

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.02.2021
PRONOUNCED ON : 25.02.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.1413 to 1417 of 2015
and
M.P.Nos.1 to 1 of 2015

M/s.Ramco Systems Ltd.,
Rep.by its Chief Financial Officer,
64, Sardar Patel Road, Taramani,
Adyar, Chennai 600 113. .. Petitioner in all W.Ps.

vs

1.The Secretary of Tamil Nadu,
Rep.by its Secretary,
Commercial Taxes Department,
Fort St.George,
Chennai 600 009.

2.The Assistant Commissioner,
Adyar Assessment Circle,
40, Greenways Road,
Chennai 600 026.

3. The Union of India,
Rep.by its Secretary,
Ministry of Finance,
North Block
New Delhi.

4. The Commissioner of Service Tax,
Service Tax Commissionerate III,
Newry Towers, No.2054-I, II Avenue,
Anna Nagar, Chennai 600 040.

.. Respondents in all W.Ps.

Prayer: Writ petition filed under Article 226 of the
Constitution of India praying for issuance of a writ of
Certiorari to call for the records of the 2nd respondent in
TIN/33610961802/2009-10, TIN/33610961802/2010-11,
TIN/33610961802/2011-12, TIN/33610961802/2012-13 and
TIN/33610961802/2013-14 and quash the proceedings dated
15.12.2014.

For Petitioner : Mr.R.L.Ramani
Standing Counsel for
Mr.B.Raveendran (in all W.Ps.)

For R1 & R2 : Mr.Mohammed Shaffiq
Spl.Govt.Pleader.(In all W.Ps.)

For R3 & R4 : Mr.V.Sundareeswaran (In all W.Ps.)

C O M M O N O R D E R

The petitioner has challenged the impugned notices issued under Section 27 of the Tamil Nadu Value Added Act, 2006. The impugned notices have been issued to the petitioner pursuant to the VAT audit conducted on 29.11.2013 under Section 64 of the TNVAT Act in the premises of the petitioner.

2. As per the audit report, the petitioner had availed input tax credit on several goods purchased by the petitioner between 01.08.2009 to 31.03.2014 to pay VAT on sale of Information Technology Products (ITP) but had failed to pay tax on such sale. Relevant portion of the statement recorded from the petitioner on 29.11.2013 reads as under:

"Delivery of software licences are liable to tax under commodity code 2068 i.e., Information Technology Products Part B of First Schedule. We have been charging VAT on software licenses for the period upto 31st July 2009.

During the course of VAT audit, it was pointed out by the audit that VAT has been omitted to be paid for the period from 1st August 2009 to 31st March 2014.

We have explained to audit that in the Finance Bill, 2009 an amendment was made to Section 65 (53a) of Finance Act, 2003 in the definition of Information Technology software the word "acquirer" was replaced by the word "provider" with effect from 16th May 2008. After the substitution the provider of information technology software service (ITSS) was brought under service tax purview as against the acquirer of such IT software for the purpose of commercial exploitation including the right to reproduce, distribute and sell. With the introduction of service tax on ITSS, charging of VAT on ITSS has been discontinued by us from 1st August 2009. We have informed about the change

in applicability of tax (i.e. from VAT to Service Tax) on software license and discontinuance of

charging of VAT to Assessment Circle. Adyar II vide letter dated 25th November 2009 submitted on 27th Nov 2009. A copy of the same is enclosed. We were informed by the audit officials that VAT is applicable on software licenses even after 16 May 2008 on the ground that VAT input credit has been taken on all purchase invoices in connection with software licenses. As per audit, the total VAT payable on license invoices works out to Rs.3,03,45,827/- for the period from 01.08.2009 to 31.03.2014."

3. The Value of License Invoices and tax liability on license invoices was estimated bin the audit is detailed below:

Year	Total value of License Invoices raised	Rate of Taxc(%)	Tax Liability
2009-10	Rs.7,44,65,020	4	Rs.29,78,601
2010-11	Rs.8,11,78,657	4	Rs.32,47,146
22011-11 (upto11.07.2011)	Rs.2,70,39,955	4	Rs.10,81,598
2011-12(after 11.07.2011)	Rs.8,20,88,569	5	Rs.41,04,428
2012-13	Rs.30,32,97,798	5	Rs.1,51,64,890
2013-14	Rs.7,53,83,289	5	Rs.37,69,164
Total	Rs.64,34,53,288		Rs.3,03,45,827

4. The impugned notices have been issued under Section 27 of the TNVAT Act, 2006. They are sought to be challenged on the ground that the petitioner was liable to pay service tax as "Information Technology Service" within the meaning of Section 65 (105) (zzzze) of the Finance Act, 1994, as amended by Finance (No.2) Act, 2009 and not Value Added Tax under the provisions of the TNVAT Act, 2006.

