

AFRReserved on 15.09.2016Delivered on 09.12.2016Court No. - 34

1. **Case :-** WRIT TAX No. - 146 of 2013
Petitioner :- M/S G.D. Goenka (P) Ltd.
Respondent :- State of U.P. and others
Counsel for Petitioner :- S.K. Tyagi, Alok Kumar
Counsel for Respondent :- C.S.C.

2. **Case :-** WRIT TAX No. - 636 of 2015
Petitioner :- M/S G.D. Goenka (P) Ltd.
Respondent :- State of U.P. and others
Counsel for Petitioner :- S.K. Tyagi, Alok Kumar
Counsel for Respondent :- C.S.C.

Hon'ble Sudhir Agarwal,J.**Hon'ble Dr. Kaushal Jayendra Thaker,J.***(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)*

1. In both these writ petitions, same petitioner-M/s G.D. Goenka (P) Ltd. has challenged notices issued by Deputy Commissioner, Trade Tax Circle-II, Agra.

2. In Writ Petition No. 146 of 2013, it has challenged notices dated 21.12.2012 and 15.01.2013 issued under Section 28(3) of U.P. Value Added Tax Act, 2008 (*hereinafter referred to as the "VAT Act, 2008"*) in respect of Assessment Years 2010-11 and 2009-10 respectively. In Writ Petition No. 636 of 2015 it has challenged assessment order dated 26.06.2015 for Assessment Years 2012-13 and 2008-09 and consequential demand of tax of Rs. 14,17,575/- and Rs. 8,35,993/- respectively.

3. The common questions raised in both these writ petitions are as under:

- a) Whether **grant of Non-Exclusive License to Franchise** for use of brand name of petitioner under Franchisee Agreement **amounts to transaction for transfer of rights to use goods for the purpose of levying VAT** in terms of settled law laid down by

Supreme Court in **Bharat Sanchar Nigam Ltd. and another Vs. Union of India**, AIR 2006 SC 1383 and **State of A.P. Vs. Rashtriya Ispat Nigam Ltd.**, 126 STC 114 SC.

b) **Whether grant of non-exclusive licence to Franchise for use of brand name of petitioner under Franchisee Agreement comes under the provisions of Service Tax or is amenable to VAT/sales tax**, and if both than which part is under Service Tax Act and which part is under VAT Act, 2008.

c) Whether respondent no. 2 is justified in assessing VAT on such use of trade mark of petitioner without adjudicating legal issues raised by petitioner vide its various reply filed with respondent no. 2 alongwith judgment as the exercise of process of levying VAT on petitioner will be futile if this Court decided this question of law in favour of petitioner.

4. Before answering aforesaid questions, brief facts, relevant and necessary for adjudication of both these writ petitions, may be stated as under.

5. M/s G.D. Goenka (P) Ltd. (*hereinafter referred to as the "Assessee/Franchisor"*) is a Company registered under Companies Act, 1956 (*hereinafter referred to as the "Act, 1956"*) having its registered office at N-85, Cannaught Place, New Delhi. Petitioner entered into an agreement with M/s KPS Educational Trust, G-7, Puneet Vrindavan, Sanjay Place, Agra (*hereinafter referred to as the "Franchisee"*). Copy of agreement is on record as Annexure-3 to the Writ Petition No. 636 of 2015). It is dated 17.12.2009. Salient features of agreement are as under:

(A) Petitioner is termed as Franchisor in agreement and is engaged in business of imparting and promoting education and has earned and established reputation under Brand name titled as "G.D. Goenka Public School" with its logo, sign, symbol, moto, registered trademark, design and copyright.

(B) It is authorized to **grant non-exclusive license for use of said Brand name.**

(C) **Franchisee owns a big chunk of land** measuring 22300 sq. meter of land **at Magtai, Bodla-Bichpuri Road, Agra and intends to construct a modern fully equipped Senior Secondary School on said land.**

(D) Franchisee has approached Franchisor, i.e., petitioner, to use its brand name, i.e., “G.D. Goenka Public School” for running said school under the guidance of petitioner and remain at par with standards of Franchisor in technical, pre-opening, academic and operational matters for betterment and welfare of children by spreading standards of education under various terms and conditions mentioned in memorandum of understanding.

(E) The **Franchisor**, i.e., petitioner in its turn is **willing to appoint Franchisee and Franchisee is willing to accept such appointment for Agra on the terms and conditions contained in agreement.** (emphasis added)

6. Some relevant terms and conditions of agreement, for our purpose, are reproduced as under:

“3. DURATION

FRANCHISOR hereby grants to the FRANCHISEE the non exclusive license for use of the said Brand name for running the School and under the guidance of the FRANCHISOR and to remain at par with the standards of 'FRANCHISOR' in technical, pre-opening, academic and operational matters, for betterment and welfare of children by spreading the standards of education, under various terms and conditions mentioned in this MOU. The present MOU shall continue for such unless the same is terminated by either party.

4. RESPONSIBILITIES AND OBLIGATIONS OF THE FRANCHISEE

In addition to the terms and conditions stated under this MOU the FRANCHISEE shall be responsible and liable to the FRANCHISOR under the below mentioned responsibilities and obligations, which have been noted hereunder only for the sake of convenience and are not exhaustive:

4.1 FRANCHISEE agrees and undertakes that the FRANCHISEE shall develop the School under this MOU in consultation with FRANCHISOR.

4.2 FRANCHISEE shall make the School operational within 24 months from the date of this MOU, failing which the MOU will be terminated by the FRANCHISOR and not be binding on the parties. Unless due to some reasons beyond the control of the FRANCHISEE, which the FRANCHISEE had at the time of occurrence of the same intimated to the FRANCHISOR in writing, then the FRANCHISOR may in consultation with the FRANCHISEE extend the period by such time as the FRANCHISOR may deem fit and proper provided that such extended period shall not exceed 12 months. Clarified that the decision to extend any such period shall be the sole discretion of the FRANCHISOR. The FRANCHISEE hereby gives its accord and consent to the FRANCHISOR to forfeit the Franchise Fee paid earlier by the FRANCHISEE in case the FRANCHISEE is unable to make the School operational within 24 months from the date of this MOU or within such period as extended by the FRANCHISOR. Thus the FRANCHISOR may in its discretion and without any prior notice to the FRANCHISEE forfeit the Franchise Fee paid earlier by the FRANCHISEE in case in the opinion of the FRANCHISOR, the FRANCHISEE has been unable to make the School operational within 24 months from the date of this MOU or within such period as extended by the FRANCHISOR.

