

CASE NO.:
Appeal (civil) 2582 of 1998

PETITIONER:
Tata Consultancy Services

RESPONDENT:
State of Andhra Pradesh

DATE OF JUDGMENT: 05/11/2004

BENCH:
S.B. Sinha

JUDGMENT:
J U D G M E N T
WITH

CIVIL APPEAL NOS. 2584, 2585 & 2586/98

S.B. SINHA, J :

INTRODUCTION:

Whether an intellectual property contained in floppies, disks or CD-ROMs would be 'goods' within the meaning of Andhra Pradesh General Sales Tax Act, 1957 (hereinafter called as 'the Act') is the question involved in this appeal which arises out of a judgment and order dated 12th December, 1996 passed by the Andhra Pradesh High Court.

"Goods" : Meaning

The said expression has been defined in Section 2(b) to, inter alia, mean all kinds of moveable property and includes all materials, articles and commodities. The amplitude of the said expression is required to be considered with a view to answer the question involved in this appeal.

The expression 'goods' is not a term of art. Its meaning varies from statute to statute. The term 'goods' had been defined in the Act as also in Clause (12) of Article 366 of the Constitution to include all materials, commodities and articles. Commodity is an expression of wide connotation and includes every thing of use or value which can be an object of trade and commerce.

In Jagir Singh and Others Vs. State of Bihar and another, etc. etc., AIR 1976 SC 997] it is stated:

"20. The general rule of construction is not only to look at the words but to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under the circumstances. Sometimes definition clauses create qualification by expressions like "unless the context otherwise requires"; or "unless the contrary intention appears"; or "if not inconsistent with the context or subject-matter". "Parliament would legislate to little purpose", said Lord Macnaghten in Netherseal Co. v. Bourne, (1889) 14 AC 228, "if the objects of its care might supplement or undo the work of legislation by making a definition clause of their own. People

cannot escape from the obligation of a statute by putting a private interpretation on its language." The courts will always examine the real nature of the transaction by which it is sought to evade the tax."

In Words and Phrases, Volume 7A, Permanent Edition at page 590, 'commodity' has been defined as under:

"A "commodity" is an article of trade, a movable article of value; something that is bought and sold. U.S. v. Sischo, D.C. Wash., 262 F. 1001, 1005.

The term "commodity" includes every movable thing that is bought or sold except animals. Peterson v. Currier, 62 III. App. 163.

"Commodity" meaning that which affords convenience or advantage, especially in commerce, including everything movable which is bought and sold. McKeon v. Wolf, 77 III. App. 325."

The definition of 'goods' in Sales of Goods Act is also of wide import which means every kind of movable property. Property has been defined therein to mean the general property in goods and not merely a special property. It is not much in dispute that 'goods' would comprehend tangible and intangible properties, materials, commodities and articles and also corporeal and incorporeal materials, articles and commodities. If a distinction is sought to be made between tangible and intangible properties, materials, commodities and articles and also corporeal and incorporeal materials, the definition of goods will have to be rewritten of comprising tangible goods only which is impermissible. This Court, therefore, will have to confine itself to the question as to whether the concerned software would come within the purview of "goods". In the Constitution, goods as such is not defined. An expansive definition with the said expression has been given which is indicated by the expression "includes". Such an expression is also of wide amplitude. [See Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology, (2002) 5 SCC 111, para 5 & 6].

When the word 'includes' is used in an interpretation clause, it must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include. [See Scientific Engineering House Pvt. Ltd. Vs. Commissioner of Income-tax, Andhra Pradesh (1986) 1 SCC 11].

RE: SUBMISSION OF BEHALF OF THE APPELLANT

Reference by Mr. Sorabjee to the provisions of Copyright Act, in my opinion, was not apposite.

