(2010) 04 MAD CK 0028

In the Madras High Court

Case No : Writ Petition No''s. 30036 to 30038 of 2002, 25391 and 9552 of 2005 and W.P.M.P. No''s. 34890 and 34891 of 2002

Bharat Offset and Others APPELLANT

Vs

Tamil Nadu Taxation Special Tribunal and Another RESPONDENT

Date of Decision : 05-04-2010

Acts Referred:

Constitution of India, 1950 — Article 366, 366(29A)
Tamil Nadu General Sales Tax Act, 1959 — Section 2, 3, 3(1), 3(2), 3(2B)

Citation : (2010) 34 VST 342

Hon'ble Judges : Prabha Sridevan, J;P.P.S. Janarthana Raja, J

Bench : Division Bench

Advocate : R. Hemalatha and S. Sundareswaran, for the Appellant; Haja Nazuruddin, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Prabha Sridevan, J.—These writ petitions have been filed for a declaration that G. O. Ms. No. 66, Commercial Taxes (B1) dated August

16, 2001 of the second respondent herein subjecting all the printed materials executed on specific orders exigible to sales tax u/s 3 of the Tamil

Nadu General Sales Tax Act, 1959 (TNGST) as that of sale, is outside the purview of the powers of the State Legislature and violative of the

consistent principles of law laid down by the honourable High Court of Madras reported in Gannon Dunkerley & Co. (Madras) Ltd. v. State of

Madras [1954] 5 STC 216 : AIR 1954 Mad 1130, State of Tamil Nadu v. Anandam Viswanathan [1977] 39 STC 226, Deputy Commissioner

(C.T.), Coimbatore Division, Coimbatore v. Karthikeya Press [1982] 51 STC 28, Court Press Job Branch, Salem v. State of Tamil Nadu [1983]

54 STC 382, State of Tamil Nadu v. Gunasundari Modern Art Printers [1995] 97

STC 489 and those by the Supreme Court reported in The

State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , Government of Andhra Pradesh v. Guntur Tobaccos Ltd. [1965] 16 STC 240,

Commissioner of Commercial Taxes, Mysore, Bangalore v. Hindustan Aeronautics Ltd. [1972] 29 STC 438, The State of Punjab Vs. Associated

Hotels of India Ltd., , State of Tamil Nadu v. Anandam Viswanathan [1989] 73 STC 1 and Hindustan Aeronautics Ltd. Vs. State of Karnataka, .

2. G.O. Ms. No. 66, Commercial Taxes (B1) Department, dated February 16, 2001, reads as follows:

Tamil Nadu General Sales Tax Act, 1959-

First Schedule - Amendment

Notification G. O. Ms. No. 66 CT (B1), dated 16th August, 2001

No. II(1)/CT/45(a)/2001.-In exercise of the powers conferred by Sub-section (1) of Section 59 of the Tamil Nadu General Sales Tax Act, 1959,

Tamil Nadu Act (1 of 1959), the Governor of Tamil Nadu hereby makes the following amendment to the First Schedule to the said Act:

Amendment. - In the First Schedule in Part C, in item 52, for sub-items (iv) to (vii) and the entries relating thereto, the following sub-item and

entries shall be substituted, namely:

(iv) all printed materials other than those specified in sub-items (i) to (iii) above, whether made of paper, paper board or other materials, like

account books, registers, order books, receipt books, memorandum pads, folders, file covers, book covers, greeting cards and invitation cards of

all kinds and trade mark labels including those materials manufactured according to specification of customers whether or not with logo or name or

matter.

3. The learned Counsel for the writ petitioners submitted that the inclusion of the above sub-items in the entry is unconstitutional. The learned

Counsel submitted that by just amending the entry by an inclusion of a sub-item, the State cannot bring to tax what is otherwise non-taxable. The

learned Counsel submitted that in a works contract, the transfer of goods is only incidental and, when goods are made to order according to the

specifications of the customers and the materials are so printed, there is no transfer of goods. The Legislature has attempted to treat as ""sale of goods"", what is really a transaction in the nature of ""a works contract"". The learned Counsel referred to Article 366 (29A) of the Constitution of

India and section 3B of the TNGST Act and the definition of ""sale"" in Section 2 thereof. The learned Counsel submitted that the fact that the

works contract"" is a ""deemed sale"" will not give the State the power to tax it as if it was a contract for sale of goods. The learned Counsel

submitted that the State cut into the scope of Section 3B of the TNGST Act by a mere amendment of the Schedule. The learned Counsel

submitted that the entries in the Schedule cannot control or prevail over the provisions of the Act. The learned Counsel further submitted that the

Supreme Court had repeatedly held that it is not open to the State to define a ""sale"" in a manner as to make a sale outside its territory into a sale

within its territory. Similarly, the State cannot by this G. O. enlarge its power to tax what is really a works contract as though it is sale of goods.

