

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.01.2021

PRONOUNCED ON : 01.03.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.39268 to 39274 of 2005

India Switch Company Pvt.Ltd.,

5, Mezzanine Floor, Thappar House,

37, Montieth Road, Egmore,

Chennai 600 008

Represented by its Authorised Signatory

S.Surya Kumar ... Petitioner in all W.Ps.

vs

1. The Deputy Commercial Tax Officer,

Egmore I Assessment Circle,

Taluk Office Buildings,

Spur Tank Road, Chepet,

Chennai 600 031.

2. The Secretary,

Ministry of Finance,

Union of India, Department of Finance,

New Delhi.

3. The Ministry of Finance,

Represented by its Secretary,

Department of Commercial Taxes,

Government of Tamil nadu,

Fort St.George, Chennai 600 009. ... Respondents 1 to 3 in

W.P.Nos.39268 to 39271/2005

1. Deputy Commercial Tax Officer,

Egmore I Assessment Circle,

Taluk Office Buildings, Spur Tank Road,

Chetpet, Chennai 600 031.

2. The Ministry of Finance,

Represented by its Secretary,

Department of Commercial Taxes,

Government of Tamil nadu,

Fort St.George, Chennai 600 009. .. Respondents 1 and 2 in

W.P.Nos.39272 to 39274/2005

Prayer in all W.Ps.: Writ petitions filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorari to call for the records connected with Order dated 15.10.2005 in SCN No.; Rc.No.1242/2005/CST Act 2001-2002; Rc.No.1242/2005/CST Act 2002-2003; Rc.No.1242/2005/CST Act 2003 - 2004; Rc.No.1242/2005/CST Act 2004-2005; Rc.No.1242/2005/CST Act 2002-2003; Rc.No.1242/2005/CST Act 2003-2004 and Rc.No.1242/2005/TNGST Act 2004-2005; (D-3 No.1/2005-2006) CST dated 29.08.2005 passed by the 1st respondent and quash the same.

For Petitioner : Mr.H.Karthik Seshadri (In all W.Ps.)

For Respondents: Mr.Mohammed Shaffiq, Spl.G.P.(In all W.Ps.)

C O M M O N O R D E R

By this common order, all the seven writ petitions are being disposed.

2. In these writ petitions, the petitioner has challenged the assessment orders, all dated 15.10.2005, passed by the respondent No.1 for the assessment years 2002-03 to 2004-05 under the provisions of the Tamil Nadu General Sales Tax Act, 1959 and for the assessment years 2001-02 to 2004-05 under the provisions of the Central Sales Tax Act, 1956.

3. The petitioner was issued with the following notices under the provisions of the Tamil Nadu General Sales Tax Act, 1959 and Central Sales Tax Act, 1956 which have culminated in the following impugned orders of the first respondent as detailed below:-.

Period	Notice/Reference	Impugned order/date	Writ petition No.
2001-2002	RC.No.1242/2005 CST Act	15.10.2005	39268/2005
2002-2003	- Do -	15.10.2005	39269/2005
2003-2004	- do -	15.10.2005	39270/2005
2004-2005	- do -	15.10.2005	39271/2005
2002-2003	R.C.No.1242/2005 TNGST Act	15.10.2005	39272/2005
2003-2004	Rc.No.1242/2005 TNGST Act	15.10.2005	39273/2005
2004-2005	Rc.No.1242/2005 TNGST Act	15.10.2005	39274/2005

4. All the above mentioned notices and impugned orders contained identical allegations for which identical finding have been rendered by the first respondent in the impugned orders.

5. All these assessment orders precede a notice which called upon the petitioner to pay tax under the provisions of the respective enactments for purported "transfer of right to use" of goods.

6. The allegations in the about notices issued under Tamil Nadu General Sales Tax Act, 1959 and the Central Sales Tax Act, 1956 state that the activity carried out by the petitioner involved installation and maintenance of ATM and other allied equipments for various banks and provision of 24 hours security at site involving cash management (i.e) collection from the bank, loading the cash in the vault, processing the cash between fit and unfit notes, loading of cash into the ATMs and ensuring that there is no cash out situation and take necessary insurance, payment of rentals in case of, off site locations i.e. where the ATMs are stationed in public places outside the bank premises, general upkeep of the site, providing 24 hours help desk for troubleshooting, Disaster Recovery Management, incidental management etc.

7. It is further alleged that the petitioner was not only purchasing ATMs from outside the state of Tamil Nadu but also from First Leasing Company of India Ltd, Chennai and that ATMs were installed not only within the state of Tamil Nadu but also outside the state of Tamil Nadu. It was also alleged that the petitioner was hiring ATMs to banks and received rental charges and was therefore liable to tax under Section 3-A TNGST Act, 1959 and with effect from 13.5.2002 after amendment to CST Act the petitioner was liable to pay the sales tax.

