CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

SERVICE TAX Appeal No. 11679 of 2016
(Arising out of OIO-VAD-EXCUS-002-COM-007-16-17 dated 03.06.2016 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-II)

ADVANCED SYS TEK PVT LTD **...Appellant**
PLOT NO.299-300,GIDC, MAKARPURA,
VADODARA-GUJARAT

VERSUS

C.S.T.-SERVICE TAX, VADODARA-II **...Respondent**
1ST FLOOR... ROOM NO.101,
NEW CENTRAL EXCISE BUILDING,
VADODARA, GUJARAT-390023

APPEARANCE:
Shri Saurabh Dixit, Advocate appeared for the Appellant
Shri R.R. Kurup, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 12706 /2023

DATE OF HEARING: 20.09.2023
DATE OF DECISION: 04.12.2023

RAJU

This appeal has been filed by Advanced Sys Tek Private Limited against demand of service tax.

2. Learned counsel for the appellant pointed out that they are engaged in the business of supplying "batch controller flow measuring instruments". Appropriate Central Excise duty on manufactured components cleared as well as appropriate CST/VAT on entire goods sales made, was discharged by the appellant. The appellant had developed Smart Terminal Software (STM) for comprehensive terminal automation which they had supplied for operating the above equipment. The appellants were also, on occasions required to supply bought out standard softwares such as Oracle/ MS Windows etc to be installed on the peripherals supplied as part of the above system. The appellants

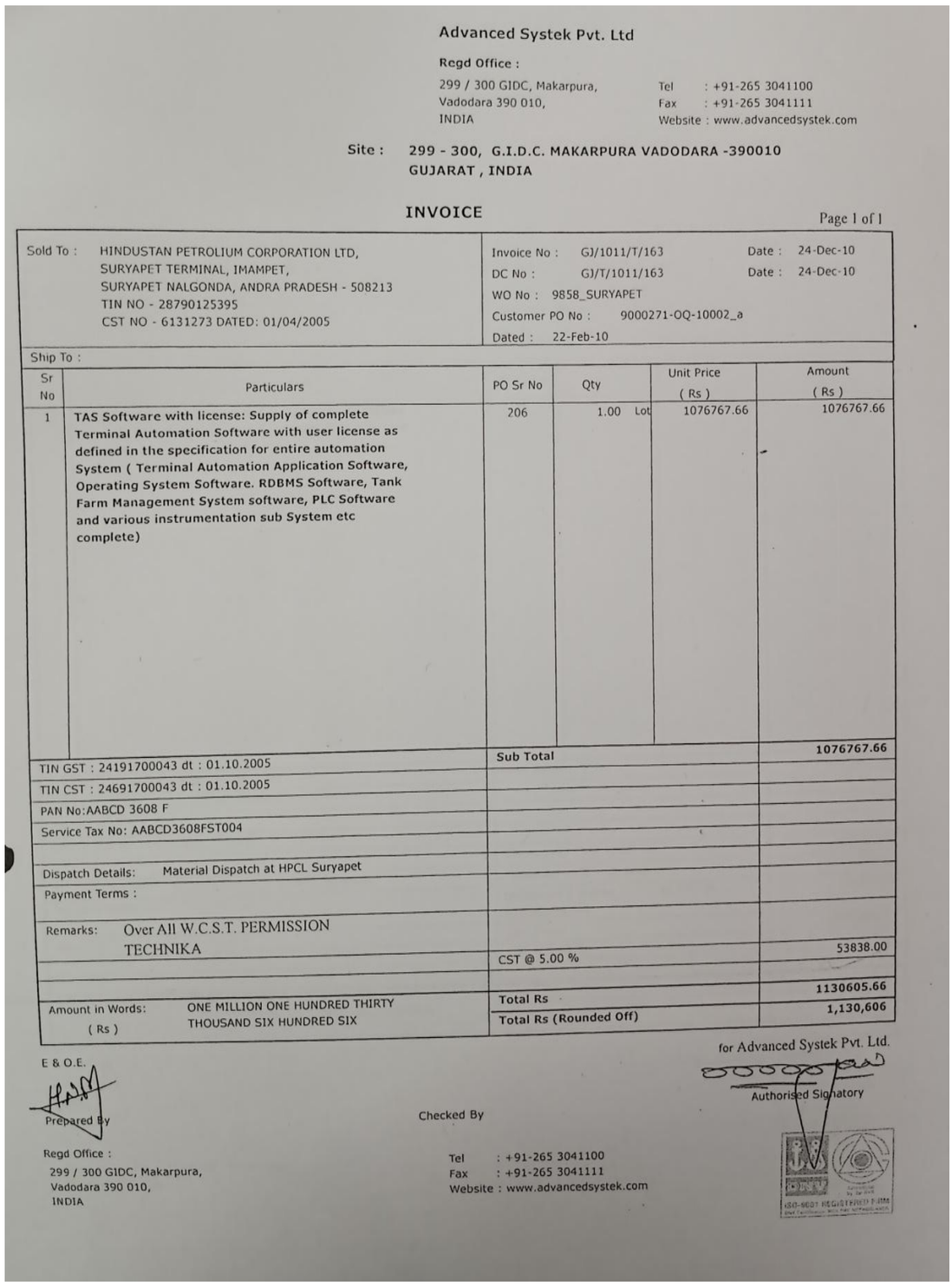
used to invariably pay applicable CST/VAT on sale of such software and no service tax was paid thereon. Since the such software was invariably supplied on appropriate medium i.e. hard-drives and other equipment, constitutes "goods", and therefore, the same does not attract service tax. Learned counsel relied on the CBEC Circular No. 644/35/12 dated 12.07.2002. From the appeal memorandum, it is seen that the appellants are not contesting the service tax already paid on STM Software. The contest is on the inclusion of value of bought out software supplied to the clients along with STM software in the assessable value.