4.3 The **entire cost of the School includes** but not limited to cost, expenses, liabilities, relating to construction, operation, maintenance and all such other things, acts etc. for making the School operational **shall be borne by FRANCHISEE only.**

4.4 The **School shall be provided at the cost of the FRANCHISEE with all such facilities** which are appropriate and as per the minimum standards laid out for the School and as advised and approved by the FRANCHISOR.

4.5 The **School shall be furnished by and at the cost of the FRANCHISEE** with such furniture and furnishings including but not limited to School building, open space, play grounds, hostels, laboratory(s) and apparatus, library and books, auditorium, gym, swimming pool, activity rooms, sports equipments and goods, utensils, furnishings, computers and all such other equipment supplies and services necessary for the operation of the School **as may be advised and approved by FRANCHISOR** and thereafter shall be so maintained by FRANCHISEE as to remain new and contemporary as specified by FRANCHISOR. The renovation and repair at the School shall be carried out in accordance with schedules and the specifications approved by the FRANCHISOR, and the FRANCHISEE shall take prior written approval of FRANCHISOR before commencement/change of any such work.

4.6 The selection of all furniture and furnishings and other operating equipments and supplies to be ordered and installed in the School shall be as per schedules and specifications approved by the FRANCHISOR from time to time.

4.7 That the FRANCHISEE shall construct and develop the School property strictly in accordance with rules and building bye-laws

prevailing in the Area at the relevant time and shall adhere to all norms required for running of the School. The FRANCHISEE shall meet the minimum standards laid down for erection, development, and maintenance of the School property as advised and approved by the FRANCHISOR.

4.8 The FRANCHISEE shall apply for and obtain all necessary permissions, sanctions, permits, no objections, licenses etc. from the Centre/State/Semi Government or any other competent authorities, Municipal or otherwise as the case may be in connection with the setting up and running of the School. The FRANCHISEE shall be solely responsible for taking all actions as may be required and necessary to obtain and keep current any governmental licenses, permits, registrations and approvals in the area that are necessary for it to carry out or perform its obligations, services and activities hereunder.

4.9 It is agreed between the Parties that the FRANCHISOR shall at no time and in no way be responsible for the abovementioned permissions, sanctions, permits, no objections, licenses etc. and for any consequences arising out of delay or failure on the FRANCHISEE's part to obtain such permissions, sanctions, permits, no objections, licenses etc.

4.10 FRANCHISEE shall apply and obtain the necessary recognitions and affiliations from the concerned statutory authorities/bodies for the running of the School at its own cost and expenses and FRANCHISOR shall at no time and in no way be responsible for the same and for any consequence(s) arising out of delay or failure on the FRANCHISEE's part to obtain such permissions.

4.11 FRANCHISEE undertakes that apart from the initial capital provided by FRANCHISEE and to the extent that funds necessary for the School are not generated by its operation, they shall be supplied by FRANCHISEE to School upon presentation and review of budgets. It is expressly agreed that FRANCHISOR shall at no time bring in any funds and is not responsible or liable for any financial obligations or legal matters whatsoever concern the School, its operation, maintenance or any other matter relating to the same.

4.12 **FRANCHISEE undertakes that it shall annually at its sole expense as instructed by FRANCHISOR undertake such capital expenditure to make such alterations, repairs, renewals, additions or improvement etc. In the School property as intimated by FRANCHISOR, so as to keep the School property new and contemporary. The FRANCHISEE undertakes and agrees that all such alterations, repairs, renewals, additions or improvement etc. will be made with as little hindrance as possible to the operation of the School. If any extraordinary repairs to or replacement of any heavy equipment shall be required at any time to maintain the School property in good operational condition or by reason of any laws or regulations now or hereinafter enforced or by reason of any municipal order or otherwise or because FRANCHISOR recommends the desirability thereof, then in such an event all such repairs, changes and**

replacements shall be made by FRANCHISEE at its own cost and expenses and with as little hindrance to the operation of the School as possible.

4.13 It is agreed that FRANCHISEE shall honor and strictly enforce all programmes, procedures, systems, policies, decisions in respect to academic and administrative area, which FRANCHISOR in its discretion decides to make applicable for the running of the School and in regard to various other services rendered to the students and staff and personnel. It is agreed that in order to have the intended chain effect and common good, FRANCHISEE shall honor all programme which FRANCHISOR in its discretion decides and makes applicable to all schools with a view to gain the chain strength. All the programmes shall be controlled centrally by FRANCHISOR.

4.14 The FRANCHISEE has represented that it is properly registered, licensed and qualified, and has all requisite power and authority in accordance with the laws, rules and regulations as applicable, to carry out its obligations and to perform services specified under this MOU. FRANCHISEE warrants that the FRANCHISEE will perform services and activities in accordance with all laws, regulations, rules, decrees or policies in force.

4.15 Neither FRANCHISEE nor its Affiliates nor any person or firm connected with it, warrant that they have participated or will participate in any action that is in violation of any laws, regulations, rules, decrees or policies in force in the Area.

4.16 FRANCHISEE agrees on behalf of itself and its affiliates, that it will not while this MOU is in effect, (whether itself or together without any other person, firm or company in any capacity whatsoever save authorized hereunder) without the prior written consent of FRANCHISOR market and/or promote and/or arrange for marketing and/or promotion in the area of any similar business concept as the one licensed in this MOU.

4.17 The **FRANCHISEE is expressly prohibited to appoint any sub-franchise/sub-FRANCHISEE within his/her area** and FRANCHISOR reserves its right to terminate the MOU in case of any such appointment.

4.18 The FRANCHISEE undertakes that the FRANCHISEE shall intimate in writing to the FRANCHISOR at the time of introducing any new members to the existing members of the Governing Body or the Managing Committee formed under this MOU. The FRANCHISEE agrees that in case all the existing members of Governing Body or the Managing Committee are replaced by new members, then the continuation of this MOU shall be sole discretion of the FRANCHISOR.

