

(2002) 12 KL CK 0013

In the High Court Of Kerala

Case No : T.R.C. No's. 176 and 186 of 1993, 315, 316 and 317 of 1994 and 39, 40 and 77 of 1995

International Computers-Indian Manufacture Ltd.

APPELLANT

Vs

State of Kerala
 Deputy Commissioner (Law), Board of Revenue (Taxes) Vs International Computers-Indian Manufacture Ltd.

RESPONDENT

Date of Decision : 16-12-2002

Acts Referred:

Constitution of India, 1950 — Article 286
Kerala General Sales Tax Act, 1963 — Section 2

Citation : (2004) 135 STC 419

Hon'ble Judges : G. Sivarajan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Jose Joseph, for the Appellant; Georgekutty Mathew, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Sivarajan, J.—The matter arises under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the Act").

2. The first five tax revision cases are filed by the assessee and the last three tax revision cases are filed by the revenue. The main question involved in the revisions filed by the assessee relates to exigibility to sales tax on the rental charges received by the assessee-company from leasing out of computer system to customers in Kerala under the Act.

3. The petitioner is a company engaged in the manufacture and sale including leasing of computer system on rental basis with its registered office at Bombay having an administrative office at Madras. It is a non-resident dealer and an assessee on the files of the Assistant Commissioner, Assessment, Special Circle, Thiruvananthapuram. The assessment years concerned are 1984-85, 1985-86, 1988-89, 1989-90 and 1990-91. According to the petitioner, it entered into

agreements with two customers, viz., M/s. H.M.T. Ltd., Kalamassery and LIC of India, Trivandrum, in Kerala for transferring the right to use computer equipments on monthly rental basis in the year 1983, that pursuant to the said agreement the computer equipments moved from its factory at Pune in Maharashtra State to the State of Kerala and the computer equipments were installed in the premises of the customers. During the assessment years 1984-85 and 1985-86 the petitioner received sums of Rs. 18,69,930 and Rs. 20,59,704 respectively as rental income from the said two customers. Similarly during the years 1988-89, 1989-90, 1990-91 also the petitioner received from the said two customers sums of Rs. 16,65,873, Rs. 37,89,209 and Rs. 37,48,075 respectively as rental income from the transfer of right to use computer equipments. The petitioner contended that the said income are not liable to be assessed under the Act for three reasons: (1) the agreement between the assessee and the customers in Kerala were executed prior to 1984 and therefore the said income cannot be assessed to tax under the Act since explanation (3B) to Section 2(xxi) of the Act regarding deemed sale was introduced only with effect from April 1, 1984. (2) The movement of the computer equipments from the petitioner's factory at Pune in Maharashtra State to the customer's premises in Kerala was pursuant to the contract entered into between the petitioner-assessee and its customers and therefore the transaction is not exigible to tax under the Act. In other words the deemed sale took place in the course of inter-State trade and commerce and therefore the transactions are outside the purview of the Act and (3) the deemed sale in question has taken place only within the State of Maharashtra when the parties have entered into the contract for transfer of right to use the equipments. The assessing authority, however, took the stand that the rental income received during the years in question are liable to tax under the Act in view of explanation (3B) to Sub-section (xxi) of Section 2 of the Act. The assessing authority completed the assessment for the years in question treating the rental income received by the assessee as turnover exigible to tax under the Act. In appeals by the assessee the first appellate authority confirmed the assessment. The assessee took up the matter in second appeal before the Sales Tax Appellate Tribunal, Thiruvananthapuram. The appeals for the years 1984-85 and 1985-86 were disposed of by a common order dated May 3, 1992. The appeals for the years 1989-90, 1990-91 and 1991-92 were disposed of by another common order dated November 9, 1993 by a Full Bench of the Tribunal in which one of the members (Sri. K. Venugopal), who was also a party to the order in the earlier appeals and this order is written by the said member. The assessee raised the following contentions before the Tribunal.