3. Learned Authorized Representative relies on the impugned order.

4. We have considered the rival submissions. We find that the appellant had developed Smart Terminal Software (STM) for comprehensive terminal automation which they had supplied for operating the above equipment supplied by them. The appellants have also occasionally supplied bought out standard software such as Oracle/ MS Windows etc to be installed on the peripherals supplied as part of the above equipment supplied by them. The appellants have discharged CST/ VAT on sale of such software and no Service tax was paid there on.

5. The principal argument of the appellant is that the software supplied by them construed goods and the same do not attract levy of service tax. They have relied on the Board Circular No. 644/35/2012 dated 12.07.2002 and also various decisions like Quick heal technologies Ltd. 2022 (63) GSTL 385 (SC), Wipro GE Medical Systems Pvt. Ltd. 2009 (14) STR 43 affirmed by Hon'ble Supreme Court reported at 2012 (28) STR J44 (SC) and Black Box Limited 2021 (1) TMI 188 –CESTAT Ahm.

6. The invoice relating to supply of TAS Software is reproduced below:



Advanced Systek Pvt. Ltd

Regd Office :
299 / 300 GIDC, Makarpura,
Vadodara 390 010,
INDIA

Tel : +91-265 3041100
Fax : +91-265 3041111
Website : www.advancedsystek.com

Site : **299 - 300, G.I.D.C. MAKARPURA VADODARA -390010 GUJARAT , INDIA**

INVOICE

Page 1 of 1

Sold To : HINDUSTAN PETROLIUM CORPORATION LTD,
SURYAPET TERMINAL, IMAMPET,
SURYAPET NALGONDA, ANDRA PRADESH - 508213
TIN NO - 28790125395
CST NO - 6131273 DATED: 01/04/2005

Invoice No : GJ/1011/T/163 Date : 24-Dec-10
DC No : GJ/T/1011/163 Date : 24-Dec-10
WO No : 9858_SURYAPET
Customer PO No : 9000271-OQ-10002_a
Dated : 22-Feb-10

Ship To :

Sr No	Particulars	PO Sr No	Qty	Unit Price (Rs)	Amount (Rs)
1	**TAS Software with license: Supply of complete Terminal Automation Software with user license as defined in the specification for entire automation System (Terminal Automation Application Software, Operating System Software. RDBMS Software, Tank Farm Management System software, PLC Software and various instrumentation sub System etc complete)**	206	1.00 Lot	1076767.66	1076767.66
				Sub Total	**1076767.66**
				CST @ 5.00 %	53838.00
				Total Rs	**1130605.66**
				Total Rs (Rounded Off)	**1,130,606**

TIN GST : 24191700043 dt : 01.10.2005
TIN CST : 24691700043 dt : 01.10.2005
PAN No:AABCD 3608 F
Service Tax No: AABCD3608FST004

Dispatch Details: Material Dispatch at HPCL Suryapet
Payment Terms :
Remarks: Over All W.C.S.T. PERMISSION TECHNIKA

Amount in Words: (Rs) ONE MILLION ONE HUNDRED THIRTY THOUSAND SIX HUNDRED SIX

for Advanced Systek Pvt. Ltd.