8. The petitioner replied to the notices issued by the respondent and denied liability. It was stated that the effective possession/control continued to rest with the petitioner and therefore question of subjecting the petitioner to tax as there was "transfer of right to use" within the meaning of the provisions of the Tamil Nadu General Sales Tax Act, 1959 and Central Sales Tax Act, 1956 were not attracted.

9. To the extent ATMs were purchased within the state of Tamil Nadu and where such leasing of ATMs were within the state of Tamil Nadu, the petitioner was held liable to pay tax at 1% as resale tax while other transactions involving first sale were held liable to tax and the merit rate. The notices issued relied upon the decision of the Hon'ble Supreme Court in 20th Century Finance Corporation vs. State of Maharashtra (119) STC 182.

10. Paragraph No.13 of the impugned orders passed by the

first respondent read identically. They are reproduced as under:-

13. I have examined the contentions of the dealers and found that the contentions are not convincing and acceptable since the notice itself is self explanatory. Leasing transactions in which possession and control of goods leased lie with lesser are subject to tax/ The element viz., possession and control exist together and concurrently. Thus, in the case on hand presence of elements namely possession and control are there.

11. The respondents have filed a counter. It is submitted that the petitioner has an alternate and efficacious remedy by way of a statutory appeal under the machineries prescribed under the provisions of the respective enactments and therefore these writ petitions were liable to be dismissed. It is submitted that the petitioner was a dealer within the meaning of the provisions of the respective enactments and a person engaged in the business of supplying by way of, or as part of any service or in any other manner whatsoever, of goods, where the supply of services was for cash, deferred payments or other valuable consideration.

12. The petitioner had also earlier obtained registration for Banking and Financial Services under the Provisions of the Finance Act, 1994 during 2002. However, the petitioner was of the view that it was not liable to pay service tax for "Banking and Financial Service" as per section 65 (11) of the Finance Act, 1994 as it stood during the period between 16.8.2002 and 28.4.2004. The petitioner was also issued with a Show Cause Notice No.4/2004-2005 by the Deputy Commissioner (STC), Office of the Commissioner of Central Excise, Chennai II. Status of the said proceeding has been disclosed on the date of hearing.

13. It is stated that the ATM's facilities are outsourced by the banks and that the petitioner was providing a technology solution to Bank of India and United Bank of India and the terms of the agreement clearly bring the transaction within the meaning of the taxable service of a transaction of "transfer of right to use" within the meaning of the respective enactments and therefore the petitioner was liable to pay TNGST/CST to the commercial tax departments.

14. Heard the learned counsel for the petitioner and the learned Special Government Pleader for the respondents. I have perused the impugned orders passed by the first respondent. I have also perused the provisions of the Tamil Nadu General Sales Tax Act, 1959 and the provisions of the Central Sales Tax Act,

1959 as amended with effect from 13.5.2002 with the amendment to the definition's of sale in section 2 (g) of the Central Sales Tax Act, 1956.

15. The point for consideration in these writ petitions is whether the petitioner should be relegated at this distant point of time to avail the alternate remedy before the Appellate Authority under the respective enactment or whether these writ petitions can be disposed on merits as there are no disputed questions of fact involved.

16. Since there are no disputed questions of fact and only application of settled position of law to the facts of the case, I am inclined to exercise the jurisdiction of the court under article 226 of the Constitution of India. Further, clarity on the law is available as on this date in the light of the decision of the Hon'ble Supreme Court in Bharat Sanchar Nigam Ltd and another Vs. Union of India and Other (2006) 3 SCC 1 ; 2006 (2) STR 2. The said decision was not available when the impugned orders were passed.

17. Article 366(29A) of the Constitution of India was amended by the 46th Amendment to the Constitution to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 were absent, within the ambit of the definition of purchase and sales for the purposes of levy of sales tax. The amendment especially allowed specific composite contracts viz. works contracts [Clause (b)], hire purchase contracts [Clause (c)], catering contracts [Clause (e)] by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax.

18. As per Clause“(29A) of Art. 366 of the Constitution of India, “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;"

19. Explaining the scope of Art.366(29A) of the Constitution of India, the Hon'ble Supreme Court in *Bharat Sanchar Nigam Ltd and another Vs. Union of India and Other* (2006) 3 SCC 1 ; 2006 (2) STR 2 observed that "Clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale. Clause (b) covers cases relating to works contracts. This was the particular fact situation which the Court was faced with in *Gannon Dunkerley* and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in *Gannon Dunkerley* was directly overcome. Clause (c) deals with hire purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under Clause (d) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to *A.V. Meiyappan's* decision a lease of a negative print of a picture would be a sale. Clause (e) covers cases which in law may not have amounted to sale because the member of an incorporated association would have in a sense begun both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Clause (f) pertains to contracts which had been held not to amount to sale in *State of Punjab v. M/s. Associated Hotels of India Ltd.* (supra). That decision has by this clause been effectively legislatively invalidated."