5. Ironically, petitioner sent a representation to the Assistant Commissioner of Central Excise who was functioning as Assistant Commissioner of Service Tax vide a letter dated

03.09.2009 explaining the background and sought for a clarification as to whether the sale of "software license" in a compact disc or other electronically readable format or over the Internet, whereby the user is permitted to use the software for a specified period and the sale of software license would attract VAT under the provision of TNVAT Act, 2006 when indeed it should have approached the respondent or any senior officer from the Commercial Tax Department as the views sought for was in the context of tax liability under the provisions of TNVAT Act, 2006.

6. The said officer by a letter dated 16.10.2009 bearing reference C.No.IV/16/11/09 STC (Tech.) informed the petitioner that the sale of software license by the petitioner would amount to " Information Technology Service" as per Section 65(105) (zzzze) of the Finance Act, 1994.

7. Thereafter, by another communication dated 22.10.2009 bearing reference C.No.IV/16/210/2009 SF0203, the petitioner was also informed that the sale of software license by the petitioner will attract service tax with effect from 16.05.2008 to 30.09.2009. The petitioner also informed about the same to the 2nd respondent herein by its communication dated 25.11.2009. It is the contention of the petitioner that it not liable to pay tax.

8. Mr.R.L.Ramani, the learned Senior counsel drew attention to the fact that the said letter was delivered and duly acknowledged by the Office of the 2nd respondent. The learned Senior counsel also submitted that Service Tax Registration was obtained and the petitioner paid service tax on the transaction.

9. He further submits that in FORM ST-2, the petitioner has clearly declared the service as taxable service as "Information Technology Software Service" as one of the specified items for which it obtained a centralized registration under the provisions of the Finance Act, 1994.

10. The learned Senior counsel also drew attention to the Form WW filed under Section 63A of the Tamil Nadu Value Added Tax Act, 2006 to substantiate the fact that the activity on which it was paying VAT earlier was liable to service tax under the provisions of the Finance Act, 1994 in the light of the amendment to the Finance Act, 1994.

11. It is submitted that in view of the amendment to Section 65(105) (zzzze) with retrospective effect from 16.05.2008 vide Finance No.2 Act, 2009, sale of software licence was liable to service tax and not VAT.

12. The learned senior counsel also drew attention to a similar audit report for the succeeding year 2013-14 wherein it has been clarified that though the petitioner availed input tax credit under Section 19 of the TN VAT Act, 2006, it has not utilized the same for settling of tax liability over other transaction on which it was liable to pay VST.

13. The learned Senior counsel further submitted that once the transaction is liable to service tax under the provision of Finance Act, 1994 as amended in 2009, question of imposing the VAT under the TNVAT Act 2006 cannot be countenanced.

14. He further submits that merely because the petitioner was paying tax at the rate prescribed in Entry 68 of the Part B of the 1st schedule to TNVAT Act, 2006 earlier by itself will amount to estoppels against the petitioner. It is further submitted that the petitioner cannot be taxed twice for the same transaction.

15. The learned Senior counsel referred to the decision of this Court in Infotech Software Dealers Association vs. Union of India and Others, (2010)34 VST 133 (Mad), wherein this Court while dealing with a challenge to the levy of service tax on the members of said Association who were selling Software products were held liable to pay tax. He submits that this Court held that the transaction would attract service tax under the provisions of the Finance Act, 1994. He refers to the following passage from the aforesaid decision:-

"On a careful reading of the above, we are of the considered view that when a transaction takes place between the members of ISODA with its customers, it is not the sale of the software as such, but only the contents of the data stored in the software which would amount to only service. To bring the deemed sale under Article 366(29A) (d) of the Constitution of India, there must be a transfer of right to use any goods and when the goods as such is not transferred, the question of deeming sale of goods does not arise and in that sense, the transaction would be only a service and not a sale."

16. The learned senior counsel also drew attention to the decision of the Karnataka High Court in Sasken Communication Technologies Ltd., vs. Joint Commissioner of Commercial Taxes (Appeals)-3, Bangalore, 55 VST 89 (Kar), wherein the Karnataka High Court held as under:

" 50. In the light of the aforesaid discussion, the finding recorded by the assessing authority that the

contract in question involves a sale of software development by the assessee cannot be sustained. It is contrary to the material on record, the constitutional provisions and the law declared by the Apex Court. Accordingly it is hereby set aside.

51. It was contended that against the order passed by the assessing authority, a statutory first appeal and against that appeal, a statutory second appeal is provided and therefore the learned Single Judge was justified in directing the parties to approach the appellate forum and this court should not entertain these appeals.