E & O.E.

Authorised Signatory

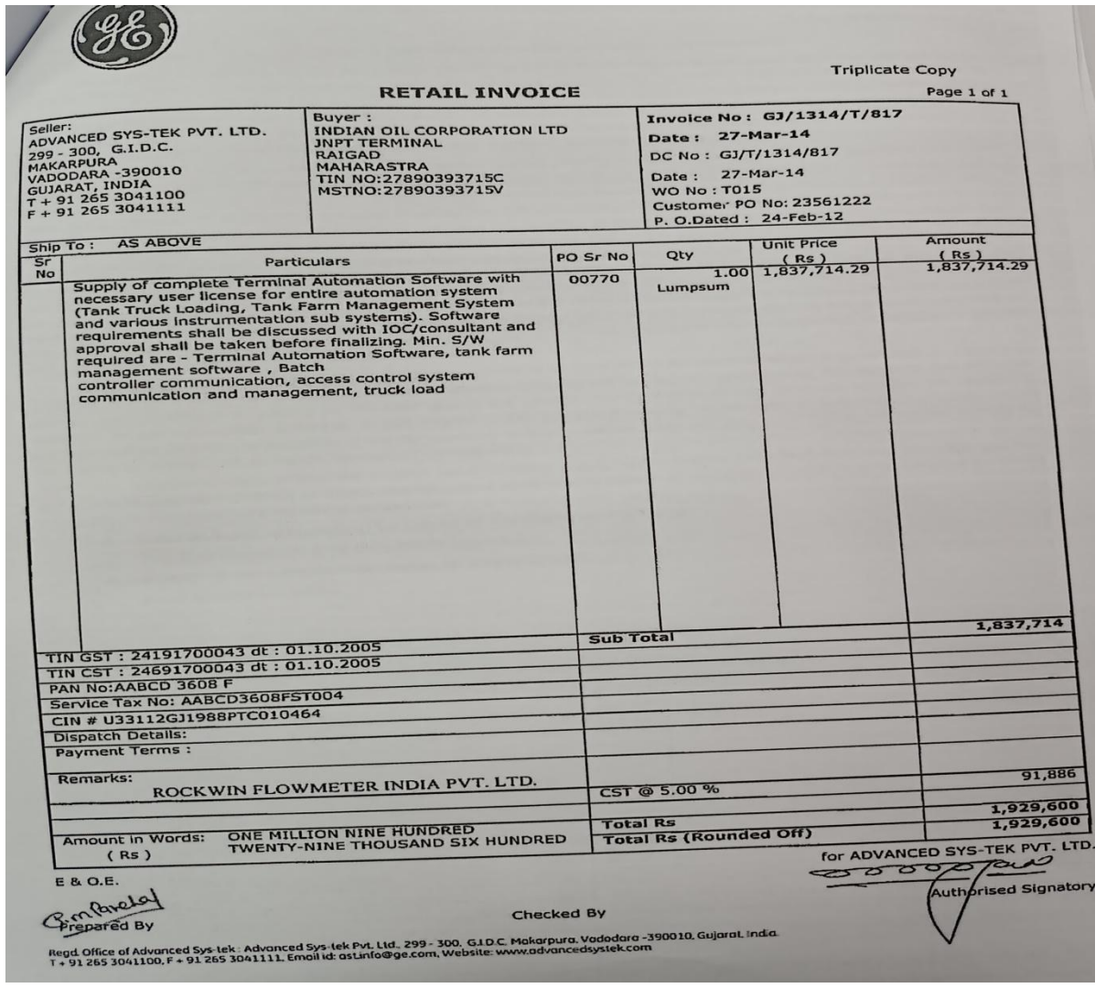
Prepared By

Checked By

Regd Office :
299 / 300 GIDC, Makarpura,
Vadodara 390 010,
INDIA

Tel : +91-265 3041100
Fax : +91-265 3041111
Website : www.advancedsystek.com

The purchase order from HPCL for the terminal automation system at 8 locations was produced by the appellant. A perusal of the said purchase order shows that there is no bifurcation of equipment software etc. item wise. The appellant has however raised item wise invoices.



