Rajasthan Tax Board, Ajmer

M/s Nifa Infocomp Service Pvt. Ltd., Jaipur .....**Appellant** **VERSUS** Commercial Taxes Officer, Anti-Evasion, Zone-I, Jaipur .....**Respondent**	**1. Appeal No. 555/2013/Jaipur** **2. Appeal No. 556/2013/Jaipur** **3. Appeal No. 557/2013/Jaipur** **4. Appeal No. 558/2013/Jaipur** **5. Appeal No. 559/2013/Jaipur**
Commercial Taxes Officer, Anti-Evasion, Zone-I, Jaipur .....**Appellant** **VERSUS** M/s Nifa Infocomp Service Pvt. Ltd., Jaipur .....**Respondent**	**6. Appeal No. 1090/2013/Jaipur** **7. Appeal No. 1091/2013/Jaipur** **8. Appeal No. 1092/2013/Jaipur** **9. Appeal No. 1093/2013/Jaipur** **10. Appeal No. 1094/2013/Jaipur**
Commercial Taxes Officer, Anti-Evasion, Zone-I, Jaipur .....**Appellant** **VERSUS** M/s Nifa Infocomp Service Pvt. Ltd., Jaipur .....**Respondent**	**11. Appeal No. 1209/2016/Jaipur** **12. Appeal No. 1210/2016/Jaipur** **13. Appeal No. 1211/2016/Jaipur** **14. Appeal No. 1212/2016/Jaipur** **15. Appeal No. 1213/2016/Jaipur**
D.B. **SHRI K.L. JAIN, MEMBER** **SHRI OMKAR SINGH ASHIYA, MEMBER**	
Present :	
Shri Vivek Singhal and Shri Alkseh Sharma, Advocates	for Assessee
Shri N.K. Baid, Dy. Govt. Advocate	for Revenue
	Dated : 27/11/2018

JUDGMENT

1. Appeal nos. 555 to 559/2013/Jaipur have been filed by the appellant dealer (hereinafter referred as the "assessee") and appeal nos. 1090 to 1094/2013/Jaipur have been filed by the Revenue against orders of the Appellate Authority-I, Commercial Taxes Department, Jaipur (hereinafter called the "appellate authority"), dated 08.01.2013, who has partially accepted the appeals wherein the levy of tax and interest on 'franchise fee' has been upheld; on the issue of taxability of

royalty amount received by the assessee, the matter has been remanded to examine the issue of levy of tax on royalty in light of various judgments and to pass a speaking order; and penalty u/s 61 has been set aside. In these impugned appellate orders, the assessment orders dated 18.04.2012 as passed by the Assistant Commissioner, Anti-Evasion, Zone-I, Jaipur (hereinafter called the "assessing officer" or the "AO") under Section 26, 55 and 61 of the Rajasthan Value Added Tax Act, 2003 (hereinafter called the "Act"), were under challenge. Appeal no. 1209 to 1213/2016 have been filed by the revenue against appellate order dated 06.01.2015, by which the levy of tax on the upfront royalty or the 'royalty fee' as described in the impugned order, has been set aside.

2. The appellate authority decided the issues as under:-

Appeal Nos. 555 to 559/2013

The appellate authority vide its order dated 08.01.2013 (in Appeal No. 122 to 126) has (i) upheld the levy of tax on 'franchise fee' collected by the assessee from its affiliate entities, (ii) remanded the matter to AO on the issue of levy of tax on royalty, and (iii) set aside the penalty u/s 61 of the Act. The assessee has preferred these appeals (no. 555 to 559/2013) challenging the appellate order on the issue of remanding the matter back to the AO to examine and levy the tax on royalty; and the revenue is in Appeal against these appellate orders against deletion of penalty u/s 61 and remand of the matter on the issue of levy of tax on royalty.

Appeal Nos. 1090 to 1094/2013

It is worth mentioning that in light of the directions given in the appellate order dated 08.01.2013 in appeal nos. 122 to 126, the AO has disposed off the remand cases on 16.12.2014, so the Appeal Nos. 1090 to 1094/2013 have though partly become infructuous, however, the revenue has agitated against the setting aside of the penalty u/s 61 of Act, so this issue is alive in these appeals, therefore, the same would have to be decided accordingly.

