

(2008) 07 MAD CK 0071

In the Madras High Court

Case No : Writ Petition No's. 38544 to 38546 of 2005 and W.P.M.P. No's. 41269, 41270, 41271 and 41273 of 2005

Infosys Technologies Ltd.

APPELLANT

Vs

Special Commissioner and Commissioner of Commercial Taxes and Another

RESPONDENT

Date of Decision : 25-07-2008

Acts Referred:

Central Sales Tax (Registration and Turnover) Rules, 1957 — Rule 13
Central Sales Tax Act, 1956 — Section 10A, 2, 8(3)
Constitution of India, 1950 — Article 366(12)
Tamil Nadu General Sales Tax Act, 1959 — Section 2, 28A, 3(5)

Citation : (2009) 233 ELT 56 : (2008) 17 VST 256

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : C. Natarajan and Aparna Nandakumar, for the Appellant; Haja Nazirudeen, Special Government Pleader (Taxes), for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—The three writ petitions are filed by the same company. W.P. No. 38544 of 2005 is filed seeking for a declaration declaring that unbranded/ customised software developed and sold by the petitioner with or without obligation, for system upgradation, repairs and maintenance or employee training is "goods" within Article 366(12) of the Constitution of India read with Section 2(d) of the Central Sales Tax Act, 1956 (for short, "the CST Act") and corresponding to Section 2(j) of the Tamil Nadu General Sales Tax Act, 1959 (for short, "the TNGST Act") and, therefore, the petitioner as producer and processors of such software for export is entitled to the beneficial provisions of Section 8(3) of the Central Sales Tax Act read with Rule 13 of the Central Sales Tax (Registration and Turnover) Rules, 1957. In the light of the declaration, they sought for a restrained order to the respondents from refusing to issue form "C" declaration and initiating penalty proceedings u/s 10A of the CST Act as illegal,

unconstitutional and without jurisdiction.

2. In W.P. No. 38545 of 2005, the challenge is to the order dated October 31, 2005 passed by the first respondent pursuant to the direction issued by this Court. Earlier, the petitioner moved this Court with W.P. No. 30101 of 2005 and this Court, vide order dated September 17, 2005, set aside the earlier order dated September 1, 2005 passed by the first respondent and directed the first respondent to consider the report of the petitioner dated July 1, 2005 in the light of the judgment of the Supreme Court and other relevant materials. The first respondent, after considering the request of the petitioners, rejected the plea of the petitioner, which is under challenge in this writ petition.

3. In W.P. No. 38546 of 2005, the challenge is to the consequential order dated November 15, 2005 issued by the Commercial Tax Officer (CTO), Thiruvannamiyur Assessment Circle, informing the petitioners that the request for "C" form will not be considered. 3. Pending the writ petitions, this Court in W.P. No. 38546 of 2005, vide order dated January 21, 2006, directed "C" forms to be given to the petitioner. An interim injunction was also granted from proceeding to levy penalty.

4. In the light of the inter-connectivity between the three writ petitions, they were heard together and a common order is being passed.

5. The petitioner is a dealer registered under the CST Act and TNGST Act and they moved the first respondent seeking for a clarification u/s 28A of the TNGST Act for determining the purchase of insulated flexible copper wire, diesel generators to use for the development of unlicensed software. They requested to know whether they can issue form XVII for the purchase of the same and avail concessional rate at three per cent provided u/s 3(5) of the TNGST Act. The authority, by his clarification No. 6/2002 dated January 10, 2002, observed as follows:

"Unlicensed software" is not "goods" as decided by the High Court of the Andhra Pradesh in the case of Tata Consultant Services v. State of Andhra Pradesh [1997] 105 STC 421. Therefore, it is clarified that the petitioners are not eligible to issue form XVII for the purchase of insulated copper wire and diesel generator, to avail the concessional rate at three per cent provided u/s 3(5) of the TNGST Act, 1959, since they are not used for manufacture of any goods.