5. USE OF BRAND NAME and INTELLECTUAL PROPERTY RIGHTS

5.1 Subject to the compliance of the terms and conditions herein contained FRANCHISOR agrees to allow FRANCHISEE to use the name of school as 'G.D. GOENKA PUBLIC SCHOOL', the Brand name 'G.D. GOENKA' and [including but not limited to] its

logo, sign, symbol, moto, registered trademark(s) design and copyright or such other marks which FRANCHISOR may in its sole discretion decide and develop for its schools, [hereinafter collectively referred to as the said 'Brand name'] to be used exclusively for 'School', situated at Magtai, Bodla – Bichpuri Road, Agra, owned by FRANCHISEE only during the term of this MOU and cannot be used anywhere else. **The said Brand name whether registered or not, shall for all times constitute the property of FRANCHISOR only.** It is clarified that the **FRANCHISEE is not authorized permitted, or granted any licenses to use “G.D. Goenka Public School” and/or “FRANCHISOR” Logo on any other stationery, internal/external correspondence like letter head, envelope, business cards or advertisements etc., or in any other form whatsoever which is not as per the terms and conditions stated in this MOU.**

5.2 The use by the School of such names, logos, signs, symbols, slogans, motto, design trademark etc., in the manner above stated shall at all times be subject to and in accordance with the provisions contained in this MOU and **FRANCHISOR shall at all times have the exclusive right to change, direct or withdraw the use of such, signs, symbols, motto, designs trademark etc., as it may in its sole discretion decide.**

5.3 FRANCHISEE shall always abide by all the instructions and recommendations given by the FRANCHISOR without any demur or objection, during the term of this MOU, regarding the use by the FRANCHISEE of the said Brand name.

5.4 **FRANCHISOR would, from time to time, make certain intellectual property rights available as limited license for specified use only.** This may cover the entire gamut of intellectual property rights, including but not limited to, its trademarks, copyrighted original works, patents, business models, designs, know-how, etc related to the said Brand name. This may be made available by the FRANCHISOR to the FRANCHISEE for the proper and intended use in furtherance of the present MOU being entered between the Parties. It is stipulated that the same would be used only as determined between the Parties, and in furtherance and fulfillment of the objectives of the MOU and in no other way.

5.5 Any violation of this provision shall make the FRANCHISEE liable to appropriate action against it, including termination of this MOU. FRANCHISOR has permitted the use of its Brand name 'G.D. GOENKA PUBLIC SCHOOL' and its logo, sign, symbol, motto or such other marks which FRANCHISOR may decide and develop for its schools, to FRANCHISEE only in regard to the running of the present school under this MOU, and in no other manner whatsoever.

5.6 The **FRANCHISOR may also allow the FRANCHISEE to display and use its said Brand name on the sign-boards to be placed at the School and/or on memos, invoices, documents, advertisements shall mandatorily state/carry 'under the aegis of G.D. Goenka School, Delhi' used and maintained by FRANCHISEE**

for the operation of the School. However it is clarified that the **intellectual property rights associated with the said Brand name are and shall always remain the sole property of FRANCHISOR.**

5.7 It is hereby agreed that unless specifically mentioned and executed between the Parties in a legal and binding document, all intellectual property rights, including but not limited to trademarks, copyrights, designs, patents, business models/methods used and developed in furtherance to the MOU, shall vest with the FRANCHISOR and **will be the exclusive property of FRANCHISOR** and the FRANCHISEE shall not claim any rights over the same.

5.8 The FRANCHISEE hereby assigns to the FRANCHISOR, **all rights in any intellectual property created as a result of the execution of this MOU.** The FRANCHISOR shall be assigned all rights in and to any property created by the FRANCHISEE as a result of this MOU in perpetuity throughout the universe, including, without limitation, all title and interest in the copyright therein and all renewals and extensions thereof; any and all trademarks, service marks, trade name, trade dress or related rights and the goodwill associated therewith; all audio rights; publishing rights; and all other ancillary, allied and subsidiary rights therein and thereto.

5.9 The FRANCHISEE agrees that **FRANCHISEE will be deemed to immediately exclusively and irrevocably assign FRANCHISOR with full title guarantee, by way of present and future assignment, all rights throughout the world in perpetuity including copyright, design rights in and to the Property, without the need for further documentation.** In furtherance to the same, FRANCHISEE certifies and assigns specifically the future works to be created as part of performance of this MOU. For the purpose of this Clause, property would include, without limitation, all material, data created by FRANCHISEE as part and result of any action taken by FRANCHISEE on behalf of the FRANCHISOR and/or in performance of the present MOU.

5.10 Any rights assigned to FRANCHISOR under the above Clauses shall not be deemed to have lapsed if FRANCHISOR fails to exercise the assignment of these rights within one year of the creation of Property, or otherwise.

5.11 Without limiting the generality of the foregoing, the FRANCHISEE specifically waives forfeits, relinquishes and abandons all claims of “moral rights”, attribution and/or integrity as to the data and other original creatives, created as a result of the present MOU between the Parties; and conveys the same to FRANCHISOR without reservation or limitation. The FRANCHISEE agrees to execute all paperwork as may be required for it to successfully waive, forfeits relinquish and abandons and its claims or rights under the provisions of this MOU.

5.12 Upon request, the FRANCHISEE agrees to assist the FRANCHISOR or its nominee (at its expense) during and at any time subsequent to the execution of this MOU in every reasonable way to

obtain for its own benefit copyrights for assignable and/or hired copyrights in any and all countries, which creative works shall be and remain the sole and exclusive property of the FRANCHISOR, or its nominee whether or not copyrighted. The FRANCHISEE agrees to execute such papers and perform such lawful acts as the FRANCHISOR, deems to be necessary to allow it to exercise all rights, title and interest in such copyrights.

