
(1996) 12 AP CK 0071

In the Andhra Pradesh High Court

Case No : Writ Petition No. 22375 of 1994 and Tax Revision Cases No's. 96, 97, 98 and 99 of 1996

Tata Consultancy Services

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 12-12-1996

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 2, 5
Constitution of India, 1950 — Article 366

Citation : (1997) 105 STC 421

Hon'ble Judges : Y.V. Narayana, J; S.S. Mohammed Quadri, J

Bench : Division Bench

Judgement

Syed Shah Mohammed Quadri, J.—A Common question is argued in the writ petition as well as in the tax revision cases, therefore they are being disposed of by a common judgment.

2. The petitioners in the writ petition seek a declaration that section 2(n) read with explanation IV, sections 5 and 5-E of the Andhra Pradesh General Sales Tax Act, 1957 (for short, "the APGST Act") are ultra vires the Constitution of India and the legislative competence of the Andhra Pradesh Legislature in so far as they seek to levy tax on the amounts received on the transfer of the right to use the software and the consequential relief restraining the respondents from taking any steps in furtherance of the impugned provision and also directing the respondents to withdraw the levy among other consequential reliefs.

3. There are two petitioners in the writ petition. The first petitioner is an association of 238 software and service companies, the list of which is enclosed to the writ petition, and the second petitioner is the resident manager of Tata Consultancy Services which is one of the members of the first petitioner. The members of the first petitioner are developing software for computers. They say that software is purely an intellectual property, which is not "goods" as defined in the APGST Act. Computer software programme consists of a set of statements or

instructions to be used directly or indirectly in a computer in order to bring about a certain result, that is "source code" or "object code". A programmer expresses his thoughts in a conventional symbolic programming language, analogous to expressing his thoughts in the staff notations used for music. This expression is usually written in a form known as "source code". It contains a combination of computer language words and human language words. The writing of a computer programme in "source code" is the first and most essential step in the expression of the intellectual thoughts of the programmer. The programmer converts the "source code" into another form, known as "object code" which is a binary representations of the programme - ones and zeros - that is capable of being copied into a computer for execution. The object code is an automatic transformation of the source code and is in effect a copy of the source code. The provocation for the writ petition is the instructions in Ref. No. CCT/A1(2)/2050/93 issued by the Commissioner of Commercial Taxes, Andhra Pradesh, respondent No. 2 herein, to all the assessing authorities stating that the software banded as floppies be treated as "goods" and the sales tax be levied under the APGST Act. The said instructions were communicated by the Assistant Commercial Tax Officer to the second petitioner by letter dated May 25, 1994. Stating that those instructions affect many of the members of the first petitioner and directly affect the second petitioner, this writ petition is filed for the reliefs mentioned above.

4. Indeed the second petitioner was provisionally assessed to sales tax on the turnover of sale of software packages, viz., Oracle, Lotus, Masterkey, N-Export, Ex-Unigraphic, etc., for the assessment years 1991-92, 1992-93 and 1993-94. Aggrieved by the order of assessment passed by the Commercial Tax Officer, Basheerbagh, Hyderabad, the second petitioner filed four appeals before the Appellate Deputy Commissioner (CT), Secunderabad Division, Hyderabad. The appellate authority found that section 5-E of the APGST Act applies to the transfer of right to use the computer software packages and that the turnover relating to the same is taxable thereunder. However, he set aside the orders of assessment for the said assessment years and remanded the cases to the assessing authority for de novo assessment with reference to the circumstances of each transaction on examining the terms and conditions of the licences. The second petitioner filed four appeals against the said orders of the first appellate authority before the Sales Tax Appellate Tribunal. The Tribunal has noted that there are two categories of software; (1) software which is specialised and exclusively custom-made to cater to the needs of individual clients; and (2) software which is standardised and marketed, for the use of certain classes of clients, like the Oracle, Lotus, Masterkey, N-Export, Ex-Unigraphics, etc., and pointed out that the charges paid for management and computer consultancy without involving transfer of goods, as contended by the petitioner herein, in regard to which copies of agreement, etc., were to be produced and examined by the Commercial Tax Officer, would fall under the first category and could not be taxed as turnover of sales of goods and that the turnover in question in the four

appeals related to the second category and accordingly it upheld the order of the first appellate authority including the order of remand. Consequently it dismissed all the four appeals by a common order on April 1, 1996. Challenging the validity of the said order of the Tribunal the second petitioner filed the abovementioned four revisions.