6. Thereafter, several correspondence took place between the petitioner and the CTO. The petitioner was informed by a letter dated September 1, 2005 by the first respondent as follows:

The petitioners are informed that they are not entitled to make purchase of goods using "C" form for use in preparation of uncanned software.

7. It was thereafter, they moved this Court to set aside the order and to consider their request in accordance with law. The petitioner was once again informed by an order dated October 31, 2005 that the petitioner is not entitled to use "C" form for its purchases for use in its service contract relating to uncanned

software which are not amenable to the sales tax law.

8. In passing the order dated January 10, 2002 the department relied upon the judgment of the Andhra Pradesh High Court in *Tata Consultancy Services v. State of Andhra Pradesh* [1997] 105 STC 421 . Subsequently, the matter was taken to the Supreme Court. The Supreme Court decided the issue vide its judgment in *Tata Consultancy Services Vs. State of Andhra Pradesh*, . The Constitution Bench of the Supreme Court, by its judgment, held that branded software is "goods". They were also in agreement with the submission made by the petitioner in that case that there was no distinction between branded and unbranded software. But the majority opinion in the said judgment held that as they were not dealing with unbranded software when it is marketed/sold as a goods and are not expressing any opinion on that issue.

However, S.B. Sinha, J., in his concurring opinion in the very same judgment in paragraph 81, observed as follows:

81. See para 78 at page 655 of [2004] 137 STC. It is not in dispute that when a program is created it is necessary to encode it, upload the same and thereafter unloaded it. Indian law, as noticed by my learned brother, Variava, J., does not make any distinction between tangible property and intangible property. A "goods" may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customised or non-customised satisfies these attributes, the same would be goods. Unlike the American courts, the Supreme Court of India have also not gone into the question of severability.

9. Therefore, when the authority passed the order pursuant to the direction of this Court dated January 21, 2006 he held that the judgment of the Supreme Court did not decide the question of uncanned/unbranded software as to whether they were goods or not. The following passage found in the impugned order may be usefully reproduced:

Any decision of a court is binding on lower courts only when that decision is given to resolve the dispute before that court and the opinions of the court in respect of matters that are not related to the disputes resolved in that case are only obiter dictum and they do not create any binding precedent.

The question before the Supreme Court in the case of *Tata Consultancy Services v. State of Andhra Pradesh* [2004] 137 STC 620 was whether canned software was "goods". The Supreme Court answered that question in the affirmative. The question whether uncanned software (unbranded software) was "goods" or not was not at all an issue before the Supreme Court in that case. That is why the Supreme Court in the concluding part of its judgment in the above case has stated?"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".

It is thus clear that all comments given by the Supreme Court in that judgment about uncanned software do not create any binding precedent and hence the petitioner is not entitled to make any legal claim on the basis of those comments. Nevertheless, the remarks of the Supreme Court in the above judgment are given respectful consideration as follows:

The Supreme Court has observed?"In India the test to determine whether a property is "goods", for purpose of sales tax, is not whether the property is tangible or intangible or incorporeal".

10. It is clear from the said order that the authority went only by the opinion expressed by the majority and except for referring to it?did not give due consideration to the concurring opinion made by S.B. Sinha, J. Be that as it may, the said question once again came up before the Supreme Court in the judgment relating to Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, wherein the Supreme Court categorically affirmed the opinion of Sinha, J. and paragraphs 56 and 57 in this regard may be reproduced below:

56. This view was adopted in Tata Consultancy Services Vs. State of Andhra Pradesh, for the purposes of levy of sales tax on computer software. It was held:

A "goods" may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold ; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customised or non-customised satisfies these attributes, the same would be goods.

57. This in our opinion, is the correct approach to the question as to what are "goods" for the purposes of sales tax. We respectfully adopt the same.

11. In the light of the subsequent pronouncement of the Supreme Court, the first respondent's reasoning in the impugned order will have to be necessarily set aside. The subsequent binding precedent compels this Court to set aside the order dated October 31, 2005 passed by the first respondent.