"(i) The agreements for the transfer of right to use computer system were entered before April 1, 1984 and since the amendment of the definition of "sale" in the Kerala General Sales Tax Act came into force only with effect from April 1, 1984 the transactions for transferring right to use the computer system are out of the purview of the Kerala General Sales Tax Act for imposing of any tax.

(ii) In any case, the computer system moved from the appellant's factory at

Pune to the place of the customers in Kerala pursuant to the concluded agreement entered into by the appellant with the customers in Kerala and hence the deemed sale by transfer of right to use goods has taken place within the State of Maharashtra and therefore at best it can be treated only as a transaction in the course of inter-State trade and commerce and the impugned transactions are not liable to tax under the Kerala General Sales Tax Act.

(iii) When the question regarding the assessability of rental income received by the appellant came up for consideration before this Tribunal in the appellant's cases for the earlier years 1984-85 and 1985-86, this Tribunal was guided by the decision of the honourable High Court of Kerala reported in [1991] 83 STC 276 KER[Deputy Commissioner of Agricultural Income Tax and Sales Tax (Law), Ernakulam v. P.K. Biriyyumma]. The principles laid down by the honourable High Court of Kerala in the decision reported in [1991] 83 STC 276 [Deputy Commissioner of Agricultural Income Tax and Sales Tax (Law), Ernakulam v. P.K. Biriyyumma] is no longer good in law in the light of the recent decision of the honourable Supreme Court in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, . In the light of the said Supreme Court decision, a reappraisal and reconsideration of the issues in these appeals are necessary."

4. The State contended before the Tribunal that though the agreement under which the transfer of right to use the computer equipments was entered into prior to April 1, 1984 the agreement contained two parts, viz., (1) installation of computer machinery in the business place of the customers in Kerala and then leasing out of such machinery on the basis of monthly charges and (2) it is a running contract for using the machinery on rental basis by the customers and therefore the levy of tax on the amount received as hire charges for using the machinery by the customers is clearly sustainable under the Act. It was also contended that the inter-State nature of the transactions canvassed by the appellant on the ground that the goods involved in these cases moved from Maharashtra to Kerala in pursuance of a lease agreement cannot be accepted since the movement of goods was not in pursuance of a contract for sale which is a must in the case of inter-State transactions. It is further contended that the goods moved as the property of the assessee-company and this nature is never altered on any occasion even though the customer is given an option to purchase the machinery on payment of value mentioned in the terms of the agreement and order placed. It was also contended that the assessee-company is the owner of the goods and that the use of the machinery by the customer on hire charges comes into operation only after installation of the machinery in the place of the customers in Kerala.

5. The Tribunal considered the matter with reference to the records. The relevant portion of the discussion in the appellate order for 1984-85 and 1985-86 is extracted below :

"As evidenced from the assessment orders and contentions raised by both sides the main question to be decided is the legality or otherwise of the assessment on

the turnover relating to the hire charges received by the assessee-company from M/s. Hindustan Machine Tools Ltd., Kalamassery, and LIC of India, Thiruvananthapuram, for the years 1984-85 and 1985-86. Since the contract between both the customers in Kerala are of identical nature it is enough to discuss the issue on the basis of agreement and orders placed by one of the customers, Hindustan Machine Tools to decide the issue in both the appeals. The copy of the agreement and order placed in pursuance of such agreement between the appellant-company and H.M.T., Kalamassery, are available at pages 172 to 184 of the assessment records for 1984-85. We find that the agreement is seen executed on July 8, 1983 and as order is placed by H.M.T. as per order dated June 6, 1983 which is even earlier than the execution of the agreement, any way the agreement is before April 1, 1984 which is the date of coming into force of the amended provisions in the KGST Act in respect of deemed sales of leasing of goods, etc., effected in pursuance of the 46th Amendment of the Constitution. As has been rightly pointed out by the State representative we find that the agreements contain two parts namely, installation of computer machinery in the business place of the customers in Kerala, i.e., at Kalamassery, and Thiruvananthapuram and (2) hiring of such installed machinery to the customers on running contract basis in consideration of monthly payment of rent. In the case of H.M.T on a monthly rental amount of Rs. 1,16,428 and the second part of the contract is for a minimum period of seven years. The following clauses in the agreement are relevant :

"33. (d) Rental charges during the period of movement of the equipment or any part thereof shall continue to be paid by the customer. ICIM reserves the right to revise its rental charges to include the additional cost of providing maintenance service at the location to which the equipment is moved.

