

### ***Kerala HC holds that situs of sale of trademark is the principal place of business of the transferor***

#### **Facts**

The assessee<sup>1</sup> with its registered office in Kerala, sold a trademark to a buyer whose registered office was in Karnataka. However, the agreement of sale of trademark was executed in Gujarat, and sales tax was also paid in Gujarat. Another assessee with its registered office in Kerala, sold a patent to a buyer registered in Maharashtra, but executed the agreement in Puducherry. The manufacturing unit of the buyer, which would be producing the goods under the patent being purchased was also in Puducherry. The Kerala sales tax authorities contended that these transactions should be subject to tax in Kerala, and accordingly, passed assessment orders, demanding sales tax/ VAT on such sale of intangible goods and non-compete fees. The issue reached the Kerala High Court (HC) on appeal.

#### **High Court's decision**

The HC held that the sale of intangible goods was taxable in Kerala as inter-State sale, and no tax would be applicable on non-compete fees. The major observations of the HC are as follows:

- In the present case, there is no transfer of right to use the goods but there is a [permanent] transfer of property in the goods.
- That the sellers were using the trademark/ patent in their products, which can be sold all over India with the transferee obtaining similar rights, cannot lead to a position that such trademark/ patent rights can be considered as available for sale as goods within any of the States where the related products are on sale.
- The *situs* of intangible goods has to be determined with reference to the owner. The location of the principal place of business is from where the owner of the trademark exercises its right to sell the goods under trademark; this is the place where the trademark/ patent exists. The HC relied on the Delhi HC's decision relating to an income-tax matter in case of CUB Pty Limited, wherein it was observed that the *situs* of the owner of an intangible asset would be the closest approximation of the *situs* of an intangible asset.
- The agreements executed in Gujarat and Puducherry do not make the sale within that State or Union Territory, since the trademarks/ patent rights are not in that State/ Union Territory.
- There is no sale of goods involved in the payment of non-compete fee.

#### **PwC comments**

Historically, the industry has adopted a position that the *situs* of sale for intangible goods (as well as right to use or lease), is the location where the agreement is executed, relying on rulings in *20<sup>th</sup> Century Finance* and *Ambalal Sarabhai*. However, this ruling has determined *situs* based on the registered office's location, since it is able to control the benefits of the intangible goods. Considering the difference in positions and quantum of transactions involved, the industry would seek certainty on this issue. It will be interesting to see if this matter proceeds to the Supreme Court. From a GST perspective also, this difference of opinion could result in further debate in other instances of sale of intangible items.

<sup>1</sup> W.P(C).No.13408 of 2009-U and others

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