

Wipro Infotech Ltd. Vs. Deputy Commissioner of Commercial Taxes (intelligence), Mysore Zone and anr.

Wipro Infotech Ltd. Vs. Deputy Commissioner of Commercial Taxes (intelligence), Mysore Zone and anr.

SooperKanoon Citation : sooperkanoon.com/386555

Court : Karnataka

Decided On : Apr-16-1998

Reported in : ILR1999KAR768; [2000]120STC159(Kar)

Judge : P. Vishwanatha Shetty, J.

Acts : [Constitution of India](#) - Article 366 and 366(29A); [Karnataka Sales Tax Act, 1957](#) - Sections 2 and 5B

Appeal No. : Writ Petition Nos. 13582 to 13586 and 41191 of 1993 and 18435, 18436 and 6916 of 1994

Appellant : Wipro Infotech Ltd.

Respondent : Deputy Commissioner of Commercial Taxes (intelligence), Mysore Zone and anr.

Advocate for Def. : Shivayogiswamy, High Court Government Pleader

Advocate for Pet/Ap. : Chander Kumar, Sr. Counsel, ;Rajesh Chander Kumar and ;S. Parthasarathi, Advs. in W.P. Nos. 13582 to 13586 of 1993, ;Ajit Kumar L. Raheja, Adv. in W.P. Nos. 18435, 18436 and 6916 of 1994 and ;M.R. Nar

Disposition : Petition dismissed

Judgement :

ORDER

P. Vishwanatha Shetty, J.

1. Since the common questions of law are raised in these petitions and the contentions urged are fairly similar, all these petitions were heard together and are disposed of by this common order.

2. In all these petitions, the common prayer made is to strike down entry 21 of the Sixth Schedule appended to the [Karnataka Sales Tax Act, 1957](#) (hereinafter referred to as 'the Act') on the ground that the said entry is ultra vires Section 5B of the Act read with Articles 366, 301 and 304 of the [Constitution of India](#).

3. In Writ Petition Nos. 13582 to 13586 of 1993 the petitioner made an additional prayer for quashing the orders of assessment dated April 27, 1993 for the assessment years 1988-89 to 1992-93, copies of which have been produced as annexures K, K1 to K4 respectively, made Under Section 28(6) of the Act.

4. In Writ Petition No. 41191 of 1993 the petitioner has also prayed for a declaration that Rule 6(c) and Rule 6(0) of the Karnataka Sales Tax Rules, 1957 as unconstitutional and ultra vires.

5. In Writ Petition Nos. 18435 and 18436 of 1994, the petitioners have also prayed for quashing the clarification dated August 3, 1990, a copy of which has been produced as annexure D, issued by the Commissioner of Commercial Taxes, in so far as it relates to the clarification given with regard to entry 21 of the Sixth Schedule appended to the Act. In these petitions, the petitioners have also prayed for quashing the order of assessment dated June 21, 1993, a copy of which has been produced as annexure E, and the demand notice dated June 25, 1993, a copy of which has been produced as annexure F, in so far as it relates to the assessment year commencing from April 1, 1989 to March 31, 1990 in respect of the petitioner in Writ Petition No. 18435 of 1994 and the order of assessment dated December 16, 1991 for the assessment period commencing from January 1, 1990 to March 31, 1990 and also the demand notice dated December 16, 1991, a

copy of which has been produced as annexure H, in so far as it relates to the petitioner in Writ Petition No. 18436 of 1994.

6. In Writ Petition No. 6916 of 1994, the petitioner has prayed for quashing the clarification dated August 3, 1989 issued by the Commissioner of Commercial Taxes, a copy of which has been produced as annexure D, in so far as it relates to the clarification given with regard to entry 21 of the Sixth Schedule appended to the Act and has also prayed for quashing the order of assessment dated December 28, 1993 for the assessment year commencing from April 1, 1990 to March 31, 1991, a copy of which has been produced as annexure F, passed by the third respondent in the said petition, and also the demand notice dated December 28, 1992, a copy of which has been produced as annexure G, issued to the petitioner to pay the amount demanded therein pursuant to the order of assessment, annexure F.

7. Brief facts of the case set out by the petitioners in each of these petitions, may be stated as hereunder :

(a) The petitioner in Writ Petition Nos. 13582 to 13586 of 1993 claims that it is a limited company registered under the provisions of the Companies Act, 1956 and a dealer registered under the provisions of the Act and the Central Sales Tax Act, 1956, and is, inter alia, engaged in the manufacture of computer systems, maintenance and servicing of computer systems. According to the petitioner in these petitions, one of its activities carried on by it relates to maintenance services in respect of computer systems manufactured and sold by it ; and it provides services for maintaining the same during the warranty period and post-warranty maintenance ; and these services are rendered in terms of contracts entered into with its customers through its offices located in various parts of the country ; the services provided during the warranty period are free of cost as opposed to charging fees for post-warranty maintenance ; and services provided by the petitioner essentially cover cost of time spent by its engineers, training cost, travelling cost, cost of maintaining inventories and overhead expenses ; and replacing of certain defective parts as specified in the agreement entered into by the petitioner-company free of cost ; and the said defective parts are subsequently