Triplicate Copy

RETAIL INVOICE

Page 1 of 1

Seller:	Buyer :	Invoice No : GJ/1314/T/817
ADVANCED SYS-TEK PVT. LTD. 299 - 300, G.I.D.C. MAKARPURA VADODARA -390010 GUJARAT, INDIA T + 91 265 3041100 F + 91 265 3041111	INDIAN OIL CORPORATION LTD JNPT TERMINAL RAIGAD MAHARASTRA TIN NO:27890393715C MSTNO:27890393715V	Date : 27-Mar-14 DC No : GJ/T/1314/817 Date : 27-Mar-14 WO No : T015 Customer PO No: 23561222 P. O.Dated : 24-Feb-12

Ship To : AS ABOVE

Sr No	Particulars	PO Sr No	Qty	Unit Price (Rs)	Amount (Rs)
	Supply of complete Terminal Automation Software with necessary user license for entire automation system (Tank Truck Loading, Tank Farm Management System and various instrumentation sub systems). Software requirements shall be discussed with IOC/consultant and approval shall be taken before finalizing. Min. S/W required are - Terminal Automation Software, tank farm management software , Batch controller communication, access control system communication and management, truck load	00770	1.00 Lumpsum	1,837,714.29	1,837,714.29
			Sub Total		1,837,714
	TIN GST : 24191700043 dt : 01.10.2005				
	TIN CST : 24691700043 dt : 01.10.2005				
	PAN No:AABCD 3608 F				
	Service Tax No: AABCD3608FST004				
	CIN # U33112GJ1988PTC010464				
	Dispatch Details:				
	Payment Terms :				
	Remarks: ROCKWIN FLOWMETER INDIA PVT. LTD.		CST @ 5.00 %		91,886
			Total Rs		1,929,600
	Amount in Words: ONE MILLION NINE HUNDRED TWENTY-NINE THOUSAND SIX HUNDRED (Rs)		Total Rs (Rounded Off)		1,929,600

for ADVANCED SYS-TEK PVT. LTD.

E & O.E.

Authorised Signatory

Prepared By

Checked By

Regd. Office of Advanced Sys-tek. Advanced Sys-tek Pvt. Ltd., 299 - 300, G.I.D.C. Makarpura, Vadodara -390010, Gujarat, India.
T + 91 265 3041100, F + 91 265 3041111, Email id: astinfo@ge.com, Website: www.advancedsystek.com

It has been pointed out in the impugned order itself that the bought out softwares MS Windows, MS (windows) Professional, WIW sep up, PLC Development software etc. are supplied, installed in the machines sold by the appellant to their clients. It is noticed that all these software other than STM software, are in the nature of standalone software which are available off the shelf for sale. The appellants have clearly claimed that they have paid VAT on the value of these softwares sold by the appellant duly installed in the machines supplied by them. The entire issue was raised by the audit party. The Revenue made the demand of service tax on the entire value of AST-STM software. The AST-STM software consisted of certain software developed by the appellants and also contended bought out software namely, STM, Oracle, OS, TFMS, PLC. The appellant agreed with the objection in so far as related to the AST-STM software, however they paid the tax after excluding the value of bought out software listed above. The Revenue was of the view that the

appellant are required to pay service tax on the entire value including the bought out softwares. The appellant had vide their letter dated 22.05.2015 conveyed their acceptance for partial agreement with the audit objection. The current issue relates to includibility of the value of the bought out software in the value for the purpose of discharge of service tax. It is also noticed that no separate order for the bought out softwares was placed by the clients and no separate invoice for the bought out softwares was made by the appellants.

