

(2005) 08 KAR CK 0011
In the Karnataka High Court
Case No : Sales Tax Appeal No. 92 of 1996

Inventa Software India (Private) Limited	APPELLANT
Vs	
Additional Commissioner of Commercial Taxes, Zone-I and Another	RESPONDENT

Date of Decision : 16-08-2005

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 12 A, 5 B
Karnataka Sales Tax Rules, 1957 — Rule 6

Citation : (2008) 17 VST 362

Hon'ble Judges : H.N. Nagamohan Das, J;H.L. Dattu, J

Bench : Division Bench

Advocate : G. Sarangan, for S. Parthasarathy, for the Appellant; S. Sujatha,
Additional Government, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Dattu, J.—These two appeals are filed against the order passed by the Additional Commissioner of Commercial Taxes, Zone-I, Bangalore, in Case No. SMR/KST/BLD-I/CR.3/95-96 for the assessment years, namely, 1989-1990 and 1990-91, dated July 15, 1996. By the impugned order, the revisional authority has set aside the orders passed by the Joint Commissioner of Commercial Taxes (Appeals) in Appeal Nos. 364 and 365 of 1994-95, dated February 25, 1995 and further has modified the orders passed by the assessing authority u/s 12A of the Karnataka Sales Tax Act, 1957, dated January 12, 1995 and December 21, 1994 for the assessment years 1990-1991 and 1989-1990, respectively, to the extent of recomputing the turnover after allowing 10 per cent of the total contract receipts as deductions under Rule 6 of the Karnataka Sales Tax Rules, 1957.

2. The facts in brief are:

The assessee is a dealer registered both under the provisions of the Karnataka Sales Tax Act, 1957 ("the KST Act," for short) and the Central Sales Tax Act, 1956 ("the CST Act," for short) and is engaged in the business of supply and

development of computer software. For the assessment years 1989-90 and 1990-91, the assessee had filed its annual returns and in that had claimed exemption on inter-State sales, export turnover, software consultancy services, sales returns, etc. The assessing authority while concluding the assessments for the years in question, had allowed the exemption on the turnover relating to the receipt of service charges and consultancy charges on the sole ground, that, the consultancy charges do not involve any purchase or sales. The orders of assessment so passed came to be modified by the assessing authority subsequently by passing reassessment orders u/s 12A of the Act, holding that the service and consultancy charges received by the assessee relate to sale of software development and the same is liable to be taxed under entry 22 of the Sixth Schedule to the KST Act.

The appellant in the appeal filed against the said order was successful before the first appellate authority, who in his order has concluded that programming, developing and supplying the software would not involve transfer of property in goods and therefore, the assessing authority was not justified in passing reassessment orders for the assessment years 1989-90 and 1990-91.

3. The revisional authority has taken exception to the aforesaid order on the ground that the order passed by the first appellate authority is erroneous and also prejudicial to the interest of the revenue and accordingly, has cancelled the orders passed by the first appellate authority and further, has restored the reassessment orders passed by the assessing authority. It is the correctness or otherwise of the said order is called in question in this appeal by the assessee, being aggrieved by the same.

The question of law raised in the memorandum of appeal for our consideration and decision is as under:

Whether, on the facts and circumstances of the case, the software consultancy charges were taxable under entry 22 of the Sixth Schedule to the KST Act?

4. The learned senior Counsel Sri Sarangan for the assessee contends that programming and developing of software to the requirement of a customer would not involve transfer of property in goods and therefore, both the assessing authority and the revisional authority were not justified in coming to the conclusion that the receipts received towards consultancy charges are exigible to taxes solely on the presumption that there is transfer of property in goods as envisaged u/s 5B of the Act. In aid of his submission, the learned senior Counsel has relied on the observations made by the apex court in the case of *M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs*, .

5. The learned Additional Government Advocate Smt. Sujatha appearing for the Revenue, would submit, that the one and the only legal issue raised and canvassed by the learned senior Counsel for the assessee is no more *res integra*, in view of the law declared by the apex court in the case of *Tata Consultancy Services Vs. State of Andhra Pradesh*, and therefore, the learned Additional

Government Advocate would submit, that the revisional authority was wholly justified in cancelling the orders passed by the first appellate authority and thereby restoring the reassessment orders passed by the assessing authority.

6. Since the legal issue involved, in our view, is no more debatable in view of the law declared by the apex court in the case of *Tata Consultancy Services Vs. State of Andhra Pradesh*, , we do not intend to discuss the entire gamut of the contentions canvassed by learned senior Counsel Sri Sarangan appearing for the assessee. In our view, it would suffice to observe only the charging provision under the KST Act, the relevant entry, the facts and the legal issues involved in *Tata Consultancy Services Vs. State of Andhra Pradesh*, .

