IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

MONDAY, THE 24TH DAY OF JULY 2023/2ND SRAVANA, 1945

ST.REV.NO.2 OF 2016

AGAINST THE ORDER DATED 3.7.2015 IN T.A.NO.13/2014 OF THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL, ERNAKULAM

REVISION PETITIONER/RESPONDENT/RESPONDENT/REVENUE:

STATE OF KERALA
REPRESENTED BY THE DEPUTY COMMISSIONER (LAW)
COMMERCIAL TAXES, ERNAKULAM.

BY SRI.MOHAMMED RAFIQ, SPL. GOVERNMENT PLEADER

RESPONDENT/APPELLANT/APPELLANT/ASSESSEE:

SRI.V.C.VINOD
MANAGING DIRECTOR, SESAME SOFTWARE SOLUTION (P) LTD,
MEYON BUILDING, CALICUT-4.

BY ADV.SRI.SRI.C.M.ANDREWS
BY ADV.SMT.BOBY M.SEKHAR
BY ADV.SRI.SHYAM PADMAN
BY ADV.SRI.S.K.SAJU

THIS SALES TAX REVISION HAVING COME UP FOR HEARING ON 24.07.2023 ALONG WITH ST.REV.NO.3 OF 2016 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

MONDAY, THE 24TH DAY OF JULY 2023/2ND SRAVANA, 1945

ST.REV.NO.3 OF 2016

AGAINST THE ORDER DATED 3.7.2015 IN T.A.NO.18/2014 OF THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL, ERNAKULAM

REVISION PETITIONER/RESPONDENT/RESPONDENT/REVENUE:

STATE OF KERALA
REPRESENTED BY THE DEPUTY COMMISSIONER (LAW)
COMMERCIAL TAXES, ERNAKULAM.

BY SRI.MOHAMMED RAFIQ, SPL. GOVERNMENT PLEADER

RESPONDENT/APPELLANT/APPELLANT/ASSESSEE:

SRI.V.C.VINOD
MANAGING DIRECTOR, SESAME SOFTWARD SOLUTION (P) LTD.,
MEYON BUILDING, CALICUT 4.

BY ADV.SRI.SRI.C.M.ANDREWS
BY ADV.SMT.BOBY M.SEKHAR
BY ADV.SRI.SHYAM PADMAN
BY ADV.SRI.S.K.SAJU

THIS SALES TAX REVISION HAVING COME UP FOR HEARING ON 24.07.2023 ALONG WITH ST.REV.NO.2 OF 2016 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

MONDAY, THE 24TH DAY OF JULY 2023/2ND SRAVANA, 1945

ST.REV.NO.4 OF 2016

AGAINST THE ORDER DATED 3.7.2015 IN T.A.NO.16/2014 OF THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL, ERNAKULAM

REVISION PETITIONER/RESPONDENT/RESPONDENT/REVENUE:

STATE OF KERALA
REPRESENTED BY THE DEPUTY COMMISSIONER (LAW)
COMMERCIAL TAXES, ERNAKULAM.

BY SRI.MOHAMMED RAFIQ, SPL. GOVERNMENT PLEADER

RESPONDENT/APPELLANT/APPELLANT/ASSESSEE:

SRI.V.C.VINOD
MANAGING DIRECTOR, SESAME SOFTWARE SOLUTION (P) LTD.
MEYON BUILDING, CALICUT-4.

BY ADV.SRI.SRI.C.M.ANDREWS
BY ADV.SMT.BOBY M.SEKHAR
BY ADV.SRI.SHYAM PADMAN
BY ADV.SRI.S.K.SAJU

THIS SALES TAX REVISION HAVING COME UP FOR HEARING ON 24.07.2023 ALONG WITH ST.REV.NO.2 OF 2016 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

MONDAY, THE 24TH DAY OF JULY 2023/2ND SRAVANA, 1945

ST.REV.NO.5 OF 2016

AGAINST THE ORDER DATED 3.7.2015 IN T.A.NO.15/2014 OF THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL, ERNAKULAM

REVISION PETITIONER/RESPONDENT/RESPONDENT/REVENUE:

STATE OF KERALA
REPRESENTED BY THE DEPUTY COMMISSIONER (LAW),
COMMERCIAL TAXES, ERNAKULAM.

