
(2005) 12 KL CK 0078

In the High Court Of Kerala

Case No : S.T.R. No's. 291, 296 and 333 of 2005

Mechanical Assembly Systems (India) Pvt. Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 05-12-2005

Acts Referred:

Constitution of India, 1950 — Article 366(12)
Kerala General Sales Tax Act, 1963 — Section 17(3), 2, 5, 5A
Kerala General Sales Tax Rules, 1963 — Rule 32(15)

Citation : (2006) 1 KLT 947 : (2006) 144 STC 536

Hon'ble Judges : K.T. Sankaran, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : V.P. Sukumar and Jairam V. Menon, for the Appellant; Raju Joseph, Special Government Pleader (Taxes), for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—These revision petitions arise out of the common order passed by the Kerala Agricultural Income Tax and Sales Tax Appellate Tribunal, Additional Bench, Kottayam in T.A. Nos. 261, 520 and 625 of 2003. Common issues arise for consideration in all these cases. Hence we are disposing of these cases by a common judgment. For convenient sake we may refer to the facts in S.T.R. No. 291 of 2005.

2. Petitioner is a private limited company engaged in the manufacture of combustible paper cartridge cases for use of the defence force. On April 15, 1999 the petitioner-company entered into an agreement with another company by name Mas Combustible Pack Ltd. (MCP), Cherthala, with its factory at Hyderabad for providing technology for production of combustible cartridge cases (CCC) and to help continuously by undertaking the repairs and maintenance required for machinery of the said company. Petitioner-company has also agreed to depute suitable personnel to MCP factory at Hyderabad for supervising uninterrupted production of CCC. Petitioner-company is entitled for 5 per cent of the sales

turnover of CCC towards remuneration for the services rendered. An agreement to that effect was executed on April 15, 1999 between the petitioner-company and Mas Combustible Pack Ltd. Pursuant to the agreement petitioner-company had deputed its personnels to the Hyderabad factory of Mas Combustible Pack Ltd., for providing technical know-how and also for maintenance and repairs of the machinery of that company and in consideration the petitioner-company has received a sum of Rs. 1,24,19,567 for the assessment year 1999-2000 as royalty.

3. The Sales Tax Officer, Cherthala, the assessing authority, verified the books of account of the petitioner for the year 1999-2000 for completing the assessment. On verification of the accounts it was found that the petitioner had received a sum of Rs. 1,24,19,567 towards royalty for assessment year 1999-2000 and hence a notice u/s 17(3) of the Kerala General Sales Tax Act, 1963 was issued to the petitioner proposing to levy tax on the said amount at the rate of 10 per cent treating the income from royalty as turnover taxable under the Act. It was also proposed to make an addition of Rs. 1 lakh to the conceded turnover for non-maintenance of manufacturing account and corresponding addition of Rs. 70,000 towards turnover u/s 5A of the KGST Act, 1963.

4. Petitioner on receipt of the said notice filed objection stating that royalty received is in respect of technical know-how provided to Mas Combustible Pack Ltd., Cherthala for manufacture of combustible cartridge cases and technical know-how being not "goods" the amount received on that account cannot be subjected to tax under the KGST Act. With regard to the non-maintenance of manufacturing account it was submitted that the petitioner was not manufacturing any consumable article and it was manufacturing only combustible cartridge cases for Defence Services of India according to orders. Further it was also stated that combustible cartridge cases are part of ammunitions for use during war times and it was not salable in the open market. Assessing authority rejected both the contentions and completed the assessment for the year 1999-2000 as proposed in the pre-assessment notice levying tax on the royalty income received and also sustaining the addition of Rs. 1 lakh to the conceded turn over. Original assessment order is dated August 26, 2002.