5. The Assistant Commissioner (CT), Legal, filed counter-affidavit for the second respondent in the writ petition. He submits that the computer software programme is essentially a set of instructions in a computer language and that the function of these programmes, is that of an interface between the computer and the user. Software can broadly be classified as "systems software" and "application software". "System software" is designed to facilitate the functioning of computers or computer systems and that in such softwares fall MS-DOS, UNIX, etc. "Application software" is a software designed for a particular type of work, for example specialised work like ARC-INFO, WORDSTAR, FOXPRO, WINGS, etc. He further submits that in a commercial sense computer software can be classified into "branded software" and "unbranded software". "Branded softwares" are sold as one package and are loaded into a computer system usually without any modification. They have commercial identity and are sold across the country; examples of such packages would be FOXPRO, WORDSTAR, WINGS, LOTUS, DBASE, WINDOWS, MS-DOS, UNIX, etc. Such software packages are movable properties and as such "goods" and the turnover of their sales or of right to their use, would be liable to be taxed as relating to sale of "goods". Modificational changes of the programme in such software packages would not change their nature and that they would nonetheless remain "goods". "Goods" like such softwares are also value added to tangibles like floppies and as such they could be taxed at the additional value at which they were sold. He further submits that even intangible property is movable property and would come within the meaning of "goods" and that even according to the petitioners software is intellectual property, therefore it would also be a movable property; and that even otherwise the software packages when sold as commercial items would fall within the meaning of "goods" u/s 2(h) read with explanation IV. It is added that the standard software packages are sold without mentioning any specific period of use and so the entire consideration is being taken as value and taxed accordingly and that for purposes of the APGST Act the method of transfer of software like right to use software, does not make any difference because there is transfer for which consideration is paid. The amended definition of "sale" would take in its fold such transactions. It is stated that section 2(n) and sections 5 and 5-E were amended with effect from July 1, 1985 by the State Legislature to bring them in line with clause (29A) of article 366 of the Constitution of India and that the constitutionality of the amended provision has been upheld by the High Court of Andhra Pradesh and the Supreme Court. For all these reasons the respondent submits that the writ petition is liable to be dismissed.

6. The petitioners filed a reply affidavit reiterating that the software packages do not come within the ambit of the term "goods", the State Legislature under entry

54 in List II of the Seventh Schedule to the Constitution, cannot enact any law levying sales tax on amounts received for the transfer of software which is an intellectual property. They say that the price paid by the user of the software is like the price paid for the opinion of a professional, a lawyer or a physician who may by words of mouth advise or treat or writ an opinion or a prescription and the same cannot be equated to transfer of goods liable to tax under the APGST Act.

7. Mr. G. S. Jetley, the learned senior counsel appearing for the petitioners, contends that section 2(n) read with Explanation IV and sections 5 and 5-E of the APGST Act are ultra vires the Constitution as they are beyond the legislative competence of the State Legislature. The learned counsel developed his argument stating that even after amendment of article 366, inserting clause (29A), the Legislature can levy sales tax on goods and since software is only intellectual property but not goods, no sales tax can be imposed on the transfer of the right to use software as that is beyond the competency of the State Legislature and ultra vires the Constitution. The learned counsel further contends that clause (29A) of article 366 of the Constitution does not authorise levy of sales tax on the right to use the intellectual property, therefore the levy of sales tax on software is without jurisdiction and illegal.

8. The learned Special Government Pleader for Taxes, contends that the questions raised in the writ petition are only academic questions and therefore the writ petition is liable to be dismissed. He further contends that the various software packages like FOXPRO, WORDSTAR, WINGS, LOTUS, DBASE, WINDOWS, MS-DOS, UNIX, etc., are "goods" known in the market and therefore they have been correctly described in the instructions as liable to tax. In other words the contention of the learned Government Pleader is that the turnover relating to sale of "branded software" will be the turnover relating to sale of "goods" and therefore exigible to sales tax. However, insofar as unbranded software is concerned, the learned Government Pleader conceded that as it related to skill and labour so it might not be falling within the meaning of "goods".