BY SRI.MOHAMMED RAFIQ, SPL. GOVERNMENT PLEADER

RESPONDENT/APPELLANT/APPELLANT/ASSESSEE:

SRI.V.C.VINOD
MANAGING DIRECTOR, SESAME SOFTWARE SOLUTION (P)
LTD,MEYON BUILDING, CALICUT-4.

BY ADV.SRI.SRI.C.M.ANDREWS
BY ADV.SMT.BOBY M.SEKHAR
BY ADV.SRI.SHYAM PADMAN
BY ADV.SRI.S.K.SAJU

THIS SALES TAX REVISION HAVING COME UP FOR HEARING ON 24.07.2023 ALONG WITH ST.REV.NO.2 OF 2016 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

MONDAY, THE 24TH DAY OF JULY 2023/2ND SRAVANA, 1945

ST.REV.NO.7 OF 2016

AGAINST THE ORDER DATED 3.7.2015 IN T.A.NO.17/2014 OF THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL, ERNAKULAM

REVISION PETITIONER/RESPONDENT/RESPONDENT/REVENUE:

STATE OF KERALA
REPRESENTED BY THE DEPUTY COMMISSIONER (LAW)
COMMERCIAL TAXES, ERNAKULAM.

BY SRI.MOHAMMED RAFIQ, SPL. GOVERNMENT PLEADER

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BY ADV.SRI.SRI.C.M.ANDREWS
BY ADV.SMT.BOBY M.SEKHAR
BY ADV.SRI.SHYAM PADMAN
BY ADV.SRI.S.K.SAJU

THIS SALES TAX REVISION HAVING COME UP FOR HEARING ON 24.07.2023 ALONG WITH ST.REV.NO.2 OF 2016 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

MONDAY, THE 24TH DAY OF JULY 2023/2ND SRAVANA, 1945

ST.REV.NO.8 OF 2016

AGAINST THE ORDER DATED 3.7.2015 IN T.A.NO.14/2014 OF THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL, ERNAKULAM

REVISION PETITIONER/RESPONDENT/RESPONDENT/REVENUE:

STATE OF KERALA
REPRESENTED BY THE DEPUTY COMMISSIONER (LAW),
COMMERCIAL TAXES, ERNAKULAM.

BY SRI.MOHAMMED RAFIQ, SPL. GOVERNMENT PLEADER

RESPONDENT/APPELLANT/APPELLANT/ASSESSEE:

SRI.V.C.VINOD
MANAGING DIRECTOR, SESAME SOFTWARE SOLUTIONS (P) LTD,
MEYONE BUILDING, CALICUT-4.

BY ADV.SRI.SRI.C.M.ANDREWS
BY ADV.SMT.BOBY M.SEKHAR
BY ADV.SRI.SHYAM PADMAN
BY ADV.SRI.S.K.SAJU

THIS SALES TAX REVISION HAVING COME UP FOR HEARING ON 24.07.2023 ALONG WITH ST.REV.NO.2 OF 2016 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O R D E R

A.K. Jayasankaran Nambiar., J.

These Sales Tax Revisions are preferred by the State against the common order passed by the Kerala Sales Tax Appellate Tribunal, Ernakulam, in T.A.Nos.13 to 18 of 2014. The common order was passed in six appeals, three of which pertain to assessments for the assessment years 2002-03, 2003-04 and 2004-05 respectively, and the other three of which pertain to penalties imposed on the respondent/assessee for the said years. The Tribunal, by the impugned order, allowed the appeals preferred by the assessee against the assessment orders as also the orders imposing penalty, and it is aggrieved by the same that the State is in revision before us through these S.T.Revisions.