4. The learned Government Pleader submitted that the Legislature or Parliament has the power to classify ""goods"", so that they fall in a particular

entry. They have the power to amend the entry as well. The real question is, whether the items mentioned in the entry did not involve a simple sale

of goods. According to the learned Special Government Pleader, if it was a transfer of chattel as chattel with an incidental works component, then

the Government order is perfectly valid.

5. We extract the changes that entry 52 undergone in this regard, to bring home the points urged by the petitioners:

TNGST Act, 1959-First Schedule-Entry 52 of Part C-8 per cent

Entry No. 52 : - From July 17, 1996 to March 31, 1999

(i) Xerox copies

(ii) Laser copies/printouts

(iii) Computer printouts

Provided that if the paper used for taking such copies or printouts has suffered tax under item 53 in Part B, the copies or printouts shall not again

be subjected to tax under any of the sub-items mentioned above.

(iv) All printed materials other than those specified in sub-items (i) to (iii) above.

Entry No. 52 : - From April 1, 1999 to August 17, 2001

(i) Xerox copies

(ii) Laser copies/printouts

(iii) Computer printouts

Provided that if the paper used for taking such copies or printouts has suffered tax under item 53 in Part B, the copies or printouts shall not again

be subjected to tax under any of the sub-items mentioned above.

(iv) All printed materials other than those specified in sub-items (i) to (iii) above.

(v) Account books, registers, order-books, receipt books, memorandum pads, folders, file covers and book covers made of paper or paper

board

(vi) Greeting cards and invitation cards of all kinds

(vii) Trade mark labels (added vide G. O. Ms. 90 dated May 30, 2000 effective from June 1, 2000)

Entry No. 52 From August 18, 2001

(i) Xerox copies

(ii) Laser copies/printouts

(iii) Computer printouts

Provided that if the paper used for taking such copies or printouts has suffered tax under (Item 30 in part C), the copies or printouts shall not again

be subjected to tax under any of the sub-items mentioned above.

(iv) All printed materials other than those specified in sub-items (i) to (iii) above, whether made of paper, paper board or other materials, like

account books, registers, order books, receipt books, memorandum pads, folders, file covers and book covers, greeting cards and invitation cards

of all kinds and trade mark labels including those materials manufactured according to specification of customers whether or not with logo or name

or matter.

Entry No. 40 : - From March 27, 2002

(i) Xerox copies

(ii) Laser copies/printouts

(iii) Computer printouts

Provided that if the paper used for taking such copies or printouts has suffered tax under item 22 of this part, the copies or printouts shall not again be subjected to tax under any of the sub-items mentioned above.

(iv) All printed materials other than those specified in sub-items (i) to (iii) above, whether made of paper, paper board or other materials, like

account books, registers, diaries, order books, receipt books, memorandum pads, folders, file covers and book covers, greeting cards and

invitation cards of all kinds and trade mark labels including those materials manufactured according to specification of customers whether or not

with logo or name or matter.

6. Section 2(n) and Section 3B of the TNGST Act are extracted hereunder:

2. Definitions.-In this Act, unless the context otherwise requires,-

...

(n) ''sale'' with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a

mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or 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) a delivery of goods on hire-purchase or any system of payment by instalments;

(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) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable

consideration;

(vi) a 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.

Explanation (1).- The transfer of property involved in the supply or distribution of goods by a society (including a co-operative society), club, firm

or any association to its members, for cash, or for deferred payment or other valuable consideration, whether or not in the course of business, shall

be deemed to be a sale for the purposes of this Act.

Explanation (1A).-Every transfer of property in goods by the Central Government or any State Government for cash or for deferred payment or

other valuable consideration, whether or not in the course of business, shall be deemed to be a sale for the purposes of this Act.

Explanation (1B).-The transfer of property involved in the purchase, sale, supply or distribution of goods through a factor, broker, commission

agent or arhatia, del credere agent or an auctioneer or any other mercantile agent, by whatever name called, whether for cash or for deferred

payment or other valuable consideration, shall be deemed to be a purchase or sale, as the case may be, by such factor, broker, commission agent,

arhati, del credere agent, auctioneer or any other mercantile agent, by whatever name called, for the purposes of this Act.

Explanation (1C).-Every transfer of property in goods including goods as unclaimed or confiscated or as unservicable or as scrap surplus, old,

obsolete or discarded materials or as waste products, by the persons or bodies referred to in Explanation (3) in Clause (g) of Section 2 of this Act,

for cash or for deferred payment or for any other valuable consideration whether or not in the course of business shall be deemed to be a sale for

the purposes of this Act.