9. In view of the above contentions of the learned counsel for the parties, the following two questions arise both in the writ petitions and T.R.Cs. for consideration :

(i) Whether section 2(n) read with Explanation IV, sections 5 and 5-E of the APGST Act are without the legislative competence and therefore ultra vires the Constitution of India; and

(ii) Whether branded software which consists of software programme sold as packages like FOXPRO, WORDSTAR, WINGS, LOTUS, DBASE, WINDOWS, MS-DOS, UNIX etc., fall within the meaning of "goods" and whether the turnover of their sale is taxable under the APGST Act.

Question No. (i) :

10. It will be useful to note here entry 54 of List II of the Seventh Schedule to the Constitution under which the impugned provisions of the APGST Act have been enacted.

"54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92-A of List I."

11. A plain reading of this entry shows that the State Legislature is competent to impose taxes on the sale or purchase of goods other than the newspaper and it is subject to provisions of entry 92-A of List I. Entry 92-A of the First Schedule authorises the Central Government to levy tax on the sale or purchase of goods other than the newspapers where such sale or purchase takes place in the course of inter-State trade or commerce. Thus it is clear that where the sale or purchase of goods other than the newspaper is otherwise than in the course of inter-State trade or commerce, the State Legislature has competency to authorise levy of tax, on such sale or purchase.

12. Section 5 of the APGST Act is the charging section and is in the following terms :

"5. Levy of tax on sales or purchases of goods. - (1) Save as otherwise provided in this Act, every dealer shall pay a tax under this Act, for each year on every rupee of his turnover of sales or purchases of goods in each year irrespective of the quantum of his turnover at the rates of tax and at the points of levy specified in the Schedule.

(2) For the purpose of this section and the other provisions of this Act, the turnover on which a dealer shall be liable to pay tax, shall be determined after making such deductions from his total turnover, and in such manner as may be prescribed :

.....

Provided that -

(i) in respect of the same transaction, the buyer or the seller, but not both, as determined by such rules as may be prescribed, shall be taxed;

(ii) where a dealer has been taxed in respect of the purchase of any goods, in accordance with the rules referred to in clause (i) of this proviso, he shall not be taxed again in respect of any sale of such goods effected by him."

13. A perusal of sub-section (1) of section 5, extracted above, discloses that it brings to tax the turnover of sales or purchases of goods in each year irrespective of the quantum at the rates of tax and at the points of levy specified in the Schedules to the APGST Act. Sub-section (2) deals with determination of turnover. From the above discussion it is clear that section 5 does not suffer from lack of legislative competence, in fact this is not seriously disputed by Mr. Jetley. What he has contended is that the term "goods" cannot be so interpreted as to include "software" and that it is only when that term is so interpreted, section 5

would then become unconstitutional. This contention in effect raises the question whether "software" falls within the meaning of "goods" which we shall consider presently.

14. The provision of section 5 was considered to be not wide enough to bring to charge certain transactions in respect of goods within the meaning of "tax on sale or purchase of goods". Faced with that situation article 366 of the Constitution which contains definitions of various terms and expressions used in the Constitution, was amended and clause (29A) was inserted by section 4 of the 46th Amendment Act, 1992. The expression "tax on sale or purchase of goods" used in the said entries, is defined in clause (29A) of article 366, which reads as follows :

"(29A) "tax on the sale or purchase of goods" includes -

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

15. This is an inclusive definition, it includes a tax on the transfer of right to use goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. "Transfer" referred to in sub-clauses (a) to clause (29A) and delivery or supply of any goods shall be deemed to be sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made.