repaired centrally at Bangalore and recycled for servicing other installations and in such cases, there is no transfer of property in goods passing to the customers. According to the petitioner, maintenance service contract entered into by it with its customers cannot be held to be goods for the purpose of levy of sales tax ; and the services rendered by it to a particular organisation will be unique and will not be useful for any other organisation ; and therefore, the petitioner is outside the purview of Section 5B of the Act with regard to the maintenance service contract entered into by it with its customers. It is the further case of the petitioners that a notice dated September 8, 1989, a copy of which has been produced as annexure B, was issued to the petitioner directing it to pay tax in respect of the activity of the maintenance service contract carried on by it for the assessment year 1988-89 and in response thereto, the petitioner sent its reply dated September 28, 1989, a copy of which has been produced as annexure C, contending, inter alia, that the amounts realised by the petitioner towards maintenance of computer systems were towards engineering services rendered by its qualified and trained personnel and there was no transfer of property in goods involved in the transaction and as such, the provisions of the Act are not applicable to it ; and inspite of the reply sent by the petitioner, since the authorities proceeded to conclude the assessment, the petitioner had filed Writ Petition No. 2169 of 1990 challenging the validity of Section 5B of the Act before this Court ; and subsequently, the said writ petition also was dismissed by this Court leaving open all other contentions urged. It appears that during the pendency of the said writ petition, the authorities have conducted search and seizure of the premises of the petitioner from January 14, 1993 and continued till January 21, 1993 and in the course of such proceedings, the authorities appear to have seized books of accounts and other documents under a mahazar dated January 21, 1993, a copy of which has been produced as annexure E and thereafter, pursuant to the seizure of books, an order dated January 21, 1993 was passed by the second respondent in the said petition, Under Section 28(3) of the Act ; and subsequently, notices dated February 26, 1993 for the assessment years 1988-89 to 1992-93, copies of which have been produced as annexures H, H1 to H4, came to be issued to the petitioner Under Section 28(6) of the Act calling upon the petitioner to pay sales tax on an annual maintenance contract receipts on the ground that the validity of Section 5B of the

Act has been upheld by this Court. Further, though the petitioner submitted its explanation to the said notices, annexures H, H1 to H4, by its reply dated March 7, 1993 and another consolidated reply dated March 20, 1993, copies of which have been produced as annexures J. and J1 respectively, the first respondent passed orders of assessment dated April 27, 1993 as per annexures K, K1 to K4 for the assessment years 1988-89 to 1992-93 respectively, Under Section 28(6) of the Act.

(b) The petitioner in Writ Petition No. 41191 of 1993 is a registered dealer under the provisions of the Act and the Central Sales Tax Act and carries on business of supply and installation of elevators and also undertakes annual maintenance contracts of the lifts so installed. According to this petition, the sum and substance of the type of annual maintenance contract entered into by the petitioner is that for a predetermined sum paid by its customers, the petitioner undertakes to maintain the lift throughout the year, if necessary, by replacing the parts of the lift ; generally, the maintenance of lift involves lubricating, greasing the lift and carrying out periodical inspection of the various components and the petitioner carries on this type of service only with a view to instill confidence in the minds of its customers about the durability of the lift itself, etc. It is the further case of this petitioner that the nature of the contract entered into by the petitioner with its customers for maintenance of lifts, is labour oriented contracts in view of the fact that normally the petitioner just lubricates lifts and carries out the routine check with instruments and the periodical inspection of the lifts and lubricating the lifts is just with a view to prevent accident due to un-noticed wear and tear of components and parts of lifts in general and in particular, the wire, rope, cable, etc. According to the petitioner, the chances of replacing of parts are so remote that some of the customers opt for contract restricting the activity of the petitioner only to oiling and greasing and the type of the contract in the parlance of the petitioner-company is known as 'oiling and greasing contract'. It is also the further case of the petitioner that certain customers enlarge the scope of the contract by including the provision for replacement of certain minor parts ; and such contract is termed as 'labour contract' ; and it is only the owners of public buildings, such as, hotels, go in for comprehensive contract, whereby full maintenance without any restriction with regard to replacement of part is assured and those types of contracts are

known as 'comprehensive lift maintenance'. It is the case of the petitioner that the assessing authority, without any justification, had issued notices Under Section 28(6) of the Act proposing to levy tax on the entire service contract entered into by the petitioner. Copies of the said notices have been produced as annexures B to B4 to this petition. The assessing authority also appears to have seized books of accounts of the petitioner. In substance, it is the case of this petitioner, like the petitioners in the other writ petitions, referred to above, the nature of the transaction carried on by this petitioner also is only a maintenance contract where there is no transfer of property in goods ; as such, the petitioner is not liable to pay any tax.