Normally, when the statute provides an alternative remedy by way of an appeal, this court declines to entertain a writ petition against such assessment orders. But it is not an invariable rule specifically when the case involves interpretations of constitutional provisions and when the authorities have already interpreted these provisions in a particular manner, the question of the party approaching the very departmental authorities would make no difference. That apart, these assessment orders are passed after coming into force of the Finance Act, 1994 and when service tax was imposed. The question for consideration is, when once by a parliamentary legislation, service tax is levied on the entire consideration received by the assessee, whether it is open to the State Legislature to levy sales tax on any portion of the said consideration which has already suffered service tax. Even otherwise also, the question for consideration is as discussed above, whether the contract in question is an indivisible contract or a composite contract and even if it is a composite contract, what is the dominant nature of the contract. These are matters which require to be interpreted by this court. It will have an effect not only on the assessee before this court, but to all the assessees who are similarly placed in the State, so that the law is settled and assessment orders to be passed by the authorities would be in accordance with law. Therefore we do not see any merit in the contention that merely because an alternative remedy is provided against these orders by way of statutory appeals, that this court should not entertain these writ appeals. Hence, we pass the following order:

(a) Writ appeals are allowed.

(b) The contracts in question are not works contract but contract for service

simplicitor. In other words it is not a composite contract, consisting of contract of service and contract of sale of goods. It is an indivisible contract of service only.

(c) The impugned order passed by the learned Single Judge and the assessment orders passed by the authorities levying sales tax are hereby set aside.

(d) The tax paid by the assessee in pursuance of the interim order passed in the writ petitions is ordered to be refunded to the assessee as it is declared that the assessee is not liable to pay any sales tax at all on the consideration received under the contract.

(e) The amount shall be refunded with interest @ 6% within four months from the date of receipt of this order. If the amount is not refunded within four months, the said amount shall carry interest @ 12%.

(f) No costs."

17. The learned senior counsel also drew attention to the counter filed by the 4th respondent Commissioner of Service Tax. He submits that the Service Tax Commissioner has reiterated that the transaction was liable to service tax and therefore the petitioner had rightly discharged the service tax liability under Section 65 B of the Finance Act, 1994.

18. The learned Senior counsel also reference to another decision in The State of Karnataka vs. IBM India Private Limited, (2015) 52 GST 1239 (Karnataka) wherein the said Court held that "in tax matters, when there are two Division Bench judgment of other High Courts on a similar provision, which it found to be the correct legal position and the said judgments having attained finality, it was held that there was no valid and justifiable reason to take a different view."

19. Learned Senior Counsel therefore states since the law on the subject has been clarified by a Division Bench of this Court in Infotech Software Dealers Association vs. Union of India and Others, (2010) 34 VST 133 (Mad), the said decision was binding on the petitioner. Attention was also invited to the following cases:-

- i) Tata Consultancy Services vs. State of Andhra Pradesh, (2004) 137 STC 620

- ii) Bharat Sanchar Nigam Ltd and Another vs. Union of India and Others, (2006) 145 STC 91
- iii) ImagicCreativePvt.Ltd., vs. Commissioner of Commercial Taxes and Others, (2008) 12 VST 371 (SC)
- iv) Infosys Technologies Ltd., vs. Special Commissioner and Commissioner of Commercial Taxes, Chepauk, Chennai and another, (2008) 17 VST 156 (Mad)
- v) MahadayalPremhandra vs. Commercial Tax Officer, Calcutta and Ors. (1958) 9 STC 428 (SC)
- vi) State of U.P. and Ors. vs. Indian Hume Pipe Co., Ltd., (1977) 39 STC 355 (SC)
- vii) Filterco and Ors. vs. Commissioner of Sales Tax, Madhya Pradesh and Ors. (1986) 61 STC 318 (SC)
- viii) Naseem Bano vs. State of U.P. and Ors. AIR 1993 (SC) 2592
- ix) Ashok Leyland Limited vs. Union of India (UO) and Ors., (1997) 105 STC 152 (SC)
- x) Sri Palani Dhandayuthabani Devasthanam vs. Commercial Tax Officer, (2001) 124 STC 53 (Mad)
- xi) Madras Granites (P) Ltd., vs. Commercial Tax Officer and Ors. (2006) 146 STC 642 (Mad)
- xii) Kasi and Sethu vs. Deputy Commercial Tax Officer (DG-CTP) Kumbakonam and another, (2003) 131 STC 73 (Mad)
- xiii) Ashok Leyland Ltd., vs. State of Tamil Nadu and another, (2004) 134 STC 473 (SC)
- xiv) Tvl.Pizzeria Fast Foods Restaurant (Madras) Pvt.Ltd., vs. Commissioner of Commercial Taxes and Ors. (2005) 140 StC 97 (Mad)
- xv) Vodafone International Holdings BV vs. Union of India and another, (2012) 6 SCC 757
- xvi) Pepsico India Holdings Pvt. Ltd. vs. Commissioner of Commercial Taxes and Ors. (2010) 29 VST 214 (Mad)
- xvii) Madras Refineries Ltd. Vs. Assistant Commissioner (2010) 28 VST 417 (Mad),
- xviii) Sasken Communication Technologies Ltd.,