16. Thereafter the APGST Act was amended by Act 18 of 1985 and section 5-E,

among other provisions, was inserted in the APGST Act. Section 5-E reads thus :

"5-E. Tax on the amount realised in respect of any right to use goods. - Notwithstanding anything contained in this Act, -

(a) Every dealer who transfer the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realised or realisable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of five paise in every rupee of the aggregate of such amount realised or realisable by him during the year;

(b) the transfer of right to use any such goods entered into by any dealer, shall be deemed to have taken place in this State whenever the goods are used within the State, irrespective of the place where the agreement whether written or oral for such transfer of right is made."

17. We have already noticed that sub-clause (e) of clause (29A) of article 366 includes tax on the transfer of right to use any goods within the meaning of tax on the sale or purchase of goods. Section 5-E authorises levy of tax on the amounts received by any dealer by transferring the right to use any goods for any purpose whatsoever whether or not for any specified period to any lessee or licensee for cash, deferred payment or other valuable consideration in the course of his business.

18. From a reading of the said entries in List II and List I of the Seventh Schedule and definition of the expression "tax on the sale or purchase of goods" in clause (29A) of article 366, it becomes evident that the State Legislature can impose tax on "the transfer of right to use any goods" for any purpose and for any period for cash, deferred payment or other valuable consideration.

Now we shall refer to the relevant terms in the APGST Act. The term "dealer" is defined in section 2(e)(iii-b) thus :

"2(e) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods or delivering goods on hire purchase or on any system of payment by instalments, or carries on or executes any works contract involving supply or use of material directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes -

(iii-b) any person, who may transfer the right to use of any goods for any purpose whatsoever (whether or not for a specified period) in the course of business to any other person."

19. The term "sale" is defined in section 2(n) as follows :

"(n) "sale" with all its grammatical variations and cognate expressions means

every transfer of the property in goods (whether as such goods or in any other form in pursuance of a contract or otherwise) by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration or in the supply or distribution of goods by a society (including a co-operative society), club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of or a charge on goods."

20. Explanation IV is in the following terms :

"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."

21. "Tax" is defined in section 2(q) as follows :

"Tax" means a tax on the sale or purchase of goods payable under this Act and includes, -

(i) to (iii).....

(iv) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration."

22. From a reading of the definitions of the terms referred to above, it can immediately be noticed that "the right to use any goods" is the key expression which is now included in the definition of each of the above terms and it becomes manifest that a "transfer of a right to use any goods" for any purpose, whether or not for a specified period, for cash, deferred payment or other valuable consideration, is deemed to be "sale" and any person who transfers the right to use of any goods for any purpose, whatsoever, whether or not for a specified period in the course of a business of any person, is a "dealer" and tax on turnover of such transfer of right as on the sale or purchase of goods, is payable under the APGST Act.

23. From the above discussion it becomes evident that in view of the amendment of the Constitution and insertion of clause (29A) in article 366 enlarging the scope of "tax on the sale or purchase of goods", the contention that section 2(n) read with Explanation IV and sections 5 and 5-E of the APGST Act are beyond the legislative competence is devoid of any substance. Therefore, the said provisions cannot be held to be ultra vires the Constitution.

Question No. (ii) :

The second point is whether the software falls within the meaning of "goods".

Here it will be useful to refer to the definition of the term "goods". In clause (12) of article 366 of the Constitution of India it is defined thus :

"(12) "goods" includes all materials, commodities and articles."

24. The definition of "goods" in section 2(h) of the APGST Act is more exhaustive and runs as follows :

"(h) "goods" means all kinds of movable property other than actionable claims, stocks, shares and securities and includes all materials, articles and commodities including the goods (as goods or in some other form), involved in the execution of a works contract or those goods used or to be used in the construction, fitting out, improvement or repair of movable or immovable property and also includes all growing crops, grass and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale and also includes motor spirit."

25. All kinds of movable property including all materials, articles and commodities and goods (as goods) or in some other form involved in the execution of a works contract or those goods used or to be used in the construction, fitting out, improvement or repair of movable or immovable property and all growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale and motor spirit fall within the meaning of "goods"; actionable claims, stocks, shares and securities are excluded from that definition. We have noticed that the definition of "goods" is an inclusive definition - it includes in its meaning the very term which it seeks to explain. It has, therefore, become necessary to fall back on the meaning of "goods" as understood in English language; its ordinary dictionary meaning is "movable property or merchandise" [Concise Oxford Dictionary]. This term has been interpreted in various judgments of the courts and we shall refer to them briefly.