(c) In Writ Petition Nos. 18435 and 18436 of 1994, it is the case of the petitioners that the petitioner was a partnership firm and the same was dissolved on December 31, 1989. The petitioner in Writ Petition No. 18436 of 1994 claims to be a limited company, which took over the first petitioner-firm after its dissolution and is also a dealer registered under the provisions of the Act and the Central Sales Tax Act. According to the petitioners, the first petitioner was carrying on its business till its dissolution and the second petitioner has been carrying on business from the date of taking over business of the first petitioner in trading in computer parts and accessories and also it undertakes annual maintenance contract of maintenance of computers ; and the annual maintenance contract is that for a predetermined sum paid by its customers ; the petitioner undertakes to maintain computer throughout the year ; and this involves both preventive and corrective maintenance. The nature of the business carried on by the petitioners in these petitions in substance, is fairly similar to the nature of business carried on by the petitioner in Writ Petition Nos. 13582 to 13586 of 1993. The petitioners have referred to the circular dated August 3, 1989, a copy of which has been produced as annexure D to these petitions, wherein the Commissioner for Commercial Taxes has clarified that the maintenance of computers (involving transfer of goods in the course of the contract of maintenance) falls under entry 21 of the Sixth Schedule appended to the Act. It is the case of the petitioners that the first petitioner has a gross and the taxable turnover for the period from April 1, 1989 to December 31, 1990 at Rs. 29,48,903.38 and Rs. 41,315.89 respectively as per the revised return ; and the third respondent did not accept the return of the petitioner

and issued a proposition notice proposing to reject the return filed ; and proposed to disallow certain deductions claimed by the petitioners ; and since the said notice was served on the person unconnected with the department of the petitioners, the said person did not forward the said notice to the concerned department of the first petitioner and hence the first petitioner did not file any reply ; and the third respondent concluded an ex parte assessment denying the petitioner any of the deductions claimed by it towards labour, service charges, etc., and determined the total turnover at Rs. 29,68,634 and taxable turnover at Rs. 6,37,540.64 and tax liability of Rs. 63,082. It is the further case of the petitioners in these petitions, that for the period from January 1, 1990 to March 31, 1990, the second petitioner declared the total turnover and taxable turnover at Rs. 4,19,766.53. But the assessing authority rejected the return filed by the second petitioner and also rejected the contention of the second petitioner that the contracts do not relate to the contract under entry 21 of the Sixth Schedule appended to the Act and determined total turnover at Rs. 7,67,500 and taxable turnover at Rs. 2,15,000 and the tax liability at Rs. 28,637.50. The assessment orders and the demand notices have been produced as annexures E, F, G and H in these petitions. It is further stated that for the period from April 1, 1989 to December 31, 1989, the first petitioner had preferred an appeal before the appellate authority.

(d) In Writ Petition No. 6916 of 1994, the petitioner claims to be a limited company and a dealer registered under the Act and the Central Sales Tax Act. It is also the case of the petitioner in this petition, that the petitioner carries on business of trading in computer parts and accessories, and also undertakes annual maintenance contract and other contracts of maintenance of computers ; and the sum and substance of the annual maintenance contract is that for a pre-determined sum paid by the customers of the petitioner ; and the petitioner undertakes to maintain the computer throughout the year ; and this involves both preventive and corrective maintenance ; and these contracts are not included in Section 2(v-i) of the Act. The nature of the business carried on by this petitioner is almost akin to the nature of the business carried on by the petitioners in the writ petitions, referred to above. It is the further case of this petitioner that for the assessment year from April 1, 1990 to March 31, 1991, the petitioner had declared the total turnover of Rs. 52,34,584.96, and claimed exemption of Rs.

74,36,002.08, and declared a taxable turnover at Rs. Nil, but the assessing authority, on the basis of the Intelligence Report made by the Deputy Commissioner of Commercial Taxes (Intelligence), did not accept the return of the petitioner and treating the annual maintenance contract receipts as taxable turnover under entry 21 of the Sixth Schedule, and proposed to assess the petitioner by levying turnover tax on the turnover inclusive of annual maintenance contract receipts. The proposition notices and the assessment orders have been produced as annexures E and F respectively and the demand notice dated December 28, 1993 has been produced as annexure G in this petition.

8. I have heard Sri Chander Kumar, learned Senior Counsel appearing along with Sri Rajesh Chander Kumar for the petitioner in Writ Petition Nos. 13582 to 13586 of 1993 and Sri Ajit Kumar L. Raheja, learned counsel for the petitioners in Writ Petition Nos. 18435, 18436 and 6916 of 1994 and Sri M.R. Narayan, learned counsel for the petitioner in Writ Petition No. 41191 of 1993. I have also heard Sri Shivayogiswamy, learned Government Pleader on behalf of the respondents in all these petitions.

9. Learned Counsel appearing for the petitioners submitted that the nature of the transaction carried by each of the petitioners in these petitions, is, in sum and substance, a maintenance contract where there is no transfer of property in goods from the petitioners to their customers ; and as such, they are not liable for payment of tax Under Section 5B of the Act. It is their contention that Under Section 5B of the Act, a dealer is liable to pay sales tax only on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract, and so long as there is no transfer of property in goods involved in the execution of works contract, a dealer is not liable to pay tax on an item, like servicing or maintenance of instruments, like computers, lifts, etc. Therefore, they submitted that entry 21 of the Sixth Schedule appended to the Act to the extent it makes a dealer to pay sales tax on full service and maintenance of instruments, equipments, appliances or plant and machinery, is ultra vires Section 5B of the Act as it makes a dealer liable to pay sales tax on an item where there is no transfer of property in goods Elaborating this submission, they pointed out that Section 2(t) of the Act defines 'sale' and to be a sale