vs. Joint Commissioner of Commercial Taxes
(Appeals)-3, Bangalore, (2012) 55 VST 89
(Karn)

xix) AGS Entertainment Private Limited vs. Union
of India and Others, (2013) 65 VST 88 (Mad)

xx) Canon India Private Limited and Ors. vs.
State of Tamil Nadu and Ors. 2014(305)ELT 255
(Mad.)

xxi) The State of Karnataka vs. IBM India Private
Limited, (2015) 52 GST 1230 (Karnataka)

xxii) JKM Graphics Solutions Private Limited vs.
The Commercial Tax Officer, Vepery Assessment
Circle, (2017) 99 VST 343 (Mad)

xxiii) M/s.C.A.Motors vs. The Commercial Tax
Officer, Tiruvarur, 2019- VIL-448-Mad

20. Mr. Mohammed Shafique, learned Additional Government Pleader (Taxes) submits that these writ petitions were premature and were liable to be dismissed. He submits that the challenge in the present cases were to the impugned notices issued under Section 27 of the Tamil Nadu VAT Act, 2006 and therefore the authorities concerned should be given an opportunity to examine the facts as to whether the petitioner has made out a case for confirming and/or dropping of the proposal under section 27 of the aforesaid Act.

21. He submits that the petitioner cannot scuttle the reassessment proceeding initiated by exhorting this Court to quash the impugned notices in a summary manner.

22. He submits that the decision of this court in AGS Entertainment Private Limited Versus Union of India [2013] 65VST 85 was distinguishable on the facts and as much as the issue there was pertaining to "transfer of rights to use" of intellectual property rights.

23. He further submits that the decision of the Karnataka High Court rendered in Sasken Communication Technologies Ltd versus Joint Commissioner of Commercial Taxes [2011] 55 VST 89 was against an order of a single judge declining to entertain the writ petition on the ground that the said company had alternate and efficacious remedy by way of statutory appeal.

24. There, the court had the opportunity of examining the contract that was signed wherein the said company had given up all the rights and claims over the software to be developed and had expressly agreed that such software which may come into existence in the end of the contract period was the absolute property of the customer.

25. He submits that there the customer was at liberty to deal with the software in the manner he wants without further reference to the assessee. The consideration paid was not for the transfer of any goods. The consideration paid was calculated in terms of the time such as mandates, man-hours and the man months. He further submits that the decision was distinguishable on the facts of the case and cannot be applied.

26. He further submits that even if tax was wrongly remitted and paid would not absolve the petitioner from paying tax, if the petitioner is held liable to pay tax. In this connection, he referred to the decision of the Hon'ble Supreme Court in Idea Mobile Communication Ltd. v. CCE & Customs, (2011) 12 SCC 608 wherein it was held that "It also cannot be disputed, If the article is not susceptible to tax under an enactment, the amount of tax paid by the assessee could be refunded as the case may be; or, the assessee has to follow the law as may be applicable. But we cannot accept a position in law that even if tax is wrongly remitted that would absolve the parties from paying the service tax if the same is otherwise found payable and a liability accrues on the assessee". He says that same reasoning will apply in the facts of the present case.

27. He further submits that the petitioner has given only a sample agreement to demonstrate that no VAT was payable. This according to him is wholly impermissible. He submits that unless the agreements and invoices are submitted no decision can be arrived. He submits that as per the decision of the Hon'ble Supreme Court in TELCO v. CCT, (1970) 1 SCC 622 an Assistant Commissioner was expected to look into each transaction in order to find out whether a completed contract of sale had taken place which could be brought to tax. He submits that even an assessing officer was bound to examine each, and every transaction independently and then decide whether it constituted a sale liable to tax under the provisions of the Act or not. He therefore prayed for dismissal of the present writ petitions.

28. I have considered the arguments advanced by the learned Standing Counsel for the petitioner Mr.R.L.Ramani and by the learned Special Government Pleader for the respondents (taxes).