41. If whetherthe customer will forthwith deliver up any equipment which is the property of ICIM and ICIM may enter any premises and recover possession of and remove the equipment. The exercise of rights under this clause will not prejudice any right of ICIM to damages or any other ICIM's rights or remedies."

On the basis of the above clause we find that the second portion of the agreement, namely, leasing arrangements and actual leasing thereon is of running contract nature and the limitation canvassed by the learned Advocate for the appellant is not applicable in this running contract. On going through the records it is seen that the assessments for the two years under appeal are completed by adopting the hire charges received after April 1, 1984 during when the amended provisions under the KGST Act came into force. In this connection it is useful to go into the amended definition brought under the KGST Act legalising the levy of tax on lease amount received for transfer of rights to use goods as per which the extended definition is given to the term dealer to include a person who whether in the course of business, transfers the right to use any goods, for any purpose whether or not for a specific period, for cash or deferred

payments or other valuable consideration. Explanation (3B) to Section 2 of the KGST Act is also relevant, it reads as follows :

"A transfer of right to use any goods for any purpose (whether or not for a specified period for cash or deferred payments or other valuable consideration shall be deemed to be a sale."

On the basis of the above definition and explanation we find that the amount received by the appellant-company from the customers in Kerala as hire charges of the computer machinery installed in the respective business places after April 1, 1984 is liable to be assessed.

As regards the inter-State nature of transaction pleaded on behalf of the appellant we have to hold that this contention is of little force for the reason that there is no inter-State movement of goods in pursuance of a contract for sale in this case, nor the same is established before us. On the other hand as has been rightly pointed out by the learned State representative, the machineries moved from Maharashtra to Kerala as the properties of the assessee-company for the purpose of installation of the same in the business places of the customers and even after the installation, the machineries remain as the properties of the appellant-company. The relevant Clause 41 of the agreement already extracted above strongly supports this view. Further even otherwise the deemed sales provisions in pursuance of the extended definition of sale covered by 46th Amendment of the Constitution is not applicable under the CST Act. The said definition is brought under the KGST Act only. This position is upheld by the honourable High Court of Kerala in the case of Deputy Commissioner of Agricultural Income Tax and Sales Tax (Law) v. P.K. Biriymma reported in [1991] 83 STC 276 KER."

In the above view of the matter, the Tribunal held that hire charges received by the appellant-company after April 1, 1984 is rightly assessed under the KGST Act for the years 1984-85 and 1985-86. In the appeals for the years 1988-89, 1989-90 and 1990-91 the Tribunal observed that it is not in dispute that leasing out of computer equipments is a specie of "transfer of right to use goods" and following the constitutional amendment by incorporating Clause (29A) in Article 366 of the Constitution. Explanation (3B) was inserted in the definition of "sale" in Section 2(xxi) of the KGST Act. Relying on the findings in the appellate order for 1984-85 and 1985-86 the Tribunal observed that they did not find any merit in the contentions raised by the counsel for the appellant based on the agreement and the inter-State nature of the transaction. The Tribunal also considered the contentions raised by the appellant's counsel that the principles laid down by the High Court in the decision reported in Deputy Commissioner of Agricultural Income Tax and Sales Tax (Law) v. P.K. Biriymma [1991] 83 STC 276 SC is no longer good law in view of the decision of the Supreme Court in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, . The Tribunal discussed the decision of the Supreme Court mentioned above as also the decision of the Bombay High Court in 20th Century Finance Corpn. Ltd v.