Appeal Nos. 1209 to 1213/2016

The appellate authority in Appeal No. 222 to 226 order dated 06.01.2015 has set aside the tax on royalty receipts, against which the revenue is in Appeal challenging these appellate orders.

3. Since all the appeals involve common issues, therefore, the same are decided by a common order. Copy of the order be placed on each relevant appeal file.

4. Brief facts leading to the present appeals are that the assessee is an institute engaged in the field of imparting training of Computer Accounts, Taxation, Finance etc. being run in the name and style of NIFA (National Institute of Finance and Accounts) through the agreements executed between it and its affiliates, and the entities so affiliated, by way of the license, are allowed to use the brand name/trade mark of the assessee company, i.e. 'NIFA'. The assessee agrees to provide courseware developed by it for the courses to be conducted at the designated NIFA Centres, study material for faculty, set of module tests and projects, final examination papers, marketing and advertising, training for marketing staff etc. In consideration of the assessee's agreement to grant the right to use the brand name/facilities as agreed upon between the two parties, a one-time non-refundable 'affiliate fee' is charged from the user entities for a period of one year and the agreement is renewable on year to year basis. Further, the affiliate entities are obliged to collect and deposit the whole fee on behalf of the assessee and out of which 80% of the total collection is paid back to the affiliates and 20% is retained by the assessee itself.

5. The affiliate entities, in turn, are required to provide suitable premises to run the NIFA Centers, furniture, fittings and fixture, one/two online practical rooms, devices and appliances, hardware equipments, library and other facilities for the purpose of computer hardware learning courses for the potential students etc.

6. During the assessment years 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11 the assessee received an 'affiliate fee' and royalty against use of its trademark/brand name. The assessing officer held these receipts as consideration for sale of 'intangible goods' and levied tax @ 4%/5% (rate as prevalent during the relevant period for Schedule-IV goods), levied interest and imposed penalty u/s 61 thereupon.

7. Aggrieved of the assessment orders, the appellant preferred appeals before the appellate authority who vide his order dated 08.01.2015 has confirmed the levy of tax and interest on the amount received as license fee and remanded the matter on the taxability of royalty. However, the penalty under section 61 was set aside. The remanded cases were decided by the AO on 16.12.2014 wherein the tax and interest were levied on the royalty receipts. Being aggrieved of these assessment orders in compliance of the appellate orders, the assessee preferred appeals and the same were accepted by the appellate authority by setting aside the tax and interest on royalty amount. It is against these appellate orders that the assessee as well as the Revenue are in appeal before the Tax Board under section 83 of the Act.

8. Learned counsel for the assessee submits that the assessee authorizes the affiliate entities or the franchise holders to use their branch name, but the said brand name is not transferred absolutely and at the same time this franchise is given to the multiple affiliates, therefore, this activity does not amount to 'sale' as defined under section 2(35) of the RVAT Act. He further submits that the activity is taxable under the Service Tax Law and service tax is paid @ 14% on the consideration for the services so rendered. He further submits that the issue at hand has squarely been covered and decided by the learned Division Bench of the Tax Board in the matter of 'M/s Career Point Infosystem Ltd. V/s CTO' in Appeal No. 182/2012/Kota, by order dated 10.07.2018. Apart from that he referred the following judgments:

i) Bharat Sanchar Nigam Ltd. and Ors. Vs. Union of India and Ors. [2006]145 STC 91 (SC) : (2006) 3 SCC 1;
ii) 20th Century Finance Corporation Limited v State of Maharashtra (2000) 6 SCC 12;
iii) Commissioner, VAT, Trade and Taxes Department Vs. International Travel House Ltd. [2009] 25 VST 653 (Delhi);
iv) Malabar Gold Private Ltd V. Commercial Tax Officer [2013] 63 VST 497 (Ker);
v) Mahyco Monsanto Biotech (India) Pvt. Ltd. and Ors. Vs. The Union of India and Ors. (2016) 95 VST 499 (Bom) and
vi) McDonalds India Pvt. Ltd. and Ors. Vs. Commissioner of Trade & Taxes, New Delhi and Ors. (2017) 102 VST 482 (Delhi)

In light of his submissions and the referred judgments, he requests to set aside the appellate orders and accept these appeals on the issues agitated therein.