Explanation (2).-(Omitted by Act 28/84 with effect from 29th May, 1984).

Explanation (3).-(a) The sale or purchase of goods shall be deemed, for the purposes of this Act, to have taken place in the State, wherever the

contract of sale or purchase might have been made, if the goods are within the State:

(i) in the case of specific or ascertained goods, at the time the contract of sale or purchase is made; and

(ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase by the seller or by the purchaser, whether the assent of the other party is prior or subsequent to such appropriation.

(b) Where there is a single contract of sale or purchase of goods, situated at more places than one, the provisions of Clause (a) shall apply as if

there were separate contracts in respect of the goods at each of such places.

Explanation (4).-Notwithstanding anything to the contrary contained in this Act, two independent sales or purchases shall, for the purposes of this

Act, be deemed to have taken place:

(a) when the goods are transferred from a principal to his selling agent and from the selling agent to the purchaser, or

(b) when the goods are transferred from the seller to a buying agent and from the buying agent to his principal, if the agent is found in either of the

cases aforesaid:

(i) to have sold the goods at one rate and to have passed on the sale proceeds to his principal at another rate, or

(ii) to have purchased the goods at one rate and to have passed them on to his principal at another rate, or

(iii) not to have accounted to his principal for the entire collections or deductions made by him in the sales or purchases effected by him on behalf

of his principal.''

...

3B. Levy of tax on the transfer of goods involved in works contract.-(1) Notwithstanding anything contained in Sub-sections (2B), (3), (4), (7)

and (8) of Section 3, or Section 7A, but subject to the other provisions of this Act including the provisions of Sub-section (1) of Section 3, every

dealer referred to in item (vi) of Clause (g) of Section 2 shall pay, for each year, a tax on his taxable turnover of transfer of property in goods

involved in the execution of works contract at the rates mentioned in Sub-section (2) of Section 3 or, as the case may be in Section 4.

Explanation.-Where any works contract involves more than one item of work, the rate of tax shall be determined separately for each such item of

work.

(2) The taxable turnover of the dealer of transfer of property involved in the execution of works contract shall, on and from the 26th day of June

1986, be arrived at after deducting the following amounts from the total turnover of that dealer:

(a) all amounts involved in respect of goods involved in the execution of works contract in the course of export of the goods out of the territory of

India, or in the course of import of the goods into the territory of India or in the course of inter-State trade or commerce;

(b) all amounts for which any goods specified in the First Schedule or Second Schedule, are purchased from registered dealers liable to pay tax

under this Act and used in the execution of works contract in the same form in which such goods were purchased;

(c) all amounts relating to the sale of any goods involved in the execution of works contract which are specifically exempted from tax under any of

the provisions of this Act;

(d) all amounts paid to the sub-contractors as consideration for execution of works contract whether wholly or partly:

Provided that no such deduction shall be allowed unless the dealer claiming deduction, produces proof that the sub-contractor is a registered

dealer liable to pay tax under this Act and that the turnover of such amounts is included in the return filed by such sub-contractor; and

(e) all amounts towards ""labour charges and other like charges"" not involving any transfer of property in goods, actually incurred in connection with

the execution of works contract, or such amounts calculated at the rate specified in column (3) of the Table below, if they are not ascertainable

from the books of accounts maintained and produced by a dealer before the assessing authority.

The table

Labour or other charges as a

Serial Type of works contract percentage value of the works

number contract

(1) (2) (3)

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1. Electrical contracts 15

----

2. All structural contracts 15

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3. Sanitary contracts 25

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4. Watch and/or clock repair contracts 50

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5. Dyeing contracts 50

----

6. All other contracts 30

(f) all amounts (including the tax collected from the customer) refunded to the customer or adjusted towards any amount payable by the customer,

in respect of unexecuted portion of works contract based on the corrections on account of measurements or check measurements, subject to the

conditions that:

(i) the turnover was included in the return and tax paid; and

(ii) the amount (including the tax collected from the customer) is so refunded or adjusted, within a period of six months from the due date for filing

of the return in which the said amount was included and tax paid.

7. Article 366 (29A) of the Constitution of India reads thus:

366. Definitions.-In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively

assigned to them, that is to say:

...

(29A) 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;.