State of Maharashtra [1989] 75 STC 217 BOM and the decisions of other High Courts and held that in order to constitute a sale under the CST Act, there must be transfer of right to use goods, the property in goods is not transferred. The Tribunal also observed as follows :

"We have found that it remains with the transferee. In the case before us, the computer systems are transported to Kerala as the goods of the appellant-company. The customers in Kerala, viz., the lessee are liable to pay the rental charges only after the computer system is installed in their business premises. The property in the computer system remains with the appellant-company and the property in the computer system is not transferred to the customers in Kerala at any stage. Since the property in the computer system remains with the appellant-company, there cannot be any sale of goods from Maharashtra to Kerala as contended by the appellant's counsel. We do not find any merit in the contention advanced by the appellant's counsel that the sales tax authorities, in Kerala State has neither authority nor jurisdiction to impose any tax on a deemed sale in the course of inter-State trade and commerce. The authorities below have rightly brought to tax under the KGST Act the rental income received by the appellant from leasing out of computer systems in Kerala. Following our earlier decision in the appellant's case on this point, we confirm the findings of the authorities below in this regard."

6. Sri Jose Joseph, learned counsel appearing for the assessee has placed before us the copies of the agreement entered into between the petitioner and one of its customers. With reference to the said agreement the counsel submitted that the agreement for the transfer of the right to use the computer system by the customers is entered into in the State of Maharashtra in the year 1983 prior to the introduction of the explanation (3B) to Sub-section (xxi) to Section 2 of the Act. He further submitted that the movement of the goods from Pune in the Maharashtra State to the customer's premises at Ernakulam/Thiruvananthapuram in the State of Kerala was in pursuance of the said agreement and therefore it is a deemed sale in the course of inter-State transaction which is not liable to be assessed under the Act. The counsel further submitted that the right to use the computer system was transferred to the customer's in the State of Maharashtra under the agreement of 1983 and therefore it cannot be subjected to assessment under the Act for the years in question. The counsel, in support of the same has relied on the decision of the Supreme Court in 20th Century Finance Corpn. Ltd, v. State of Maharashtra [2000] 119 STC 182 SC. The counsel also submitted that at any rate the Tribunal did not consider the question as to whether under the agreement the transfer of right to use the computer system was in respect of goods which were in existence or not.

7. The learned Government Pleader appearing for the respondent-State on the other hand submitted that the agreement entered into between the assessee and the customers are in two parts : one for transport of the computer equipment to

the customer's premises and then leasing out of such machinery on the basis of monthly charges. He also submitted that it is a rent contract for using machinery on rental basis by the customers and therefore the rent received from the customers is liable to tax under the Act. The Government Pleader further submitted that going by the agreement it is clear that the transaction was not in respect of ascertained or existing goods and therefore even under the agreement the appropriation is contemplated only in the State of Kerala. The Government Pleader accordingly submitted that the Tribunal and the authorities below were perfectly justified in assessing the rent received for the use of the computer system from its customers under the Act.

8. The power of the State Legislatures to levy sales tax on the transfer of right to use any goods envisaged under Clause (29A)(d) of Article 366 of the Constitution, on the premise that goods put to use are located within their States, came up for consideration before the Supreme Court in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, . The Supreme Court had noted that several States by their legislations have levied tax on the transactions of transfer of right to use goods on the location of goods at the time of their use within their States irrespective of the place where the agreement for such transfer of the right to use such goods is made. The Supreme Court in that context considered the question as to whether a State can levy sales tax on transfer of right to use goods merely on the basis that the goods put to use are located within its State irrespective of the facts that--(a) the contract of transfer of right to use has been executed outside the State ; (b) sale has taken place in the course of an inter-State trade ; and (c) sales are in the course of export or import into the territory of India. The assessee contended before the Supreme Court that the State Legislature cannot so frame its law as to convert an outside sale or a sale in the course of import or a sale in the course of an inter-State trade or commerce, into a sale inside the State.