5. Petitioner aggrieved by the order filed appeal before the Appellate Assistant Commissioner, Commercial Taxes, Alappuzha. First appellate authority however, deleted the addition of Rs. 1 lakh and corresponding addition of Rs. 70,000 u/s 5A of the Act placing reliance on the decision of this Court in Deputy Commissioner (Law), Commercial Taxes, Ernakulam v. Krishna Plastics [2002] 128 STC 39. Levy of tax on royalty received was however sustained and held that the amount received for providing technology was liable to tax. Aggrieved by the order of the appellate authority dated May 17, 2003 petitioner took up the matter in appeal before the Tribunal. Revenue also filed second appeal before the Tribunal against deletion of the addition made in the assessment order by the first appellate authority. Petitioner raised an additional ground before the Tribunal stating that technical know-how unless incorporated in a tangible media and

transferred, cannot constitute "goods" for the purpose of levy of sales tax and therefore not exigible to sales tax. Tribunal rejected that contention and held that the amount of royalty received can be subjected to tax. Regarding the addition of Rs. 1 lakh made to the conceded turnover with corresponding addition of Rs. 70,000 u/s 5A of the Act, the Tribunal found that the said addition was justified because non-maintenance of manufacturing account is a ground to sustain the addition and therefore the deletion of the same by the first appellate authority was held to be not in order. Consequently, addition made by the assessing authority was restored. Points raised in other revision petitions are also the same.

6. Four questions of law were formulated by the petitioner which we re-draft and consolidate and state as follows:

(i) Is the Tribunal justified in law in holding that the technical know-how be considered as goods unless it is copied or incorporated into any media and then transferred ?

(ii) Whether the Tribunal is justified in rejecting the accounts and restoring turnover estimation made by the assessing authority, though the only purchaser of the commodity was the Government of India ?

Sri V.P. Sukumar, learned counsel for the assessee, reiterated various contentions raised by him before the Tribunal. Counsel submitted that the agreement was only for offering technology by deputing suitable personnel who without parting the technical know-how would carry out the work as per the agreement. Counsel submitted technical know-how unless incorporated in a tangible media and transferred would not constitute "goods" for the purpose of levy of sales tax. Special Government Pleader for Taxes Sri Raju Joseph supported the findings of the Tribunal on the questions posed.

7. Petitioner-company is mainly engaged in the manufacture of CCC. The company executed an agreement with M/s. Mas Combustible Pack Ltd., Cherthala, on April 15, 1999. Terms and conditions of the agreement are extracted below :

1. The party of the first part hereby agrees to offer the technology required for the production of CCC and to help continuously undertaking the repairs and maintenance required to the machinery and to depute suitable personnel, so as to have uninterrupted production, and the party of the second part agrees to pay to the party of the first part in consideration for the above, and towards the continuous maintenance of the machinery and for deputing its personnel during the production period, 5 per cent of the sales turnover (turnover of CCC) or such other percentage as may be agreed by both the parties.

2. The party of the second part shall inform and send a copy of all the purchase orders and intimate the production schedule to the party of the first part.

3. The party of the first part shall depute suitable technical personnel at all times to the factory of the party of the second part.

4. It is confirmed that the party of the first part shall transfer the technology to manufacture of combustible cartridge casings to the party of the second part at the rate to be approved by both the parties.

5. It is also confirmed that the party of the first part shall manufacture and sell/repair the machinery required for the manufacture of CCC by the party of the second part at a rate to be approved by both the parties.

6. The amount payable by the party of the second part to the party of the first part shall be settled at least on a yearly basis, otherwise the party of the first part shall be at liberty to stop all the assistance and technical support to be provided to the party of the second part as per this agreement.

Counsel for the revision petitioner placing reliance on the above mentioned agreement submitted that there was no transfer of technical know-how to Mas Combustible Pack Ltd., for manufacture of CCC. But the agreement was for offering the technology required for the production of CCC and to help continuously by providing the required technical details for undertaking repairs and maintenance required to the machinery by deputing suitable personnel so as to have uninterrupted production.