7. Section 5B of the Act provides for levy of tax on the taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract as mentioned in column (2) of the Sixth Schedule to the Act at the rates specified in column (3) of the said Schedule. Entry 22 of the Sixth Schedule to the Act speaks of "programming and providing computer software" and the rate of tax during the relevant assessment year was at six per cent.

8. In the present case, the assessee is engaged in the business of supply and development of computer software and it receives charges in the matter of developing and programming computer software supplied by the customers. Sri Sarangan, the learned senior Counsel, emphasised at the time of hearing the appeal, that the assessee only assists its customers by developing the computer software on the computer discs supplied by the customers and therefore, what the assessee provides for its customers is only the consultancy services and there is no element of transfer of property in goods and therefore, the assessing authority could not have assumed, that the consultancy services would also involve the purchase and sales of goods and therefore, the entire transaction would fall under the charging provision. The submissions made by the learned Senior Counsel would have received some consideration by us, if not, for the law enunciated by the apex court in the case of *Tata Consultancy Services Vs. State of Andhra Pradesh*, .

9. In the aforesaid decision, the facts were:

The appellant before the apex court was a dealer providing consultancy services including computer consultancy services and as a part of their business, they prepare and load on customers computer custom made software and also sell computer software packages off the shelf. The question before the apex court was "whether the canned software sold by the assessee can be termed to be goods as such assessable to sales tax under the Andhra Pradesh General Sales Tax Act, 1957?" The apex court while answering the question, after making reference to the decision of the apex court of *M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs*, , on which reliance was also placed by learned senior Counsel Sri Sarangan before us has observed:

The term "goods" as used in Article 366(12) of the Constitution of India and as defined under the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods". There is no difference between a sale of a software programme on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media, i.e., the paper or cassette or disc or CD. Thus a transaction sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programmes have all these attributes.

There is no distinction between branded and unbranded software. However, the branded software is goods. In both cases, the software is capable of being abstracted, consumed and use. In both cases the software can be transmitted, transferred, delivered, stored, possessed, etc. Thus even unbranded software, when it is marketed/sold, may be goods. However, the Supreme Court declined to express 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.

10. In the instant case, the revisional authority after scrutinising the books t of account maintained by the dealer in its regular course of business, xerox copies of the invoices issued by the assessee to its customers and also the profit and loss account filed for the assessment years in question before the assessing authority, has given his findings and in that has noticed :

The scrutiny of the assessment records wherein several xerox copies of the invoices have been filed indicates that the dealer is receiving charges for software programming and development even though it indicates the same as "charges received for professional services rendered". However, further scrutiny throws light on the nature of works undertaken such as programming and developing finished modules, inventory modules, financial accounting, pay roll, A.R. module, etc., for example, invoice No. VDS/20/89-90, dated July 31, 1989

clearly indicates that you are engaged in "application software development" in areas such as financial accounting, inventory control, sales analysis, purchase order system, etc. Several other invoices reveal very clearly as to the professional services rendered are nothing but software development programme. Some of the invoices are quoted below:

1. Inv. No. VDS/27/89-90, dated September 2, 1989;
2. Inv. No. VDS/26/89-90, dated September 2, 1989;
3. Inv. No. VDS/30/89-90, dated September 26, 1989;

(System study and software development for the period August 18, 1989 to September 11, 1989) 200 hours Rs. 8,500;

4. Inv. No. VDS/52/89-90, dated March 14, 1990

(Distributed data base implementation from February 21,1990 to March 13, 1990) 200 hours Rs. 8,500.

The scrutiny of the profit and loss account filed for the year ending March 31, 1990 clearly indicates income received from software development at Rs. 34,20,789.36. In addition to this, the assessing authority has given a clear finding in the order passed u/s 12A on January 12,1995 for the year 1990-91 that, on verification of records, it is seen that the software development charges have been received in the guise of consultancy charges.

Under the facts and circumstances as explained above, it is evident that the dealer has undertaken work of software development programmes, or other related Works in connection with the development of software programming to their customers.

11. In view of the aforesaid factual finding of the revisional authority, which is again based on the relevant material available in the assessment records, we are of the view, that the law laid down by the apex court in the case of Tata Consultancy Services Vs. State of Andhra Pradesh, , would squarely apply to the business activity of the appellant before us. Therefore, the question of law raised by the appellant for our consideration and decision requires to be answered in the affirmative, i.e., in favour of the Revenue and against the assessee. According, the following:

ORDER

12. The appeal is rejected;

The impugned order passed by the revisional authority for the assessment years 1989-90 and 1990-91 under the provisions of the Karnataka Sales Tax Act, 1957, in No. SMR/KST/BCD-I/CR.3/95-96, dated July 15, 1996 is confirmed;

No order as to costs. Ordered accordingly.