9. The facts of the Supreme Court case in brief are as follows: The assessee carries on business of leasing diverse equipments. According to them, they entered into Master Lease Agreements with the lessee, i.e., the party who desired to take equipment for use on hire. The assessee agrees to give on lease diverse machinery/equipments listed in the lease summary Schedule, subject to terms and conditions stipulated in the Master Lease Agreements. The lease summary Schedule only mentions the broad category of equipment proposed to be leased and the correct value thereof. The Master Lease Agreement provides that orders for individual equipment will be placed by the assessee at the instance of lessees and that the equipment to be leased will be dispatched by the manufacturer or supplier concerned to the locations specified in the lease. Thereafter, at the instance of the lessees, the assessee places their purchase orders to the suppliers or manufacturers for supply of individual items or equipments falling within the category and correct value mentioned in the Master Lease Agreement Schedules. The assessee's further case is that they disburse the value of equipment to the suppliers and at the instance of the assessee the

suppliers deliver the equipments to the lessees at the specified locations for use. After the equipments are delivered and put to use, the lessee executes supplementary lease Schedules acknowledging due receipt of the lease equipments and such supplementary lease deeds form an integral part of the Master Lease Agreement. The transaction of transfer of right to use goods has been subjected to tax by more than one State. One State levies tax because the goods were found to be located in their States at the time of execution of contract which has taken place outside the State. Some States levy tax when the goods are delivered in their States for use in pursuance of agreements of transfer executed outside their States and some States tax such transactions of deemed sales on the premise that agreements for transfer of right to use have been executed within their States.

10. The Supreme Court after consideration of the legislative entry 48 of List II of the Seventh Schedule to the Government of India Act, 1935, Article 286 of the Constitution, entry 54 of List II of the Seventh Schedule to the Constitution and the earlier decisions of the Supreme Court right from *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, (ii) *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, summarised the legal position thus :

"35. As a result of the aforesaid discussion our conclusions are these :

(a) The States in exercise of power under entry 54 of List II read with Article 366(29A)(d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export.

(b) The appropriate Legislature by creating legal fiction can fix situs of sale. In the absence of any such legal fiction the situs of sale in case of the transaction of transfer of right to use any goods would be the place where the property in goods passes, i.e., where the written agreement transferring the right to use is executed.

(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods.

(e) The transaction of transfer of right to use goods cannot be termed as contract of bailment as it is deemed sale within the meaning of legal fiction engrafted in Clause (29A)(d) of Article 366 of the Constitution wherein the location or delivery

of goods to put to use is immaterial."

11. The Supreme Court thereafter examined the provisions of the various State enactments in the light of the propositions laid down as above. It was found that explanation to Section 2(10) of the Maharashtra Sales Tax on the Transfer of the Right to use any Goods for any Purpose Act, 1985 deems the transfer of right to use any goods to have occurred in the State of Maharashtra if the goods are located within the State at the time of their use, irrespective of the place where agreement of such transfer of the right is made and therefore it widens the scope of the definition of "sale" so as to include deemed sales (i) which are in the course of inter-State trade and commerce; (ii) sales outside the State of Maharashtra and (iii) sales which occasioned import of goods into India. The Supreme Court accordingly held that the explanation transgresses the limits of legislative power conferred on the State Legislature under entry 54 of List II. The court accordingly read down the explanation to the effect that it would not be applicable to the transactions of transfer of right to use any goods covered by the three situations noted above. Explanation (3B) of Section 2(xxi) of the Act reads :

"Explanation (3B).--A transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration shall be deemed to be a sale."

It can be seen that this explanation is also similar to the explanation considered by the Supreme Court mentioned above. Thus, it has to be held that Explanation (3B) of Section 2(xxi) of the Act would not apply to the transaction of transfer of right to use any goods if such deemed sale is (i) an outside sale ; (ii) sale in course of import of the goods into or export of the goods outside the territory of India ; and (iii) an inter-State sale.