Copyright Act and the Sales Tax Act are also not statutes in pari materia and as such the definition contained in the former should not be applied in the latter. [See Jagatram Ahuja Vs. Commr. of Gift-tax, Hyderabad AIR 2000 SC 3195, p. 3201]

In absence of incorporation or reference, it is trite that it is not permissible to interpret a word in accordance with its definition in other statute and more so when the same is not dealing with any cognate subject. [See State of Kerala Vs. Mathai Verghese & Ors. (1986) 4 SCC 746, p. 753 and Feroze N. Dotivala Vs. P.M. Wadhvani & Ors. (2003) 1 SCC 433, p. 442]

It may not be necessary for us to rely upon the decisions of this Court in H. Anraj Vs. Government of T.N. [(1986) 1 SCC 414] the correctness whereof has been doubted in Sunrise Associates Vs. NCT of Delhi [(2000) 10 SCC 420]. It is also not necessary to rely upon the Australian decision, Pont Data Australia Pty Ltd. Vs. ASX Operations Pty Ltd. & Anr. [1990 (93) Australian Law Reports 523] which is said to have been reversed in Re: ASX Operations Pty Ltd. and Australian Stock Exchange Ltd. and Pont Data Australia Pty Ltd. [FED No. 710 Trade Practices (1991) ATPR para 41-069 97 ALR 513/19 IPR 323 27 FCR 460.

However, we may notice that the Federal Court of Australia while reversing the judgment was of the opinion that as the definition of 'goods' contained in Sub-Section (4) of Section 4 of the TP Act included gas and electricity, the same would not be held to mean further including "encoded electrical impulses". It was, however, noticed:

"We should add that in Toby Constructions Products Pty Ltd. v Computa Bar (Sales) Pty Ltd. (1983) 2 NSWLR 48, Rogers J. held that a sale of a computer system, comprising both hardware and software, was a sale of "goods" within the meaning both of the Sale of Goods Act 1923 (N.S.W.) and the warranties implied by Part V of the TP Act. His Honour said (supra) at 54), with reference to United States authorities, that he did not wish it to be thought he was of the view that software by itself may not be "goods". This is a question which is left open after the present appeal, which, as will be apparent, has decided a narrower point."

The standard works on software by Mr. Rahul Matthan and Mr. Roger S. Pressman, relied upon by Mr. Sorabjee, may be relevant for proper understanding as to what a software is and what is the nature and character of software and in ordinary parlance may contrast a book, ordinary video or audio cassette but it is well settled that the applicability of the statute would depend upon its purport and object. Taxability of a software has its history in other countries. Its journey in American courts started in the Seventies. There had been a difference of opinion in different jurisdictions as regards taxability of the software. The majority of the courts held that it is intangible property, but the Federal Supreme Court said that it is not so. The State Legislatures made amendments as a result whereof a shift in the approach started. Having regard to the changes in definition even the American Courts began holding that tax can be imposed on such softwares.

In Advent Systems Ltd. vs. Unisys Corpn, 925 F. 2d 670 (3rd Cir. 1991), relied on by Mr. Sorabjee, the court was concerned with interpretation of uniform civil code which "applied to transactions in goods". The goods therein were defined as "all things (including specially manufactured goods) which are moveable at the time of the identification for sale". It was held :

"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 "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.

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, moveable and available in the marketplace. The fact that some programs may be tailored for specific purposes need not alter their status as "goods" because the Code definition includes "specially manufactured goods."

The topic has stimulated academic commentary with the majority espousing the view that software fits within the definition of a "good" in the U.C.C.

Applying the U.C.C. to computer software transactions offers substantial benefits to litigants and the courts. The Code offers a uniform body of law on a wide range of questions likely to arise in computer software disputes: implied warranties, consequential damages, disclaimers of liability, the statute of limitations, to name a few.

The importance of software to the commercial world and the advantages to be gained by the uniformity inherent in the U.C.C. are strong policy arguments favoring inclusion. The contrary arguments are not persuasive, and we hold that software is a "good" within the definition in the Code."

