

# **Tata Consultancy Services vs State Of Andhra Pradesh on 5 November, 2004**

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**Bench: N. Santosh Hegde, S.N. Variava, B.P. Singh, H.K. Sema, S.B. Sinha**

CASE NO.:

Appeal (civil) 2582 of 1998

PETITIONER:

Tata Consultancy Services

RESPONDENT:

State of Andhra Pradesh

DATE OF JUDGMENT: 05/11/2004

BENCH:

N. Santosh Hegde & S.N. Variava & B.P. Singh & H.K. Sema & S.B. Sinha

JUDGMENT:

JUDGMENT WITH CIVIL APPEAL NOs. 2584, 2585 & 2586/98 Delivered by S.B.SINHA, J S. N. VARIAVA, J 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. Sisco*, 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 Ill2d 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, using 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 ."

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 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 ."

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 :

" Simply 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 :

" Thus, 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 :

" Prior 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, *Supra*, 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 film, 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. 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. 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 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 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 "

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



recording 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:

" Two 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 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 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 levability 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 marketted by it and the appeals should be dismissed.

===== S. N.  
VARIAVA, J.

These Appeals are against the Judgment dated 12th December, 1996 of the Andhra Pradesh High Court. The Appeals have been placed before this Bench pursuant to an Order of this Court dated 16th January, 2002.

Briefly stated the facts are as follows :

The Appellants provide consultancy services including Computer Consultancy Services. As part of their business they prepare and load on customers' computers custom made software (for sake of convenience hereinafter referred to as 'uncanned software') and also sell Computer Software Packages off the shelf (hereinafter referred to as 'canned software'). The canned Software Packages are of the ownership of companies/persons, who have developed those software. The Appellants are licensees with permission to sub-licence these packages to others. The canned software programmes are programmes like Oracle, Lotus, Master Key, N-Export, Unigraphics, etc. In respect of the canned software the Commercial Tax Officer, Hyderabad, passed a provisional Order of Assessment under the provisions of the Andhra Pradesh General Sales Tax Act, 1957 [hereinafter called 'the said Act'] holding that the software were goods. The Commercial Tax Officer accordingly levied sales tax on this software. The Appellate Deputy Commissioner of Commercial Taxes also held that the software were goods and liable to tax. However, the matter was remanded back for purposes of working out the tax. The further Appeal, filed by the Appellants, before the Sales Tax Appellate Tribunal, Andhra Pradesh, was dismissed on 1st April, 1996. The Appellants then filed a Tax Revision Case in the Andhra Pradesh High Court, which has been dismissed by impugned Judgment dated 12th December, 1996.

The question raised in this Appeal is whether the canned software sold by the Appellants can be termed to be "goods" and as such assessable to sales tax under the said Act. To consider this question, it is necessary to first look at the relevant provisions.

Section 2(h) of the said Act reads as follows:

"2(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 severed before sale or under the contract of sale and also includes motor spirit."

"Sale" is defined in Section 2(n) as follows:

"2(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.

Explanation I : A delivery of goods on the hire- purchase or any system of payment by instalments shall, notwithstanding the fact that the seller retains the title in the goods, as security for payment of the price, be deemed to be a sale.

Explanation II : (a) Notwithstanding anything contained in the Indian Sale of Goods Act, 1930 (Central Act III of 1930) a sale or purchase of goods shall be deemed, for the purpose of this Act to have taken place in the State, wherever the contract of sale or purchase might have been made, if the goods are within the State.

(i) in the case of specific or ascertained goods, at the time the contract of sale or purchase is made; and

(ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase by the seller or by the purchaser, whether the assent of the other party is prior or subsequent to such appropriation.

(b) Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of clause (a) shall apply as if there were separate contracts in respect of the goods at each of such places.

Explanation III : Notwithstanding anything contained in this Act or in the Indian Sale of Goods Act, 1930 (Central Act III of 1930), two independent sales or purchases shall for the purposes of this Act, be deemed to have taken place.

