

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

JUDGMENT:
J U D G M E N T

(With C. A. Nos. 2584, 2585 and 2586 of 1998)

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, Madhya 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.