In Colonial Life Insurance Co. vs. Electronic Data Systems Corp. 817 F. Suppl. 235 (supra), Advent Systems Ltd. (supra) was followed.

Linda A. Sharp, J.D., in an Article titled "Computer Software or Printout Transactions as subject to State Sales or Use Tax", published in 36 ALR 5th 33, noticed the development of law as well as technological development of computers and opined that a tape containing a copy of a canned programme does not lose its tangible character because its content is a reproduction of the product of intellectual effort just as the phonorecord does not become intangible because it is a reproduction of the product of artistic effort. The learned author referred to a large number of case laws wherein such a statement of law was enunciated. In the article various statutes defining software as tangible goods had also been taken notice of.

Strong reliance has been placed by Mr. Sorabjee on a judgment of Illinois Supreme Court in First National Bank of Springfield vs. Department of Revenue, [421 N.E.2d 175, 85 III2d 84, 421 NE2d 175], wherein software was held to be intangible personal property on the premise :

"The tapes were certainly not the only medium through which the information could be transferred. In this way, the tapes differ from a movie film, a phonograph record or a book, whereby the media used are the only practicable ways of preserving those articles. Thus, while those articles and the tapes are similar in that they physically represent the transfer of ideas or artistic processes, whereas computer programs are separable from the tapes. Not only may software information be conveyed any number of ways, but it may even be copied off of the tapes and stored, on another medium. (see Bryant & Mather, Property Taxation of Computer Software, 18 N.Y.L.F. 59, 67 (1972). In short, it is not the tapes which are the substance of the transaction is, in instance, the transfer of intangible personal property and, as such, is not taxable. Under the Illinois Use Tax Act\005."

The said decision was rendered in 1981. However, subsequently in *Comptroller of the Treasury vs. Equitable Trust Company* [464 A.2d 248], an earlier decision of the Tennessee Court in *Commerce Union Bank vs. Tidwell*, [538 *473 S.W.2d 405], as also *First National Bank of Springfield* (supra), were considered wherein it was observed :

"We can take judicial notice, based on modern human experience, that the technology, exists for producing a copy of a movie film on disc, of a phonograph record on tape, and of a book on microfiche. We have previously discussed how the program copy is not separated from the tape, when it is used in the computer. See B.U. Note, supra, at 188-89. To remove the program copy from the magnetic tape requires that it be overwritten, or obliterated in a magnetic field, in the way in which one dictating on tape makes corrections or wipes the tape clean."

Thus, the court found a change in the concept and noticed a departure from earlier view that the computer software was intangible property. The argument of severability which had held the field was also negated. Noticing several other judgments, it was held :

"What is troublesome about (the tax court) approach is the fact that, while a substantial portion of the software is of a tangible nature, i.e. punched cards, magnetic tapes, instructions covering operation or applications, (for property tax purposes) the remainder consists of personal services to be rendered after purpose\005."

In the aforementioned premise, it also negated the contention which incidentally has been raised by Mr. Sorabjee that the price paid for a copy of a canned programme reflects the cost of developing the programme which the proprietor hopes to recover, with profit, by spreading the cost among its customers, stating :

"\005Simply because the canned program on tape is much more expensive than the typical phonorecord, the program tape is not any less tangible."

In *Compuserve, INC vs. Lingley* [535 N.E. 2d 360], the court disagreed with the opinions contained in the earlier judgments and stated the law in the following terms :

"\005Thus, the essence of the transaction in the sale of computer software was the purchase of nontaxable intangible information. The Missouri Supreme Court in *James* and the Texas Court of Civil Appeals in *First National Bank of Fort Worth* also used an essence-or-purpose-of- the-transaction test to determine that computer software is intangible property.