5.13 That FRANCHISEE shall not voluntarily or involuntarily, by operation of law or otherwise, sell, assign, transfer, lease, sublet or otherwise dispose of, in whole or in part, the Brand name 'G.D. GOENKA PUBLIC SCHOOL' or any of the rights or privileges granted by FRANCHISOR, to any other entity. Any attempt to sell, assign, transfer, lease, sublet or otherwise dispose of all or any part of the Brand name or FRANCHISOR's rights therein shall be null and void and shall be grounds for termination of this MOU.

5.14 FRANCHISEE may only represent as the authorized FRANCHISEE of FRANCHISOR during the term of this MOU. FRANCHISEE shall not use or cause to use the said Brand name 'G.D. GOENKA' in any manner after the determination or earlier termination of this MOU.

5.15 FRANCHISEE is free to prepare its own website and also to undertake advertisements through electronic media and print media like CDs, Emails, television, newspaper, pamphlets, radio and any other advertisement material at its own cost subject to:

- i. The FRANCHISEE shall get all advertisements and material approved in writing from the FRANCHISOR before its issuance and circulation in the market and to public at large.
- ii. FRANCHISEE, under any circumstances, itself or through its agent/advertiser cannot release any statement, interview, press release etc. without prior written consent of FRANCHISOR and without getting the content of same approved from the FRANCHISOR.
- iii. FRANCHISEE shall not circulate any circular, study material, notice/information to its staff members, students, parents, any third party without first getting the same approved in writing from FRANCHISOR.
- iv. FRANCHISEE shall not use or print any brochure, advertising material and fact sheets, or other stationery, which does not confirm to the standards as made applicable by FRANCHISOR.
- v. FRANCHISEE shall send all advertising material, fact sheet etc. for prior written approval of FRANCHISOR before printing, distribution and usage of the same.
- vi. On all advertisements and promotional material etc. as approved by the FRANCHISOR it shall be mandatorily stated that “under the aegis to G.D. Goenka School, Delhi”.

16. FRANCHISEE FEE AND ROYALTY

16.1. That **FRANCHISEE** upon the execution of this MOU shall pay to **FRANCHISOR** a sum of Rs. 1,00,00,000.00 (Rupees One crore only) in the name of **FRANCHISOR**, as onetime non-refundable **FRANCHISEE** fee.

16.2. Any tax or statutory obligation in the nature of Service tax or similar tax, attached to this shall be borne by **FRANCHISEE** and shall be reimbursed to **FRANCHISOR**, in case the payment of such statutory taxes is to be charged and paid by **FRANCHISOR**.

16.3. The one time non-refundable Franchisee fee as per para 16.1 and 16.2 of this agreement has already been paid by **FRANCHISEE** to the **FRANCHISOR**.

16.4 That **FRANCHISEE** shall pay a Royalty of 12% (Twelve percent) to **FRANCHISOR** against use of the said Brand name on the collection of Revenue, from students of the School, every quarter by 10th of the month in which the fee is payable, by Bank Draft or Cheque payable in New Delhi or by way of transfer to the account of **FRANCHISOR**. Any tax or statutory obligation in the nature of Service tax or similar tax, attached to this shall be borne by **FRANCHISEE** and shall be reimbursed to **FRANCHISOR**, in case the payment of such statutory taxes is to be charged and paid by **FRANCHISOR**.

17. TERMINATION OF MOU

17.1. The **FRANCHISEE** shall have the right to use the name of **FRANCHISOR** only after the execution of the instant MOU and the compliance of all the obligations and terms and conditions contained herein including the payment of Interest free refundable security deposit amount, if any [in case directed by the **FRANCHISOR** and so deposited by the **FRANCHISEE**] and the completion of the infrastructure for running the school as mentioned in the MOU.

17.2. **FRANCHISOR** may in its discretion revoke the Franchise and rescind all rights and privileges associated therewith in the event of a material breach of the terms and conditions of the MOU by the **FRANCHISEE**. In which case the **FRANCHISOR** shall issue a notice of termination of the MOU to the **FRANCHISEE**. The MOU and all the rights and obligations stated under the same shall stand terminated immediately upon receipt of the said Termination Notice by the **FRANCHISEE** or within 3 days from the date of issuance of the said notice, whichever is earlier. Save and except in case the **FRANCHISOR** opts to provide a cure period to the **FRANCHISEE** for rectification of the default or material breach within a period of 30 days from the receipt of the termination Notice by the **FRANCHISEE**. Provided in such case if the **FRANCHISEE** is unable to cure or rectify the breach/default as stated in the termination notice within the notice period of 30 days to the satisfaction of the **FRANCHISOR** then the MOU shall stand terminated without any further notice at the expiry of the notice period of 30 days.

17.3. Further provided that giving of the said option of rectification of default or material breach, to the **FRANCHISEE** by the **FRANCHISOR** shall be sole discretion of the **FRANCHISOR** and not a

right of the FRANCHISEE. A material breach or cause for revocation, by way of example, would include but not be limited to the following conditions:

17.3.1 That FRANCHISEE fails to maintain and upgrade the School as per the technological and other developments at par with other FRANCHISOR Schools.

17.3.2 That there is evidence that FRANCHISEE has misled the FRANCHISOR on account of collection of revenue.

17.3.3 That the FRANCHISEE fails to make the School operational within the stipulated period as per the terms of the MOU.

17.3.4 That FRANCHISEE fails to adopt or implement the policies and procedures as directed by FRANCHISOR.

17.3.5 Any other reason suggesting deviation from the policies of FRANCHISOR or there is sufficient evidence damaging the image and Brand of FRANCHISOR.

17.3.6 That FRANCHISEE carries out any illegal activity as per the laws of the Government of India.

17.3.7 If FRANCHISEE shall dissolve, become bankrupt, insolvent, cease transaction of business, commit any act of bankruptcy reorganization, composition, or arrangement, then this MOU may be immediately terminated by the FRANCHISOR.

17.3.8 THAT the FRANCHISEE fails to submit details of the revenue for calculation of the Royalty amount and/or non-payment of Royalty amount to the FRANCHISOR as per the terms and conditions of this MOU.