29. It will be useful to refer to the decision of the Honourable Supreme Court in Tata Consultancy Services Versus State of Andhra Pradesh(2005) 1 SCC 308;137 STC 260 before proceeding to merits and demerits of the contentions of the respective counsel.

30. Tata Consultancy Services had provided consultancy services including computer consultancy services. As a part of their business, they prepared and loaded on customers' computers custom-made software which was referred to as "uncanned software". The company also sold computer software packages off the shelf which was referred to as "canned software".

31. The court observed that in the case of "canned software packages," the ownership over the software was with the person who developed that software. Tata consultancy services was a mere licensee with a permission to sub-license the software in the packages to users. The "canned software" programs included software programs like Oracle, Lotus, Master Key, N-Export, Unigraphics, etc.

32. There the Commercial Tax Officer, Hyderabad passed a provisional order of assessment under the provisions of the Andhra Pradesh General Sales Tax Act, 1957 and had held that the canned software were "goods" and therefore levied sales tax.

33. The Appellate Deputy Commissioner of Commercial Taxes also upheld that order of the Commercial Tax Officer remanded the case back to the Commercial Tax Officer for the purpose of quantification of tax. Further, appeals before the Tribunal and the High Court also affirmed the order of the Commercial Tax Officer.

34. The Hon'ble Supreme Court considered the issue as to whether the "canned software" sold by Tata Consultancy Services could be termed as "goods" and whether it was assessable to sales tax under the said Act. In para 27 the Hon'ble Supreme Court held as under:-

27. "In our view, the term "goods" as used in Article 366(12) of the Constitution and as defined under the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. [(2001) 4 SCC 593] A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it

is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes."35. The Court also left the issue open regarding sale unbranded CD with following observation:-

"29. Mr Sorabjee submitted that the High Court correctly held that unbranded software was "undoubtedly intellectual property". Mr Sorabjee submitted that the High Court fell in error in making a distinction between branded and unbranded software and erred in holding that branded software was "goods". We are in agreement with Mr Sorabjee when he contends that there is no distinction between branded and unbranded software. However, we find no error in the High Court holding that branded software is goods. In both cases, the software is capable of being abstracted, consumed and use. In both cases the software can be transmitted, transferred, delivered, stored, possessed, etc. Thus even unbranded software, when it is marketed/sold, may be goods. We, however, are not dealing with this aspect and express no opinion thereon because in case of unbranded software other questions like situs of contract of sale and/or whether the contract is a service contract may arise".

35. Though the Court had left the issue open as to whether sale of unbranded software was liable to tax or not at the same time, nevertheless held that it was goods.

36. "Information Technology Software Services" was specifically excluded from the definition of "Business Auxiliary Services" (BAS) in Section 65(19) of the Finance Act, 1994 when the definition of "Business Auxiliary Services" (BAS) was amended in the year 2003.

37. In the explanation appended to the definition of "Business Auxiliary Services" (BAS) in Section 65(19) of the Finance Act, 1994, it was clarified that "Information Technology Software Service" means any service in relation to designing, developing or maintaining of computer software or computerized data processing or system networking or any other service primarily in relation to operation of computer systems. The said Explanation to Section 65(19) of the Finance Act, 1994 is reproduced below:-

Explanation. For the removal of doubts, it is hereby declared that for the purposes of this clause information technology service means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems;