The Supreme Court of Ohio in *Interactive Information Systems, Inc. vs. Limbach* (1985), 18 Ohio st. 3d 309, 311, 18 OBR 356, 357-358, 480 N.E. 2d 1124, 1126, in determining the taxability of computer hardware also recognized that computer programs are intangible property when the court stated :

"\005Prior to encoding the tape, the

appellee is dealing with intangibles-ideas, plans, procedures, formulas, etc.; and, although these intangibles are in some respects transformed or converted (or 'organized') into a different state or form, such transformation or conversion is not 'manufacturing' because no 'material or thing' has been transformed or converted." (Emphasis sic.)

The Supreme Court of Ohio also distinguished that the tapes were tangible, while the computer information was intangible.

The courts that have found computer software to be tangible have based their decisions on the fact that the computer program was coded on a tangible medium, such as a computer tape. See *Citizens & Southern Systems, Inc. vs. South Carolina Tax Comm.* (1984), 280 S.C. 138, 311 S.E. 2d 717; *Hasbro Industries, Inc. vs. Norberg* (R.I. 1985), 487 A.2d 124; *Chittenden Trust Co. v. King* (1983), 143 Vt. 271, 465 A.2d 1100; and *Comptroller of the Treasury v. Equitable Trust Co.* (1983), 296 Md. 459, 464 A.2d 248 (finding that only noncustomized computer software is tangible property)."

It is true that in *Compuserve, Inc.* (supra), the court found that the computer software developed by the appellants therein was intangible property, but a perusal of the said judgment shows the other views of the other courts were noticed therein wherein computer software was held to be a tangible property on the ground that the computer programme was coded on a tangible medium such as a computer tape.

Northeast Datacom, Inc. et al. vs. City of Wallingford [212 Conn.639, 563 A2d 688, was rendered on the premise of the severability doctrine. The said judgment, however, was rendered keeping in view the statute levying tax on personal property wherein the phrase "tangible personal property" was added by amendment in 1961 by Public Act 61 No. 24.

In *South Central Bell Telephone Co. v. Sidney J. Barthelemny, et al.* [643 So. 2d 1240 : 36 A.L.R. 5th 689], the Supreme Court of Louisiana noticed the definition of 'tangible personal property' which was in the following terms :

"Personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses. The term 'tangible personal property' shall not include stocks, bonds, notes or other obligations or securities."

It was held :

"The term "tangible personal property" set forth in the City Code, and its synonymous Civil Code concept "corporeal movable", must be given their property intended meaning. Physical recordings of computer software are not incorporeal rights to be comprehended by the understanding. Rather, they are part of the physical world. For the reasons set out below, we hold the computer software at issue in this case constitutes corporeal property under our civilian concept of that term, and thus, is tangible personal property, taxable under ' 56-21 of the City Code."

The court, however, noticed that the shift in the trend was not uniform. Having regard to the fact that the computer software became the knowledge and understanding and upon discussing the characteristics of computer software and classification thereof as tangible or intangible under Louisiana law, it was held :

"The software itself, i.e. the physical copy, is not merely a right or an idea to be comprehended by the understanding. The purchaser of computer software neither desires nor receives mere knowledge, but rather receives a certain arrangement of matter that will make his or her computer perform a desired function. This 13 arrangement of matter, physically recorded on some tangible medium, constitutes a corporeal body.

We agree with Bell and the court of appeal that the form of the delivery of the software-magnetic tape or electronic transfer via modem- is of no relevance. However, we disagree with Bell and the court of appeal that the essence or real object of the transaction was intangible property . That the software can be transferred to various media i.e. from tape to disc, or tape to hard drive, or even that it can be transferred over the telephone lines, does not take away from the fact that the software was ultimately recorded and stored in physical form upon a physical object. See Crockett, supra, at 872-74; Shontz, at 168-70; Cowdrey, supra, at 188-90. As the court of appeal explained, and as Bell readily admits, the programs cannot be utilized by Bell until they have been recorded into the memory of the electronic telephone switch. 93-1072, at p. 6, 631 So.2d at 1342. The essence of the transaction was not merely to obtain the intangible "knowledge" or "information", but rather, was to obtain recorded knowledge stored in some sort of physical form that Bell's computers could use. Recorded as such, the software is not merely an incorporeal idea to be comprehended, and would be of no use if it were. Rather, the software is given physical existence to make certain desired physical things happen.