17.4. Subject to issuance of 3 months prior written notice to the Franchisor, in case the FRANCHISEE wishes to terminate the present MOU during the term of the MOU for any reason or wishes to not run the school any more then the FRANCHISEE shall be liable to pay to the FRANCHISOR compensation of 1 year's revenue, as decided by the FRANCHISOR, for calculation of Royalty, of the students enrolled as one the date of withdrawal by the FRANCHISEE. Similarly, in the event of termination of this MOU due to any material breach including but not be limited to as stated under clause 17.3.1 to clause 17.3.8 or/and non-fulfillment of any terms and conditions stated under this MOU by the FRANCHISEE, shall make the FRANCHISEE liable to pay to the FRANCHISOR compensation of 1 year's revenue, as decided by the FRANCHISOR, for the calculation of Royalty, of the students enrolled as on the date of termination by the FRANCHISOR.

17.5. Under any such circumstances leading to termination of MOU by the FRANCHISOR or the FRANCHISOR, the FRANCHISEE shall be directly and solely responsible and liable for any legal, financial or other consequences arising out of such termination.

17.6. All rights of the FRANCHISEE as provided under this MOU including the limited non exclusive License granted to the

FRANCHISEE to use the Brand name shall cease immediately upon termination or earlier determination. The FRANCHISEE and all persons claiming under it shall immediately cease and desist from the use of the said Brand Name 'G.D. GOENKA PUBLIC SCHOOL' and trade name of FRANCHISOR and any other sign, mark, slogan, symbol or other distinguishing characteristic owned by or associated with FRANCHISOR or the Brand name G.D. GOENKA. Failing which the FRANCHISOR shall be at liberty to take any such action as available under law against the FRANCHISEE.

17.7. It is clarified that termination of the MOU by the FRANCHISOR shall not entitle the FRANCHISEE to any payment on account of any business loss, loss of anticipated profit or any other losses or claims in respect of such termination.

17.8. Termination or earlier determination of this MOU shall not relieve or release FRANCHISEE from making payments which FRANCHISEE may owe or owed to the FRANCHISOR or any other entity or authority under the terms of the MOU.

17.9. The FRANCHISEE shall at its own expense return to the FRANCHISOR forthwith upon termination or earlier determination of the MOU all information, whether confidential or not, documentation data, documentation data, materials etc. in its possession belonging to the FRANCHISOR together with any copies thereof or any other documents, data material entrusted to the FRANCHISEE by the FRANCHISOR or which may have come in the possession of the FRANCHISEE during the term of the MOU.

17.10. That FRANCHISEE shall forthwith upon receipt of the termination Notice or earlier determination and not later than 24 hours from the receipt of the same render accounts to the FRANCHISOR along with the up to date records. Provided up till 12 months after the termination of the MOU and upon the request of the FRANCHISOR the FRANCHISEE shall cooperate with the FRANCHISOR and hand over for inspection the relevant books of account of the FRANCHISEE in order to verify the calculation of the Royalty, whether paid or payable by the FRANCHISEE and the payment of compensation as stated under Clause 17.8.

FRANCHISOR shall be entitled to injunctive and equitable relief for any violation of the terms and conditions. FRANCHISEE shall pay all costs and expenses including reasonable advocate fee borne by the FRANCHISOR for enforcing any provision of the MOU including the provisions of this Clause. The provisions of this clause shall survive the termination of this MOU. And the provisions of this MOU shall, to the extent stated or necessarily implied, survive the termination thereof."

(emphasis added)

7. Clause 20 of agreement is for the purpose of notice and communication etc. The address of Assignor/petitioner, i.e., Franchisor and Franchisee are mentioned as under:

Franchisor: G.D. Goenka Pvt. Ltd., N-85, Connaught Place, New Delhi 110011

Franchisee: KPS Educational Trust, G-7, Puneet Vrindavan, Sanjay Place, Agra-282002 (UP)

8. All the three issues basically relate to the fact, “whether Franchisee agreement amounts to transaction of “transfer of the right to use goods” for the purpose of levy of Value Added Tax (*in short* 'VAT') or the factum that petitioner since paying service tax, whether will stand absolved from liability of tax under VAT Act, 2008”.

9. In our view this question was initially considered by a Constitution Bench in **20th Century Finance Corpn. Ltd. and another Vs. State of Maharashtra, 2000(6) SCC 12**. However, before referring to said judgment, we may refer to some relevant provisions of VAT Act, 2008.

10. The relevant terms for the purpose of present dispute are definitions of “business”, “dealer”, “goods”, “lease”, lessee”, “lessor”, “place of business” and “sale” as defined under Section 2(e), (h), (m), (q), (r), (s), (x) and (ac) of VAT Act, 2008. It read as under:

*“(e) "**business**" in relation to business of buying or selling goods includes-*

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern;

*(ii) the execution of any works contract **or the transfer of the right to use any goods for any purpose (whether or not for a specified period)**;*

(iii) any transaction of buying, selling or supplying plant, machinery, raw materials, processing materials, packing materials, empties, consumable stores, waste or byproducts, or any other goods of a similar nature or any unserviceable or obsolete or discarded machinery or any parts or accessories thereof or any waste or scrap or any of them or any other transaction whatsoever, which is ancillary to or is connected with or is incidental to, or results from such trade, commerce, manufacture, adventure or concern, works contract or lease,

but does not include any activity in the nature of mere service or profession which does not involve the purchase or sale of goods.”

“(h) **"dealer"** means any person **who carries on in Uttar Pradesh** (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration **and includes, -**

(i) a local authority, body corporate, company, any co-operative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business;

(ii) a factor, broker, arhati, commission agent, del credere agent, or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal, whether disclosed or not;

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not, and whether the offer of the intending purchaser is accepted by him or by the principal or nominee of the principal;

(iv) a Government which, whether in the course of business or otherwise, buys, sells, supplies or distributes goods, directly or otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration;

(v) any person who acts within the State as an agent of a dealer residing outside the State, and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as-

(A) a mercantile agent as defined in Sale of Goods Act, 1930 or

(B) an agent for handling of goods or documents of title relating to goods; or

(C) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or such payment;

(vi) a firm or a company or other body corporate, the principal office or head quarter whereof is situated outside the State, having a branch or office in the State, in respect of purchases or sales, supplies or distribution of goods through such branch or office;

(vii) any person who carries on the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(viii) any person who carries on the business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash or for deferred payment or other valuable consideration;

(ix) a railway container contractor, an air cargo operator, a courier service provider, who fails to disclose the name and complete address of consigner or consignee or if discloses such name or address of consigner or consignee is found bogus, forged or not verifiable; or the owner or person in-charge of a vehicle who obtained authorization for

transit of goods from the officer in charge of entry check post but failed to deliver the same to the officer incharge of the exit check post;

(x) an owner or person in-charge of a godown or warehouse who stores commercial goods, other than those of transporters except those referred to in sub-clause (ix);

Provided that a person who, not being a body corporate, sells agricultural or horticultural produce grown by himself or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant, lessee or otherwise, or who sells poultry or dairy products from fowls or animals kept by him shall not, in respect of such goods, be treated as a dealer."