2. The respondent/assessee was doing business in software. During the relevant period, computer software attracted tax @ 4% *ad valorem* in terms of Entry 56A of the First Schedule to the Kerala General Sales Tax Act [hereinafter referred to as the "KGST Act"]. The said entry was introduced into the KGST Act with effect from 1.4.2002. The respondent/assessee had not taken any

registration in respect of the sale of software affected by it, for it was under the impression that the tax liability in respect of the activity of developing and supply of customised software to its clients would only attract the levy of service tax and not sales tax. For not taking out the necessary registration under the KGST Act and paying tax in respect of the sale of customised software to its clients, penalty proposals were initiated by the Sales Tax Department for each of the assessment years aforementioned. Although the respondent/assessee preferred replies to the notices issued to it by the Department, contending therein that customised software was not goods, and that, in view of the service tax already paid by it, sales tax could not be demanded from it for the supply of customised software to its clients, the penalty proposals were confirmed by the Intelligence Officer at first instance, and by the First Appellate Authority in a further appeal carried by the respondent/assessee.

3. In the meanwhile, the assessments were also completed for the said assessment years by the Assessing Officer concerned based on the findings of the Intelligence Officer in the penalty proceedings. The assessment orders, although carried in appeal before the First Appellate Authority, did not meet with any degree of success since the First Appellate Authority confirmed the assessments made against the respondent/assessee. The

respondent/assessee therefore preferred second appeals before the Appellate Tribunal, which separately considered the appeals filed against the assessments and penalty proceedings and confirmed the findings of the First Appellate Authority and dismissed the appeals preferred by the respondent/assessee. Aggrieved by the said order of the Tribunal, the respondent/assessee approached this Court through revision petitions against the orders passed by the Tribunal in the penalty matters as also the assessment matters. The High Court, on that occasion, allowed the revision petitions preferred by the assessee and remitted the matter back to the Tribunal for a *de novo* consideration on merits.

4. In the *de novo* proceedings pursuant to the remand by this Court, the Tribunal, by the order impugned in these revisions, found that the decision of the Constitution Bench of the Supreme Court in **Tata Consultancy Services v. State of Andhra Pradesh – [(2005) 1 SCC 308]** was rendered in the context of "canned software", which was a reference to software not created for any particular consumer and which was available off the shelf. In other words, the Tribunal found that the judgment of the Supreme Court referred above had no application in cases of uncanned software which referred to software that was developed for a particular customer and which was not sold off the shelf.

Based on the said finding, the Appellate Tribunal found in favour of the respondent/assessee both on the aspect of leviability of sales tax on customised software as also on website development charges charged by the assessee on its customers. On finding that the assessments done against the assessee in respect of the aforesaid charges was not legally sustainable, the Tribunal proceeded to allow the appeals filed against the penalty orders as well, and resultantly, the assessee succeeded both against the assessment orders as also against penalty orders passed against him by the lower authorities.

5. In the Revisions before us, S.T.Rev.Nos.3, 4 and 7 of 2016 pertain to the assessments completed against the assessee and S.T.Rev.Nos.2, 5 and 8 of 2016 pertain to the penalty imposed on the assessee. At the very outset, we find that inasmuch as the very issue of taxability of customised software under the KGST Act was in a state of flux as, during the relevant time, there was ambiguity that prevailed in the trade as to whether it was service tax or sales tax that would be payable on the supply of customised software to clients, and further on account of the several rounds of litigation that ensued whereby the adjudicating authorities including the Appellate Tribunal found in favour of the assessee there is sufficient cause for deleting the penalty imposed on the assessee in the instant cases. As is well settled, penalty under a taxing Statute

is normally levied for wilful suppression or other like contumacious conduct on the part of the assessee in evading tax that is due to the Government. In a case like this, we cannot find the assessee guilty of any contumacious conduct that would warrant the imposition of a penalty on it. Resultantly, we have no hesitation in dismissing the S.T.Rev.Nos.2, 5 and 8 of 2016 that have been filed by the State seeking to set aside the impugned orders of the Tribunal that set aside the penalty orders issued against the assessee for the assessment years 2002-03, 2003-04 and 2004-05 respectively.