12. The case of the petitioner as already noted is that the deemed sale is an inter-State sale or an outside sale. The case of the State is that the transaction is a deemed sale inside the State as the contract is a composite one for delivery of the computer equipments at the premises of the customers and to install the same and the other for transfer of the right to use the said computer equipments. Let us now examine the agreement entered into between the petitioner and the two customers as to whether the transactions in question falls under any of the three categories, i.e., an outside sale or sale in the course of import or export or an inter-State sale.

13. This counsel for the petitioner has supplied photo copies of the agreements entered into between the petitioner and the two customers which are identical. We have perused the computer hire contract in the case of H.M.T. Ltd. handed over to us, a photo copy of the said contract is appended. This appears to be a standard form of contract where the quantity, type No., description, monthly rental of each item, installation charges, etc., are mentioned. Total monthly rental and installation charges are specified. Installation charges in full to be paid along with the order. The equipment has to be installed in the premises of the

customer in the State of Kerala. The customer requests the petitioner to supply the equipments specified in the contract in accordance with and subject to the terms and conditions therein and overleaf. The customer puts his signature and date. The petitioner agrees to supply the equipment specified in this contract in accordance with law and subject to the terms and conditions therein and overleaf. The signature of the company secretary and the date is given. This only shows that the customer wanted to install the equipments specified therein on rental basis in the premises of the customer to which the petitioner had agreed subject to the terms and conditions contained in the leaf attached thereto. There is no indication in the said contract that the agreement was entered into in the State of Maharashtra. It is also probable that the petitioner's representative might have come to the business place of the respective customers and had executed the agreement which is in a standard form. Any way, it would appear that the customers wanted the equipments to be installed by the petitioner in the customer's premises and the petitioner had agreed to bring the goods at the customer's premises and to install the same. It is the obligation of the petitioner to deliver the equipments at the customer's premises and to install the same.

14. We have also perused the general terms and conditions appended to the agreement. As already noted the agreement only shows that the customers wanted the computer equipments specified therein ; the petitioner had specified the rental and installation charges ; the petitioner wanted the installation charges to be paid along with the order ; the place where the equipment to be installed is specified ; the customer requests for supply of the equipments subject to the terms and conditions therein and overleaf and the petitioner agrees to the same. We have therefore perused the general terms and conditions appended to the agreement.

15. The relevant clauses of the general conditions are extracted below :

Clause 6. Delivery :

Any delivery time which may have been indicated to you is the current estimated delivery time and is subject to variation. Time of delivery shall not be the essence of the contract.

Clauses 7 and 8 regarding installation :

7. Before delivery the customer at his own expense will suitably prepare the premises for the equipment and provide all the necessary electrical and other installations and fittings and a suitable supply of electric current.

8. ICIM at the expense of the customer will deliver the equipment and place it in the customer's premises.

Clause 10. Installation date :

10. "Installation date" is the date when ICIM notifies that standard ICIM tests are carried out at site or one month after the operational use begins whichever is

earlier provided that if installation or testing is delayed other than through the fault of ICIM and if the delay continues for more than seven days after the date when ICIM notifies the customer in writing that ICIM is ready to install or test. Installation date shall be the date of such notification.

11. Unless accepted earlier, the equipment is deemed accepted on installation date.

13. Rental charges and installation charges :

Rental commences on the installation date or thirty days after the delivery of the equipment to the customer's premises whichever is earlier and is payable in advance on the first of each calendar month. With the first payment shall also be paid the appropriate rental for the part month from and including the date on which the rental commences. 14. The installation charge shall be paid by the customer in the manner shown on the face of the contract.

15. Cost and charges : Costs and charges for packing and cases (at prevailing prices), transport and insurance, octroi duty and all other duties, taxes, levies and imposts, present or future, together with charges for clearance and forwarding done by or on behalf of ICIM or otherwise in respect of the supply of equipment and parts thereof from factory or from other premises in India and on termination of contract, all costs, charges and all expenses incurred in removing equipment and parts thereof from the customer's premises to factory or to other premises in India shall be borne by the customer. The money due under this clause shall be paid (a) on delivery of the equipment or parts thereof to the customer's premises and (b) on removal thereof from the customer's premises as applicable.

Clause 46 reads :

ICIM's liability to perform obligations under this contract is also subject to ICIM or its suppliers obtaining imp"ort licences (including import licences for raw materials, components and parts) requisite or adequate for its planned production schedule.

Clause 48 reads :

In no event will ICIM accept any liability :

(a) in negligence for any economic loss which is not a consequence of physical injury or damage to persons or property.

(b) for any indirect losses arising out of any breach of this contract or obligations under this contract.

Clause 49 reads :

The total of ICIM's liabilities under or in connection with this contract (whether arising from contract negligence or howsoever) is limited in respect of anyone event or series of connected events to the actual loss or damage sustained

subject to a maximum of Rupees thirty thousand."

16. It is seen from the above general conditions that there is no obligation to supply the equipment within a stipulated time, that time is not the essence of contract (Clause 6) that ICIM is bound to deliver the equipment and place it at the customer's premises (Clause 7), that unless accepted earlier the equipment is deemed accepted on the installation date and that the rental commences on the installation date or 30 days after the delivery of the equipment to the customer's premises whichever is earlier (Clause 13). It is also seen that consequence of cancellation of contract by the customer is also provided in terms of damages. Clause 18 shows that supply of the equipment or part thereof can be either from their factory or from other premises in India. The payment of costs and freight is contemplated only on delivery of the equipment or part thereof to the customer's premises. Clause 46 says that ICIM's liability to perform obligations under this contract is also subject to ICIM or its suppliers obtaining import licences (including import licences for raw materials, components and parts) requisite for its planned production schedule. This would clearly show two aspects : (1) that the contract is one in respect of non-existing goods In other words the equipments are to be manufactured and supplied and (2) there is no absolute obligation to supply the goods. If for any reason they are not able to manufacture the set and deliver the same they are not liable for any consequences.

17. Thus though there is a contract between the petitioner and its customers for delivery of equipments at the customer's premises and for transferring the right to use the said equipments there was no transfer of the goods nor transfer of the right to use the goods by the said contract. It is only an agreement for sale and not a contract of sale. Further the contract was only a contingent one depending upon various factors. The customer has to place the order pursuant to the contract : the petitioner has either to manufacture the equipment or procure the equipment from wherever in India and deliver the same at the customer's premises. Then only the transfer of the right to use the equipment takes place. This means that the transfer of the right to use the equipment is dependant on the supply of the equipment. If for the reasons stated in Clause 46 of the general conditions of contract the equipment could not be delivered the contract is frustrated. No consequences are also provided in case the petitioner commits any breach other than for a total compensation of Rs. 30,000 (vide Clauses 48 and 49).

18. According to us the Tribunal is right in its view that the contract was of a composite character having two parts : (1) Installation of computer machinery in the business place of the customer in Kerala and (2) hiring of such installed machinery to the customers on running contract basis in consideration of monthly rent.

19. On a consideration of the contract between the petitioner and its customers we are of the view that no inter-State nature of transaction was involved so as to

treat the transaction in question either as a deemed inter-State sale or as an outside sale transaction. In fact no transfer of right to use the equipment in presenti took place as a result of the contract. The transfer takes place on compliance of the terms of the contract entered into between the parties, viz., an order from the customer, manufacture or procurement of the equipment by the petitioner and its delivery and installation in the customer's premises. If anyone of these requirements are not fructified the transfer of the right to use the equipments does not take place. There is also no compulsion to deliver the equipment nor any consequence for such non-delivery other than that provided in Clause 49 of the contract. In order that a sale to be in the course of inter-State trade or commerce falling u/s 3(a) of the Central Sales Tax Act there must have movement of goods from one State to another as an incident of the contract of sale. In other words the inter-State movement must be the result of a covenant, express or implied in the contract of sale or an incident of the contract. Even if it is not so specified in the contract itself it is enough if the movement is in pursuance of and incidental to the contract of sale. [See English Electric Co. of India Ltd. and Another Vs. The Deputy Commercial Tax Officer and Others, .