(1) When the goods are transferred from a principal to his selling agent and from the selling agent to his purchaser, or (2) When the goods are transferred from the seller to a buying agent and from the buying agent to his principal, if the agent is found in either of the cases aforesaid,--

(i) to have sold the goods at one rate and to have passed on the sale proceeds to his principal at another rate; or

(ii) to have purchased the goods at one rate and to have passed them on to his principal at another rate; or

(iii) not to have accounted to his principal for the entire collections or deductions made by him, in the sales or purchases effected by him on behalf of his principal; or

(iv) to have acted for a fictitious or non-

existent principal.

Explanation IV : 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."

Section 5 provides as follows:

"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 rate of tax and at the points of levy specified in the Schedules.

(2) For the purpose of this section and other provisions of this Act, the turnover 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.

(3) The taxes under this section shall be assessed, levied and collected 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."

Mr. Sorabjee submitted that the term "goods" in Section 2(h) only includes tangible moveable property and the words "all materials, articles and commodities" also cover only tangible moveable property. He submitted that computer software is not tangible moveable property. In support of his submission, he relied upon certain observations in the book "The Law Relating to Computers and the Internet" by one Mr. Rahul Matthan, wherein it has been stated that a software program is essentially a series of commands issued to the hardware of the computer that enables the computer to perform in a particular manner. It is stated that to make it effective, therefore, the sequence of commands must be physically stored on a portion of the computer that can be readily accessed by the processing unit of the computer. It is stated that in order for this, the programs should be reduced to a physical form so that it is capable of being stored. It is stated that the programs are therefore of a nature that they may be recorded on magnetic media (much like the recording of audio or video on cassettes and tapes) but that in cases of software, the programmes are recorded on floppy drives, CDs or hard drives. In the book, 'the nature of software' is defined as follows:

"The Nature of Software What then, is the software program? If a person goes to a store to purchase an item of software, he will most likely be given a box containing a series of floppy discs or a single CD-ROM and some instructional material. Within the floppy discs or the CD-ROM will be all the components of the program that one requires to copy (for install) onto the hard disc of the computer, in order that the program can function.

So is the CD-ROM that you have purchased, the software? If the answer to that question is yes, the corollary would be that the CD-ROM containing the software program, becomes the sale and exclusive property of the person who bought it and can be sold or distributed fully. If you purchase a soap, you become the sole owner of that soap and you could re-sell it, cut it into pieces and distribute it or, unhygienic though it may sound, even hire it out to various people to use and no one could challenge your actions since you have paid valuable consideration and purchased the product and thereby have accrued the sole right to deal with that item. If that applies to the soap, why could it not apply to the CD-ROM?

The answer to that question lies in understanding the basic difference between a software program and other traditional goods. As already discussed, software is a series of instructions. While it may be housed in a floppy disc or a CD-ROM or the hard disc of the computer, the item referred to as software is the series of commands that operates the computer. Though the floppy disc, the CD-ROM and the hard disc are each tangible commodities that could be bought sold and resold, the software embedded in these media are intangible and fall into a very different category."

Mr. Sorabjee also relied upon a book "Software Engineering" by Roger S. Pressman, wherein it has been stated that a Software is an instruction that when executed provides desired function and performances. It is stated that a Software is composed of programs, data and documents. Each of these items comprises a configuration that is created as part of the software engineering process. Mr. Sorabjee also drew the attention of the Court to the definitions of "Computer" and "Computer



Programme" in The Copyright Act, 1957. These read as follows:

"Computer" includes any electronic or similar device having information processing capabilities".

"Computer programme" means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result."

Mr. Sorabjee submitted that the definitions show that a computer programme falls within the definition of literary work and is intellectual property of the programmer.

Mr. Sorabjee submitted that a computer software is nothing but a set of commands, on the basis of which the computer may be directed to perform the desired function. He submitted that a software is completely unlike a book or a painting. He submitted that when the customer purchases a book or a painting what he gets is the final product itself. Mr. Sorabjee submitted that in cases of software the consumer does not get any final product but all that he gets is a set of commands which enable his computer to function. He submitted that having regard to its nature and inherent characteristic, software is intangible property which cannot fall within the definition of the term "goods" in Section 2(h) of the said Act.