26. In *State of Bihar v. Rameshwar Jute Mills Ltd.* [1953] 4 STC 179 (Pat) the meaning of the term "goods" in section 2(e) of the Bihar Sales Tax Act, 1947, fell for consideration of a Division Bench of the Patna High Court. The Indian Jute Mills Association allotted certain "loom hours" to each mill which could be sold by the mill under specified circumstances. The assessee sold some "loom hours" on which sales tax was realised. The Patna High Court, on reference of the case to the High Court u/s 25 of that Act, held :

""goods" in section 2(d) of the Bihar Sales Tax Act, 1947, must be construed to mean only tangible corporeal property and not abstract rights like "loom hours" or actionable claims, stocks, shares or securities, and that the sale of "loom hours" did not fall within the ambit of that Act. So the levying of tax was invalid."

27. In *Nizam Sugar Factory Limited Vs. Commissioner of Sales Tax*, , Division Bench of the erstwhile Hyderabad High Court considered the meaning of "goods" as defined in the Hyderabad General Sales Tax Act and the Rules made thereunder. The question there was whether "steam" would fall within the meaning of "goods" in the said Hyderabad Act and the sale of "steam" could be subjected to sales tax. It was held that steam is a tangible property so it came within the meaning of the word "goods" which was construed to mean any

property visible, tangible, corporeal or movable for the purpose of that Act and the sale of steam was held to be taxable thereunder. P. Jaganmohan Reddy, J. (as he then was) speaking for the Division Bench, observed :

"The word "goods" is one which has an indefinite meaning and various statutes have defined it as including or excluding something or things which may or may not be included in or excluded from its generic meaning. We may with Lord Sumner in the case of the *Noordam* [1911] AC 105 say that "the content of the word "goods" differs greatly according to the context in which it is found and the instrument in which it occurs."

28. In *Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur*, the question was whether the Madhya Pradesh Electricity Board was a "dealer" and "electricity" was "goods" within the meaning of the Madhya Pradesh General Sales Tax Act. The Madhya Pradesh High Court, on reference by the Sales Tax Tribunal, held that the Electricity Board was a dealer as defined in section 2(c) of that Act and that "electricity" could not be regarded as article or matter which could be possessed, moved or delivered. On appeal to the Supreme Court, reversing the judgment of the Madhya Pradesh High Court on the question whether "electricity" was "goods" it was held that "electricity" was "goods" within the meaning of that Act. It was pointed out that the term "movable property" when considered with reference to "goods" as defined for the purpose of sales tax could not be taken in a narrow sense and merely because electric energy was not tangible or could not be moved or touched like a piece of wood or a book, it could not cease to be movable property when it had also the attributes of such property; that the electricity was capable of abstraction, consumption and use and it could be transmitted, transferred, delivered, stored and possessed, therefore it was a movable property and "goods" within the meaning of the Act.

29. In *The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio*, a photographer was taxed under the Madhya Pradesh General Sales Tax Act, 1958 on the amount received by him for supplying photograph prints to his client or customer or for enlarging the photos. The Supreme Court held that when a photographer undertook to take a photograph, develop the negative or do other photographic work and thereafter supply the prints to his client, he could not be said to enter into a contract for sale of "goods". The contract was held to be for use of skill and labour by the photographer to bring about the desired result and that the sales tax was not payable by him under that Act.

30. In *Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay*, the question was whether the PVC film would fall under the tariff item 15-A(2) of the Central Excise Tariff Act, 1985. It was contended on behalf of the manufacturer that only the goods specified in the Schedule to the Central Excises and Salt Act, could be subjected to duty. Dealing with that contention, Sabyasachi Mukharji, J. (as he then was), speaking for the Supreme Court,

observed :

"..... It appears to us that under the Central Excise Act, as it stood at the relevant time, in order to be goods as specified in the entry the first condition was that as a result of manufacture goods must come into existence. For articles to be goods these must be known in the market as such or these must be capable of being sold in the market as goods."