6. When it comes to S.T.Rev.Nos.3, 4 and 7 of 2016 preferred by the State against the order of the Tribunal that set aside the orders of assessment passed against the respondent/assessee for the assessment years 2002-03, 2003-04 and 2004-05 under the KGST Act, we find that the reasoning given by the Tribunal is that customised software developed and supplied to its clients by the assessee could not be brought to tax under the KGST Act since the Constitution Bench judgment of the Supreme Court in **Tata Consultancy [supra]** dealt only with canned software or software that was available off the shelf and not customised software. On a reading of the judgment of the Supreme Court in **Tata Consultancy [supra],** we find that the findings therein are clearly applicable not only to canned software

but also to uncanned or customised software. We might refer profitably to the findings at paragraphs 27, 78 and 81 of the judgment, where it is stated as follows:

> "**27.** In our view, the term "goods" as used in Article 366 (12) of the Constitution of India and as defined under the said Act is very wide and includes 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 program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. 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 program 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 programs have all these attributes.
>
> **78.** A software may be intellectual property but such personal intellectual property contained in a medium is bought and sold. It is an article of value. It is sold in various forms like - floppies, disks, CD-ROMs, punchcards, magnetic tapes, etc. Each one of the mediums in which the intellectual property is contained is a marketable commodity. They are visible to senses. They may be a medium through which the intellectual property is transferred but for the purpose of determining the question as regard

> leviability of the tax under a fiscal statute, it may not make a difference. A program containing instructions in computer language is subject matter of a licence. It has its value to the buyer. It is useful to the person who intends to use the hardware, viz., the computer in an effective manner so as to enable him to obtain the desired results. It indisputably becomes an object of trade and commerce. These mediums containing the intellectual property are not only easily available in the market for a price but are circulated as a commodity in the market. Only because an instruction manual designed to instruct use and installation of the supplier program is supplied with the software, the same would not necessarily mean that it would cease to be a 'goods'. Such instructions contained in the manual are supplied with several other goods including electronic ones. What is essential for an article to become goods is its marketability.
>
> **81.** It is not in dispute that when a program is created it is necessary to encode it, upload the same and thereafter unload it. Indian law, as noticed by my learned Brother, Variava, J., does not make any distinction between tangible property and intangible property. A "goods" may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods. Unlike the American Courts, Supreme Court of India have also not gone into the question of severability."

The aforesaid findings of the Supreme Court leave us in no manner of doubt that even a customised software will satisfy the definition of 'goods' for, it is evident that it has the attributes having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. Once the said attributes are seen satisfied in the software in question, then whether the software is treated as customised or non-customised, it would nevertheless be

categorised as 'goods' for the purposes of levy of tax. The said view of the Supreme Court has since been followed in later decisions including a recent decision of the Supreme Court in **Commissioner of Service Tax, Delhi v. Quick Heal Technologies Limited – [(2023) 5 SCC 469]**. We are therefore of the view that merely because the software developed by the respondent/assessee in the instant case was customised for a particular user and was not sold to other users, the charges collected from the customer cannot escape the levy of sales tax under the KGST Act. This is more so because the mere fact that it was customised for a particular user did not lead to the software ceasing to be goods for the purposes of levy of sales tax. Thus, we allow S.T.Rev.Nos.3, 4 and 7 of 2016, by answering the questions of law raised therein in favour of the Revenue and against the assessee. S.T.Rev.Nos.2, 5 and 8 of 2016 are dismissed by answering the questions therein in favour of the assessee and against the Revenue.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
MOHAMMED NIAS C.P.
JUDGE

prp/25/7/23

APPENDIX OF ST.REV.NO.2/2016

PETITIONER ANNEXURES:

Annexure A	A TRUE COPY OF THE ORDER DATED 30.01.2008 PASSED BY THE INTELLIGENCE OFFICER (IB), KOZHIKODE IN RESPECT OF THE YEAR 2002-03.
Annexure B	A TRUE COPY OF THE COMMON ORDER PASSED BY THE DEPUTY COMMISSIONER (APPEALS), COMMERCIAL TAXES, KOZHIKODE DATED 13.05.2009.
Annexure C	A CERTIFIED COPY OF THE ORDER OF THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL, ERNAKULAM IN TA NOS. 13/14 TO 18/14 DATED 03.07.2015.
Annexure C(a)	A TRUE COPY OF ANNEXURE C

APPENDIX OF ST.REV.NO.3/2016

PETITIONER ANNEXURES:

Annexure A	A TRUE COPY OF THE ASSESSMENT ORDER FOR THE YEAR 2004-05 PASSED BY THE COMMERCIAL TAX OFFICER, THIRD CIRCLE, KOZHIKODE
Annexure B	A TRUE COPY OF THE 1ST APPELLATE ORDER PASSED BY THE DEPUTY COMMISSIONER (APPEALS), COMMERCIAL TAXES, KOZHIKODE DATED 27/12/2010
Annexure C	A TRUE COPY OF THE COMMON ORDER DATED 3/7/2015 PASSED BY THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL

APPENDIX OF ST.REV.NO.4/2016

PETITIONER ANNEXURES:

Annexure A	A TRUE COPY OF THE ASSESSMENT ORDER FOR THE YEAR 2002-03 PASSED BY THE COMMERCIAL TAX OFFICER, THIRD CIRCLE, KOZHIKODE
Annexure B	A TRUE COPY OF THE 1ST APPELLATE ORDER PASSED BY THE DEPUTY COMMISSIONER (APPEALS), COMMERCIAL TAXES, KOZHIKODE DATED 27/12/2010
Annexure C	A TRUE COPY OF THE COMMON ORDER DATED 3/7/2015 PASSED BY T HE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL

APPENDIX OF ST.REV.NO.5/2016

PETITIONER ANNEXURES:

Annexure A	A TRUE COPY OF THE ORDER DATED 30/1/2008 PASSED BY THE INTELLIGENCE OFFICER (IB), KOZHIKODE IN RESPECT OF THE YEAR 2004-05
Annexure B	A TRUE COPY OF THE COMMON ORDER PASSED BY THE DEPUTY COMMISSIONER (APPEALS), COMMERCIAL TAXES, KOZHIKODE DATED 13/5/2009
Annexure c	A TRUE COPY OF THE ORDER OF THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL, ERNAKULAM IN TA NOS.13/14 TO 18/14 DATED 3/7/2015

APPENDIX OF ST.REV.NO.7/2016

PETITIONER ANNEXURES:

Annexure A	A TRUE COPY OF THE ASESSMENT ORDER FOR THE YEAR 2003-04 PASSED BY THE COMMERCIAL TAX OFFICER, THIRD CIRCLE, KOZHIKODE
Annexure B	A TRUE COPY OF THE 1ST APPELLATE ORDER PASSED BY THE DEPUTY COMMISSIONER (APPEALS), COMMERCIAL TAXES, KOZHIKODE DATED 27.12.2010
Annexure C	A TRUE COPY OF THE COMMON ORDER DATED 03/07/2015 PASSED BY THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL

APPENDIX OF ST.REV.NO.8/2016

PETITIONER ANNEXURES:

Annexure A	A TRUE COPY OF THE ORDER DATED 30.01.2008 PASSED BY THE INTELLIGENCE OFFICER (IB), KOZHIKODE IN RESPECT OF THE YEAR 2003-04
Annexure B	A TRUE COPY OF THE COMMON ORDER PASSED BY THE DEPUTY COMMISSIONER (APPEALS), COMMERCIAL TAXES, KOZHIKODE DATED 13/05/2009
Annexure C	A TRUE COPY OF THE ORDER OF THE KERALA AGRICULTURAL INCOME TAX AND SALES TAX APPELLATE TRIBUNAL, ERNAKULAM IN TA NOS.13/14 TO 18/14 DATED 03/07/2015

RESPONDENT'S ANNEXURES: NIL.

//TRUE COPY//

P.S. TO JUDGE