Mr. Sorabjee submitted that the question as to whether software is tangible or intangible property has been considered by the American Courts. He fairly pointed out that in America there is a difference of opinion amongst the various Courts. He submitted that, however, the majority of the Courts have held that a software is an intangible property. He showed to the Court a number of American Judgments, viz., the cases of Commerce Union Bank vs. Tidwell reported in 538 S.W.2d 405; State of Alabama vs. Central Computer Services, INC reported in 349 So. 2d 1156; The First National Bank of Fort Worth vs. Bob Bullock reported in 584 S.W.2d 548; First National Bank of Springfield vs. Department of Revenue reported in 421 NE2d 175; Compuserve, INC. vs. Lindley reported in 535 N.E. 2d 360 and Northeast Datacom, Inc., et al vs. City of Wallingford reported in 563 A2d 688. In these cases, it has been held that 'computer software' is tangible personal property. The reasoning for arriving at this conclusion is basically that the information contained in the software programs can be introduced into the user's computer by several different methods, namely, (a) it could be programmed manually by the originator of the program at the location of the user's computer, working from his own instructions or

(b) it could be programmed by a remote programming terminal located miles away from the user's computer, with the input information being transmitted by telephone; or (c) more commonly the computer could be programmed by use of punch cards, magnetic tapes or discs, containing the program developed by the vendor. It has been noticed that usually the vendor will also provide manuals, services and consultation designed to instruct the user's employees in the installation and utilization of the supplied program. It has been held that even though the intellectual process is embodied in a tangible and physical manner, that is on the punch cards, magnetic tapes, etc. the logic or intelligence of the program remains intangible property. It is held that it is this intangible

property right which is acquired when computer software is purchased or leased. It has been held that what is created and sold is information and the magnetic tapes or the discs are only the means of transmitting these intellectual creations from the originator to the user. It has been held that the same information could have been transmitted from the originator to the user by way of telephone lines or fed directly into the user's computer by the originator of the programme and that as there would be no tax in those cases merely because the method of transmission is by means of a tape or a disc, it does not constitute purchase of tangible personal property and the same remains intangible personal property. It has been held that what the customer paid for is the intangible knowledge which cannot be subjected to the personal property tax. In these cases, difference is sought to be made between purchase of a book, music cassette/video or film and purchase of software on the following lines:

"When one buys a video cassette recording, a book, sheet music or a musical recording, one acquires a limited right to use and enjoy the material's content. One does not acquire, however, all that the owner has to sell. These additional incidents of ownership include the right to produce and sell more copies, the right to change the underlying work, the right to license its use to other and the right to transfer the copyright itself. It is these incidents of the intellectual, intangible competent of the software property that Wallingford has impermissibly assessed as tangible property by linking these incorporeal incidents with the tangible medium in which the software is stored and transmitted."

It has been fairly brought to the attention of the Court that many other American Courts have taken a different view. Some of those cases are South Central Bell Telephone Co. vs. Sidney J. Barthelemy reported in 643 So.2d 1240; Comptroller of the Treasury vs. Equitable Trust Company reported in 464 A.2d 248; Chittenden Trust Co. vs. Commissioner of Taxes reported in 465 A.2d 1100; University Computing Company vs. Commissioner of Revenue for the State of Tennessee reported in 677 S.W.2d 445 and Hasbro Industries, INC. vs. John H. Norberg, Tax Administrator reported in 487 A.2d 124. In these cases, the Courts have held that when stored on magnetic tape, disc or computer chip, this software or set of instructions is physically manifested in machine readable form by arranging electrons, by use of an electric current, to create either a magnetized or unmagnetized space. This machine readable language or code is the physical manifestation of the information in binary form. It has been noticed that at least three program copies exist in a software transaction: (i) an original, (ii) a duplicate, and (iii) the buyer's final copy on a memory device. It has been noticed that the program is developed in the seller's computer then the seller duplicates the program copy on software and transports the duplicates to the buyer's computer. The duplicate is read into the buyer's computer and copied on a memory device. It has been held that the software is not merely knowledge, but rather is knowledge recorded in a physical form having a physical existence, taking up space on a tape, disc or hard drive, making physical things happen and can be perceived by the senses. It has been held that the purchaser does not receive mere knowledge but receives an arrangement of matter which makes his or her computer perform a desired function. It has been held that this arrangement of matter recorded on tangible medium constitutes a corporeal body. It has been held that a 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 disk, tape, hard drive, or

