded goods to the brand owner. Hence the Sixth Proviso and Explanation III to Section 5(3)(a) is clearly not applicable. Any sale by Applicomp to the appellant does not give the benefit of any reduction in tax to the appellant. [310-H; 311-A]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5150 of 2006.

F

From the Judgment and Order dated 20-1-2004 of the High Court of Karnataka at Bangalore in S.T.A. No. 70/2003.

Harish N. Salve, Y. Raja Gopala Rao, Y. Ramesh and Vismai Rao for the appellant.

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Sanjay R. Hedge, Anil Kumar Mishra, Vikrant Yadav and Sashidhar for the Respondent.

The Judgment of the Court was delivered by

H **MARKANDEY KATJU, J.** Leave granted.

This appeal has been file against the judgment of a Division Bench of the Karnataka High Court dated 20.1.2004 in STA No. 70 of 2003, by which the appeal was dismissed.

Heard learned counsel for the parties and perused the record.

The appellant is a registered dealer under the Karnataka Sales Tax Act, 1957 ("KST Act" for short). The appellant is the Licensee and registered user of the trade mark "Whirlpool" in terms of the Trade Mark & Trade Name Licence Agreement dated 24.2.1995 executed between M/s. Whirlpool Corporation, USA, which is stated to be the proprietor and owner of the said trade mark and the Appellant. The licence granted to the appellant to use the trade mark is non-transferable.

On 4.2.2003, the appellant entered into an agreement with M/s. Applicomp India Limited (for short "Applicomp" or the "Manufacturer") under which Applicomp agreed to manufacture and supply electronic products and electrical appliances such as Refrigerators, Washing Machines, Air Conditioner, etc., to the appellant on Original Equipment Manufacture basis, as per the specifications of the appellant. Relevant portions of clauses 4, 5 and 6 of the agreement are extracted below :

> "....The manufacturer is exempted from payment of Sales Tax for the goods manufactured at its factory at Hosur Road, Attibele..
>
> 4. The buyer hereby warrants that the Buyer is the owner of all rights in the trade mark "Whirlpool" and has the exclusive right to use the said trade mark in India. Buyer hereby authorizes the manufacturer to use and affix the said trade mark to the products which are sold to the buyer in accordance with the specifications of the Buyer.
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> 5. Manufacturer acknowledges that this agreement does not include any license of buyer's trade marks. Manufacturer shall not affix trade mark to any products manufactured and/or sold to any third party other than that to the party of the second part in respect of the manufactured products.
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> 6. Buyer has the right to inspect samples of the products to verify that the use of the trade mark conforms to buyer's specifications and also inspect/audit the quality of the products manufactured...."

Applicomp is neither a registered user nor a licensee in respect of the

A trade mark "Whirlpool". The agreement just enables Applicomp to affix the trade mark of the appellant to the products which are manufactured by it to the specifications of the appellant, and which are exclusively to be supplied to the appellant, and not to any other product of Applicomp.

The State Government, by notification dated 20.7.2000 issued in exercise
B of power under Section 19C of the KST Act, exempted the tax payable under the said Act by Applicomp on the sale of furnished goods manufactured by it, for a period of 10 years from the commencement of commercial production subject to the restrictions and conditions stated in the said notification. Hence the sales by Applicomp to appellant are exempt from payment of any
C tax under the KST Act.

Section 5(3)(a) of the KST Act provides that tax shall be levied under the Act "in the case of sale of any of the goods mentioned in column (2) of the Second Schedule, by the first or the earliest of successive dealers in the State who is liable to tax under that Section, a tax at the rate specified in the
D corresponding entry of column (3) of the said Schedule, on the taxable turn over of sales of such dealer in each year relating to such goods." Refrigerators fall under Entry (6) of Part-R of the Second Schedule, the rate of tax being 20% from 1.4.2002, and washing machines as Electrical Goods, falls under Entry-2(V) of Part-E of the Second Schedule, the rate of tax being 16% from 1.6.2003. The third proviso and the sixth proviso to Section 5(3) as also
E Explanation III thereto, which are relevant to this case are extracted below :

> *"Third Proviso to Section 5(3)(a)* Provided further that where any goods liable to tax under this Act are produced or manufactured by a dealer with the brand name or trade mark of any other dealer and
> F which are not used by the latter as raw materials, component parts or packing materials, as defined under the explanation to Section 5-A, the sale of such goods by the dealer who has produced or manufactured to the dealer who is the brand name or trade mark holder, shall not be deemed to be, but the subsequent sale of such goods by the dealer having the right either as proprietor or otherwise
> G to use the said name or the trade mark, either directly or through another, on his own account or on account of others shall be deemed to be the sale by the first dealer liable to tax under this Section.
>
> *Illustration* - 'A' has registered a trade mark for manufacture of certain goods. He gets the said goods manufactured by 'B' under the
> H said trade mark. The sale by 'B' to 'A' of the said goods is not the

first sale but the sale by 'A' or by any other person on his account is the first sale. A