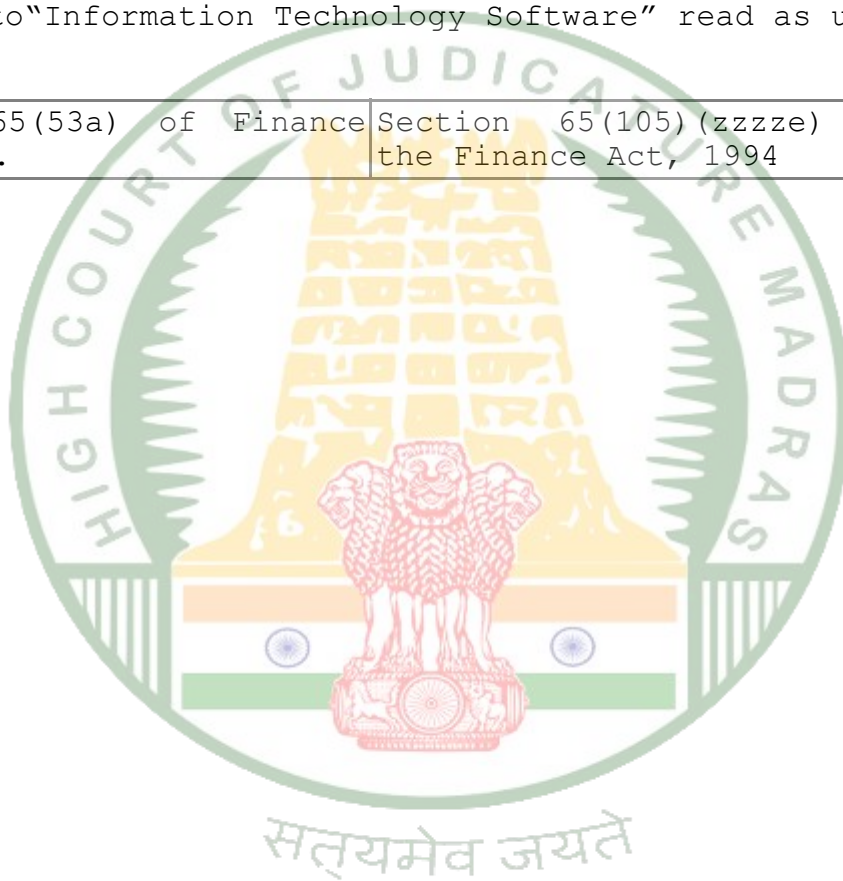
38. In Circular No. 59/8/2003, dated 20.6.2003, the Central Board of Excise and Customs had also clarified that a personal computer or a laptop has been used for providing the service does not, ipso facto, make the service an "information technology service". Similarly, the fact that any of the IT services mentioned in the explanation has been used by the service provider as an input service does not automatically make the output service and input service.

39. It further opined that individual service was to be examined with reference to the explanation provided to the definition of "business auxiliary service" and only such output services which qualify to be IT services in terms of the said explanation shall remain excluded from taxable service under the heading Business Auxiliary Service.

40. "Information Technology Software Service" was brought within the purview of taxable service with effect from Finance Act No.2 of 2009 with the introduction of Section 65(53a) and Section 65(105) (zzzze) in the Finance Act, 1994.

41. In 2009 vide Finance (No.2) Act 2009, the definition of taxable service of "Information Technology Service" in Section 65(105) (zzzze) of the Finance Act, 1994 was tweaked and amended with effect from 16.05.2008. With effect from 16.05.2008, the definition of "Information Technology Software Service" in Section 65(53a) and the definition of taxable service in relation to "Information Technology Software" read as under:-

Section 65(53a) of Finance Act, 1994.	Section 65(105) (zzzze) of the Finance Act, 1994
---------------------------------------	--



WEB COPY

"Information technology software" means any representation of instruction, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment.

Taxable Service" in relation to:-
(zzzze)"Information technology software" service means any service provided or to be provided to any person, by any other person in relation to information technology software, including,-
development of information technology software, study, analysis, design and programming of information technology software, adaptation, upgradation, enhancement, implementation and other similar services related to information technology software, providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specification for a database design, guidance and assistance during the start up phase of a new system, specifications to secure a database, advice on proprietary information technology software, providing* the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products, providing* the right to use

* substituted for the word "acquiring" with effect from 16.05.2008 vide Finance No.2 Act, 2009

42. Prior to that, under the Tamil Nadu Value Added Tax Act, 2006, "Information Technology Product" was notified by the Government and was liable to tax at 4% with effect from 1.1.2007 and later at 5% with effect from 12.7.2011 under Entry 68, Part B, I Schedule.

43. For the aforesaid purpose, the Government of Tamil Nadu issued G.O.Ms.3 CT&R (B1) dated 1.1.2007 with effect from 1.1.2007. Sl. No. 5 to G.O.Ms.3CT&R (B1) dated 1.1.2007 is reproduced below:-

5. IT software of any media.
(a) Disc for laser reading systems for reproducing phenomena other than sound or image.
(b)Magnetic tapes for reproducing phenomena other than sound or image.
(c) other software.
(i) on floppy disc or cartridge tape.
(ii) on disc or on CD ROM.
(iii) on other media.
(d) Recorded and pre-recorded DVDs and CDs.

44. Thus, "Information Technology Product" was attracted to "IT software of any media"on :-

(i) floppy disc or cartridge tape;or
(ii) disc or on CD ROM;or
(iii) other media.

45. IT software of any media" as enumerated above were liable to tax under the provisions of the Tamil Nadu Value Added Tax, 2006 under entry 68, Part B of the First Schedule of the Act read with G.O. Ms. 3 CT& R (B1) dated 1.1.2007 with effect from 1.1.2007. Earlier, under Entry 18, Part B to Schedule I of the Tami Nadu General Sales Tax Act, 1959 "Software including IT Software" were liable to tax with effect from 27.03.2002.