other device. It has been held that the fact that the information can be transferred and then physically recorded on another medium does not make computer software any different from any other type of recorded information that can be transferred to another medium such as film, video tape, audio tape or books. It has been held that by sale of the software programme the incorporeal right to the software is not transferred. It is held that the incorporeal right to software is the copyright which remains with the originator. What is sold is a copy of the software. It is held that the original copyright version is not the one which operates the computer of the customer but the physical copy of that software which has been transferred to the buyer. It has been held that when one buys a copy of a copyrighted novel in a bookstore or recording of a copyrighted song in a record store, one only acquires ownership of that particular copy of the novel or song but not the intellectual property in the novel or song. Mr. Dwivedi pointed out that the difference of opinion among the various American Courts has arisen because under the American Statutes Act what is taxable is "tangible personal property". He submitted that it is this definition which required the American Courts to consider whether software is tangible or intangible. Mr. Dwivedi submitted that the definition of the term "goods" in the said Act is a very wide definition. He submitted that "goods" have been defined to mean all kinds of moveable property except those specified, namely, actionable claims, stocks, shares and securities. He pointed out that the definition includes all materials, articles and commodities. He submitted that the words "all materials, articles and commodities"

have been used in the said Act in the same sense as used in Article 366 (12) of the Constitution of India. Article 366 provides that unless the context otherwise requires, the expressions given therein would have the meanings respectively assigned to them. Under Sub-clause (12), the term "goods" includes all materials, commodities and articles. He submitted that the legislative power, of the State to levy sales tax, is by virtue of Entry 54 of List II of Schedule 7. Mr. Dwivedi relied upon a number of cases of this Court, set out hereafter, to show that the term "goods" has been held to include even incorporeal and/or intangible properties.

In the case of Commissioner of Sales Tax, Madhra Pradesh, Indore vs. Madhya Pradesh Electricity Board, Jabalpur reported in (1969) 1 SCC 200, the question whether electricity was "goods" for the purposes of imposition of sales tax under the Madhya Pradesh General Sales Tax Act, 1959. It was noted that the definition of the term "goods" meant all kinds of "movable property" and included "all materials, articles and commodities". It was held as follows:

"The reasoning which prevailed with the High Court was that a well-defined distinction existed between the sale or purchase of "goods" and consumption or sale of electricity otherwise there was no necessity of having Entry No.53 but under Entry 53 taxes can be levied not only on sale of electricity but also on its consumption which could not probably have been done under Entry 54. It is difficult to derive much assistance from the aforesaid entries. What has essentially to be seen is whether electric energy is "goods" within the meaning of the relevant provisions of the two Acts. The definition in terms is very wide according to which "goods" means all kinds of movable property. Then certain items are specifically excluded or included and electric energy or electricity is not one of them. The term "movable

property" when considered with reference to "goods" as defined for the purposes of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is needless to repeat that it is capable of abstraction, consumption and use which, if done dishonestly, would attract punishment under Section 39 of the Indian Electricity Act, 1910. It can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property. Even in *Benjamin on Sale*, 8th Ed. Reference has been made at p. 171 to *County of Durham Electrical etc. Co. v. Inland Revenue*, in which electric energy was assumed to be "goods". If there can be sale and purchase of electric energy like any other movable object, we see no difficulty in holding that electric energy was intended to be covered by the definition of "goods" in the two Acts. If that had not been the case there was no necessity of specifically exempting sale of electric energy from the payment of sales tax by making a provision for it in the schedules to the two Acts. It cannot be denied that the Electricity Board carried on principally the business of selling, supplying or distributing electric energy. It would therefore clearly fall within the meaning of the expression "dealer" in the two Acts."