One cannot escape the fact that software, recorded in physical form, becomes inextricably intertwined with, or part and parcel of the corporeal object upon which it is recorded , be that a disc, tape, hard drive, or other device. Crockett, supra, at 871072; Cowdrey, Supre, at 188-90. That the information can be transferred and then physically recorded on another medium is of no moment, and does not make computer software any different than any other type of recorded information that can be transferred to another medium such as fil, video tape, audio tape, or books."

It was further opined :

"It is now common knowledge that books, music, and even movies or other audio/visual combinations can be copied from one medium to another. They are also all available on computer in such forms as floppy disc, tape, and CD-ROM. Such movies, books, music, etc\005.can all be delivered by and/or copied from one medium to another, including electrical impulses with the use of a modem. Assuming there is sufficient memory space available in the computer hard disc drive such movies,

books, music, etc\005.can also be recorded into the permanent memory of the computer such as was done with the software in this case.

93-1072, at p. 4, 5. 631 So.2d at 1346-47 (dissenting opinion). See also Shontz. Supra, at 168-170; Harris, supra, at 187.

That the information, knowledge, story, or idea, physically manifested in recorded form, can be transferred from one medium to 15 another does not affect the nature of that physical manifestation as corporeal, or tangible. Shontz, supra, at 168-170. Likewise, that the software can be transferred from 1248 one type of physical recordation, e.g., tape, to another type, e.g., disk or hard drive, does not alter the nature of the software, Shontz, supra, at 168-170; it still has corporeal qualities and is inextricably intertwined with a corporeal object. The software must be stored in physical form on some tangible object somewhere\005"

Reversing the findings of the court below that the computer software constitutes intellectual property, it was opined :

"In sum, once the "information" or "knowledge" is transformed into physical existence and recorded in physical form, it is corporeal property. The physical recordation of this software is not an incorporeal right to be comprehended. Therefore we hold that the switching system software and the data processing software involved here is tangible personal property and thus is taxable by the City of New Orleans."

St. Albans City :

Mr. Sorabjee submitted that this Court Associated Cement Companies Ltd. Vs. Commissioner of Customs [(2001) 4 SCC 593] has misapplied the principles contained in St. Albans City and District Council Vs. International Computers [1996 (4) All ER 481].

Our attention in this behalf has been drawn to the judgment of Sir Iain Glidewell which is in the following terms:

"During the course of the hearing, the word 'software' was used to include both the (tangible) disk onto which the COMCIS program had been encoded and the (intangible) program itself. In order to answer the question, however, it is necessary to distinguish between the program and the disk carrying the program.

In both the Sale of Goods Act, 1979, s 61, and the Supply of Goods and Services Act 1982, s.18, the definition of goods includes 'all personal chattels other than things in action and money'. Clearly, a disk is within this definition. Equally clearly, a program, of itself, is not."

As regard utility of an instruction manual, it was observed:

"As I have already said, the program itself is not 'goods' within the statutory definition. Thus a

matter of the program in the way I have described does not, in my view, constitute a transfer of goods. It follows that in such circumstances there is no statutory implication of terms as to quality or fitness for purpose."

The question which arose in that case was as to whether the defendant therein had breached its contract to supply the plaintiffs with a computer system to be used in administering their collection of community charge by providing valid software which significantly overstated the relevant population of their area and, thus, caused them to suffer a loss of revenue. The suit for damages was allowed. It was held by the Court of Appeals that the submission on behalf of the appellant was that the question as to whether as between the plaintiffs and the defendant the plaintiffs dealt as consumer or on the defendant's written standard terms of business within Section 3(1) in the light of the definition of 'business' in Section 14 was answered in the negative on the ground that one cannot be said to deal on another's standard terms of business, negotiate with those terms before entering into the contract.