12. Even though Mr. C. Natarajan, learned Senior Counsel appearing for the petitioners, took pains to produce the technical consultant agreement to show the various terms for the purpose of indicating that it was a sale, this Court considers that it is unnecessary to go into the details of the contract at this juncture.

13. The ground by which the impugned order dated October 31, 2005 came to be passed was based on the judgment of the Supreme Court in State of Karnataka Vs. B.M. Ashraf and Co., . It was to show that subject to the provisions of Section 5(5) of the KST Act, no tax u/s 5 is leviable on the sale price of such goods and the purchasing dealer (i) either consumes such goods in the manufacture of other goods for sale or otherwise (or consumes, otherwise) or dispose of such

goods in any manner other than by way of sale in the State, or (ii) despatches them to place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce shall be liable to pay tax on the purchase price of such goods at the same rate at which it would have been leviable on the sale price of such goods u/s 5.

14. However, Mr. C. Natarajan, learned Senior Counsel relied upon the judgment of the Supreme Court in Polestar Electronic (Pvt.) Ltd. Vs. Additional Commissioner, Sales Tax and Another, and more particularly, referred to paragraph 15 See page 428 of [1978] 41 STC. in which it was observed as follows:

15. Similarly, for the same reasons, which we need not repeat again, "manufacture" and "sale" in Section 5(2)(a)(ii) and the second proviso mean manufacture and sale anywhere without any geographical limitation and neither "manufacture" nor "sale" is restricted to the territory of Delhi. There are no works like "inside the Union Territory of Delhi" to qualify "manufacture" or "sale" and there is no cogent or compelling reason for reading such words in Section 5(2)(a)(ii) and the second proviso. The use of the goods purchased as raw materials in the manufacture of goods may, therefore, take place anywhere and not necessarily inside Delhi and equally the sale of the goods so manufactured may be effected anywhere, whether inside or outside Delhi. The only end-use of the goods purchased required to be made for attracting the applicability of Section 5(2)(a)(ii) is that the goods must be utilised by the purchasing dealer as raw materials in the manufacture of goods and the goods so manufactured must be sold, irrespective of whether the manufacture or sale takes place inside Delhi or outside. If the purchasing dealer does not use the goods purchased as raw materials in the manufacture of goods or having manufactured the goods does not sell them, he would commit a breach of the intention expressed by him in the declaration furnished to the selling dealer and the second proviso would immediately be attracted and the price of the goods purchased by him would be liable to be included in his taxable turnover. But so long as he carries out the intention expressed in the declaration and uses the goods purchased as raw materials in the manufacture of goods, whether inside or outside Delhi, and sells the goods so manufactured in Delhi or outside, he would not fall within the second proviso and the sale to him would not be taxable in his hands.

Learned Senior Counsel relied upon the said passage to show that his case was squarely covered by the said decision.

15. A counter-affidavit dated July 21, 2008 was filed by the second respondent CTO. However, in the counter-affidavit, there is neither discussion about the concurring judgment of the Tata Consultancy Services Vs. State of Andhra Pradesh, nor the subsequent BSNL case [2006] 3 VST 95 : [2006] 145 STC 91 , which are binding on them.

16. The learned Senior Counsel also took this Court to the meanings of various

words in the software industry and referred to passages from the computer encyclopedia as well as from the decisions of the Supreme Court and the Andhra Pradesh High Court. There is no necessity to reproduce those meanings in the present case as the Supreme Court has categorically held that the concurring opinion of S.B. Sinha, J. is the correct position of law and that if the software, whether customised or non-customised, satisfies the Rules as a "goods", it will also be "goods" for the purpose of sales tax.

In the light of the above, W.P. No. 38544 of 2005 seeking for a declaration will stand allowed. The order dated October 31, 2005 passed by the first respondent authority challenged in W.P. No. 38545 of 2005 will stand set aside and the consequential order dated November 15, 2005 passed by the CTO also will stand set aside.

17. In the light of the common order passed by this Court in these three writ : petitions, the respondents are directed to act as per the dicta laid down by the Supreme Court and pass appropriate orders on the request made by the petitioners in accordance with law. No costs.