Thus this Court has held that the term "goods", for the purposes of sales tax, cannot be given a narrow meaning. It has been held that properties which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed etc. are "goods" for the purposes of sales tax. The submission of Mr. Sorabjee that this authority is not of any assistance as a software is different from electricity and that software is intellectual incorporeal property whereas electricity is not, cannot be accepted. In India the test, to determine whether a property is "goods", for purposes of sales tax, is not whether the property is tangible or intangible or incorporeal. The test is whether the concerned item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed etc. Admittedly in the case of software, both canned and uncanned, all of these are possible.

This Court in the case of *H. Anraj vs. Government of Tamil Nadu*, reported in (1986) 1 SCC 414, had, in the context of Bengal Finance (Sales Tax) Act, 1941, occasion to consider whether lottery tickets were goods. It has been submitted that the lottery tickets were an actionable claim as the essence of a lottery was a chance for a prize for a price. This Court noted the definition of "goods" and held that the term "moveable property", for the purposes of sales tax, could not be taken in a narrow sense. It was held that incorporeal rights, like copyright or an intangible thing like electric energy, were regarded as goods exigible to sales tax and, therefore, entitlement to a right to participate in a draw, which was beneficial interest in movable property, would fall within the definition of "goods".

The question whether electricity can be termed as "goods" again arose before a Constitution Bench of this Court in *State of A. P. vs. National Thermal Power Corpn. Ltd. & Ors.* reported in (2002) 5 SCC 203. This Court, noticing the earlier authorities, held that the definition of "goods" in Article 366 (12) of the Constitution of India was very wide and included all kinds of movable properties. It was held that the term "movable property" when considered with reference to "goods" as defined for

the purposes of sales tax cannot be taken in a narrow sense. It was held that merely because electric energy was not tangible or would not be moved or touched like, for instance, a piece of wood or a book it would not cease to be movable property when it had all the attributes of such property. It was held that electricity was capable of abstraction, consumption and use which, if done dishonestly, was punishable under Section 39 of the Indian Electricity Act, 1910. It was held that electric energy could be transmitted, transferred, delivered, stored and possessed in the same way as any other movable property. It was held that electricity was thus "goods" within the meaning of the Sales Tax Act. Thereafter, in the case of *M. P. Cement Manufacturers' Association vs. State of M. P. & Ors.*, reported in (2004) 2 SCC 249, the question was whether the levy of cess on generation of electricity by the *M. P. Upkar Adhiniyam, 1981*, as substituted by *M. P. Upkar (Sanshodhan) Adhyadesh, 2001*, was valid. It was held that there was no legislative competence in the State to levy cess as the Parliament had exclusive legislative competence in this respect by virtue of Entry 84 in List I of Schedule 7. However, in this case also it has been held that electricity was "goods" and that the State would have competence to levy tax on the sale and consumption of electricity but could not levy cess on the production of electricity. In the case of *Associated Cement Companies Ltd. vs. Commissioner of Customs*, reported in (2001) 4 SCC 593, the question was whether customs duty was leviable on technical material supplied in the form of drawings, manuals and computer disc, etc. The further question was if customs duty was leviable how it was to be valued. In that case also it was *inter alia* argued that custom duty could not be levied as the drawings, designs diskettes, etc. were not goods and that they only constituted ideas. It had been submitted that what was being transferred was technology, i.e., the knowledge or know-how and thus, even though this may be valuable, it was intangible property and not goods. This Court noted Section 2 (22) of the Customs Act, which defined "goods" as follows:

- "2.(22)(a) vessels, aircrafts and vehicles;
- (b) stores;
- (c) baggage;
- (d) currency and negotiable instruments; and
- (e) any other kind of moveable property."