transaction, there must be transfer of property in goods by one person to another in course of trade or business for cash or deferred payment or other valuable consideration and in the case of maintenance contract, there is no transfer of property in goods involved in the execution of works contract entered into by each of the petitioners with their customers ; and as such, by providing for entry 21 to the Sixth Schedule, it is not permissible to make the petitioners liable to pay tax on contract of service and maintenance of instruments, equipments, appliances or plant and machinery. They further pointed out that entry 21 of the Sixth Schedule appended to the Act also runs beyond the provisions contained in Article 466 of the [Constitution of India](#). It is their further contention that rendering of service or effecting repairs to an instrument or a contract of labour or service, where there is no transfer of property in goods, cannot be termed as the sale of goods. They pointed out with reference to Section 2(m) of the Act, that 'goods' means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes livestock, all materials, commodities and articles (including the goods as goods or in some other form) involved in the execution of a works contract or those goods to be used in the fitting out, improvement or repair of movable property ; and so long as there is no transfer of property in the goods, the contract of service and maintenance of instruments, equipments, appliances or plant and machinery is not liable for payment of sales tax. They also submitted that Sub-Clause (b) of Clause (29A) of Article 466 of the [Constitution of India](#) read with Section 5B of the Act makes it clear that it is only in the case of transfer of property in the goods, the State Legislature is competent to levy the tax ; and in the guise of providing for levy of tax in the transfer of goods, it is not permissible for the State to provide for an entry to levy tax for the services rendered by the petitioners, in the profession or the business carried on by them. It is also alternatively submitted that entry relating to service and maintenance of instruments, equipments, appliances or plant and machinery will not fall within the definition of 'works contract' within the meaning of Section 2(v-i) of the Act. It was their further submission that service is not brought under levy of tax Under Section 5B of the Act as it is not a sale of goods in any form ; and therefore, the levy of tax on service or maintenance of instruments, equipments, appliances or plant and machinery is ultra vires Section 5B of the Act and Sub-Clause (b) of Clause (29A)

of Article 466 of the [Constitution of India](#). They further contended that in so far as the levy of tax on service or maintenance of instruments, equipments, appliances or plant and machinery, there is no charging section ; and, therefore, entry 21 of the Sixth Schedule appended to the Act is liable to be declared as illegal and beyond the provisions of the Act and Article 466 of the [Constitution of India](#). They further submitted that the transfer of property, if any, in the nature of service contract entered into by the petitioners with their customers, is only incidental and is not the object of the main contract and the use of goods in such transactions is not liable for payment of tax. They also pointed out that the computer is not an instrument or an equipment and, therefore, it does not fall within entry 21 of the Sixth Schedule appended to the Act. They also submitted that consequently, the impugned assessment orders/proposition notices are liable to be quashed. In support of the above submissions, they relied upon the following decisions :

(1) B. Girija v. State of Karnataka .

(2) Devi Dass Gopal Krishnan v. State of Punjab : [1967]3SCR557 .

(3) I.T.C. Classic Finance and Services v. Commissioner of Commercial Taxes [1995] 97 STC 330 .

(4) Sir Shadi Lai and Sons v. Commissioner of Income-tax : [1987]169ITR510(SC) .

(5) Ganesh Dass Sreeram v. Income-tax Officer : [1988]169ITR221(SC) .

(6) Government of Andhra Pradesh v. Guntur Tobaccos Ltd. : [1965]2SCR167 .

(7) Everest Copiers v. State of Tamil Nadu : AIR 1996 SC2662 .

(8) Commissioner of Sales Tax, Maharashtra State, Bombay v. Gordhandas Tokersey .

(9) Electro Enterprises v. Commissioner of Sales Tax, Maharashtra State, Bombay [1995] 98 STC 116 (Bom).

(10) State of Karnataka v. Sanjiv Mehra .

(11) State of Gujarat v. Minu Chemical Pvt. Ltd. .

(12) Tejraj Parasmal v. State of Orissa [1995] 96 STC 464 (Ori).

10. The petitioners in Writ Petition Nos. 13582 to 13586 of 1993, 18435, 18436 and 6916 of 1994, have challenged the orders of assessment on the ground that the assessing authorities have no power to pass the impugned orders Under Section 28(6) of the Act. They also submitted that the impugned circular issued by the Commissioner clarifying the maintenance of instruments, equipments, appliances or plant and machinery, is also beyond the scope of Section 5B of the Act.

