

Advanced Contract, Tendering and Public Procurement
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Lecture 41
Special Contracts: Sale of Goods - Part 04

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Whether IPR and software are goods?



- *Commissioner of Sales Tax v Duke & Sons (P) Ltd. [1999 (112 STC 370]*
 - Under The Maharashtra Sales Tax on the Transfer of the Right to use any Goods, 1985 : is transfer of trademark is taxable as goods?
- *TCS v State of A. P AIR 2005 SC 371[5 judges]*
 - Relied on *St Albans City and District Council v International Computers Ltd. 1996 4 All ER 481*



Taking this discussion forward and trying to evaluate modern elements of understanding what are “goods” Today to say goods are movable property, one of the interesting aspects for us to consider is intellectual property. Now intellectual property is new kind of property, it is intellectual in the sense that it is something to create, unlike what was traditional property in terms of movable and immovable, land and house. Movable was everything that was tangible in nature, but intellectual property may not actually have tangibility.

Yet it is called property and have been given the rights such as patent, trademark and copyright traditionally as individual rights or even industrial design as the case may be. Then there are community rights like say geographical indication and so on and so forth. so, including plant varieties and others. So, there are so many of these intellectual property rights that can be created and whether IP can be considered as goods. Now, this is a question that has been very important because of several reasons.

First and foremost, to talk about intellectual property, having attributes of property and if it has economic value (which intellectual property definitely has) because it is something that to be exploited in the market, you can make economic gains from the same. So, the first

question that people did raise is, can I pledge these intellectual properties to the bank and raise some kind of loan. To the discussion on pledge, pledge was only a goods, mortgage is immovable mostly and pledge is of intellectual property. It can not only be pledged, but please note it can be sold or there can be imposition of sales tax as well. The word sale under intellectual property usually is commonly used is “assignment or licensing” as the case may be. The licensing is supposed to be kind of the right to use whereas assignment is like a sale value not only transfer, the right to use, but also transfer the rights absolutely.

So, the question has been answered by the judges and they have said that any transfer of rights to use the intellectual property is considered as a deemed sale. Now, this is something that is brought about in the constitution amendment. Article 366 in the Constitution has said that if there is any transfer of “rights to use” that can also be considered as sale of goods and the state governments can actually index the sale. So, from a taxation perspective, intellectual property has been considered as movable property, this is something that can be taxed as well. So, it is to understand that the nature of modern property is to be considered here

Now, going further to the most probably amazing case or interesting case that one would like to read is the Tata Consultancy Services versus the State of Andhra Pradesh. Now, since this case decided in 2005, but the main contention of the issue in this case is whether software can be considered as good. The software is very integral (the recording on a software here it is called the Camtasia software, which NPTEL has subscribed to). This course is on a platform which is software and most of these companies say that the software “goods”. They reconsider that this is a product development. Once the software is developed and have to maintain it the services is upgraded, that’s the argument for software to be called as goods

Today most of the smartphone runs on software and then have antivirus as another additional product that is also given. Most of desktops have MS office, they may some kind of an Internet Explorer or Mozilla to actually run the system. Today in the phone, there is a software in terms of an app and download this app, payments are made on this app. So, the app is also w kind of software in which services are actually given to you.

So, the question is when these companies which are huge in number in terms of the kind of transaction value, the terms and conditions that they established the kind of economic consumer activity that they contribute to, you will notice that the software industry being so huge, the question very clearly says is, what kind of contracts are they making? And what kind of tax are these contracts are going to attract to?

So, the state comment said, look, software is goods, everything is goods for the state government. And hence they said look, we should be able to tax it. This is nothing but sale of goods and sales tax is applicable to software products, to which TCS, Tata Consultancy Services, they probably disagreed. The challenges they said was that only giving services of software, because they are writing a code and algorithm is being made and that is just being used, and it is not something that is tangibly delivered to the customer.

And hence, it is called the service and not sales. So, that was the argument of TCS and it went to the court and the court had to decide what are this software's actually doing. What are these companies doing? What are the nature of this contract that has been agreed to?

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Judgment of TCS

- It is submitted that the High Court correctly held that unbranded software was "undoubtedly intellectual property". 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.



Now, the court in this case at a huge length did discuss a lot of things and they brought in jurisprudence from other jurisdictions including the United States, where a similar challenge or a similar problem arises. Now, what the court do is they actually looked at “water” as some kind of analogy that can be drawn and compared to software, this would look water that is flowing freely river, it is not considered as goods until and unless it is actually drum or abstracted into cutting. Once water is put in the bottle and it is sealed and has a brand, this levy on water becomes goods. Hence once the software is branded, it is abstracted and it can be put in some kind of device like a bottle or a CD, it can be stored in that CD in terms of the number of MB or GB that it can be measured in terms of storability, then it can be processed, it can be dealt with or it can be transferred, so the CDs can be bought and sold.

The courts use this very interesting term called uncapped and capped. So, what is capped is definitely should be considered as goods because it has a marketability, it has a brand image, it can be sold off the shelf. And hence, in the TCS case, very interestingly, the court says that look, branding and unbranding is not so important, though in one sense it is, but what is important is that the software can deliver, transferred, store and process, then that will create the software to be goods. So, what was sold in the CD was considered by this court decision as goods and what was probably customized, maybe could be considered a service. So that is how the TCS judgment was evolved.

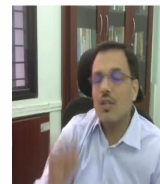
And there was a clear segregation of the software contracts as some that can be considered as goods and some can need not be considered as goods, because they are customized to the customer and these are mostly the contract that TCS was intervening. However, please note, the TCS judges did not look at the word sale. Now, this is important because sale is a yet another aspect because there can still be under the definition of goods. But the point is, under the definition of sale is it different test altogether? This is about about the attributes that thing needs to be considered as goods in the Sale of Goods Act.

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Goods



- Specific
- Unascertained
- Future goods



Note that goods are three things that one has to understand as goods. Goods can be divided into these categories. Certain goods are specific. There are goods that are present, they exist, they are identified and they are asserted. That is what a specific good is. There are specific goods because, you can have a sale of goods contract for specific goods because the goods that are existing know that have been identified to be given to the buyer. Now, say in a sack of rice required is just 5 kgs of rice and specify that these are the 5 kilograms that is being giving to the buyer, then it becomes specific goods otherwise the goods are unascertained.

The goods are present but not ascertained and not been identified as the goods. For example, to buy a car, there can be specifications. In the car showroom, which is the car that has been identified that would be the specific goods. Still than the cars are there. But which among them is what the seller intends to give becomes something that is relevant and important about how the contract of sale of goods has to be done. There is this very interesting concept of Sale of Goods Act of future goods. With an example of what is the contract forming can there be an agreement to sell for future goods? Under the Sale of Goods Act, there can be proper contract and that proper contract is meant to sell which that is enforceable, but how it is for future goods?

Now, until you have the goods ascertained and specific, there cannot be sale of goods. There can be an agreement to sell for future goods, but that cannot be sale of goods. So, sale of goods can only occur of goods that are ascertained, that are specified. That is how the condition under the Sale of Goods Act comes into place.

So, goods have to be ready for delivery. And please note the Sale of Goods Act also further acts and says that it is the duty of the seller to put the goods in a deliverable state. And to put the goods in a deliverable state is possible only after being ascertained what he intends to pass to the buyer. So, that is how the test on the sale of goods finally occurs.