Glidewell, J. noticed that in that case the evidence was that in relation to many of the programme releases, an employee of ICL went to St. Albans' premises where the computer was installed taking with him a disk on which the new programme was encoded and himself performed the exercise of transferring the programme into the computer. The learned Judge despite holding that the programme itself is not 'goods' held that such term would employ to all types of contracts that the programme will be reasonably capable of achieving the intended purpose.

The definition of goods in the said Act does not merely include personal chattels but all articles, commodities and materials. The definition of goods in the said Act was wider in term than in Sale of Goods Act, 1979 and the Supply of Goods and Services Act 1982. Furthermore, here, we are not concerned with a programme which is not a part of the disk but a programme contained in a disk.

Strict Interpretation or Literal Interpretation :
We, in this case, are not concerned with the technical meaning of computer and computer programme as in a fiscal statute plain meaning rule is applied. [See Partington Vs. Attorney-General, (1869) LR 4 HL 100, p. 122]

In interpreting an expression used in a legal sense, the courts are required to ascertain the precise connotation which it possesses in law.

It is furthermore trite that a court should not be over zealous in searching ambiguities or obscurities in words which are plain. [See Inland Revenue Commissioner Vs. Rossminster Ltd. (1980) 1 All ER 80, p. 90]

It is now well-settled that when an expression is capable of more than one meaning, the Court would attempt to resolve that ambiguity in a manner consistent with the purpose of the provisions and with regard to the consequences of the alternative constructions. [See Clark & Tokeley Ltd. (t/a Spellbrook) Vs. Oakes [1998 (4) All ER 353].

In Inland Revenue Commissioners Vs. Trustees of Sir John Aird's Settlement [1984] Ch. 382, it is stated:

"\005Two methods of statutory interpretation have at times been adopted by the court. One, sometimes called literalist, is to make a meticulous examination of the precise words used. The other sometimes called purposive, is to consider the object of the relevant provision in the light of the other provisions of the Act \026 the general

intendment of the provisions. They are not mutually exclusive and both have their part to play even in the interpretation of a taxing statute."

In *Indian Handicrafts Emporium and Others Vs. Union of India and Others* [(2003) 7 SCC 589] this Court expounded the theories of purposive construction. [See also *Ramesh Mehta Vs. Sanwal Chand Singhvi and Ors*, JT 2004 (Suppl.1) SC 274]

Francis Bennion in his oft quoted treatise "Statutory Interpretation" at pages 368 & 369 states:

"Subsection (2) Where the enactment is grammatically ambiguous, the opposing constructions put forward are likely to be alternative meanings each of which is grammatically possible. Where on the other hand the enactment is grammatically capable of one meaning only, the opposing constructions are likely to contrast an emphasized version of the literal meaning with a strained construction. In the latter case the court will tend to prefer the literal meaning, wishing to reject the idea that there is any doubt.

Example 149.2 In a tax avoidance case concerning capital transfer tax, the Court of Appeal were called on to construe the Finance Act 1975 Sch 5 para 6(7) as originally enacted. Counsel for the Inland Revenue put forward several alternative arguments on construction, but the court preferred the one based on the unglossed literal meaning. It may be conjectured however that the other arguments helped to convince the court that the Inland Revenue's case was to be preferred."

A statute ordinarily must be literally construed. Such a literal construction would not be denied only because the consequence to comply the same may lead to a penalty. This aspect of the matter has been considered by this Court in *Indian Handicrafts Emporium (supra)*. Proceeding on the basis that there existed a dichotomy, the Court ultimately held that the resolution will have to be reached by reading the entire statute as a whole. [See also *Reema Aggarwal Vs. Anupam and Others*, (2004) 3 SCC 199]

In *Balram Kumawat Vs. Union of India and Others* [(2003) 7 SCC 628] this Court held:

"The Courts will reject that construction which will defeat the plain intention of the Legislature even though there may be some inexactitude in the language used. Reducing the legislation futility shall be avoided and in a case where the intention of the Legislature cannot be given effect to, the Courts would accept the bolder construction for the purpose of bringing about an effective result. The Courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve."