8. Now let us refer to the aforesaid decisions mentioned in the writ prayer, both of the Supreme Court as well as those of this Court, since the

impugned Government order is being attacked as being unconstitutional:

I. Decisions of the Madras High Court:

(a) In Gannon Dunkerley & Co. (Madras) Ltd. v. State of Madras [1954] 5 STC 216 (Mad) : AIR 1954 Mad 1130, this Court held that the

expression ""sale"" or ""purchase of goods"" in entry 54 of List II of the Constitution had the same meaning as the word ""sale"" had in the Sale of

Goods Act. It was held that a construction works contract could not be broken into a contract for sale of materials and a contract for payment of

works done.

(b) In State of Tamil Nadu v. Anandam Viswanathan [1977] 39 STC 226 (Mad), this Court held that the contracts entered into by the universities

and other educational institutions with the printer for printing question papers are not contracts whose main object is transfer of property in the

question papers and dismissed the tax revision filed by the State.

(c) In Deputy Commissioner (C. T.), Coimbatore Division, Coimbatore v. Karthikeya Press [1982] 51 STC 28, this Court held that the orders for

printing of ledgers and account books were works contract and the order forms provided separately for the execution of work and held in favour

of the assessee.

(d) In Court Press Job Branch, Salem v. State of Tamil Nadu [1983] 54 STC 382, this Court held that the work of printing done by the assessee

in that case was in pursuance of a works contract.

(e) In State of Tamil Nadu v. Gunasundari Modern Art Printers [1995] 97 STC 489, this Court held that the printing of account books for Indian

Bank, the assessee in that case, was a works contract.

II. Decisions of the Supreme Court:

(a) In The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , the Supreme Court affirmed the decision of the Madras High Court

in Gannon Dunkerley & Co. (Madras) Ltd. v. State of Madras [1954] 5 STC 216 (Mad) : AIR 1954 SC 1130 and held that in a sale of goods,

the essential ingredients was an agreement to sell movables for a price and the property passed pursuant to that agreement and in a building

contract, which is entire and indivisible, there is no sale of goods because in any such contract, the agreement between the parties is that the

contractor should put up the construction according to the specifications contained in the agreement and therefore in such an agreement, there was

neither a contract to sell the materials used in the construction nor does the property pass therein as movables.

(b) In Government of Andhra Pradesh v. Guntur Tobaccos Ltd. [1965] 16 STC 240, the Supreme Court held that the packing of tobacco in

waterproof material must be regarded as an integral part of the process of re-drying and not independent of that process. It was held that in a

contract for re-drying raw tobacco and supplying it in a packed condition, the packing materials formed an integral part of the process of re-drying

and there was no independent contract for sale of packing material and it was only an incident of the drying process.

(c) In The Commissioner of Commercial Taxes, Mysore, Bangalore Vs. Hindustan Aeronautics Ltd., , where the question was whether the

delivery of railway coaches by the assessee to the Railway Board is liable to sales tax, the Supreme Court held that the contract in question is a

pure works contract and not subject to sales tax. The court did not agree with the contention that when all the materials used in the construction of a coach belong to the railways there can be any sale of the coaches itself. It was held that the difference between the price of a coach and the cost

of the material can only be the cost of services rendered by the assessee.

(d) In The State of Punjab Vs. Associated Hotels of India Ltd., , it was held that in the case of supply of food and other amenities apart from

lodging made by a hotelier to his guests for which a consolidated amount is charged, the contract for services cannot be bifurcated as one for

service and another for sale of foodstuff.

(e) In Hindustan Aeronautics Ltd. Vs. State of Karnataka, , the contract was one for servicing, repairing and overhauling air force planes. The

spare parts were separately built. The question was, whether the contract amounted to works contract and whether the supply of spare parts

amounted to sale. The Supreme Court held as follows (at pages 323 and 324 of STC):

It would be appropriate, in our opinion, because it clearly enunciates the principles, to refer to the statement of law in Benjamin''s Treatise on the

Law of Sale of Personal Property with reference to the French Code and Civil Law Eighth Edn. [1950] pp. 167-168., where the learned Editor

has deduced the principles that would be applicable in deciding the controversy before us. These principles are:

1. A contract whereby a chattel is to be made and affixed by the workman to land or to another chattel before the property therein is to pass, is

not a contract of sale, but a contract for work, labour and materials, for the contract does not contemplate the delivery of a chattel as such.

2. When a chattel is to be made and ultimately delivered by a workman to his employer, the question whether the contract is one of sale or of a

bailment for work to be done depends upon whether previously to the completion of the chattel the property in its materials was vested in the

workman or in his employer. If the intention and result of the contract is to transfer for a price property in which the transferee had no previous

property then the contract is a contract of sale.

Where, however the passing of property is merely ancillary to the contract for the performance of work such a contract does not thereby become

a contract of sale.

3. Accordingly,

(i) where the employer delivers to a workman either all or the principal materials of a chattel on which the workman agrees to do work, there is a

bailment by the employer, and a contract of work and labour or for work, labour and material (as the case may be), by the workman.