"(m) **"goods"** means every kind of class of movable property and includes all materials, commodities and articles involved in the execution of a works contract, and growing crops, grass, trees and things attached to, or fastened to anything permanently attached to the earth which, under the contract of sale, are agreed to be severed, but does not include actionable claims, stocks, shares or securities."

"(q) **"lease"** means any agreement or arrangement whereby **the right to use any goods for any purpose is transferred by one person to another (whether or not for a specified period) for cash, deferred payment or other valuable consideration without the transfer of ownership** and includes a sub-lease but does not include any transfer on hire purchase or any system of payment by installments."

"(r) **"lessee"** means any person to whom the right to use goods for any purpose is transferred under a lease."

"(s) **"lessor"** means any person by whom the right to use any goods for any purpose is transferred under a lease."

"(x) **"place of business"** means any place where a dealer carries on business and includes-

(i) any shop, ware-house, godown or other place where a dealer stores his goods;

(ii) any place where a dealer produces or manufactures goods;

(iii) any place where a dealer keeps his books of accounts and documents;

(iv) any place where a dealer executes the works contract or **where the right to use goods is exercised**;

(v) in a case of a dealer who carries on business through an agent (by whatever name called), the place of business of such agent."

"(ac) **"sale"** with its grammatical variations and cognate expressions, means **any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge)** by one person to another, for cash or for deferred payment or **for any other valuable consideration and includes,-**

(i) a transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

- (ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (iii) the delivery of goods on hire purchase or any other system of payment by installments;
- (iv) **a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;**
- (v) the supply of goods by an association or body of persons (whether incorporated or not) to a member thereof for cash, deferred payment or other valuable consideration;
- (vi) the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration, and such delivery, transfer or supply of any goods under sub-clause (i) to sub-clause (vi) above shall be deemed to be sale of those goods by the person making the delivery, transfer or supply and a purchase of those goods by the person to whom such delivery, transfer or supply is made.” (emphasis added)

11. The definition of “sale on goods” was incorporated in VAT Act, 2008 in the light of definition of tax on sales or purchase of goods as contained under Article 366(29A) of Constitution and it would be appropriate to refer the same also hereunder:

(29-A) “tax on the sale or purchase of goods” includes--

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.”

12. Now we come to the judgment in **20th Century Finance Corpn. Ltd. (supra)**. Majority judgment has been rendered by Hon'ble V.N. Khare, J. on behalf of himself, Justice Bhargava and Justice Mohapatra. In aforesaid judgment the statute relates to State of U.P. which was considered by Court was U.P. Trade Tax Act, 1948 (*hereinafter referred to as the "Act, 1948"*) as it was amended by amendment of definition of "sale" or "purchase of goods" under Article 366 of the Constitution. in U.P. The dispute referred for resolution was, "where is the taxable event on the transfer of right to use any goods". Court also considered power of State Legislature to levy sale tax on "transfer of right to use any goods" envisaged under Clause (29-A)(d) of Article 366 of Constitution on the premise that goods put to use are located within their State. Several State legislations provided liability of tax on transaction of "transfer of right to use goods" on location of goods at the time of their use within their States, irrespective of place where agreement for such transfer of right to use such goods is made. Court thus formulated question as under:

"Whether a State can levy sales tax on transfer of right to use goods merely on the basis that the goods put to use are located within its State irrespective of the facts that - (a) the contract of transfer of right to use has been executed outside the State; (b) sale has taken place in the course of an inter-State trade; and (c) sales are in the course of export or import into the territory of India." (emphasis added)

13. Contention on behalf of assessee before Supreme Court was that State Legislature cannot so frame its law so as to convert an outside sale or a sale in the course of an inter-State trade or commerce, into a 'sale' inside the State. Interpreting Article 366 (29-A) (a) to (f) of Constitution, Court by majority held:

(a) Sub- clause (a) to (f) of clause (29A) of Article 366 are not actual sales within the meaning of sale but are **“deemed sales”** by legal fiction created therein.

(b) Where situs of sale has not been fixed or covered by any legal fiction created by appropriate legislature, location of sale would be the place where property in goods passes.

(c) Where a party has entered into formal contract and goods are available for delivery irrespective of place where they are located, the situs of such sale would be where the property in goods passes, namely, where the contract is entered into.

(d) Transfer of goods will be a deemed sale in the cases of sub-clauses (a) and (b), the delivery of goods will be a “deemed sale” in case of sub-clause (c), supply of goods and services respectively will be “deemed sales” in the cases of sub- clauses (e) and (f) and transfer of right to use any goods will be a “deemed sale” in the case of sub-clause (d). Clause (29A) cannot be read as implying that tax under sub-clause (d) is to be imposed not on transfer of right to use goods but on delivery of goods for use.

(e) On a plain construction of sub-clause (d) of Clause (29A), taxable event is transfer of right to use the goods regardless of when or where the goods are delivered for use.

(f) Article 266(29-A (d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee.

(g) Where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed

between the lessor and the lessee and **situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed**. Thus, where goods to be transferred are available and a written contract is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed.

(h) When goods are entrusted to a common carrier for delivery, it amounts to delivery to consignee. If it takes place outside the State, the fact that subsequently goods have reached the State where they are put to use, cannot be ground for determining tax liability on the ground that the goods are located in that State for use.

