

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
SALES TAX REFERENCE NO.8 OF 2000  
IN  
REFERENCE APPLICATION NO.56 OF 1991**

The Commissioner of Sales Tax  
Maharashtra State, Bombay  
having his office at 8<sup>th</sup> floor,  
Vikrikar Bhavan, Mazgaon,  
Bombay 400 010.

...Applicant.

v.

M/s. Rolta Computer & Industries  
Private Limited having their  
place of business at 2<sup>nd</sup> floor,  
22<sup>nd</sup> Street, MIDC, Marol,  
Andheri (East), Bombay 400 053

...Respondent.

Mr.V.A.Sonpal, AGP For the Applicant.

Mr.C.B.Thakkar, adv. for the Respondent.

**CORAM : F.I. REBELLO &  
J.H. BHATIA, JJ.  
DATED : 19TH JUNE, 2009**

**Judgment: (Per J.H.Bhatia, J.)**

1           The Commissioner of Sales Tax filed the application seeking direction to the Maharashtra Sales Tax Tribunal to refer the following questions to the High Court under Section 61(1) of the Bombay Sales Tax Act.

“1 Whether on the facts and in the circumstances of the case and on a true and correct interpretation of section 2 (10) of the Maharashtra Sales Tax on the Transfer of the Right to use any goods for any purpose Act, 1985, the Tribunal was justified in holding that the impugned transaction does not amount to a sale under the provisions of the Lease Act ?

2 Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that even after consideration that the constructive possession of the computer being given to the contractee mentioned in the impugned invoice the computer continues to be under effective control of the respondents contractor and, therefore, transfer of right to use the computer by the contractee could not be held to have taken place as covered by the term “sale” occurring in the Lease Act ?

This Court directed the Tribunal to send statement of the facts to the Court and the application was converted into Sales Tax Reference.

2 Respondents are engaged in the business of computers data processing and software consultancy. They had computers with required gadgets at their site at MIDC, Marol, Andheri (E). ONGC having their office at Vasudhara, Bandra (E) had an agreement with the respondents to get their quotation inventory and financial accounting applications processed from the respondents on certain terms and conditions.

Respondents charged Rs.2500/- per hour for CPU. Respondents were in doubt as to whether transaction would involve payment of tax under the Maharashtra Sales Tax on the transfer of the right to use any goods for any purposes Act, 1985 (In short 'The Act'). Therefore, respondents made an application before the Commissioner of Sales Tax to determine the question as to whether the transaction would be taxable under the said Act. The Commissioner held that as soon as the ONGC is allowed to use the terminal, transfer of right to use to the computer starts and it continues till the use of the terminal is continued and, therefore, it attracts the sales tax under the said Act. Being not satisfied with the decision, the respondent preferred the appeal no.78 of 1989 before the Maharashtra Sales Tax Tribunal. The Tribunal allowed the appeal and set aside the order passed by the Additional Commissioner of Sales Tax. Hence, this reference at the instance of the Commissioner of Sales Tax.

3 Provision is made for the purpose of levy of tax under Sections 3 and 4 of the Act. Section 3 and 4 read as follows:

**“3 Incidence of tax.---** Subject to the provisions contained in this Act and the rules made thereunder a tax shall be leviable on the turnover of sales in respect of:-

- (i) the transfer of the right to use any goods agreed to before

the appointed day but the right to use is exercised on or after the appointed day;

(ii) the transfer of right to use any goods agreed to prior to the appointed day, and where in the right to use has been continued after the appointed day, to the extent of the sale price received or receivable in respect of such use on or after the appointed day; and

(iii) the transfer of right to use any goods agreed to on or after the appointed day.”

4. Levy of tax.--- There shall be levied a tax on the turnover of sales in respect of the transfer of the right to use goods specified in the Schedule, at such rate not exceeding fifteen Paise in the rupee, as the State Government may by notification in the Official Gazette, specify from time to time and different rates may be specified for different goods specified in the Schedule.

Section 2(10) defines ‘Sale’. It reads thus:

“2(10) “sale” means the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or any other valuable consideration and the word “sell” with all its grammatical variations and cognate expressions, shall be construed accordingly.”

From the definition of word 'Sale', it becomes clear that sale means transfer of the right to use any goods for any purposes whether for specified period or not. Mainly the question is whether under the agreement between the respondent and ONGC, any "transfer of the right to use any goods" had taken place.

4 To understand the definition and to find out whether transaction between the respondents and the ONGC would attract sales tax under the said Act, it is necessary to look the facts which are no more in dispute. The Tribunal has quoted the facts as follows in paragraph 16:

"16. It is an admitted position that the computer of the appellants is fixed at one place. The computer is a moveable property. The appellants have engaged their operators to work with the computer. The appellants pay the salary of the operators. The appellants pay the electricity charges required for running the computer. At no point of time physical possession, or effective control of the computer is delivered to the ONGC. The officials of the ONGC bring their floppy and get the outputs from their computer. If the computer goes out of order, naturally, the owner in possession of the same will be required to repair the same. By no stretch of imagination, ONGC would be required to pay the repairing charges."