11. In opposition of the submission made by the learned counsel for the petitioners, Sri Shivayogiswamy, learned Government Pleader, submitted that entry 21 of the Sixth Schedule appended to the Act is constitutionally valid and is fully within the power of the State Legislature. He pointed out that what has been provided under entry 21 of the Sixth Schedule appended to the Act is to provide for levy of tax in respect of the transfer of property in goods involved in servicing and maintaining instruments, equipments, appliances or plant and machinery. According to the learned Government Pleader, it is only in cases where there is transfer of property in goods involved in execution of works contract in respect of servicing and maintenance of instruments, equipments, appliances or plant and machinery, the dealer is liable to pay tax ; and not in cases where the contract is pure and simple, which relates to servicing and maintenance of instruments, equipments, appliances or plant and machinery where there is no transfer of property in goods involved. It was his further submission that whether there is a transfer of property in goods or not, is a matter which has to be enquired into and decided on the basis of the materials to be considered by the assessing authority in each case. Entry 21, which provides for levy of tax on transfer of property in goods involved in execution of works contract relating to service and maintenance of instruments, equipments, appliances or plant and machinery, cannot be struck down as ultra vires either Section 5B of the Act or Article 466 of the [Constitution of India](#). In support of his submission, he relied upon the decision of the Supreme Court in the case of Gannon Dunkerley & Co. v. State of Rajasthan [1993] 88 STC

204. He also pointed out that in so far as the orders of assessment impugned in these petitions are concerned, there is absolutely no justification for this Court to interfere with the said orders and it is open to the petitioners to challenge the impugned orders by preferring an appeal or revision as provided under the Act, He further pointed out that whether each of the petitioners is liable for payment of tax under the Act ; and whether there is transfer of property in goods in respect of the transaction carried on by them, is a matter which requires to be considered either by the assessing authorities under the Act or by the appellate authority, as the case may be, in an appeal ; and, therefore, this Court should not examine the said questions, which are disputed questions of fact, in exercise of its jurisdiction either Under Article 226 or Under Article 227 of the [Constitution of India](#).

12. In the light of the rival submissions made by learned counsel appearing for the petitioners and the learned Government Pleader, the questions that would arise for my consideration in these petitions, are--

(1) Whether entry 21 of the Sixth Schedule appended to the Act is ultra vires either Section 5B of the Act or Article 466 of the [Constitution of India](#) ?

(2) Whether the circular dated August 3, 1989 issued by the Commissioner clarifying the maintenance of instruments, equipments, appliances or plant and machinery, is beyond the scope of Section 5B of the Act ?

(3) Whether the orders of assessment impugned in each of these petitions are liable to be quashed in exercise of the power conferred on this Court either Under Article 226 or Under Article 227 of the [Constitution of India](#) ?

13. It may be useful to refer to Clause (12) and Sub-Clause (b) of Clause (29A) of Article 466 of the [Constitution of India](#), sections 2(v-i), 2(m) and 5B of the Act and entry 21 of the Sixth Schedule appended to the Act, which will have bearing to consider the questions that would arise for consideration in these petitions. The said provisions read as follows :

(a) Clause (12) of Article 466 of the Constitution reads as under :

'(12) 'goods' includes all materials, commodities, and articles.' (b) Sub-Clause (b) of Clause (29A) of Article 466 of the Constitution reads as hereunder :

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

(a)

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

(c) Sections 2(v-i), 2(m) and 5B of the Act, read as under :

'2(v-i) 'works contract' includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property.'

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

'5-B. Levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts.--Notwithstanding anything contained in Sub-section (1) or Sub-section (3) or subsection (3C) of Section 5, but subject to Sub-section (4), (5) or (6) of the said section, every dealer shall pay for each year, a tax under this Act on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in column (3) of the said Schedule.'

(d) Entry 21 of the Sixth Schedule to the Act reads as hereunder : '21. Full service and maintenance of instruments, 10 percent.' equipments, appliances or plant and

machinery.

14. Now, let me examine the questions that would emerge for consideration in these petitions.

Re. Question (1) :

15. Having given my anxious consideration to the submission made by the learned counsel for the petitioners that entry 21 of the Sixth Schedule appended to the Act is ultra vires Section 5B of the Act and Article 466 of the Constitution, I am of the view that there is absolutely no merit in the said contention. It is no doubt true that it is not permissible for the State to levy sales tax under the Act on the taxable turnover of an assessee in execution of works contract on an item where there is no transfer of property in goods. In other words, it is not permissible for the State to levy tax in execution of works contract, like, servicing and maintenance of instruments, equipments, appliances or plant and machinery if, in execution of the said works contract, there is no transfer of property in goods. Section 5B of the Act provides for payment of tax by every dealer on turnover of transfer of property in goods (whether as goods or in some other form) involved in execution of works contract mentioned in column 2 of the Sixth Schedule. The same is the position which flows from a reading of Sub-Clause (b) of Clause (29A) of Article 466 of the [Constitution of India](#). Therefore, a combined reading of Sub-Clause (b) of Clause (29A) of Article 466 of the [Constitution of India](#) and Section 5B of the Act makes it clear that in the matter of execution of works contract, the tax is leviable Under Section 5B of the Act on the taxable turnover of an assessee only in respect of transfer of property in goods (whether as goods or in some other form) involved in execution of works contract mentioned in column 2 of the Sixth Schedule. Therefore, the vires of entry 21 of the Sixth Schedule appended to the Act has to be considered in the back drop of the charging provision provided Under Section 5B of the Act. In my view, the reading of Section 5B of the Act along with entry 21 of the Sixth Schedule appended to the Act makes it explicit that the tax is leviable on taxable turnover of an assessee in respect of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract. Section 5B of the Act, as noticed by me earlier, empowers levy of tax