7. The appellants also claimed that Rule 5 of the Service Tax (Determination of Value) Rules 2006 was declared ultravirus by an order of Hon'ble High Court of Delhi in the case of Intecontinental Consultants & Technocrats P. Ltd. 2014 (29) STR 9 (DEL.), the said order of Hon'ble High court was also approved by Hon'ble Apex Court as reported in 2018 (10) GSTL 401 (SC).

8. The appellant had claimed that the bought out items were in the nature of reimbursable expenses and therefore, not includible in the value for the purpose of service tax. The appellant in their defense reply before the Commissioner has clearly asserted as follows:

> *"4) The software sold by our client includes the software developed by them on their own, which is a generalized software, usable at the terminals. It is not specifically designed from customer to customer, and in that sense, it is not a custom made tailor made software. The same is merely made adjustable to the particular site requirement, suitably. Together with such software, our client also procures other third party softwares such as Oracle, OS (windows etc), TFMS, PLC etc. and supplies the same to customers back to back. Admittedly almost in all cases, even such softwares are placed upon appropriate medium, such as hard drives, CD, loading it in computers etc. and it is supplied in form of a product i.e. already contained in a medium. Admittedly, such softwares are otherwise off the shelf softwares and not designed or developed by our client, nor modified in any manner, by our client.*
>
> *a. As a Standard Operating Procedure, it is mandatory for our client to first put such softwares on a medium as stated hereinabove, and test the same in simulated operating conditions and only after qualifying the said test, the product loaded with software is cleared to the customer site. This procedure is called Factory*

Acceptance Test (FAT) and the same is carried out before supplying the softwares. We enclose herewith FATs on sample basis, in support of this averment. The relevance of these documents is that it conclusively proves the submission on part of our client that what was supplied was in most cases on some medium. As such, what was supplied was "goods" and rightly subjected to VAT alone by our client. As stated supra, this is also in conformity with the Board clarification dt. 12.7.12.

b. Furthermore, the said bought out software have to be generally pre-loaded in the system/computers before supplying the same to customers, since these are the most basic off the shelf software, which basically provide User Interface/ database and Operating environment, under which the STM software operated. In other words, this is at par with providing for eg. Windows OS on the computer by loading it, so that the customer can view what exactly the STM software is doing and operate programmes such as MS word, MS Excel etc. As such, by its very nature, in most cases it is necessary that such bought out softwares are pre- loaded in the computers/system, hard disc, CD etc. and after FAT supplied from our client's factory."

This assertion of the appellant has not been doubted in the impugned order anywhere. In this background, the decision of Hon'ble Apex court in the case of Quickheal Technologies Ltd. reported in 2022 (63) GSTL 385 (SC), becomes relevant. In the said decision Hon'ble Apex court has observed as follows:

"Relevant provisions of law

35. The New definition of the term "service" has been given under the clause 44 of Section 65B of the Act, 1994 which reads as follows :-

"service" means any activity carried out "(44) by a person for another for consideration, and includes a declared service, but shall not include -

(a) an activity which constitutes merely, -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution; or

(iii)a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1. - For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to, -

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

Explanation 2. - For the purposes of this clause, transaction in money shall not include any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

Explanation 3. - For the purposes of this Chapter, -

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4. - A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;"

36. The analysis of the definition of "service" as above makes it clear that the service will not include those activities which includes transfer, delivery or supply of any goods which is deemed to be sale within the meaning of Clause (29A) of Article 366 of the Constitution.

37. Clause (29A) of Article 366 of the Constitution of India defines the deemed sale. This clause reads as follows :-

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

(a) a tax on the transfer, otherwise than in pursuance of a contact, 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) invoked 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;"

38. Thus, the above clause specifies the cases which the tax in relation to sale and purchase of goods will include and also outlines its applicability even in the case of deemed sale.

39. Section 66E deals with the concept of declared services. This Section reads as follows :-

"**66E.**The following shall constitute declared services, namely :-

(a) renting of immovable property;

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.

Explanation. - For the purposes of this clause,-

(I) the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely :-

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972; (20 of 1972.) or

(B) chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodeling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;

(g) activities in relation to delivery of goods on hire purchase or any system of payment by instalments;

(h) service portion in the execution of a works contract;

(i) service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity."

40. Thus, the declared services include the services of renting of immovable property, works contract, hire purchase/instalment payment system, supply of food/drink, etc. In other words, under the Constitution what is related to deemed sale is also covered under the deemed service as per the above Section.