14. Conclusions of Constitution Bench's majority judgment, are in para 35, which reads as under:

“(35) As a result of the aforesaid discussion our conclusions are these:

*(a) The States in exercise of power under Entry 54 of List II read with Article 366 (29A) (d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, **if such sale takes place outside the State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export.***

*(b) The **appropriate legislature by creating legal fiction can fix situs of sale. In the absence of any such legal fiction the situs of sale in case of the transaction of transfer of right to use any goods** would be the place where the property in goods passes, i.e. **where the written agreement transferring the right to use is executed.***

*(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place **where the contract is executed** and not where the goods are located for use.*

*(d) In cases **where goods are not in existence** or where there is an oral or implied transfer of the right to use goods, **such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods.***

(e) The transaction of transfer of right to use goods cannot be termed as contract of bailment as it is deemed sale within the meaning of legal fiction engrafted in clause (29A) (d) of Article 366 of the Constitution wherein the location or delivery of goods to put to use is immaterial.”

(emphasis added)

15. Court then referred to Section 2(h)(iv), Explanation I, clause (ii) of U.P. Trade Tax Act, 1948, which reads as under:

“2.(h) 'Sale' with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration and includes --

(i) ... (ii) ... (iii)

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

Clause (ii) of Explanation I to Section 2(h):

*“(ii) in a case falling under sub-clause (iv), if the goods are used by the lessee within the State during any period, **notwithstanding that the agreement for the lease has been entered into outside the State or that the goods have been delivered to the lessee outside the State.**” (emphasis added)*

16. Court then held in para 45 of the judgment, as under:

“By virtue of clause (ii) of Explanation I to Section 2 (h), the ambit of sale has been widen by including outside sale as inside sale on mere location of goods for use within the State irrespective of the fact that the agreement for transfer of right to use has been executed outside the State or whether the sale is outside the State, the tax is chargeable within the State. And, further, on account of a special provision for rates of tax, the other provision such as single point tax as well as exemption etc. is not applicable to the transaction of transfer of right to use any goods. We find that clause (ii) of Explanation I of Section 2(h) is in excess of legislative power under Entry 54, List II of Seventh Schedule and, therefore, we direct that clause (ii) of Explanation I of Section 2(h) of the Act shall be read down to this effect that it would not be applicable to the transaction of transfer of right to use any goods if such deemed sale is (i) an outside sale, (ii) sale in course of the import of the goods into or export of the goods out of the territory of India and (iii) an inter-State sale.” (emphasis added)

17. After the judgment in **20th Century Finance Corpn. Ltd.** (*supra*) there is a change in statute and now VAT Act, 2008 has been promulgated repealing Act, 1948.

18. VAT is exigible on “sale or purchase of goods” as defined under Article 366 (29A) of Constitution read with Section 2(ac) of VAT Act, 2008. There are certain transactions which normally would not have come within the ambit of term “sale” or “purchase” but due to legal

fiction provided by legislature by amending Article 366(29A) of Constitution, such transactions have been included within the term “sale”. A “transfer of right to use any goods” for any purpose for valuable consideration is one of such legal fiction brought within the ambit of “sale”.

19. Learned counsel for petitioner relied on a three Judge judgment in **Bharat Sanchar Nigam Ltd. and another (supra)** wherein Court considered following questions:

“A) what are "goods" in telecommunication for the purposes of Article 366 (29A)(d)?

B) is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber?

C) is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the States to tax the sale element?

D) If the providing of a telephone connection involves sale is such sale an inter state one?

E) Would the "aspect theory" be applicable to the transaction enabling the States to levy sales tax on the same transaction in respect of which the Union Government levies service tax.”

20. Court answered aforesaid questions in the judgment delivered by Hon'ble Ruma Pal, J. and the above questions have been answered in para 92 of the judgment as under:

“91. For the reasons aforesaid, we answer the questions formulated by us earlier in the following manner:

A) Goods do not include electromagnetic waves or radio frequencies for the purpose of Article 366(29A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the Assessing Authorities.

B) There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

C) The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

D) The issue is left unanswered.

E) The aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service.”

21. What is evident from aforesaid verdict is that earlier concept of sale consisted of (i) an agreement to transfer title (ii) supported by consideration, and (iii) an actual transfer of title in the goods. Aforesaid concept did not include several cases of sale of goods wherein instead of goods, property in goods used to be transferred. It is this aspect which has been included and covered by amendment of Constitution by introducing Clause (29A) in Article 366 of the Constitution.

22. Now the “deemed sale” includes a “transfer of property in goods for valuable consideration”. Agreement, whether exist or not, is not a necessary component to bring a transaction within the term “sale” or “purchase” under Article 366 (29A) of Constitution. This has been explained by a Constitution Bench in **Sunrise Associates Vs. Government of NCT of Delhi and others, 2006(5) SCC 603**. Court has said that anything which is subject matter of ownership would come within the term “property”. When we talk in terms of “sale” it would mean transfer of ownership in goods but in the context of “deemed sale” under Article 366(29A) of Constitution, it will include “transfer of right to use ownership in goods”.

23. In the context of sale of lottery ticket, Constitution Bench in **Sunrise Associates (supra)** held that a lottery ticket, if sold, by itself does not involve sale of goods, like purchase of railway tickets which gives right to a person to travel by railway. It is nothing other than a contract of carriage. The actual ticket is merely evidence of the right to travel. A contract is not property, but only a promise supported by consideration, upon breach of which either a claim for specific performance or damages would lie. Same is the position in respect of a ticket to see cinema or a pawn brokers ticket or memoranda or

contracts between vendors of tickets and purchasers. Therefore, in order to hold a lottery ticket to be “goods” it can be only if there is a transfer of rights. Court said that on purchase of a lottery ticket, purchaser has a claim of conditional interest on prize money which is not in purchasers possession. A lottery having been held to be in essence a chance for a prize, sale of a lottery ticket can only be a sale of that chance. There is no other element. Every right can be subdivided into lesser rights. When these lesser rights culminate in a legally recognizable right, it is the latter which defines the right. The right to participate in the draw is a part of composite right of chance to win and it does not feature separately in the definition of the word "lottery". It is an implicit part of chance to win. There is no value in the mere right to participate in the draw and purchaser does not pay for the right to participate. The consideration is paid for the chance to win. There is therefore no distinction between the two rights. The right to participate is, therefore, part of an actionable claim. It is in this context, Court held that here is a case of transfer of actionable claim and not transfer of goods.