46. When a software is copied on a CD or magnetic disk or other forms of transmission, a "goods" come into existence in

such media. The sale of such CD or magnetic disk or in other forms of transmission of the software may license the user to use the software therein. However, there is goods which has come into existence and prima facie it appears the petitioner was liable to tax under the provisions of the Tamil Nadu Value Added Tax Act, 2006.

47. Therefore, it is for the petitioner establish that it was not engaged in sale of "IT software of any Media" and that it was providing only taxable service of "Information Technology Software Service" within the meaning of Section 65(105) (zzzze) of the Finance Act, 1994.

48. The views of Assistant Commissioner of Service Tax asking the petitioner to pay service tax on the same goods may not be an answer for not paying VAT particularly in the light of the fact that even as per the petitioner it was earlier paying tax under Entry 18, Part B of the Schedule I of the Tami Nadu General Sales Tax Act, 1959.

49. Relevant portion of the query of the petitioner in its letter dated 3.9.2009 to the Asst. Commissioner of Central Excise also indicates it was selling software licence in a compact disc or other electronically readable format or over the Internet as is evident from a reading of para 3 of the said letter:-

Clarification sought:-

We sell software license with the "software licence" in a compact disc or other electronically readable format or over the Internet, whereby they are permitted to use the software for a specified period and the sale of software licenses attracts VAT under TNVAT Act 2006.

In view of the above referred amendment to Sec.65 (105) (zzzze), we wish to seek your clarification as to whether sale of software licenses would fall under the definition of "information technology service" especially when they are construed as sale of goods for the purpose of levy of VAT, thereby sale consideration of software license be deemed to be value of Information technology software service?

50. From a reading of the representation of the petitioner which has been extracted above, it is clear that the petitioner was prima facie selling software license to its customer in a compact disc or other electronically readable

format or through Internet. Such sale permitted the user a license to use the software contained therein.

51. The representation of the petitioner on 3.9.2009 to the Central Excise Department indicates that the clarification was sought for as to whether "software license" in a compact disc or other electronically readable format or over the Internet, whereby its clients/customers are permitted to use the software for a specified period of time and sale of software licenses attracts VAT under the provisions of the Tamil Nadu Value Added Tax Act, 2006.

52. The petitioner ought to have been aware of the decision of the Hon'ble Supreme Court in Tata Consultancy Case referred to supra wherein it was categorically concluded that even "uncanned software" was goods. Since the issue was left open, as the occasion did not arise before it, the petitioner could have approached the officers of the Commercial Tax Department by explaining the views it entertained.

53. The Asst Commissioner of Central Excise has not compared the taxing entries under the provisions of the Tamil Nadu Value Added Tax Act, 2006 and the provisions of the Finance Act, 1994 as amended with effect from 16.5.2008 while giving his opinion. Therefore, such an opinion of the obtained by the petitioner was not binding on the Commercial Tax Department

54. Further, neither the Asst Commissioner of Central Excise who was functioning as the Asst Commissioner of Service Tax nor the fourth respondent who has been impleaded had any authority to clarify whether the petitioner was liable to pay tax under the provisions of the Tamil Nadu Value Added Tax Act, 2006 enabled them to give such a clarification at that point of time. If no tax was paid, they were merely entitled to initiate recovery proceedings under the Finance Act, 1994.

55. In fact, during the material period, section 48A of the Tamil Nadu Value Added Tax Act, 2006 also did not exist for the petitioner to seek for any clarification from the State-Level Authority for Clarification and Advance Ruling as such a provision did not exist. A similar provision thus existed in Section 28A of the TNGST Act, 1959 which gave the powers to the Commissioner of Commercial Tax to issue a clarification also did not exist, when the petitioner approached the Assistant Commissioner of Central Excise.

56. When the petitioner decided to transition to pay service tax there was no other provision under which it could have obtained clarification. At the same time, the petitioner should have obtained a clarification from the Commercial Tax Department before taking a drastic step to stop paying tax under the provisions of the Tamil Nadu VAT Act, 2006 instead of

obtaining a opinion only from the Assistant Commissioner of Excise.

57. Prime facie, it appears the petitioner was selling "Information Technology Software of any Media" as specified in the Notification vide G.O. Ms. 3 CT& R (B1) dated 1.1.2007 of the Tamil Nadu Government and was liable to pay tax under the provisions of the Tamil Nadu Value Added Tax Act, 2006 with effect from 1.1.2007 when the aforesaid Act came into force. However, it would require a detailed examination in the re-assessment proceeding.

58. It is quite possible that the petitioner may have decided transition to pay service tax as bulk of the input services utilized were available as input tax credit under the provisions of the Cenvat Credit Rules, 2004 and therefore it took a conscious decision to pay service tax to save tax the revenue out flow from it.