20. Earlier the Hon'ble Supreme Court in 20th Century Finance Corporation versus State of Maharashtra (119) STC 182; (2000) 6 SCC had settled the controversy as to which State could levy sales tax, when a contract was signed in one State and the

delivery of the goods or use of the rights were in different States. The majority held that the State where the contract was signed would have the power to levy sales tax. Thus, as per the said decision, the place where the goods were delivered or used could not be a place for levy of sales tax. The said case was also concerned with the constitutional validity of 46th amendment to the Constitution. The court upheld the constitutional validity of the amendment.

21. The above decision was however slightly diluted in Bharat Sanchar Nigam Ltd. and another Vs. Union of India and Other (2006) 3 SCC 1 ; 2006 (2) STR 2 referred to supra. The Court observed as follows:-

67. With respect, the decision in 20th Century Finance Corporation Limited v. State of Maharashtra, cannot be cited as authority for the proposition that delivery of possession of the goods is not a necessary concomitant for completing a transaction of sale for the purposes of Article 366(29A)(d) of the Constitution. In that decision the Court had to determine where the taxable event for the purposes of sales tax took place in the context of sub-clause (d) of Article 366(29A). Some States had levied tax on the transfer of the right to use goods on the location of goods at the time of their use irrespective of the place where the agreement for such transfer of right to use such goods was made. Other States levied tax upon delivery of the goods in the State pursuant to agreements of transfer while some other States levied tax on deemed sales on the premise that the agreement for transfer of the right to use had been executed within that State (vide Paragraph 2 of the judgment as reported). This Court upheld the third view namely merely that the transfer of the right to use took place where the agreements were executed. In these circumstances the Court said that: -

"No authority of this Court has been shown on behalf of respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods. We are, therefore, of the view that 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. (emphasis ours)

69. In determining the situs of the transfer of the right to use the goods, the Court did not say that delivery of the goods was inessential for the purposes of completing the transfer of the right to use. The emphasized portions in the quoted passage evidences that the goods must be available when the transfer of the right to use the goods take place. The Court also recognized that for oral contracts the situs of the transfer may be where the goods are delivered (see Para 26 of the judgment)

70. In our opinion, the essence of the right under Article 366(29A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise

22. The concurring view of late Hon'ble Mr. Justice A.R. Lakshmanan, J in Bharat Sanchar Nigam Ltd. and another Vs. Union of India and Other (2006) 3 SCC 1 ; 2006 (2) STR 2 referred to supra summarizes the law on the subject relating to "transfer of right to use. It has given more clarity on the scope of levy of tax in the case transfer of right to use. Relevant portion of the said decision reads as under:-

91. To constitute a transaction for the transfer of the right to use the goods the transaction must have

the following attributes:

- a. There must be goods available for delivery;
- b. There must be a consensus ad idem as to the identity of the goods;
- c. The transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;
- d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute - viz. a "transfer of the right to use" and not merely a licence to use the goods;
- e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

23. In the facts and circumstances of the present case, the above test enunciated for "transfer of right to use" is not satisfied. Therefore, the petitioner cannot be subjected to tax under the provisions of the Tamil Nadu General Sales Tax Act, 1959 and/or under the provisions of the Central Sales Tax Act, 1956. In the transactions entered between the petitioner and the banks, the effective control over to ATM's continued to vest with the petitioner. Since the issue stands fully covered in favour of the petitioner in the above cited decision of the Hon'ble Supreme Court in Bharat Sanchar Nigan Ltd. and another Vs. Union of India and Other (2006) 3 SCC 1 ; 2006 (2) STR 2, these writ petitions deserve to be allowed by quashing the impugned orders.

24. As a matter of fact, the subject transaction may have been liable to tax under Section 65(105)(zzzzj) of the Finance Act, 1994 with effect from 2008 after service tax was levied on "Supply of Tangible Goods" as about test for "transfer of right to use" is conspicuously absent.

25. Therefore, the impugned orders seeking to tax the petitioner under the provision of the Tamil Nadu General Sales Tax Act, 1959 and under the provisions of the Central Sales Tax Act, 1956 are quashed with consequential relief to the petitioner.

26. These writ petitions are allowed with the above observation. No Costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

kkd

To

1. Deputy Commercial Tax Officer,
Egmore I Assessment Circle,
Taluk Office Buildings,
Spur Tank Road, Chepet,
Chennai 600 031.

2. The Secretary,
Ministry of Finance,
Union of India,
Department of Finance,
New Delhi.

3. The Secretary,
The Ministry of Finance,
Department of Commercial Taxes,
Government of Tamil nadu,
Fort St. George,
Chennai 600 009.

+2ccs to M/s. H.Karthik Seshadri, Advocate, sr no.12095

+1cc to The Special Government Pleader(Taxes), sr no.12987

सत्यमेव जयते

W.P.Nos.39268 to 39274 of 2005

PPA(CO)

RMP(18/03/2021)

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