under the Act on a taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column 2 of the Sixth Schedule at the rates specified in the corresponding entry in column 3 of the said Schedule. Therefore, tax is leviable on taxable turnover relating to transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract relating to full service and maintenance of instruments, equipments, appliances or plant and machinery. There may be cases where works contract, involves only service and maintenance of instruments, equipments, appliances or plant and machinery where there is no transfer of property in goods involved, or there may be cases where, in service and maintenance of instruments, equipments, appliances or plant and machinery, transfer of property in goods involved is so negligible which cannot be treated as a transfer of property in goods involved in the execution of works contract, like, the ink used by an artist, or there may be works contract relating to service and maintenance of instruments, appliances or plant and machinery, by replacement of one or some of the parts of an equipment, appliances or plant and machinery or replacement of a major portion of the parts of the instruments, equipments, appliances or plant and machinery or the entire equipments, appliances or plant and machinery. In the last two out of four instances given above (except the case where works contract only involves service and maintenance of instruments, equipments, appliances or plant and machinery without there being transfer of property in goods), there would be transfer of property in goods involved in the execution of works contract relating to full service and maintenance of instruments, equipments, appliances or plant and machinery. In such cases, is it possible to take the view that merely because the contract relating to full services and maintenance of instruments does not specifically provide for payment of price separately for replacement of the parts of the instruments, equipments, appliances or plant and machinery and it is a pre-determined one composite contract for payment of charges towards services rendered involving labour and also towards the cost of the replacement of parts? In my view, the answer should be in the negative. So long as there is transfer of property in goods involved in the execution of works contract relating to service and maintenance of instruments, equipments, appliances or plant and machinery in terms of Section 5B of the Act,

a dealer is liable to pay tax under the Act on his taxable turnover of transfer of property in goods involved in the execution of works contract. There is no escape for a dealer from payment of tax, however, cleverly or intelligently the terms of a contract might have been couched by the dealer with his customers. The resulting position that would flow from the terms of the contract and the nature of the transaction in each case, is a matter which is required to be considered on appreciation of the material on record along with the attendant circumstances relating to the transaction in question. It is necessary to point out that in business transactions, the works contracts are frequently not recorded in writing setting out all the covenants and conditions thereof, and the terms of the contract had to be gathered from the evidence and attendant circumstances. The question in each case is one about the true agreements between the parties and the terms of the agreement must be deduced from a review, as already pointed out by me, of all the attendant circumstances. As a result of the 46th Amendment to the Constitution made by inserting Clause (29A) Under Article 466, the contract, which was single and indivisible, has been altered by a legal fiction into a contract, which is divisible into one for sale of goods and other for supply of labour and services and as a result such a contract which was single and indivisible has been brought at par with a contract containing two separate agreements. [See : Builders' Association of India v. Union of India : [1989]2SCR320 and Gannon Dunkerley & Co. v. State of Rajasthan : (1993)1SCC364]. In these petitions, I do not propose to examine the terms of the contracts sought to be relied upon by the petitioners as the decision to the challenge made to the validity of entry 21 of the Sixth Schedule appended to the Act, does not depend upon the terms of the contract sought to be relied upon by the petitioners. What is the nature of services rendered and maintenance of instruments, equipments, appliances or plant and machinery carried out, is required to be examined by the assessing authority in each case on the basis of the materials that is placed before it by the assessee including the contracts sought to be relied upon by the asses sees-petitioners. Entry 21 of the Sixth Schedule cannot be read in isolation from Section 5B of the Act. As observed by me earlier, if entry 21 of the Sixth Schedule appended to the Act is read in conjunction or along with Section 5B of the Act, it leaves no doubt that the tax is leviable only on transfer of property in goods involved in the

execution of works contract. It may be in the nature of full service and maintenance of instruments, equipments, appliances or plant and machinery without involving the transfer of property in goods or it may be in the nature of full service and maintenance of instruments, equipments, appliances or plant and machinery with transfer of property in goods involved in the execution of works contract. Therefore, I am unable to accede to the persuasive submission of the learned counsel for the petitioners that entry 21 of the Sixth Schedule authorises levy of sales tax on services and maintenance of instruments, equipments, appliances or plant and machinery where there is no transfer of property in goods involved and as such, the said entry is liable to be struck down.

16. However, it is relevant to notice the submission of Sri Chander Kumar that in the repair of instruments, there is no transfer of property in goods. I am unable to accede to the said submission. It cannot be said as an absolute proposition that in all cases, the repair of an instrument, equipment, appliances or plant and machinery does not involve in any transfer of property in goods. If the repair of an instrument requires replacement of parts either wholly or partly of an instrument, in my view, there is a transfer of property in goods as the replacement of such parts would be 'goods' within the meaning of Clause (12) of Article 466 of the Constitution and also Section 2(m) of the Act. As noticed by me earlier, Clause (12) of Article 466 of the Constitution provides that 'goods' includes all materials, commodities and articles. It is an inclusive definition. The definition of 'goods' provided Under Section 2(m) of the Act is very wide in terms and it makes all kinds of movable property other than newspapers, actionable claims, stocks and shares and securities, including those goods to be used in the fitting out, improvement or repair of movable property as goods. Therefore, I am unable to accept the submission of the learned counsel appearing for the petitioners that there is no element of transfer of goods involved in the execution of work relating to full service, maintenance of instruments, equipments, appliances or plant and machinery.