31. It was further observed that goods are articles as known in the market as separate, distinct, identifiable commodities.

32. From the above discussion it follows that the term "goods" has an indefinite meaning and its import differs greatly according to the context of the statute in which it is employed, so it has to be construed accordingly. The definition of that term in the APGST Act would take in its fold every merchandise and every movable property which is separate, distinct and identifiable commodity known to the market including intangible movables but does not include abstract rights. It follows that if it is found that computer software is movable property or article or identifiable commodity it would fall within the meaning of the "goods".

33. Prof. P. S. Atiyah in "The Sale of Goods" (The Sale of Goods by P. S. Atiyah 8th Edition - at page 50) has considered the meaning of the term "goods" and pointed out that items of intellectual property, such as copyrights, patents and trade marks are not "personal chattels" and they do not fall within the definition of "goods" in section 61 of the English sale of Goods Act, 1979 which is as exhaustive as the definition under the APGST Act. The learned author expressed that in modern times the important question which is not yet wholly resolved, is whether computer software would constitute "goods" within the meaning of the Act. We have to bear in mind that we are concerned here with software which are contained in floppies or discs like ARC-INFO, WordStar, Foxpro, Wings, etc. Relying on a decision of New South Wales in Toby Construction Products Pty. Ltd. v. Compura Bar (Sales) Pty. Ltd. (1983) 2 NSW 48 it is opined that the software contained in physical objects is clearly "goods". Referring to the Uniform Commercial Code of the United States, it is pointed out that computer software is classified into (i) "off the shelf" and (ii) supply of software which is tailor-made to the customer's particular requirements; in regard to the first category, it is indicated that the transaction closely resembles an ordinary consumer purchase of goods within the definition of a contract of sale of goods.

34. As our discussion is confined to branded software, as it is called here, of which American equivalent is "computer software off the shelf", we do not consider it appropriate to embark upon discussion on the question of the nature of "unbranded software" which is also termed as software "tailor-made to the customer's particulars requirements".

35. In the light of the above discussion, we have no hesitation in concluding that the branded software can safely be treated as falling within the ambit of "goods" under the APGST Act.

36. Mr. Jetley has vehemently contended that software cannot be treated as goods within the meaning of the APGST Act. He has given various reasons the foremost of which is that it is an intellectual property containing set of instructions to the computer and no one, except the licensee, can use it. This takes us to the question as to whether intellectual property could fall within the purview of "goods".

"Intellectual property" as the expression itself suggests, comprehends works of the human intellect having the incidence of property; the products of thought, creativity and intellectual effort are the subject-matter of intellectual property rights.

37. In England "intellectual property" includes copy rights, patents, designs, registered and unregistered trade marks and service marks, confidential information and other matters, such as semi-conductor chip design. In other countries not all these intellectual property rights are recognised and in some there are additional intellectual property rights [Commercial Exploitation of Intellectual Property by Hilary E. Pearson and Clifford G. Miller - at page 2]. In India, however, different types of intellectual property rights are governed and protected by legislation like Copy Rights Act, Designs Act, Patents Act, etc. There can be no doubt that intellectual property cannot be treated as personal chattel. There are, however, various articles which are also intellectual properties which enjoy the protection of law both in India as well as in abroad.

38. Insofar as the computer software is concerned, we have already mentioned above two categories of software, viz., (i) the branded software and (ii) unbranded software. Whereas the first type of software falls within the meaning of "goods", the second type of software, viz., unbranded software cannot be treated as "goods". Therefore, it would not only be inappropriate but also incorrect to state that intellectual property does not fall within the ambit of "goods". In our view a correct statement would be that all intellectual properties may not be "goods" and therefore branded software with which we are concerned here cannot be said to fall outside the purview of "goods" merely because it is intellectual property; so far as "unbranded software" is concerned, it is undoubtedly intellectual property but it may perhaps be outside the ambit of "goods". However, we consider it unnecessary to discuss its various aspects and express any opinion in that regard. We are, therefore, unable to accept the contention that merely because software is "intellectual property" is cannot be treated as "goods" as being too broad a statement.