It is thus to be seen that under the Customs Act, apart from what had been specified therein, any other kind of moveable property constituted goods. This Court held as follows:

"27. According to Section 12 of the Customs Act, duty is payable on goods imported into India. The word "goods" has been defined in Section 2(22) of the Customs Act and it includes in clause (c) "baggage" and clause (e) "any other kind of moveable property". It is clear from a mere reading of the said provision 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. An item which does not fall within clauses (a), (b), (c) or (d) of Section 2(22) will be regarded as coming under Section

2(22)(e). Even though the definition of the goods purports to be an inclusive one, in effect it is so worded that all tangible moveable articles will be the goods for the purposes of the Act by residuary clause (e) of Section 2(22). Whether moveable article comes as a part of a baggage, or is imported into the country by any other manner, for the purpose of the Customs Act, the provision of Section 12 would be attracted. 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 are moveable goods and would be covered by Section 2(22)(e) of the Customs Act.

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

34. The decision of Winter v. Putnam case (938 F 2nd 1033 (9th Cir 1991) is also of no help to the appellants as in that case it was the quality of information regarding mushrooms which was not regarded as a product even though the encyclopaedia containing the information was regarded as goods. Here we are not concerned with the quality of information given to the appellants. The question is whether the papers or diskettes etc. containing advice and/or information are goods for the purpose of the Customs Act. The answer, in our view, is in the affirmative.

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41. Significantly Chapter 49 also includes items which have substantial intellectual value as opposed to the value of the paper on which it is put. Newspapers, periodicals, journals, dictionaries etc. are to be found in Chapter 49 wherein maps, plans and other similar items are also included, while Chapter 97 talks about original engravings. It is clear that intellectual property when put on a media would be regarded as an article on the total value of which customs duty is payable.

42. To put it differently, the legislative intent can easily be gathered by reference to the Customs Valuation Rules and the specific entries in the Customs Tariff Act. The value of an encyclopaedia or a dictionary or a magazine is not only the value of the paper. The value of the paper is in fact negligible as compared to the value or price of

an encyclopaedia. Therefore, the intellectual input in such items greatly enhances the value of the paper and ink in the aforesaid examples. This means that the charge of a duty is on the final product, whether it be the encyclopaedia or the engineering or architectural drawings or any manual.

43. Similar would be the position in the case of a programme of any kind loaded on a disc or a floppy. For example in the case of music the value of a popular music cassette is several times more than the value of a blank cassette. However, if a pre-recorded music cassette or a popular film or a musical score is imported into India duty will necessarily have to be charged on the value of the final product. In this behalf we may note that in *State Bank of India v. Collector of Customs* ((2000) 1 SCC 727 : (2000) 1 Scale 72) the Bank had, under an agreement with the foreign company, imported a computer software and manuals, the total value of which was US Dollars 4,084,475. The Bank filed an application for refund of customs duty on the ground that the basic cost of software was US Dollars 401,047. While the rest of the amount of US Dollars 3,683,428 was payable only as a licence fee for its right to use the software for the Bank countrywide. The claim for the refund of the customs duty paid on the aforesaid amount of US Dollars 3,683,428 was not accepted by this Court as in its opinion, on a correct interpretation of Section 14 read with the Rules, duty was payable on the transaction value determined therein, and as per Rule 9 in determining the transaction value there has to be added to the price actually paid or payable for the imported goods, royalties and the licence fee for which the buyer is required to pay, directly or indirectly, as a condition of sale of goods to the extent that such royalties and fees are not included in the price actually paid or payable. This clearly goes to show that 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.

44. It is a misconception to contend that what is being taxed is intellectual input. What is being taxed under the Customs Act read with the Customs Tariff Act and the Customs Valuation Rules is not the input alone but goods whose value has been enhanced by the said inputs. The final product at the time of import is either the magazine or the encyclopaedia or the engineering drawings as the case may be. There is no scope for splitting the engineering drawing or the encyclopaedia into intellectual input on the one hand and the paper on which it is scribed on the other. For example, paintings are also to be taxed. Valuable paintings are worth millions. A painting or a portrait may be specially commissioned or an article may be tailor-made. This aspect is irrelevant since what is taxed is the final product as defined and it will be an absurdity to contend that the value for the purposes of duty ought to be the cost of the canvas and the oil paint even though the composite product, i.e., the painting, is worth millions.