24. We may also notice hereat that the question, whether SIM Card can be said to be 'goods' in **Bharat Sanchar Nigam Ltd. and another (supra)** matter was remanded, and thereafter it was held that a SIM Card or Subscriber Identity Module is a portable memory chip used in cellular telephones. It is a tiny encoded circuit board which is fitted into cell phones at the time of signing on as a subscriber. It has no intrinsic sale value at all. This aspect was considered subsequently in **Idea Mobile Communication Ltd. Vs. C.C.E. and C., Cochin, 2011(12) SCC 607** and in paras 20 and 21 the Court said:

“20. ... There cannot be any dispute to the aforesaid position as the Appellant itself subsequently has been paying service tax for the entire collection as processing charges for activating cellular phone and paying the service tax on the activation. The Appellant also accepts the

position that activation is a taxable service. The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of service tax, for the SIM Cards are never sold as goods independent from services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM Cards which on its own but without the service would hardly have any value at all.

21. Thus, it is established from the records and facts of this case that the value of SIM cards forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. The Sales Tax authority understood the aforesaid position that no element of sale is involved in the present transaction.”

25. In the light of above observations we find that nature of transaction in the present case is different and hence judgment in **Bharat Sanchar Nigam Ltd. and another (supra)** does not help petitioner to exclude liability of VAT under VAT Act, 2008.

26. The judgment in **State of A.P. Vs. Rashtriya Ispat Nigam Ltd. (supra)** relied by petitioner also does not help it for the reason that a finding of fact was recorded therein that transaction between parties did not involve transfer of rights to use machinery by contractors and in absence of same sale tax was not leviable. The said judgment, therefore, has no application to the facts of present case.

27. When exposition of law discussed above is applied in the context of transfer of right to use goods relating to a goodwill or Brand name, we find that it will be within the ambit of sale and exigible to VAT under VAT Act, 2008. Brand name is nothing but a goodwill and incorporeal property which has its value. In the present case petitioner has transferred right to use its Brand name which has value, to be used by Franchisee, for consideration. Consideration amount, we have already mentioned, is part of contract between parties. Therefore, judgment in **Bharat Sanchar Nigam Ltd. and another (supra)** or **Sunrise Associates (supra)** would help

petitioner to claim, that, since it is paying service tax also, therefore, VAT is not admissible under VAT Act, 2008.

28. Right to use property, i.e., Brand name for consideration is a 'sale' under the definition of 'sale' in VAT Act, 2008 read with Article 366 (29A) of Constitution and on amount of consideration, VAT is chargeable. If there is simultaneously other activities which may come within the definition of 'service', petitioner may be liable to pay “service tax” on that or those aspect(s) but consideration of transfer of right to use Brand name, i.e., goods, is exigible to VAT having satisfied the definitions of “goods” and “sale” as discussed above. Neither the judgment in **Bharat Sanchar Nigam Ltd. and another (supra)** or **Sunrise Associates (supra)** will absolve petitioner from liability of VAT under VAT Act, 2008.

29. There are two more authorities which, in our view, would make it clear that demand of VAT by respondents in the case in hand is within the ambit of VAT Act, 2008.

30. In **Yasha Overseas Vs. Commissioner of Sales Tax and others, 2008(8) SCC 681** a question arose, whether import licence granted under import and export policy if transferred by 'A' to 'B', will be exigible to “sales tax”. A three Judge Bench in **Vikas Sales Corporation Vs. Commissioner of Commercial Taxes, 1997(57) ECC 1** held that it is exigible to trade tax. Its correctness was doubted and this was considered by another three Judge Bench in **Yasha Overseas Vs. Commissioner of Sales Tax (supra)**. Relying on the meaning of term “goods”, used in a fiscal statute imposing tax of sales, includes all kinds of moveable property. The word "property" may denote nature of interest in goods and when used in this sense, means title or ownership in a thing. The word may also be used to describe the thing itself. The two concepts are different. A distinction must be kept in mind when considering use of word in connection

with sale of goods. It quoted from Dictionary of Commercial Law by A. H. Hudson (1983 Edn.), which reads as under:

"'Property' -- In commercial law this may carry its ordinary meaning of the subject-matter of ownership. But elsewhere, as in the sale of goods it may be used as a synonym for ownership and lesser rights in goods.

Hence, when used in the definition of "goods" in the different sales tax statutes, the word "property" means the subject-matter of ownership. The same word in the context of a "sale" means the transfer of the ownership in goods."

31. Court held that import licence has its own implicit value and purchasable on payment of consideration for its value, therefore, satisfy the definition of 'goods' within the meaning of "sales tax" laws and is exigible to tax.

32. Another recent judgment is in **State of Karnataka and others Vs. Pro Lab and others, 2015(8) SCC 557**. Court said that dominant intention test has already been overruled. It has noticed, if a transaction has two component, one sale of goods and another service, on the respective part of sale and service, both taxes, namely, sales tax and service tax can be exigible and it cannot be claimed, since service tax is being paid, hence trade tax is not payable.

33. In view of above, we answer Question-1, formulated above, by holding that grant of non-exclusive licence to Franchisee for use of Brand name of petitioner under the agreement for consideration is exigible to tax under VAT Act, 2008 and judgments in **Bharat Sanchar Nigam Ltd. and another (supra)** and **State of A.P. Vs. Rashtriya Ispat Nigam Ltd. (supra)** are neither applicable to the facts of present case nor lay down a different law.

34. In respect of Question-2, we hold, if there is a composite transaction, part whereof amounts to sale of goods and other aspects amount to service, both taxes on different aspects are leviable and dominant intention test is no more available.

35. In view of answers given to Questions- 1 and 2, Question-3 becomes redundant and in any case stands answered against petitioner.

36. In view of above discussion, both writ petitions are devoid of merit. Dismissed accordingly without there being any order as to costs.

Order Date :-09.12.2016

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