17. It is also necessary to point out that fairly under similar circumstances where the constitutional validity of entry 25 of the Sixth Schedule, which relates to levy of tax under the Act on the taxable turnover of a dealer relating to transfer of property

in goods involved in execution of work relating to processing and supply of photographs, photo prints and photo negatives, was called in question in the case of *Classic Colour Lab v. Deputy Commissioner of Commercial Taxes* (Assessments-II, Mysore (Writ Petition No. 31660 of 1997 Reported in and connected matters disposed of on November 26, 1997), after elaborately considering the decisions cited at the Bar, I had negatived the contention of the petitioners in the said petitions that entry 25 of the Sixth Schedule appended to the Act, is ultra vires either Section 5B of the Act or Article 466 of the [Constitution of India](#). At paragraph 12(a) (10a in STC) of the said judgment, I have observed as follows :

'Section 5-B of the Act provides for payment of tax by every dealer on turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts mentioned in column

(2) of the Sixth Schedule. Therefore, there cannot be any doubt that the tax could be levied in the execution of works contract only on transfer of property in goods. Column

(2) of entry 25 of the Schedule provides for levy of tax on processing and supplying of photographs, photo prints and photo negatives. Whether, in a given case, processing and supplying of photographs, photo prints and photo negatives results in the transfer of property in the goods or not, is a matter of verification on the basis of the returns filed by the assessee. It may vary from assessee to assessee depending upon the nature of the business carried on by each assessee. Merely on the basis of the observations made by the Supreme Court in *B.C. Kame's case* : [1977]2SCR435 , it is not possible to strike down the entry so long as the entry provides for levy of tax on transfer of property in goods. Entry 25 has to be read along with Section 5B of the Act. If so read, it is clear that the entry does not permit for levy of tax on the services rendered or exhibition of skill or labour involved in the execution of the work. It only provides for levy of tax on transfer of property in the goods in execution of the works contract. This is permissible under Sub-Clause (b) of Clause (29A) of Article 466 of the Constitution as well as Under Section 5B read with entry 25 of the Schedule to the Act. Further,

to what extent, the material is used to produce a finished goods depends upon the nature of the work executed by each of the petitioners or an assessee who carries on business in processing and supplying of photographs, photo prints and photo negatives. The principle laid down, in my view, in B.C. Kame's case : [1977]2SCR435 , has to be understood in the back drop of the amendment made to Article 466 of the Constitution by inserting Clause (29A) by means of the Constitution (46th Amendment) Act. In B.C. Kame's case : [1977]2SCR435 , the Supreme Court proceeded to observe that after buying photographic goods, the photographer sells them to his customers or uses them in three ways, i.e.,

(1) in taking photographs and supplying prints thereof,

(2) in making enlargements for the clients who bring their own negatives, and

(3) in preparing positive prints of the same size from the negatives brought by the clients. The Supreme Court, in the said case, has no doubt taken the view that when a photographer undertakes to photograph, develop the negative, or do other photographic work and thereafter supplies the prints to his customers, he cannot be said to enter into a contract for sale of goods and the contract, on the contrary, is for use of skill and labour by the photographer to bring about a desired result. In the said case, it is further held that taking of photographs and supplying of prints thereof neither results in sale of photographs nor can it be treated as sale of photographs for the reason that it is not the intention of the customer to buy a photograph from the photographer as a photograph has no marketable value. However, in the said case, the Supreme Court did not consider the work relating to enlargement of photographs from the negatives brought by the customer and preparing the positive prints of the same size from the negatives brought by the customers. The effect of processing and supplying of photographs, photo prints and photo negatives made available by the customer, was also not considered by the Supreme Court in B.C. Kame's case : [1977]2SCR435 . It may be that in cases where a photographer undertakes to take photograph, develop the negative or do photographic work and thereafter supply prints to his customer, he cannot be said to have entered into a contract for sale of goods. In such situation, the contract has to be treated as one for use of skill and labour by the photographer to bring

about the desired result. In the year 1982, in view of the law laid down by the Supreme Court in the case of State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. : [1959]1SCR379 where the Supreme Court took the view that a works contract was an indivisible contract and the turnover of the goods used in the execution of the works contract would not be exigible to sales tax, the Parliament passed the 46th Amendment amending the Constitution in several respects in order to bring many of the transactions in which property in goods passed, but are not considered as sales, for the purpose of levy of sales tax within the scope of the power of the State to levy the sales tax. Thus, after the 46th amendment, the works contract, which was an indivisible one, is by a legal fiction altered into a contract, which is divisible into one for sale of goods and the other for supply of labour and service, enabling a State to levy sales tax on value of goods involved in a works contract. In the light of the said amendment, Section 5B came to be incorporated into the Act. In view of the decisions of the Supreme Court in Builders Association of India v. Union of India : [1989]2SCR320 , Gannon Dunkerley & Co. v. State of Rajasthan [1993] 88 STC 204 and Builders' Association of India v. State of Karnataka [1993] 88 STC 248, it is now well-established that it is competent for the State Legislature to impose tax on transfer of property in goods involved in the execution of a works contract and the petitioners can escape liability only if they are able to establish that the photographic work done by them will not come within the term 'works contract'. As stated by me earlier, these are the matters which are required to be examined by the assessing authority on the basis of the returns filed by the petitioners and depending upon the nature of the work carried out by them. It is not possible to generally lay down that in all cases of processing and supplying of photographs, photo prints and photo negatives, there is no element of works contract involved and there is no transfer of property in goods. Therefore, I am of the view that the petitioners cannot receive much assistance from the law laid down by the Supreme Court in B.C. Kame's case : [1977]2SCR435 , in support of their plea that the impugned entry is liable to be struck down as unconstitutional.'