Referring to its earlier decisions, this Court opined :

"36. These decisions are authorities for the proposition that the rule of strict construction of a regulatory/penal statute may not be adhered to, if thereby the plain intention of Parliament to combat crimes of special nature would be defeated."

[See also Swedish Match AB & Anr. Vs. Securities & Exchange Board, India & Anr., 2004 (7) SCALE 158]

So long natural meaning for the charging section is adhered to and when the law is certain, then a strange meaning thereto should not be given.

[See Indian Banks' Association, Bombay and Ors. Vs. M/s. Devkala Consultancy Services and Ors., JT 2004 (4) SC 587]

Although normally a taxing statute is to be strictly construed but when the statutory provision is reasonable akin to only one meaning, the principles of strict construction may not be adhered to. [See Commnr. of Central Excise, Pondicherry Vs. M/s. ACER India Ltd., 2004 (8) SCALE 169]

Determination :

A software may be intellectual property but such personal intellectual property contained in a medium is bought and sold. It is an article of value. It is sold in various forms like \026 floppies, disks, CD-ROMs, punch cards, magnetic tapes, etc. Each one of the mediums in which the intellectual property is contained is a marketable commodity. They are visible to senses. They may be a medium through which the intellectual property is transferred but for the purpose of determining the question as regard leviability of the tax under a fiscal statute, it may not make a difference. A programme containing instructions in computer language is subject matter of a licence. It has its value to the buyer. It is useful to the person who intends to use the hardware, viz., the computer in an effective manner so as to enable him to obtain the desired results. It indisputably becomes an object of trade and commerce. These mediums containing the intellectual property are not only easily available in the market for a price but are circulated as a commodity in the market. Only because an instruction manual designed to instruct use and installation of the supplier programme is supplied with the software, the same would not necessarily mean that it would cease to be a 'goods'. Such instructions contained in the manual are supplied with several other goods including electronic ones. What is essential for an article to become goods is its marketability.

At this juncture, we may notice the meaning of canned software as under:

"(7) 'Canned ?software'?means that is not specifically created for a particular consumer. The sale or lease of, or granting a license to use, canned software is not automatic data processing and computer services, but is the sale of tangible personal property. When a vendor, in a single transaction, sells canned software that has been modified or customized for that particular consumer, the transaction will be considered the sale of tangible personal property if the charge for the modification constitutes no more than half of the price of the sale."

[See STATE-CASE APP-CT,OH-TAXRPTR 402-978 Ohio Board of Tax Appeals, Aeroquip Cop. Page 9 of 12]

The software marketed by the Appellants herein indisputably is canned software and, thus, as would appear from the discussions made hereinbefore, would be exigible to sales tax.

It is not in dispute that when a programme is created it is necessary to encode it, upload the same and thereafter unloaded. Indian law, as noticed

by my learned Brother, Variava, J., does not make any distinction between tangible property and intangible property. A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods. Unlike the American Courts, Supreme Court of India have also not gone into the question of severability.

Recently, in Commnr. Of Central Excise, Pondicherry Vs. M/s. ACER India Ltd. [2004 (8) SCALE 169] this Court has held that operational software loaded in the hard disk does not lose its character as tangible goods.

If a canned software otherwise is 'goods', the Court cannot say it is not because it is an intellectual property which would tantamount to rewriting the judgment. In Madan Lal Fakirchand Dudhediya vs. Shree Changdeo Sugar Mills Ltd. [(1962) Suppl. 3 SCR 973], this Court held that the court cannot rewrite the provisions of law which clearly is the function of the Legislature which interprets them.

I respectfully agree with the opinion of Variava, J. that the appellant herein is liable to pay sales tax on the softwares marketed by it and the appeals should be dismissed.