8. The agreement in our view speaks for itself. Petitioner has transferred the technical know-how to another company, i.e., M/s. Combustible Pack Ltd., for consideration. M/s. Combustible Pack Ltd. have expressed their willingness to purchase the technology for production of CCC from the petitioner-company, For transfer of technical know-how petitioner received Rs. 1,24,19,567 for the year 1999-2000, Rs. 56,59,506 for the year 2000-01 and Rs. 13,36,896 for the year 2001-02. Intention of the parties is clearly reflected in the agreement. One party has expressed its willingness to purchase technology required for the production of CCC from the other party and other party has agreed to part with technical know-how for consideration. The terms and conditions of the agreement would exhibit an incident of sale and purchase. We are not prepared to say that the technical know-how is not goods and parting of the same for consideration would not amount to sale and purchase. In order to appreciate the contentions raised on either side it is necessary to refer the relevant provisions. Expression "goods" is defined u/s 2(xii) which reads as follows :

"goods" means all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities) and includes live stock, all materials, commodities and articles (including those to be used in the construction, fitting out, improvement or repair of immovable property or used in the fitting out, improvement or repair of movable property) and every kind of property (whether as goods or in some other form) involved in the execution of a works contract, and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale ;

Expression "sale" is also defined u/s 2(xxi) of the Act which is extracted below :

"sale" with all its grammatical variations and cognate expressions means every transfer whether in pursuance of a contract or not of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration.

Section 5 of the Act deals with levy of tax on sale or purchase of goods. The said provision is also extracted below for easy reference :

5. Levy of tax on sale or purchase of goods.-(1) Every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than two lakh rupees and every casual trader or agent of a non-resident dealer, whatever be his total turnover for the year, shall pay tax on his taxable turnover for that year,-

(i) in the case of goods specified in the First or Second Schedule, at the rates and only at the points specified against such goods in the said Schedules ;

(ii)...

(iii) in the case of transfer of the right to use any goods for any purpose (whether or not for a specified period) at the rate of eight per cent at all points of such transfer ;

(iv)(a) in the case of transfer of goods involved in the execution of works contract where transfer is in the form of goods at the rates and at the points specified against such goods in the First, Second or Fifth Schedule;

(b) in the case of transfer of goods involved in the execution of works contract (where the transfer is not in the form of goods but in some other form) specified in the Fourth Schedule, at the rate specified against such contract in the said Schedule :

Provided that no tax is payable in respect of the turnover of goods the transfer of which was effected without any processing or manufacture on which tax was levied under Clause (i) on any earlier sale in the State or which are exempted from tax and for goods coming under the Fifth Schedule, no tax specified for the first sale is payable, on which tax was levied in any earlier sale in the State :

Provided further that tax payable in respect of turnover of goods coming under the Second Schedule the transfer of which was effected without any processing or manufacture shall not exceed the rate and only at the points specified against such goods in the said Schedule.

(v) in the case of goods specified in the Fifth Schedule at the rates and at the two points specified against such goods in the said Schedule :

Provided that where there are no two points of sale in the State for any goods coming under the Fifth Schedule and the first sale is to a person other than a registered dealer, the rate specified in column (8) of that Schedule shall apply to such sales :

Provided further that the registered dealer effecting the last sale within the State to a person other than a registered dealer shall, pay tax at the rates shown in column (6) or in column (8), as the case may be, of the Fifth Schedule irrespective of his turnover :

Provided also that where a registered dealer, after purchasing the goods on payment of the tax mentioned in column (4) of the Fifth Schedule,-

(a) uses or disposes of such goods in any manner other than by way of sale within the State, or

(b) despatches them to any place outside the State except as a direct result of sale in the course of inter-State trade or commerce,

he shall pay tax at the rate shown in column (6) of the said Schedule on the purchase turnover of the goods :

Provided also that where no tax is payable by a dealer effecting the first sale within the State, to a registered dealer for sale then the dealer effecting the subsequent sale within the State shall pay tax at the rates shown in column (4) of the Fifth Schedule and where there are no two points of sale in the State for any goods coming under the Fifth Schedule and the subsequent sale is to a person other than a registered dealer, or to a registered dealer other than for sale in the rate specified in column (8) of that Schedule shall apply to such sales ;

Provided that where a tax has been levied under this Sub-section or u/s 5A, in respect of the sale or purchase of goods specified in the Second Schedule, and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be prescribed.