Further, in the said decision, I have also taken the view that merely because some skill is used or some service is rendered in the execution of works contract, that itself is not a ground to strike down entry 25 of the Sixth Schedule appended to the

Act so long as the said entry intends to levy tax on transfer of property in goods, which are used for the execution of works contract by use of skill or rendering some service. The principle laid down in *Classic Colour Lab v. Deputy Commissioner of Commercial Taxes (Assessments-II, Mysore)*, in my view, would fully apply to negative the contention advanced by the learned counsel for the petitioners with regard to the challenge made to the constitutional validity of entry 21 of the Sixth Schedule appended to the Act. Therefore, I am of the view that the first question has to be answered against the petitioners. In the light of the discussion made above, I am of the view that the decision relied upon by the learned counsel for the petitioners is of no assistance to them and I find it unnecessary to refer to the said decisions in details as they do not have direct bearing to the challenge made to the validity of entry 21 of the Sixth Schedule appended to the Act.

Re. Question (2) :

18. The clarification issued by the Commissioner only clarifies that maintenance of computers involving transfer of goods in the course of the contracts of maintenance under entry 21 of the Sixth Schedule is liable for payment of tax at 10 per cent. The impugned clarification only states that if any contract relating to maintenance of computers involves transfer of property in goods, the same is liable for payment of tax under the Act. The clarification given by the Commissioner is in conformity with the provisions of Section 5B read along with entry 21 of the Sixth Schedule to the Act. I do not find any merit in the submission made by the learned counsel appearing for some of the petitioners that the clarification issued by the Commissioner, which has been produced as annexure D in Writ Petition No. 6916 of 1994, is liable to be quashed. Therefore, question No. (2) is also held against the petitioners.

Re. Question (3) :

19. Even on question No. (3), I am of the view that the petitioners are not entitled for the reliefs sought for by them.

(a) In Writ Petition Nos. 13582 to 13586 of 1993, the petitioners have sought for the quashing of the orders of assessment dated April 27, 1993 for the assessment years 1988-89 to 1992-93, copies of which have been produced as annexures K, K1 to K4, made by the Deputy Commissioner of Commercial Taxes (Intelligence) issued Under Section 28(6) of the Act. Since I have upheld the constitutional (validity of entry 21 of the Sixth Schedule, appended to the Act, the challenge made to the orders of assessment annexures K, K1 to K4 dated April 27, 1993 on the ground that entry 21 of the Sixth Schedule is beyond the competency of the State Legislature and consequently the impugned orders of assessment are illegal, is liable to be rejected. However, in so far as the contention of the petitioners in these petitions that the said orders came to be passed without the authority of law and it was beyond the competency of the first respondent in the said writ petitions, to pass the said orders is concerned, it is necessary to point out that a right of appeal is provided against the said orders. All the contentions urged on the merits challenging the said orders can be legitimately urged before the appellate authority. I do not find any justifiable ground to examine the merits of the contentions with regard to the challenge made to the orders of assessment, annexures K, K1 to K4, in exercise of my extraordinary jurisdiction either Under Article 226 or Under Article 227 of the [Constitution of India](#). The challenge made by the petitioners to the orders of assessment is liable to be rejected on the ground that the petitioners have an alternate remedy provided under the Act. The same is the position in respect of the challenge made to the order, annexure E dated June 21, 1993 and the order, annexure G dated December 16, 1991 impugned in Writ Petition Nos. 18435 and 18436 of 1994 and also the order, annexure F dated December 28, 1993 impugned in Writ Petition No. 6916 of 1994.

20. However, all the contentions urged by the petitioners on the merits of the orders of assessment impugned are left open to be urged before the appropriate appellate authorities and the petitioners are given liberty to file appeals against the said orders. However, it is needless to observe that if the petitioners file necessary applications for condonation of delay, the appropriate appellate authority will be taken into consideration the pendency of these petitions before this Court, while considering the prayer of the petitioners for condonation of delay in preferring the appeals. Further, in the event of the petitioners filing appeals, the appellate

authorities are directed to dispose of the appeals as expeditiously as possible and at any event of the matter, not later than three months from the date of the presentation of the appeals. Further, wherever impugned notices are issued, the petitioners are given four weeks' time from today to file their objections.

21. In the light of the discussion made above, these petitions are liable to be dismissed. Accordingly, they are dismissed. However, no order is made as to costs.

22. Sri Shivayogiswamy, learned High Court Government Pleader, is permitted to file his memo of appearance within four weeks from today.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com