5                    In **Bharat Sanchar Nigam Limited and Another v. Union of India and Others [2006] 145 Sales Tax Cases 91 (S.C.)**, the Supreme Court was required to consider whether the delivery of goods is necessary for effecting right of transfer to use the goods. Their Lordships observed as follows in paragraphs 72, 75 and 76.

“72. In the State of U.P. v. Union of India (2003) 3 SCC 239 it was also held:

“Handing over of the possession is not sine qua non of completing the transfer of the right to use any goods, as was held by a Constitution Bench of this Court in 20<sup>th</sup> Century Finance Corpn. Ltd. v. State of Maharashtra (2000) 6 SCC 12..... Once DoT connects the telephone line of the assigned number of the subscriber to the area exchange, access to other telephones is established. There cannot be denial of the fact that giving such an access would complete the transfer of the right to use the goods.”

75. In our opinion, the essence of the right under article 366(29A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to

use those goods, would not arise.

*(emphasis supplied)*

76. In *State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd.* (2002) 3 SCC 314, it was claimed by the sales tax authorities that the transaction by which the owner of certain machinery had made them available to the contractors was a sale. The court rejected the submission saying that:

“.....the transaction did not involve transfer of right to use the machinery in favour of contractors..... The effective control of the machinery even while the machinery was in use of the contractor was that of the respondent-company, the contractor was not free to make use of the machinery for the works other than the project work of the respondent or.....(para 4, page 315)”

In concurring but separate judgment, His Lordship Mr. Justice Dr.AR

Lakshmanan observed as follows in paragraph 98:

“98. To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

(a) There must be goods available for delivery;

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

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

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

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

6 From these observations, it is clear that even though the actual delivery of the goods is not necessary for effecting transfer of right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. In the present case, during the relevant time, computers and other necessary apparatus were available at the time of the agreement. They, being moveable properties, were deliverable. Question is whether they were also delivered at some stage. Delivery of the goods at some stage is very important. In view of the observations of Their Lordships in paragraph 75, if no delivery has taken place at any stage, this requirement would be missing and it would be difficult to say that transfer of right to use the goods was effected. List of goods is given in the schedule to which this Act is applicable. As per the schedule, transfer of the right to use video cassette, television sets,



video cassette recorders, video cassette players or projectors, vehicles like trucks, tractors, buses, jeeps, cars, 3 wheelers, etc. are covered. A video grapher or the photographer may be engaged to cover certain function. Naturally the video grapher or photographer would take his instruments like camera with him to cover the programme and prepare photographs or the videofilms. Normally the instruments are operated by himself or his assistants. The instruments are never delivered to the customer during the period the programme is being covered. The said photographer or videographer may, during that period, use instruments only for that particular programme but the right to use the said instruments are not given to the customer whose programme is being covered. Similarly a truck may be engaged for transportation of goods by some person by paying fare or freight to the truck owner. Said truck owner will use the vehicle from the time of loading till its unloading at the destination for that particular assignment but the truck is operated and driven either by himself or his employee. The vehicle is not delivered to the person, who has hired the truck for the purpose of transportation of the goods. Similarly, a person may hire bus for taking marriage party from one place to another. The owner of the bus may provide the bus for that purpose and take the passengers to the

destination. However, the bus is driven and operated by the employees of the bus owner. The vehicle is never delivered to the hirer. In all these circumstances, delivery of the goods at any stage of time is missing. As pointed out by Their Lordships of the Supreme Court goods must have been delivered at some stage of time and, the transferee should have legal right to use the goods and for the period during which transferee has such legal right, it has to be to the exclusion of the transferor.

7           In the present case, from the facts noted earlier, it is clear that the goods, i.e., computers and terminals were always in possession of the respondents. They were never delivered or handed over to the ONGC. It may be that as per the requirement of ONGC, fixed time was assigned to them and during that fixed time of the day, staff members of ONGC would come to the office of the respondents to get their work done but during all that period, computers would be operated by the employees of the respondents and not by the employees of the ONGC. Merely because a person agrees to provide service to a particular customer during a particular period of time of day to the exclusion of all other customers for the purpose of convenience, it does not mean that goods have been actually delivered to that particular customer to the exclusion of not only other customers but also to the exclusion of owner

himself. Nature of the contract and the transaction between the respondents and the ONGC was nothing more than service contract whereby certain services were provided by the respondents to the ONGC. There is nothing to show that the constructive possession of the computers and other instruments was with ONGC at any time. To that extent, the question no.2 is not correct. In view of the language of Sections 3 and 4 tax shall be leviable on the turnover of sales in respect of *transfer of right to use any goods*. Unless there is transfer of right to use any goods, the provisions of the said Act will not be attracted and sales tax cannot be levied on such transactions. Taking into consideration the nature of the contract between the respondents and the ONGC and the legal position, it must be held that the Tribunal correctly interpreted the provisions of Section 2(10) of the Act while holding that the transaction is not taxable.

8 For the aforesaid reasons, we answer the questions in affirmative, i.e., in favour of the respondents and against the revenue.

**(J.H. BHATIA,J.)**

**(F.I. REBELLO,J.)**