The term "goods" used in the Kerala General Sales Tax Act has got a broad and wide meaning. "Goods" have been defined to mean all kinds of movable properties except those specified, namely, newspapers, actionable claims, stocks, shares, etc. Goods which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed, etc., are "goods" for the purposes of sales tax. Technical know-how can also be transmitted, transferred, delivered, stored or possessed, etc. Agreement would definitely indicate that there is a transfer of technology for the manufacture of CCC deputing personnel for consideration, i.e., through human media. Transfer of technology in any manner either through floppy disc, CD or through deputing personnel, etc., would constitute sale within the meaning of Section 2(xxi) of the Kerala General Sales Tax Act.

9. We may in this connection refer to the judgment of the Supreme Court in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, . Court held as follows :

It is true that what the appellants had wanted was technical advice or

information technology. Payment was to be made for this intangible asset. But the moment the information or advice is put on a media, whether paper or diskettes or any other thing, then what is supplied becomes chattel. It is in respect of the drawings, designs, etc., which are received that payment is made to the foreign collaborators. It is these papers or diskettes, etc., containing the technological advice, which are paid for and used. The foreign collaborators part with them in lieu of money. It is, therefore, sold by them as chattel for use by the Indian importer. The drawings, designs, manuals, etc., so received are goods on which customs duty could be levied.

Holding that computer software is a "goods" the court held as follows :

Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a "goods", but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a goods, but, when transcribed as a book, it becomes a goods.

That a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, movable and available in the market place. The fact that some programs may be tailored for specific purposes need not alter their status as "goods" because the Code definition includes "specifically manufactured goods".

The traditional meaning of the word "goods" has made radical change due to technological and scientific developments. Reference may also be made to a recent decision of the apex Court in *Tata Consultancy Services v. State of Andhra Pradesh* [2004] 137 STC 620 : (2005) 13 KTR 1 wherein the apex Court examined the constitutional definition of the word "goods" and held that it includes all materials, articles and commodities both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. Court held, software programmes contain all these characteristics. It is relevant to refer to the dictum laid down by the Supreme Court which is extracted below:

In our view, the term "goods" as used in Article 366(12) of the Constitution of India and as defined under the said Act are very wide and include all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in *M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs*, . 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". We see 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.

The division Bench of this Court of which one of us (K.S. Radhakrishnan, J.) is a party in *Pan India Network Infravest Pvt. Ltd. Vs. State of Kerala*, held that selling of online lottery tickets which is intangible goods and transfer of which would constitute sale within the meaning of sale under the Kerala General Sales Tax Act. Principles enunciated above would positively show that transfer of technical know-how either through technical personnel by undertaking the work would satisfy the definition of "sale" u/s 2(xxi) of the KGST Act. We therefore fully concur with the view of the Tribunal that the transfer of technical know-how by deputing personnel would amount to sale of goods and exigible to tax under the EGST Act.

10. We also fully concur with the view of the Tribunal that the addition of Rs. 1 lakh made to the conceded turnover with corresponding addition of Rs. 70,000 u/s 5A of the KGST Act is justified. Admittedly, assessee has not produced the manufacturing accounts before the assessing authority. Rule 32(15) of the KGST Rules specifically states that every manufacturer of goods shall maintain daily production accounts, showing quantitative details of the various raw materials used for the manufacture and the quantitative details of the goods so manufactured. It is settled law that non-maintenance of manufacturing account is a valid ground for rejection of accounts and estimation of turnover. Reference may be made to the decision of this Court in [2002] 128 STC 39 [Deputy Commissioner (Law), Commercial Taxes, Ernakulam v. Krishna Plastics] .

11. We therefore, concur with the decision of the Tribunal for the above mentioned reasons and dismiss all these revision petitions.