39. The other reasons given by Mr. Jetley for not treating the computer software as "goods" will be dealt with now. It is argued that where a developer of software creates the software packages, no bank or financial institution will accept that as security and that the entire set of software programme can be erased from the magnetic media and that such a thing is not possible in the case of "goods" and that is a proof positive of the fact that software is not "goods" as defined under the Act. Yet an additional aspect is highlighted and that is that software has to be

updated to put it in accord with the current thoughts and trends in the society and that these aspects are not present in "goods". In our view, none of the features pointed out above can be treated as determinative of the question as to whether an article falls within the meaning of the "goods". The contention that development of software essentially involves intellectual activity, we have already pointed out above, would not be a reason to exclude the software floppies from the purview of "goods". In our view this contention is as untenable as the assertion that book of poetry or records or discs of music sold in the market cannot be treated as "goods" as poetry or music also involves high intellectual activity.

40. The fact that the bankers or financial institutions will not accept the software packages as security is not a reason to exclude software from the purview of goods because not accepting software programme as security can be for various reasons including the reason that once software is developed, its copies can be made so the one which is kept with the bank will become useless if other copies are being used by others, as such it would not be a commercially viable security for a bank or financial institutions; it may also be for the reason that after a particular period the software loses much of its utility so if the bank accepts it as security after the lapse of the period it would lose its commercial value. We also do not find any substance in the submission that as the software programmes can be erased and thereafter it becomes non-existent, it cannot be treated as "goods". If it is a question of destruction of something, the same reasoning may even apply to a book, a disc, audio or video tapes or any other "goods". It will not also be a valid reason to exclude the software from the purview of "goods" on the ground that it requires updating to bring it in accord with the current thoughts and trends in the society, because in many law books and in scientific books on various subjects updating is an essential factor and that in our view can badly be a ground to conclude that software cannot be treated as "goods". Here it may be borne in mind that we are considering the question of software in a limited sense in which it is used in the instructions issued by the Commissioner of Commercial Taxes, i.e., when the software is contained in the floppies and discs. In our view, software is as much "goods" as music on tapes, video or audio, paintings on papers or any other work of art inscribed on any material things. When floppies or discs of branded software are self and purchased or the right to use the same is licensed identifiable commodities/articles known to the market are dealt with but not the use of skill or labour of the programmer.

41. It is argued that software contains instructions or information so it will be exempt from tax like newspaper; reliance is placed on the judgment of the Supreme Court in *Sait Rikhaji Furtarnal and another Vs. State of Andhra Pradesh*, . There the question was whether the old newspapers were covered by the exemption provided in the Constitution and not liable to sales tax. It was held that even if the newspapers were not of the same date or of a current period, their contents had news value and they continue to be the newspapers and therefore they would be covered by the exemption granted under the

Constitution. The case of the petitioners here is that the floppies/discs containing the software programme fall within the meaning of newspaper and therefore they are exempted under the Constitution. Inasmuch as the floppies or discs cannot be treated as news paper, the said judgment of the Supreme Court would not advance the case of the petitioners.

42. From the above discussion it follows that floppies/discs containing software programme like Oracle, Lotus, Masterkey, N-Export, Ex-Unigraphic, etc., are "goods" as defined u/s 2(h) of the APGST Act.

43. Having regard to the conclusion reached by us, it is not necessary to consider whether the definition of "goods" in section 2(h) of the APGST Act has to be read down so as to exclude software from it. In any event the question of reading down a provision will arise only when the provision is found to be unconstitutional by the court, to save it from being struck down on the ground of unconstitutionality the doctrine of reading down will be invoked. In this case the circumstances do not warrant invoking of the said doctrine.

44. For the above reasons, we find no merit in the writ petition and no illegality in the common order of the Sales Tax Appellate Tribunal in Tribunal Appeal Nos. 415, 416, 417 and 418 of 1995 dated April 1, 1996, which is the subject-matter of the T.R.Cs. Writ Petition No. 22375 of 1994 and Tax Revision Case Nos. 96 to 99 of 1996 are accordingly dismissed but in the circumstances of the case without costs.

45. Petitions dismissed.