59. It is quite possible that the petitioner may have also obtained opinions of experts which may have influenced the petitioner to take advantage of the tax regime obtaining a clarification from the office of the fourth respondent was totally uncalled for.

60. However, the aforesaid clarification sans any reasoning. The petitioner appears to have risked to avoid VAT. Therefore, if tax was due, it has to pay such tax to the Commercial Tax Department.

61. The decision of the Division Bench of this Court in Infotech Software Dealer Association versus Union of India [2010] 34 VST 133 which was relied upon by the learned senior counsel for the petitioner in my view is not relevant. The Division Bench there dealt with constitutional validity of the amendment to Section 65 (105) (zzzze) of the Finance Act, 1994 with effect from 16.05.2008.

62. There the challenge was made to the amendment to the above definition of taxable service in section 65(105)(zzzze) of the Finance Act, 1994 as amended by Finance No 2 Act, 2009 which amended sub-clause (v) and (vi) by substituting the word "acquiring" with "providing".

63. The specific prayer of the petitioner therein was to declare Section 65(105)(zzzze) of the Finance Act, 1994 as null and void, ultra virus and unconstitutional and contrary to Section 265, entry 92 C and 97 one of List I, entry 54 of List II of the Schedule VII and contrary to the provisions of Article 19 (1) (g), 265 and 268 A of the Constitution of India in so far as the petitioner were concerned therein

64. The Division Bench has merely upheld the constitutional validity of the aforesaid provision. The passing reference in

paragraph 46 cannot be construed to be a ratio laid down by the court. In fact, the court also could not have touched on the merits of the transaction while answering the constitutional validity of the provision as the scope of the enquiry is limited.

65. Even if the observation of the Division Bench of this Court in the above case to the effect that "To bring the deemed sale under article 366 (29 A) (d) of the Constitution of India, there must be a transfer of right to use any goods and when the goods as such is not transferred, the question of deeming sale of goods does not arise and in that sense, transaction would be only a service and not a sale" were to be construed as ratio, it may not give any advantage to the petitioner in the facts of the case in view of the clarification sought for by the petitioner which has been extracted above.

66. The petitioner has to independently satisfy the respondent, that the transaction in questions were outside the purview of TN VAT Act 2006 by producing agreements and invoices. It is not answer to the impugned notice issued under Section 27 of the TN VAT Act, 2006 that the petitioner was not liable to tax in view of the letter of the Assistant Commissioner of Central Excise.

67. Therefore, I am of the view that these writ petitions filed by the petitioner are without any merits are liable to be dismissed. The petitioner should therefore submit all the agreements signed with its client and invoices raised on its client during the period in dispute before the 2nd respondent and file written submissions before the 2nd respondent and demonstrate on facts how it was not liable to pay tax under the provisions of the Tamil Nadu Value Added Tax Act, 2006 under Entry 68, Part B of the Schedule I to the said Act within period of 45 days from the date of receipt of a copy of this Order.

68. The 2nd respondent shall consider the representation if any of the petitioner and thereafter pass appropriate orders on merits, in accordance with law without being influenced by the observations contained herein. It is made clear that there is no finding of facts rendered in this order while dismissing these writ petitions filed under Article 226 of the Constitution of India. The observations have been made only to conclude that the petitioner has not made out a case for interference with the reassessment proceedings initiated by the respondent under the provisions of the Tamil Nadu Value Added Tax Act, 2006 under Article 226 of the Constitution of India.

69. Since the dispute pertains to the assessment years 2009-10 to 2013-14, the respondent shall pass appropriate orders on merits within a period of six months from the date of receipt of this Order after affording an opportunity of personal hearing to the petitioner.

70. These writ petitions stand dismissed with the above observation. No costs. Consequently, connected miscellaneous petitions are also closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

kkd
To

1. The Secretary, Commercial Taxes Department,
Fort St. George, Chennai 600 009.

2. The Assistant Commissioner,
Adyar Assessment Circle,
40, Greenways Road,
Chennai 600 026.

3. The Secretary,
The Union of India,
Ministry of Finance,
North Block, New Delhi.

4. The Commissioner of Service Tax,
Service Tax Commissionerate III,
Newry Towers, No.2054-I, II Avenue,
Anna Nagar, Chennai 600 040.

+1 CC to The Special Government Pleader (T) sr 12292.

+1 CC to Mr.V. Sundareswaran, Advocate sr 11791.

WEB COPY

W.P.Nos.1413 to 1417 of 2015
and M.P.Nos.1 to 1 of 2015

SR II (CO)
SP(17/03/2021)