45. It will be appropriate to note that the Customs Valuation Rules, 1988 are framed keeping in view the GATT protocol and the WTO agreement. In fact our rules appear

to be an exact copy of GATT and WTO. For the purpose of valuation under the 1988 Rules the concept of "transaction value" which was introduced was based on the aforesaid GATT protocol and WTO agreement. The shift from the concept of price of goods, as was classically understood, is clearly discernible in the new principles. Transaction value may be entirely different from the classic concept of price of goods. Full meaning has to be given to the rules and the transaction value may include many items which may not classically have been understood to be part of the sale price.

46. 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. 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.

47. In the case of *St Albans City and District Council v. International Computers Ltd.* ((1996) 4 All ER 481) Sir Ian Glidewell in relation to whether computer programme on a disc would be regarded as goods observed at p. 493 as follows :

"Suppose I buy an instruction manual on the maintenance and repair of a particular make of car. The instructions are wrong in an important respect. Anybody who follows them is likely to cause serious damage to the engine of his car. In my view, the instructions are an integral part of the manual. The manual including the instructions, whether in a book or a video cassette, would in my opinion be 'goods' within the meaning of the 1979 Act, and the defective instructions would result in a breach of the implied terms in Section 14.

If this is correct, I can see no logical reason why it should not also be correct in relation to a computer disc on to which a program designed and intended to instruct or enable a computer to achieve particular functions has been encoded. If the disc is sold or hired by the computer manufacturer, but the program is defective, in my opinion there would prima facie be a breach of the terms as to quality and fitness for purpose implied by the 1979 Act or the 1982 Act."

48. The above view, in our view, appears to be logical and also in consonance with the Customs Act. Similarly in *Advent Systems Ltd. v. Unisys Corpn.* (925 F 2d 670 (3d Cir 1991)) it was contended before the Court in the United States that software referred to in the agreement between the parties was a "product" and not a "good" but intellectual property outside the ambit of the Uniform Commercial Code. In the said Code, goods were defined as "all things (including specially manufactured goods) which are moveable at the time of the identification for sale". Holding that computer software was a "good" the Court held as follows :



"Computer programs are the product of an intellectual process, but once implanted in a medium they 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 it 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'."

49. We are in agreement with the aforesaid observations and hold that the value of the goods imported would depend upon the quality of the same and would be represented by the transaction value in respect of the goods imported."

To be noted that this authority is directly dealing with the question in issue. Even though the definition of the term "goods" in the Customs Act is not as wide or exhaustive as the definition of the term "goods" in the said Act, it has still been held that the intellectual property when it is put on a media becomes goods. Mr. Sorabjee submitted that whilst referring to the case of *St. Albans City and District Council vs. International Computers Ltd.* [1996 (4) All E R 481] this Court missed the express finding of that Court to the effect "clearly, a disk is within this definition. Equally clearly, a program, of itself, is not". Mr. Sorabjee submitted that the English case clearly holds that software programmes are not goods. He further submitted that the observations of this Court in *Associated Cements Case (Supra)* are in the context of valuation of imported goods and must therefore not be taken into consideration whilst deciding whether software is intangible, incorporeal intellectual property. We are unable to accept this submission of Mr. Sorabjee. The observations have been made not just in the context of valuation but to decide whether the items imported were "goods". Question of valuation would come only if the items imported were "goods" on which custom duty could be levied.

In the case of *Commissioner of Central Excise, Pondicherry vs. M/s Acer India Ltd.*, reported in JT 2004 (8) SC 53, this Court has considered in detail what a software programme is. After so considering, it has been held that a computer and operative software are different marketable commodities. This Judgment would also have been against the arguments canvassed by Mr. Sorabjee but for the fact that this Court has itself clarified as follows:

"86. We, however, place on record that we have not applied our mind as regard the larger question as to whether the informations contained in a software would be tangible personal property or not or whether preparation of such software would amount to manufacture under different statutes."

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

Before concluding, it must be mentioned that before the High Court certain other questions were also raised. However, those have not been agitated or pressed before us.

In this view of the matter, we see no infirmity in the Judgment of the authorities below or in the impugned Judgment. Accordingly, the Appeals shall stand dismissed with no order as to costs.