41. The Transfer of Right to use goods for case, deferred payment or value consideration is considered as deemed sale under sub-clause (d) of Article 366(29A) of the Constitution of India. Right to use of tangible goods and services has also been brought under the service tax net by the Finance Act, 2008, with effect from 16-5-2008 *vide* Notification No. 18/2008-S.T., dated 10-5-2008 whereby taxable service has been defined under Section 65(105)(zzzzj) of the Act, 1994 to mean as :-

"Any services provided or to be provided, to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances."

Position of law

42. *Tata Consultancy Services* (supra) was a case in which the specific issue of computer software packages was considered as is the concern in the present case also. There was, however, a distinction drawn insofar as the 'uncanned software' and 'canned software' alternatively termed as 'unbranded' and 'branded' is concerned. The distinction is in that a 'canned software' contains programmes which can be used as such by any person purchasing it, while an 'uncanned software' is one prepared for a particular purchaser's requirements by tweaking the original software to adapt to the specific requirements of a particular entity. While a 'canned software' could be sold over the shelf, an 'uncanned software' is programmed to specific and particular needs and requirements. This Court held that in India the test to determine whether a property is "goods", for the purpose of sales tax, is not confined to whether the goods are tangible or intangible or incorporeal. The correct test would be to determine whether an item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. It was held that both in the case of 'canned' and 'uncanned' software all these are possible (sic para 16). *Associated Cement Companies Ltd.* v. *Commissioner of Customs,* (2001) 4 SCC 593 = 2001 (128) E.L.T. 21 (S.C.), was heavily relied on by this Court. It was held :-

In our view, the term "goods" as used in "27. Article 366(12) of the Constitution and as defined under the said Act is very wide and includes 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 *Associated Cement Companies Ltd.* A software program may consist of various commands which enable

the computer to perform a designated task. The copyright in that program may remain with the originator of the program. 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 program 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 programs have all these attributes".

At this stage it must be mentioned that Mr. 28. Sorabjee had pointed out that the High Court has, in the impugned judgment, held as follows :

"... 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 may perhaps be outside the ambit of 'goods'."

(Emphasis Suppiled)

Mr. Sorabjee submitted that the High Court 29. correctly held that unbranded software was "undoubtedly intellectual property". Mr. Sorabjee submitted that the High Court fell in error in making a distinction between branded and unbranded software and erred in holding that branded software was "goods". We are in agreement with Mr. Sorabjee when he contends that there is no distinction between branded and unbranded software. However, we find no error in the High Court holding that 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. We, however, are not dealing with this aspect and express no opinion thereon because in case of unbranded software other questions like situs of contract of sale and/or whether the contract is a service contract may arise".

43. *Associated Cement Companies Ltd.* (supra) considered the question whether the drawings, designs, etc. relating to machinery or industrial technology were goods, leviable to duty of customs on their transaction value at the time of import. It was argued that the transfer of technology or know-how though valuable was intangible. The technology when transmitted to India on some media does not get converted from an intangible thing to tangible thing or chattel and that in a contract by supply of services there is no sale of goods, was the argument. Reading Section 2(22) of the Customs Act, 1962 which defines the word "goods",

including clause (c) "baggage" and clause (e) "any other kind of moveable property", it was held that any moveable article brought into India by a passenger as part of his baggage can make him liable to pay customs duty as per the Customs Tariff Act, 1975. Any media whether in the form of books or computer disks or cassettes which contain information technology or ideas would necessarily be regarded as "goods" under the aforesaid provisions of the Customs Act, these items being moveable goods, covered by Section 2(22)(e) of the Customs Act. What was transferred was technical advice on information technology. But the moment the information or advice is put on a media, whether paper or diskettes or any other thing, the supply is of a chattel. It is in respect of the drawings, designs, etc. which are received that payment is made to the foreign collaborators. The question whether the papers or diskettes etc. containing advice and/or information are goods for the purpose of the Customs Act was answered in the affirmative. This Court clearly held that *"the intellectual property when put on a media would be regarded as an article on the total value of which customs duty is payable"*. *"When technical material is supplied whether in the form of drawings or manuals the same are goods liable to customs duty on the transaction value in respect thereof"*. It was concluded so in paragraph 46 :