Materials added by the workman, on being affixed to or blended with the employer''s materials, thereupon vest in the employer by accession, and

not under any contract of sale.

(ii) where the workman supplies either all or the principal materials, the contract is a contract for sale of the completed chattle and any materials

supplied by the employer when added to the workmen''s materials vest in the workman by accession.

The learned Editor has emphasised that where passing of property was merely ancillary to the contract for the purpose of the work, such a

contract does not thereby become a contract for sale. This principle can also be deduced from the observations of the decision of Robinson v.

Graves [1935] 1 KB 579.

(f) In Patnaik and Company Vs. State of Orissa, , the goods mentioned were bus bodies. The majority held that the case of a contract ""...to

construct a building is quite different...; but under this contract, the bus body never loses its character as movable property, and the property in the

bus body passes to the Government as movable property..."", and the majority concluded that the contract is a contract for sale of goods and

dismissed the appeal filed by the assessee.

9. According to the learned Counsel for the petitioners, these decisions would clearly indicate that when the goods in question included printed

materials or where printing was done, there was no question that it was a works contract and therefore, by the impugned Government order, the

Government was bringing to tax as sale, a works contract which could not be taxed as such and therefore, the impugned Government order is

unconstitutional.

10. In Elel Hotels and Investments Ltd. v. Union of India [1989] 74 STC 146, the Supreme Court held that it is well-settled that a very wide

latitude is available to the Legislature in the matter of classification of objects, persons and things for purposes of taxation. In Aphali

Pharmaceuticals Ltd. v. State of Maharashtra [1991] 81 STC 113, the Supreme

Court explained how the Schedule should be used in construing

provisions in the body of the Act and it is as much an act of Legislature as the Act itself and it must be read together with the Act for all purposes

of construction. The expression in the Schedule cannot control or prevail against the express enactment and in case of any inconsistency between

the Schedule and the enactment, the enactment is to prevail and if any part of the Schedule cannot be made to correspond, it must yield to the

Medicinal and Toilet Preparations (Excise Duties) Act.

11. In T. V. Sundaram Iyengar & Sons v. State of Madras [1975] 35 STC 24, the Supreme Court held as follows (at page 29):

The question with which we are concerned, as would appear from the resume of facts given above, is whether the construction of the bus bodies

and the supply of the same by the assessees to their customers was in pursuance of a contract of sale as distinguished from a contract for work and

labour. The distinction between the two contracts is often a fine one. A contract of sale is a contract whose main object is the transfer of the

property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of

the price is not the transfer of a chattel qua chattel, the contract is one for work and labour. The test is whether or not the work and labour

bestowed end in anything that can properly become the subject of sale; neither the ownership of the materials, nor the value of the skill and labour

as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the

circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel (see Halsbury''s

Laws of England, Vol. 34, p. 6 Third Edition).

12. In State of Tamil Nadu v. Anandam Viswanathan [1977] 39 STC 226 the Madras High Court held as follows:

...The contract entered into by the universities and other educational institutions with the printer or any other person for printing question papers

and supplying the same to the universities and institutions cannot be said to be a contract whose main object is the transfer of the property in the

question papers from the printer to the universities and institutions.

13. In Vasani Cloth Stores Vs. The State of Maharashtra, dealt with a tailoring

contract, wherein the Division Bench of the Bombay High Court

has held as follows:

...On a consideration of all the circumstances of the present case, we have found it difficult to accept the view of the Tribunal that, either from the

bill or from any other material on record, it can be said reasonably that two separate contracts can be spelt out, one for the supply and sale of

lining material or hair canvas or, for the matter of that, for the supply and sale of thread and buttons, and the other for service charges. The two are

indivisible. Supply is inevitable, for, without either thread or buttons or lining material, it may not be possible to execute the work. That these

articles are required to be used need not be determinative of the question whether there is no separate agreement for purchase. Ordinarily, such

contracts, where materials to be used are ancillary to the execution of the contracts, do not import agreements to sell materials, as such, if that is

so, it cannot be said that the tailoring bill involves the sale of materials as well as the charges for stitching.

14. The decision of our High Court in The State of Tamil Nadu Vs. Anandam Viswanathan, was confirmed by the Supreme Court in State of

Tamil Nadu v. Anandam Viswanathan [1989] 73 STC 1, wherein it was observed that printed question paper or printed papers cannot be

categorised as entailing sale of goods, but it is rather a contract for work done. The Supreme Court held that such contracts that referred to

printing of judgments cannot be construed as contract for sale. In Sarvodaya Printing Press v. State of Maharashtra [1994] 93 STC 387, a Full

Bench of the Bombay High Court had considered the question whether printed materials in question, viz., the multi-coloured triplicate receipt

books specially designed, printed and prepared for the State Electricity Board was sale of goods or whether it was works contract. The Full

Bench observed as follows (at page 393 of 93 STC):

...If the parties intend to contract for a chattel, then it is a contract of sale even though work or skill and labour may have to be bestowed in

bringing into being the chattel. If the parties contract for the rendering of work and labour or skill and labour, it is not a sale, though in the execution

of the contract the passing of materials may incidentally be involved.

15. In those circumstances, the Full Bench held that the supply of receipts was

not sale and was a works contract and answered the question in

favour of the assessee. It further held,

that having regard to the special type of job-work done and other basic circumstances, the supply represented a works contract. The intention of

the parties was material and it was obvious. The principal object of the MPEB was to get the material printed and not to purchase printed material.

The charges were composite. The books were specially designed for the MPEB as per its specifications as to size, type, colour, format,

background, etc. No space was left blank obviously because the books were valuable and upon misuse could cause terrible loss to the MPEB.

Under the contract the applicant could not retain or use the printed books and the excess, if any, had to be destroyed. Although the paper and ink

used were property of the applicant before printing, thereafter they became the property of the MPEB by theory of accretion. The passing of

property in the goods used to the MPEB was, by the very nature of things, only incidental or ancillary to the contract of printing. No transfer of

chattel qua chattel was involved. The work done was composite or indivisible with separate charges for the material. The applicant was

responsible for protecting the goods and preventing them from falling into the hands of third parties. The goods were not standard goods and were

not capable of any use to any one else and thus had no commercial value. Material could not be used even as scrap if rejected and had to be

destroyed. Therefore, the supply of printed material to the MPEB by the applicant was not a sale but a works contract.

16. Here too, we will see that the passing of the property was incidental or ancillary to the contract of printing and they became the property of the

Electricity Board only by the accretion factor. It was important that the general public had no access to these receipts, because they could be

misused and so, there may also even insist to destroy whatever excess receipts that had been printed over and above the numbers for which

MPEB had placed orders. So, the conclusion depends on the nature of the goods in question and the agreement between the parties.

17. Following the decision in State of Tamil Nadu Vs. Anandam Viswanathan, , our court, in State of Tamil Nadu v. Gunasundari Modern Art

Printers [1995] 97 STC 489 (Mad), held that the supply of account books for

Indian Bank amounts to works contract.

18. In Thomson Press (India) Ltd. v. State of Haryana [1996] 100 STC 417, a Full Bench of the Punjab and Haryana High Court held that in the

facts and circumstances of the case, the printing of lottery tickets amounted to execution of works contract. In that case, the lottery tickets were

printed in four colours, the material for printing on the reverse was supplied by the customer, the specimen signature of the Director of the State

Lotteries was to be printed on the tickets, the art work had to be supplied from an agency and the proof of art work had to be approved by the

Deputy Director. In the above case, the Full Bench referred to Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd., and State of Tamil

Nadu Vs. Anandam Viswanathan, and they too observed as follows (at pages 424 and 425 of 100 STC):

When stationery is printed and sold as such, the transaction would amount to sale of goods. However, where the end-product is not a commercial

commodity and cannot be sold as such to anyone or everyone in the market by the printer, the transaction would not normally amount to sale of

goods but would be execution of a works contract. The printing of currency notes at Nasik, of cheque books for a bank, question papers for a

university, is not the same thing as printing of letter heads or account books, etc. Undoubtedly, paper and ink are necessary inputs in both cases.

Still the former would be execution of a works contract while the latter would be sale of goods. The use of paper and ink are only incidental in

case of a works contract. The printing of lottery tickets also involves not only skill and expertise but also confidentiality and security. Every printer

may not be able to do the job.

...

Thus, one of the tests is-can the product be sold to any person in the market or has it to be supplied to the particular customer? If it cannot be sold

in the market and has to be supplied to a particular customer, the transaction can normally be described as execution of a works contract. In such

a case, the supply of material is just incidental. Similar appears to be the position in the present case. The petitioner could not have sold the lottery

tickets in the market to any person. These had to be supplied to the customer. These involved not only expertise but also confidentiality. The supply of paper and ink in the circumstances of this case was only incidental. As a result, the amount charged by the petitioner for the printing of

lottery tickets from different customers could not be included in the taxable turnover...

19. It would appear to us that the assessees have wrongly taken advantage of the observation that if the product is to be supplied to a particular

customer, the transaction can normally be described as execution of works contract. We must remember, the word used is ""normally"". It cannot be

relied on as a dicta that any product which is supplied by a person to another which cannot be sold in the open market must be a transaction

involving works.

20. In a number of cases, the assessees had taken the stand that when there are printing materials which contain labels or logos or names of

purchaser, then all such transactions are works contract. In fact, this Court, in State of Tamil Nadu represented by Deputy Commissioner (CT),

Tirunelveli Division v. Orient Packaging Industries and the Secretary, The Tamil Nadu Sales Tax Appellate Tribunal [2009] 26 VST 397, held that

supply of biscuits and labels made according to the specifications with the name and address of the manufacturer printed thereon by the dealer was

a sale or a works contract. But it is clear that G. O. Ms. No. 66 was not brought to the notice of the court in the above case.

21. The apprehension of the petitioners appears to be that by the above Government order, all transactions which are really works contract would

be brought into tax as a sale of goods and what the State was not permitted to do by the various decisions referred to above, it has attempted to

secure by introduction of an entry in the Schedule.

22. The power of the Legislature to classify goods in the Schedule has already been referred to in the decisions of the Supreme Court. However, it

is undeniable that if the order for printing material is only a works contract, then that can never be brought to tax as a sale of goods, merely by

inclusion. The State evidently wanted to make it clear that the mere printing of name or logo would not turn what was essentially a sale of goods

into a works contract and since the assessees were relying on The State of Tamil Nadu Vs. Anandam Viswanathan, to assert their right that it was

not taxable, the State wanted to make it clear by this G. O. But this G. O. does not and cannot change the legal position that the question whether

a particular contract is one for sale or is a works contract cannot be decided in the abstract. It has to be done by examination of the terms and

conditions of the contract.

23. We will explain this further. It is possible that during festival times, a purchaser may place orders for 1000 diaries or 1000 address books

which are readily available with the supplier. Since these address books or diaries will be distributed to the customers for Deepavali or New Year,

the purchaser might ask the supplier to print his name or affix the label. Then the mere fact that the labels have been printed bearing the name of the

particular customer will not make it a works contract. It is obvious that a diary bearing the name ""XYZ Limited"" cannot be sold to anyone else, but

when the supplier has stocks of diaries where he merely prints ""XYZ Limited"" or ""ABC Limited"" and gives them to his customers, that printing will

not turn the transaction into a works contract. It is purely and simply a sale of goods. Here, the printing of the logo is incidental to the sale and the

transaction between the supplier and the purchaser is not work charged.

24. We have already referred to the tests spelt out in the various decisions. The decision in The State of Tamil Nadu Vs. Anandam Viswanathan,

cannot be automatically applied to all transactions where printing materials are supplied. There, what was transferred in the transaction was the

property in ""the questions"" which belonged to the university. The white sheets are meaningless without the questions being printed. The question is,

whether the property belonged to the universities. The printer was merely asked to print what is required by the university. The university has no

intention to purchase the papers. It places an order for printing of questions. The university required utmost confidence to be maintained, since the

questions should not be ""leaked"" to the students before the actual date of the examination. But the printing of question paper on the request of the

university cannot be equated to printing of a name or logo on goods which are purchased. We referred to diary only as an example. There, the

subject of the transaction is only purchase of the diary. The printing of name is just incidental. So, what we have to see is whether the work is

incidental or the purchase is incidental. The fact that the Legislature has introduced the additional word in entry 40 will not change the position of law in any manner. The authorities will have to examine each transaction and look at the contract in question and decide whether it is works

contract or whether it is only a sale. The mere fact of bearing the logo or name up to the specification to the customer''s will not make it a works

contract.

25. In Rainbow Colour Lab v. State of Madhya Pradesh [2000] 118 STC 9, the Supreme Court considered whether the job rendered by a

photographer in taking photographs, developing and printing the films amounted to a works contract and observed as follows (at page 14):

Thus, it is clear that unless there is sale and purchase of goods, either in fact or deemed, and which sale is primarily intended and not incidental to

the contract, the State cannot impose sales tax on a works contract simpliciter in the guise of the expanded definition found in Article 366(29A)(b)

read with Section 2(n) of the State Act. On facts, as we have noticed that the work done by the photographer which, as held by this Court in The

Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio, , is only in the nature of a service contract not involving

any sale of goods, we are of the opinion that the stand taken by the respondent-State cannot be sustained.

26. They explained the accretion factor (at page 13 of 118 STC):

...However modernised the camera be the skill of the photographer is still important for getting the best results. It cannot also be treated as a sale

of the photograph for the reason that it is not the intention of the customer to buy a photograph from the photographer. The photograph has no

marketable value. What is expected from the photographer is his service, artistic skill and talent. If any property passes to the customer in the form

of photographic paper, it is only incidental to the service contract. No portion of the turnover of a photographer relating to this category of work

would be exigible to sales tax...

27. In the judgments referred to above, we find that the court, be it this Court or the Supreme Court, had examined the contract in question and

considered whether it was work charged or whether it was a pure sale, and whether the sale of materials was incidental to the works component

or whether the works component was incidental to the sale. Therefore, ultimately, it is clear that when the question to be decided is whether it is a works contract or whether it is a sale, the original authority, the appellate authority and the Tribunal are bound to examine the contract and the

terms and conditions contained therein. Merely because in one case it has been held that the printing order that has been undertaken was a works

contract will not automatically mean that any contract where printed materials are supplied, even if they bear the name of the purchaser, will

without any question be deemed to be works contract. The following extract from Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd., , is

relevant for the purpose of the present case (at page 255):

The fact that in the execution of a contract for work some materials are used and property in the goods so used passes to the other party, the

contractor undertaking to do the work will not necessarily be deemed on that account to sell the materials. A contract for work in the execution of

which goods are used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in

the execution of the works for a price; it may be a contract for work in which the use of materials is accessory or incidental to the execution of the

work; or it may be a contract for work and use or supply of materials though not accessory to the execution of the contract is voluntary or

gratuitous. In the last class there is no sale because though property passes it does not pass for a price. Whether a contract is of the first or the

second class must depend upon the circumstances; if it is of the first, it is a composite contract for work and sale of goods; where it is of the

second category, it is a contract for execution of work not involving sale of goods.

It is true that in business transactions the works contract are frequently not recorded in writing setting out all the covenants and conditions thereof,

and the terms and incidents of the contract have to be gathered from the evidence and attendant circumstances. The question in each case is one

about the true agreement between the parties and the terms of the agreement must be deduced from a review of all the attendant circumstances...

28. The works contract could be indivisible as it is in the case of a buildings construction contract or there can be cases where the price of the

inputs and the labour charges are separately fixed. The divergent judicial opinion in this regard was settled by the Supreme Court in The State of

Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , where the Supreme

Court held that in the case of a building contract, no sale of

materials was involved in the construction of the building and therefore, they held the State Legislature was not competent to levy tax on the supply

of materials involved in the execution of a works contract. Thereafter, the Law Commission suggested the insertion of a wide definition of ""sale"" to

cover works contract and consequently, Clause (29A) was added in Article 366 of the Constitution by the 46th Amendment. It was held that

when the power to tax a sale in the ordinary sense is subject to certain conditions and restrictions, the power to tax a deemed sale under Clause

(29A) was also subject to the same restrictions and conditions. In fact, in Larsen & Toubro Ltd. v. Union of India [1993] 88 STC 204, the

Supreme Court held that they did not propose to go into the question whether a deemed sale resulting from transfer of property of goods involved

in the execution of a particular works contract amounts to a sale in the course of inter-State trade or commerce and that it... ""has to be decided in

the light of the particular terms of the works contract and it cannot be decided in the abstract"". Therefore, rightly in all the decisions that we have

referred to above, as we have stated earlier, this issue has been decided with reference to the particular terms of the contract.

29. So, these are all the special features which would identify for us to see whether the transaction is taxable as one for sale of goods. We are not

persuaded by the submissions made by the learned Counsel for the petitioners that merely by inclusion the State will bring to tax what is a works

contract. Even after the inclusion, it is necessary to prove whether a given transaction is a works contract pure and simple or it involves sale of

goods. The Supreme Court held that this is a mixed question of law and fact depending upon the facts of each case-vide Hindustan Aeronautics

Ltd. Vs. State of Karnataka, . On the contrary, the State wanted to check the mischief, where merely because the goods were printed material,

the assessees had been able to persuade that the transfer of goods in question were part of a works contract, relying on The State of Tamil Nadu

Vs. Anandam Viswanathan, . Therefore, the challenge to the constitutional validity of the Government order is rejected.

30. The learned Government Pleader relied only on a decision in State of Andhra Pradesh Vs. Kone Elevators (India) Ltd., which dealt with the

actual work at site for installation of lift. It is submitted that for installation, the test that is applied should be applied here and that is the real

standard for determination whether it is a sale or contract.

31. As we have seen from the decisions referred to above, to decide whether a contract in question is a works contract or if it is only a sale, each

transaction will have to be examined on the facts and circumstances of the case having reference to the terms of the contract and that question

cannot be decided in the abstract.

32. For all the reasons stated above and in view of the various decisions discussed hereinbefore, the writ petitions are dismissed. There shall be no

order as to costs. Consequently, the connected miscellaneous petitions are closed.