Sixth Proviso to Section 5(3)(a) - Provided also that where goods are sold, under a brand name by the trade mark holder or the brand name holder or any other dealer having the right as proprietor or otherwise to use the said name or trade mark either directly or through another B on his own account or on account of others, exclusively to a marketing agent or distributor or wholeseller or any other dealer, subsequent sale of such goods by the latter shall also be liable to tax under this Section and the tax so payable shall be reduced by the amount of tax already paid on the sale of such goods by the former. C

Explanation III - For the purpose of the sixth proviso to clause (a), where goods are sold under a brand name by the trade mark holder or the brand name holder or any other dealer having the right as proprietor or otherwise to use the said name or trade mark either directly or through another on his own account or on account of D others, who is exempt from tax by any notification issued under Section 8-A or Section 19-C, the expression "tax already paid" means the tax payable under this Section on such sale if the sale had been effected by any other dealer."

It was submitted by Shri Harish Salve, learned senior counsel for the E appellant, that the transaction between the Applicomp and the appellant falls under the Sixth Proviso read with Explanation III to the Section 5(3)(a), whereas the learned counsel for the revenue submitted that the transaction is squarely covered by the Third Proviso. In view of this difference in the stands taken by the appellant and the respondent, the appellant filed an application for confirmation of its view before the Authority for Clarifications F and Advance Rulings under Section 4 of the Act by posing the following question :

"Whether the brand owner who is an exclusive purchaser of goods manufactured, using its brand name, by a manufacturer who is G exempted under Section 8A or 19C is entitled to claim set off on the deemed tax paid on the purchases made from such manufacturer and is required to pay tax under Section 5(3)(a), only on the value addition thereof."

The Authority by its order dated 27.10.2003 has given its clarification H

A holding that the transactions between Applicomp and the appellant are governed by the Third Proviso to Section 5(3)(a) and not by the Sixth Proviso and Explanation III to that Section.

Aggrieved, the appellant filed an appeal to the High Court, which was dismissed and hence this appeal.

B

In our opinion, there is no merit in this appeal and we agree with the view taken by the High Court.

Learned counsel for the appellant submitted that by virtue of the Sixth Proviso read with Explanation III under Section 5(3)(a) of the Act, credit has C to be given to the appellant in respect of sales tax that would have been paid by Applicomp in respect of the branded goods sold by it to the appellant. It is submitted that Applicomp as a matter of fact has not paid the sales tax as it is exempt from such payment.

In our opinion this argument is clearly untenable. In our opinion it is D the Third Proviso and not the Sixth Proviso which applies in this case because the goods are manufactured by the dealer (Applicomp) using the branded name of another dealer (appellant). These goods are not used as raw materials, components or packing materials. Hence the sale by Applicomp to the appellant cannot be deemed to be the sale by the first dealer liable to tax E under this Section, but it is the subsequent sale of such goods by the dealer having the right either as proprietor or otherwise (appellant) which has to be deemed to be the first sale liable to tax under this Section. This submission is further supported by the illustration to the Sixth Proviso which states :

> *"Illustration* - `A' has registered a trade mark for manufacture of F certain goods. He gets the said goods manufactured by `B' under the said trade mark. The sale by `B' to `A' of the said goods is not the first sale but the sale by `A' or by any other person on his account is the first sale."

Applying the above illustration to the facts of the present case, 'A' G would be the appellant and 'B' would be Applicomp. The incidence of tax on the first sale would be on the appellant and not on Applicomp.

Moreover, a reading of clauses 4 and 5 of the agreement dated 4.2.2003 between the appellant and Applicomp makes it clear that Applicomp is neither a registered user nor a licensee of the trade mark. Thus it is not selling the H

goods as either a trade mark holder or as one having any rights as the proprietor of the trade mark or otherwise. Hence the Sixth Proviso clearly does not apply and any sale by Applicomp to the appellant does not give the benefit of any reduction in tax to the appellant. A

In the present case, the appellant is the owner of the brand name 'Whirlpool' registered under the Trade and Merchandise Act, 1958. Under the agreement between the parties, the refrigerators and other consumer goods are got manufactured by M/s. Applicomp India Ltd. and as per the agreement M/s. Applicomp have to manufacture the products under the brand name 'Whirlpool' and sell them exclusively to the appellant. M/s. Applicomp is not the registered user of the brand name 'Whirlpool'. Moreover, the sales made by M/s. Applicomp to the appellant, are not sales to the exclusive marketing agent or distributor or wholeseller or any other dealer but are only sales of manufactured branded goods to the brand owner. Hence in our opinion the Sixth Proviso and Explanation III to Section 5(3)(a) is clearly not applicable. B C

Thus, there is no force in this appeal. The appeal is accordingly dismissed. There shall be no order as to costs. D

B.B.B. Appeal dismissed.