> '46.<u>The concept that it is only chattel sold as chattel, which can be regarded as goods, has no role to play in the present statutory scheme as we have already observed that the word "goods" as defined under the Customs Act has an inclusive definition taking within its ambit any moveable property.</u> The list of goods as prescribed by the law are different items mentioned in various chapters under the Customs Tariff Act, 1997 or 1999. Some of these items are clearly items containing intellectual property like designs, plans, etc.'.
>
> (Underlining by us for emphasis)

44. We may also refer to and rely upon a decision of this Court in the case of *20th Century Finance Corpn. Ltd.* v. *State of Maharashtra*, reported in (2000) 6 SCC 12. In this decision, this Court considered the incorporation of clause (d) of Clause (29A) of Article 366 of the Constitution referred to above. It is apt to quote the following relevant portion from the judgment :-

> "26... The various sub-clauses of clause (29A) of Article 366 permit the imposition of tax thus : sub-clause (a) on transfer of property in goods; sub-clause (b) on transfer of property in goods; sub-clause (c) on delivery of goods; sub-clause (d) on transfer of the right to use goods; sub-clause (e) on supply of goods; and sub-clause (f) on supply of services. The words and such transfer, delivery or supply. In the latter portion of clause (29A), therefore, refer to the words transfer, delivery and supply, as applicable, used in the various sub-clauses. Thus, the transfer of goods will be a deemed sale in the cases of sub-clauses (a) and (b), the delivery of goods will be a deemed sale in case of sub-clause (c), the supply of goods and services respectively will be deemed sales in the cases of sub-clauses (e) and (f) and the transfer of the right to use any goods will be a deemed sale in the case of sub-clause (d). Clause (29A) cannot, in our view, be read as implying that the tax under sub-clause (d) is to be imposed not on the transfer of the right to use goods but on the delivery of the goods for use. Nor, in our view, can a transfer of the right to use goods in sub-clause (d) of clause (29A) be equated with the third sort of bailment referred to in Bailment by Palmer, 1979 edition, page 88. The third sort referred to there is when goods are left with the bailee to be used by him for hire, which implies the transfer of the goods to the bailee. In the case of sub-clause (d), the goods are not required to be left with the transferee.

All that is required is that there is a transfer of the right to use the goods. In our view, therefore, on a plain construction of sub-clause (d) of Clause (29A), the taxable event is the transfer of the right to use the goods regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used. And further contract in respect thereof is also required to be executed. Given that, the locus of the deemed sale is the place where the right to use the goods is transferred. Where the goods are when the right to use them is transferred is of no relevance to the locus of the deemed sale. Also of no relevance to the deemed sale is where the goods are delivered for use pursuant to the transfer of the right to use them, though it may be that in the case of an oral or implied transfer of the right to use goods, it is effected by the delivery of the goods."

45. While holding that in a contract for the transfer of the right to use goods, the taxable event would be the execution of the contract for delivery of the goods, it was observed :-

"27.*Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods.* If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods."

(Emphasis Supplied)

46. In *BSNL* (supra) this Court took the view that a telephone service is nothing but a "service". However, the nature of the transaction involved in providing the telephone connection may be a composite contract of "service" and "sale". There may be a transfer of right to use the "goods" as defined in the providing of access or telephone connection by the telephone service provider to a subscriber. Justice Ruma Pal, speaking for the Bench in her separate judgment, took the view that a subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. At the most, the concept of the sale in a subscriber's mind would be limited to the handset that might have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him with the telephone connection. In such circumstances, it was held that the electromagnetic waves or radio frequencies are not "goods" within the meaning of the words "either in Article 366(12) or for the purpose of Article 366(29A)(b)". Emphasis was laid on the fact, whether there are any deliverable goods or not. If there are no deliverable goods in existence, like the one in *BSNL* (supra), there is no transfer of user under Article 366(29A)(b) at all.

47. Justice Dr. A.R. Lakshmanan, in his separate but concurring judgment, highlighted the following attributes in para 97 of the judgment to constitute a transaction for the transfer of right to use the goods :-

xx xx xx "97.