20. A cumulative reading of the agreement and the general conditions stipulated in the leaf attached to the agreement we are not in a position to hold that (1) the contract was one executed in the State of Maharashtra where the petitioner's registered office is situated. There is no indication in the agreement to support the said contention of the petitioner. (2) For the very same reason the transaction cannot be treated as an outside State deemed sale which took place in the State of Maharashtra. (3) The agreement as a whole evidences only an agreement for sale and not a contract of sale. At any rate the contract was a contingent one and no property in the goods passes as a result of the contract.

21. Now considering the issue in the light of the principles laid down by the Supreme Court in the 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, in the absence of a binding contract of an inter-State transaction propositions (a) to (c) laid down by the Supreme Court have no relevance in this case.

22. If at all, proposition (d) alone can have application. Even this proposition will not help the petitioner since the contract was in respect of goods not in existence and the transfer of right to use is effected only by the delivery of the goods. Hence the taxable event would be only on the delivery of the goods. This is the true position of the transaction in this case.

23. Admittedly the turnover which is assessed to tax under the Act for all the five years is the rental received by the petitioners from the customers after April 1, 1984 and for the period covered by the said assessment years.

24. we are in full agreement with the conclusions reached by the Tribunal on this issue. We accordingly confirm the order of the Tribunal on this issue. All the revisions filed by the petitioner are dismissed.

25. Now we will consider the revisions filed by the department. These revisions arise from the common order of the Tribunal for the years 1988-89, 1989-90 and 1990-91.

26. The question raised in these revisions are as to whether the Tribunal was right in setting aside the order of the authorities regarding the assessability of maintenance charges conceded in the return in order to find out whether there is any movement of the goods which are being appropriated in the works contract from any other State and as to whether the Tribunal was justified in entertaining the above question for the first time before the Tribunal without raising the question before the assessing authority as well as the first appellate authority.

27. The main contention of the revenue is that the assessee had conceded taxable turnover in regard to maintenance charges received and the assessing authority had deducted 30 per cent towards labour charges from the maintenance charges received by the petitioner and the assessee was only aggrieved by the percentage deduction when regular accounts are maintained by the petitioner. It is only before the Tribunal the petitioner had raised the contention that the materials used in the maintenance work is not exigible to tax since the transaction was an inter-State sale on the basis of the Supreme Court decision in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, .

28. We have heard the learned Government Pleader for the petitioner and Sri Jose Joseph the learned counsel for the respondent-assessee. We find that the assessee, in the returns filed for 1988-89 and 1989-90 had claimed exemption in respect of labour charges as per accounts and conceded the entire receipt of maintenance charges as taxable. The assessing authority deducted only 30 per cent towards labour charges. The Deputy Commissioner confirmed this. The assessee had raised the new contention regarding the non-liability to tax under the Act only before the Tribunal. The Tribunal had directed the assessing authority to ascertain whether the petitioner had received any amount towards maintenance of computer equipments leased out to the customers in Kerala and deduct if any amount so received. Regarding the contention of the appellant that the materials used for the maintenance work in respect of the computer systems sold in Kerala have moved from Maharashtra to Kerala in pursuance of the maintenance contract and since there is a deemed sale of the materials in the course of inter-State trade and commerce the sales tax authorities are prohibited from imposing tax on maintenance charges received by the petitioner the Tribunal felt that the said issue requires to be re-examined by the assessing authority. Necessary directions were issued in that regard. It was also observed that if the assessee is maintaining proper books of accounts and supporting documents which discloses the labour and service charges there is no question of making any percentage deduction. The assessing authority was directed to consider this. The Tribunal had only remitted the question for consideration by the assessing authority. We do not find any illegality in the said direction.

However, we make it clear that the assessing authority is free to consider the said issue on merits independently in the light of the direction issued by the Tribunal and take a decision in the matter.

These tax revision cases are also dismissed with the observation made hereinabove.