9. Learned Deputy Government Advocate appearing for the respondent-Revenue supported orders of the AO and submits that the activity carried out by the assessee squarely falls under the definition of 'sale' as given under Section 2(35)(iv) of the Act. He also prays that the appellate authority has wrongly set aside the tax and interest levied on the royalty receipts, which too should have been upheld by him. It was also argued that the assessee has been willfully defaulted in payment of tax, therefore, levy of penalty was justified and the appellate authority has erred in setting aside the same. He, therefore, requests to confirm the order of the assessing officer and to set aside the appellate order to the extent the appeal was partly accepted therein.

10. We have gone through the submissions of both the parties and perused the relevant record.

11. The issue of taxability on upfront royalty and affiliate fee or license fee, has been decided by a Division Bench of the Tax Board in the case of **'M/s Career Point Infosystem Ltd. V/s CTO' in Appeal No. 182/2012/Kota, by order dated 10.07.2018**, wherein it is been held that the upfront royalty and the share in the fee collected from the students/coaching participants shall not be exigible to the State Tax (VAT). The relevant portion of the said judgment is reproduced hereunder:

> *"19. On plain reading of these agreements, it is clear beyond any ambiguity that the franchise holders have very limited right to use the brand name in a geographical area i.e. a municipal limit only wherein the affiliate entities are permitted to operate. The clause 6.1 which pertains to "Exclusive Property", emphatically states that all rights towards the trade mark exclusively belong and accrue to vest in the Company. Affiliates are not even authorised to sub-license or to further assign any right to third party or person. The clause 6.17 debars the affiliates towards any right or interest in Company's trade mark, copyright etc. So, the franchise agreement grants nothing more than mere permissive use which is non-exclusive in nature, of the defined intangible rights to the franchisees or the affiliate entities.*
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> *20. As evident from various clauses of the agreements finalized with the franchise holders, the use of the trademark is permissive one and at the same time, it is non-exclusive kind of right to be used by the affiliates, therefore, the transactions between the assessee and its affiliates do not conform to the test as laid down by the Hon'ble Supreme Court in BSNL's case [2006] 145 STC 91 (SC) and 20th Century Finance's case (2000) 6 SCC 12, to be termed as*

'transaction for the transfer of the right to use the goods' exigible to the State Tax. So, the decisions of the Hon'ble Bombay High Court in the matter of Subway Systems (India) Pvt. Ltd V State of Maharashtra & Ors. (2016) 95 VST 499 (Bom); Hon'ble Delhi High Court in the case of McDonalds India Pvt. Ltd. and Ors. (2017) 102 VST 482 (Delhi) and Hon'ble Kerala High Court in the case of Malabar Gold Private Ltd V. Commercial Tax Officer [2013] 63 VST 497 (Ker) squarely apply in the present case.

21. We are, therefore, of the considered view that the transactions between the assessee and its affiliates do not qualify to be termed as 'a transfer of the right to use goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration', therefore, no State Tax (VAT) can be levied on the consideration as received from the assessee's affiliate entities for use of its brand name."

12. In the present matter, the agreement between the assessee and its affiliates are almost on identical lines as those in the above referred case. For ready reference the important clauses of the agreements executed between the assessee and its affiliates are reproduced hereunder:-

"1.1 Grant of License

The Company hereby grants to the said Centre solely for the purposes stipulated herein and strictly subject to the terms and conditions herein the license and permission to use, the method, courseware, information and services provided hereunder, solely and exclusively for the purposes of fulfilling the said study centre's obligations in relation to the said NIFA Centre as prescribed by the Company herein and from time to time.

It is hereby expressly agreed and declared that the Centre owner's shall use the method, courseware, information and services and any and all the other information, particulars and the like provided by the company under this Agreement solely and exclusively for the purposes of the said NIFA Centre being established and operated pursuant to this Agreement and for no other purpose whatsoever and shall use the same subject to the terms and conditions herein contained, and in any further communication issued from time to time by the company to said Centre duly signed by the company's authorized person(s).

1.2 License Of Mark

The mark, trade mark, service mark, trading name, trading style, trade description, design, insignia and logo associated with the name NIFA and any additions, substitutes or derivatives thereof (hereinafter referred to collectively and/or severally as "the Mark") shall solely and exclusively belong to the company. The company grants to the Centre

a license to use the Mark along with its business or corporate name, in such manner as may be prescribed by the company, on its letterheads, name boards, banners, notice boards, promotional literature or advertisements clearly indicating that the said Centre is operating an independent business under license from the company. The company reserves the absolute and express right to control all uses of the Mark by the Affiliate for all purposes.

1.3 Location of NIFA Centre

The license and permissions granted to the said Centre under this Agreement shall relate and be restricted solely and exclusively to one NIFA located at ***Chittorgarh*** *hereinafter referred to as "the said NIFA Centre", for conducting the courses specified in Annexure-A hereto (hereinafter referred to as "the Courses") and for no other purpose whatsoever and in particular, the Centre shall not make or undertake any alteration, modification or variation in the said NIFA Centre and/or the courses.*

3.7 Intellectual Property Rights & Non-disclosure

(a) The Centre disclaims any right to or interest in the company's Mark and Copyrights relating to the methods, information, material and services made available by the company hereunder and the goodwill derived there from. The said Centre agrees that certain trade secrets and procedures may be available to it in confidence and agrees not to divulge or disclose any such trade secrets and procedures, during the validity thereof and thereafter.

(b) The Centre agrees and recognizes that all the technical and other information, courseware and student material made available by the company hereunder is confidential to the company and that the Centre shall use any such confidential information/material only of purposes of and as per terms and conditions of this agreement. The Centre agrees not to disclose or divulge during the validity hereof and thereafter, such confidential information to any third party, except as authorized hereunder.

3.8 Not to Sub-license or Assign

The Centre shall not, nor shall be deemed to be entitled to sub-license or to enter into any agreement/arrangement whatsoever with any other person or party, with a view to delegating or assigning the rights, benefits granted to and/or duties and obligations undertaken by the Centre under this Agreement."

13. As evident from various clauses of the agreements finalized with the affiliate entities, the use of the trademark is permissive one and at the same time, it is non-exclusive kind of right to be used

by the affiliates, therefore, the transactions between the assessee and its affiliates do not conform to the test as laid down by the Hon'ble Supreme Court in **BSNL's case [2006] 145 STC 91 (SC)** and **20th Century Finance's case (2000) 6 SCC 12**, to be termed as 'transaction for the transfer of the right to use the goods' exigible to the State Tax. So, the decisions of the Hon'ble Bombay High Court in the matter of **Subway Systems (India) Pvt. Ltd V State of Maharashtra & Ors. (2016) 95 VST 499 (Bom)**; Hon'ble Delhi High Court in the case of **McDonalds India Pvt. Ltd. and Ors. (2017) 102 VST 482 (Delhi);** Hon'ble Kerala High Court in the case of **Malabar Gold Private Ltd V. Commercial Tax Officer [2013] 63 VST 497 (Ker)** and the Rajasthan Tax Board Judgment in the case of **'M/s Career Point Infosystem Ltd. V/s CTO' in Appeal No. 182/2012/Kota (order dated 10.07.2018)** squarely apply in the present case.

14. We are, therefore, of the considered view that the transactions between the assessee and its affiliates do not qualify to be termed as **'a transfer of the right to use goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration'**, therefore, no State Tax (VAT) can be levied on the consideration as received from the assessee's affiliate entities in the form of 'license fee'/ 'affiliate fee' and 'royalty', for use of its brand name.

15. In light of the judgments as referred above, the Appeals of the assessee are accepted and those of the Revenue are rejected. Needless to say, the issue of penalty u/s 61 automatically goes as the levy itself has been set aside.

16. As discussed above, the appeal nos. 555 to 559/2013 as preferred by the assessee are allowed and the appeal nos. 1090 to 1094/2013 and 1209 to 1213/2016 as preferred by the Revenue are disallowed.

17. Order pronounced.

(Omkar Singh Ashiya)
Member

(K.L. JAIN)
Member