(a) There must be goods available for delivery;

(b) There must be a consensus ad idem as to the identity of the goods;

(c) The transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;

(d) For the period during which the transferee has such legal right, it has to be the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;

(e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

48. In the case of *BSNL* (supra), His Lordship noticed that none of the aforesaid attributes were present in the relationship between the telecom service provider and a consumer of such services.

49. His Lordship thereafter in para 117 of the judgment referred to the Sale of Goods Act, 1930. We quote para 117 as under :-

Sale of Goods Act, comprehends two "117. elements, one is a sale and the other is delivery of goods. *20th Century Finance Corporation Limited* v. *State of Maharashtra*, 2000 (6) SCC 12 at p. 44, para 35 ruled that

where the goods are available for the "35. (c) 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.

In cases where goods are not in existence or (d) 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."

50. Ultimately, His Lordship took the view that as no goods' elements were involved, the transaction was purely one of service as there was no transfer of right to use the goods at all.

51. The following principles to the extent relevant may be summed up :-

(a) The Constitution (Forty-sixth) Amendment Act intends to rope in various economic activities by enlarging the scope of "tax on sale or purchase of goods" so that it may include within its scope, the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) of Clause (29A) of Article 366. The works contracts, hire purchase contracts, supply of food for human consumption, supply of goods by association and

clubs, contract for transfer of the right to use any goods are some such economic activities.

(b) The transfer of the right to use goods, as distinct from the transfer of goods, is yet another economic activity intended to be exigible to State tax.

(c) There are clear distinguishing features between ordinary sales and deemed sales.

(d) Article 366(29A)(d) of the Constitution implies tax not on the delivery of the goods for use, but implies tax on the transfer of the right to use goods. The transfer of the right to use the goods contemplated in sub-clause (d) of clause (29A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire.

(e) In the case of Article 366(29A)(d) the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use goods. In such a case taxable event occurs regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used.

(f) The levy of tax under Article 366(29A)(d) is not on the use of goods. It is on the transfer of the right to use goods which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods.

(g) The transfer of right is the sine qua non for the right to use any goods, and such transfer takes place when the contract is executed under which the right is vested in the lessee.

(h) The agreement or the contract between the parties would determine the nature of the contract. Such agreement has to be read as a whole to determine the nature of the transaction. If the consensus ad idem as to the identity of the goods is shown the transaction is exigible to tax.

(i) The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use the goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant.

52. From the judicial decisions, the settled essential requirement of a transaction for the transfer of the right to use the goods are :

(i) it is not the transfer of the property in goods, but it is the right to use the property in goods;

(ii) Article 366(29A)(d) read with the latter part of the clause (29A) which uses the words, *"and such transfer, delivery or supply"*... would indicate that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use;

(iii)in the transaction for the transfer of the right to use goods, delivery of the goods is not a condition precedent, but the delivery of goods may be one of the elements of the transaction;

(iv)the effective or general control does not mean always physical control and, even if the manner, method, modalities and the time of the

> use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods;
>
> (v) the approvals, concessions, licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods; and
>
> (vi)during the period of contract exclusive right to use goods along with permits, licenses, etc., vests in the lessee.

Construction of agreement between the parties :-

53……..

54…….

> **55.**The sum and substance of the ratio of the case of *BSNL* (supra) as discernible is that the contract cannot be vivisected or split into two. Once a lump sum has been charged for the sale of CD (as in the case on hand) and sale tax has been paid thereon, the revenue thereafter cannot levy service tax on the entire sale consideration once again on the ground that the updates are being provided. We are of the view that the artificial segregation of the transaction, as in the case on hand, into two parts is not tenable in law. It is, in substance, one transaction of sale of software and once it is accepted that the software put in the CD is "goods", then there cannot be any separate service element in the transaction. We are saying so because even otherwise the user is put in possession and full control of the software. It amounts to "deemed sale" which would not attract service tax.

9. It can be seen from the above decision that when such software is supplied (preloaded) in a medium like hardware in the instant case, the same cannot be treated as provision of service. The said supply would amount to sale of goods. In this background, the demand of service tax on the value of bought out software by the appellant cannot be sustained. The demand to that extent is set aside. Appeal is allowed in above terms.

(Pronounced in the open court on 04.12.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha