

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE N. TUKARAMJI

WRIT PETITION Nos.13474 and 13482 of 2008

COMMON ORDER: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Issue raised in both the writ petitions is one and the same. Parties are also the same. Therefore, both the writ petitions have been heard together and are being disposed of by this common judgment and order.

2. Heard Mr. Kailashnath P.S.S., learned counsel for the petitioner; Mr. V.Rajeshwar Rao, learned counsel for respondents No.1 and 2; and Mr.B.Mukherjee, learned counsel representing Mr. Gadi Praveen Kumar, learned Deputy Solicitor General of India appearing for respondent No.3.

3. In W.P.No.13474 of 2008 challenge made is to the final assessment order dated 12.05.2008 for the assessment period 2007-08 (up to 14.02.2008) under the Central Sales Tax Act, 1956 (briefly, 'the CST Act')

hereinafter). On the other hand, in W.P.No.13482 of 2008 the challenge is to the final assessment order dated 12.05.2008 for the assessment period 2006-07 under the CST Act.

4. Both the aforesaid orders have been passed by the Commercial Tax Officer, Punjagutta Circle, Hyderabad (briefly, 'Commercial Tax Officer' hereinafter). Additionally, a prayer has been made to declare Entry 39(14) of Schedule IV of the then Andhra Pradesh Value Added Tax Act, 2005 (briefly, 'the VAT Act' hereinafter) insofar it provides for levying of sales tax on customised Information Technology (IT) software as *ultra vires* and unconstitutional. Besides, petitioner has sought for a declaration that Section 65(53)(a) read with Section 65(105)(zzzzze) of the Finance Act, 1994, is *ultra vires* and unconstitutional.

5. For the sake of convenience, we will refer to the averments in W.P.No.13482 of 2008.

6. From a perusal of the final assessment order dated 12.05.2008 it is seen that petitioner is a dealer in domestic sales of software and also export sales of software. Business premises of the petitioner was visited by the Commercial Tax Officer on 26.02.2008 for verification of sale invoices and purchase invoices following the judgment of the Supreme Court in **Tata Consultancy Services v. State of Andhra Pradesh**¹. Thereafter, authorised representative of the petitioner appeared before the Commercial Tax Officer on 21.03.2008 and produced copies of sale invoices for the concerned assessment period. On verification thereof, it was noted that major portion of sale of software was in the course of export to foreign countries while a portion related to domestic sale of software taxable under the CST Act. Petitioner claimed exemption on domestic sales in the returns filed on the ground that sale of software represented software services. Adverting to Entry 39(14) of Schedule IV of the VAT Act read with the CST Act, Commercial Tax Officer took the *prima facie* view that sale of customised IT software was

¹ (2005) 1 SCC 308

liable to tax in terms of the aforesaid provisions at the rate of 10%.

7. Accordingly, a show cause notice dated 25.03.2008 was issued to the petitioner. Petitioner submitted reply dated 19.04.2008 stating that petitioner was engaged in the development of software solutions tailored to cater to the specific needs of customers. It provided the manpower and software skills for implementation. This was in no way connected to canned/uncanned software solutions. It was also contended that the work of software application depended on the needs, characteristics and methods of the customer organisation. Consideration of such software application work was measured in terms of manpower hours and that ownership of the deliverables vested with the client i.e., intellectual property of the software remained with the client. Further, petitioner sought to distinguish the judgment of the Supreme Court in **Tata Consultancy Services** (supra).

8. However, Commercial Tax Officer did not accept the explanation furnished by the petitioner. Adverting to the

decision of the Supreme Court in **Tata Consultancy Services** (supra), it was held that customised software is also a taxable good. As per the aforesaid decision, there is no distinction between canned and uncanned software; both canned and uncanned software are goods and liable to tax. Commercial Tax Officer clarified that the nature of work undertaken by the petitioner was development of customised software. The mode and receipt of payment i.e., whether on hourly basis or in lump sum towards development of customised software would not decide the nature of work. Development of customised software starts from designing, continues through development and implementation and ends with handing over the developed software after successful execution. Therefore, the amount collected from the clients is nothing but sale value of customised software, which is exigible to tax under the VAT Act.

8.1. Though petitioner had contended that it had paid service tax to the consulting engineers or management consultants, Commercial Tax officer opined that Finance

Act, 1994, and VAT Act are two different enactments covering different fields. That apart, petitioner did not produce any evidence to prove payment of service tax on the goods sought to be taxed under the CST Act read with the VAT Act. Therefore, Commercial Tax Officer held that the amounts indicated in the show cause notices were liable to be paid by the petitioner and confirmed the same.

9. Aggrieved, the writ petition has been filed.

9.1. This Court by order dated 26.06.2008 had admitted the writ petition for hearing and passed an interim order staying the impugned order dated 12.05.2008 on condition of depositing 50% of the disputed tax within eight weeks.

10. Since considerable reliance has been placed by both the sides on the Constitution Bench decision of the Supreme Court in **Tata Consultancy Services** (supra) it would be apt to advert to the same at the outset.

10.1. Tata Consultancy Services provides consultancy services, including computer consultancy services. As part of their business they prepare and load on customers'

computers custom-made software (uncanned software) and also sell computer software packages off the shelf (canned software). The canned software packages are of the ownership of companies/persons who have developed those software. Appellant was a licensee with permission to sub-licence these packages to others. The canned software programs are programs like Oracle, Lotus, Master Key etc. In respect of canned software, Commercial Tax Officer, Hyderabad, had passed a provisional order of assessment under the provisions of the Andhra Pradesh General Sales Tax Act, 1957, holding that the software were goods and accordingly, sales tax was levied thereon. This was affirmed by the appellate authority. Ultimately, after traversing through several rounds of litigation, the matter landed up in the Supreme Court. Question for consideration before the Supreme Court was whether the canned software sold by the appellant could be termed as “goods” and thus exigible to sales tax under the Andhra Pradesh General Sales Tax Act, 1957?

10.2. After referring to relevant provisions of the aforesaid Act and several decisions, including in the case of **CST v. M.P. Electricity Board**², Supreme Court held that the term “goods” for the purposes of imposition of sales tax cannot be given a narrow meaning. It was held as follows:

19. Thus this Court has held that the term “goods”, for the purposes of sales tax, cannot be given a narrow meaning. It has been held that properties which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed, etc. are “goods” for the purposes of sales tax. The submission of Mr Sorabjee that this authority is not of any assistance as a software is different from electricity and that software is intellectual incorporeal property whereas electricity is not, cannot be accepted. In India the test to determine whether a property is “goods”, for purposes of sales tax, is not whether the property is tangible or intangible or incorporeal. The test is whether the item concerned is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. Admittedly in the case of software, both canned and uncanned, all of these are possible.

10.3. Thus, Supreme Court held that the test to determine whether a property is “goods” for purposes of sales tax is

² (1969) 1 SCC 200

not whether the property is tangible or intangible or incorporeal. The test is whether the item concerned is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed etc. Admittedly, in the case of software, both canned and uncanned, all the above attributes are present.

10.4. Supreme Court referred to the definition of the term “goods” appearing in Article 366(12) of the Constitution of India and held as follows:

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. v. Commissioner of Customs*** [(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.

10.5. Thus, according to the Supreme Court, the word “goods” as defined in Article 366(12) of the Constitution of India is very wide and includes all types of movable properties, whether those properties be tangible or intangible. In case of software or sale of computer software it is clearly a sale of goods. Even an intellectual property, whether it be in the form of canvas or computer discs or cassettes and marketed, would become goods. Supreme

Court thereafter agreed with the submission of Mr. Soli J.Sorabjee that there is no distinction between branded and unbranded software. In both the cases the software is capable of being abstracted, consumed and used. In both cases the software can be transmitted, transferred, delivered, stored, possessed etc. Thus, unbranded software when it is marketed/sold may be goods. However, Supreme Court did not express final opinion on this aspect as this was not the issue before it.

11. In our considered opinion, the view taken by the Commercial Tax Officer is in consonance with the view taken by the Supreme Court in **Tata Consultancy Services** (supra).

12. Learned counsel for the petitioner made a valiant effort to contend that what was being construed to be goods was in fact a service provided by the petitioner and therefore, not exigible to sales tax. In this connection, he has placed reliance on a Division Bench decision of the Karnataka High Court in **Sasken Communication**

**Technologies Ltd. v. Joint Commissioner of
Commercial Taxes (Appeals)-3³.**

13. However, on going through the aforesaid judgment we find that the question which fell for consideration of the Division Bench of the Karnataka High Court was whether a contract for development of a software falls within the mischief of a “works contract” and whether upon development of the software it is vested with the customer from day one in which event whether it would amount to deemed sale under Article 336(29A)(b) of the Constitution of India?

14. Karnataka High Court examined various agreements entered into by the parties and observed that on the day when the parties had entered into agreement there was no software in existence; in other words, there was no goods in existence. The agreement was not for transfer of software. The agreement was for development of software. As per the agreement, the dealer had given up all the rights

³ MANU/KA/2245/2011

and claims of the software which would be the absolute property of the customer.

15. In the light of the above analysis, it was held by the Karnataka High Court that the contracts in question were not works contract but contract for service simplicitor. Consequently, the orders passed by the taxing authority levying sales tax were set aside.

16. We are afraid, the aforesaid decision of the Karnataka High Court is clearly distinguishable from the facts and circumstances of the present case and not at all applicable.

17. As already discussed above, decision of the Supreme Court in **Tata Consultancy Services** (supra) clearly supports the contention of the Commercial Tax Officer that the development of software solutions carried out by the petitioner was nothing but sale of goods and therefore, exigible to sales tax under the VAT Act read with the CST Act.

18. We, therefore, do not find any merit in the challenge to the impugned orders dated 12.05.2008.

19. Insofar the other prayers made by the petitioner are concerned, we are of the view that the same are not required to be gone into in the present proceedings.

20. Consequently, both the writ petitions are dismissed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

UJJAL BHUYAN, CJ

N. TUKARAMJI, J

08.02.2023

vs