

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.11.2017

Coram

The Hon'ble Mr.Justice T.S.Sivagnanam

W.P.No.39115 of 2005

and

W.P.No.19693 of 2007

W.P.M.P.Nos.41894 of 2005

and

M.P.No.1 of 2007

M/s. Dax Networks Ltd.,
rep. by its Chief Operating Officer
and Power of Attorney Mrs. R. Sudha.

...Petitioner in both W.Ps.

Vs.

1. The Commissioner of Commercial Taxes,
Ezhilagam Chepauk,
Chennai - 600 005.

2. The Commercial Tax Officer,
Adyar, I Assessment Circle,
Chennai - 600 028.

...Respondents in both W.Ps.

Prayer in W.P.No.39115 of 2005

Writ Petition, filed under Article 226 of the Constitution of India, for
issuance of Writ of Certiorarified Mandamus to call for records of the first

respondent in D.Dis Acts Cell-II/50103/2003Clarification No.192/2004, dated 29.07.2004, and the Clarification in L.Dis.Acts Cell-II/57614/2004/Clarification No.179/2005, dated 03.11.2005, reiterating the earlier Clarification D.Dis.Acts Cell-II/50103/2003 Clarification No.192/2004, dated 29.07.2004, and to quash the above impugned clarifications and further to direct the respondents to classify the computer based Switches, Hubs and Routers as Compute Peripherals.

Prayer in W.P.No.19693 of 2007

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorarified Mandamus to call for the records of the second respondent, in TNGST/0861604/2004-2005, and to quash the impugned proceedings dated 27.04.2007 and further, to direct the respondents to classify computer based Switches, Hubs of Routers as Compute Peripherals.

For Petitioner
in both W.Ps. : Mr.P. Rajkumar

For Respondent : Mr.K.Venkatesh
in both W.Ps. Government Advocate

COMMON ORDER

Heard Mr.P. Rajkumar, the learned counsel appearing for the petitioner and Mr.K.Venkatesh, the learned Government Advocate for the respondents.

2. Both the Writ Petitions, viz., W.P.No.39115 of 2005 and W.P.No.19693 of 2007, have been filed by the same petitioner. In W.P.No.39115 of 2004, the challenge is to the clarification issued by the first respondent/Commissioner of Commercial Taxes, dated 29.07.2004, in exercise of his power under Section 28-A of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter, referred to as 'TNGST Act'). The other Writ Petition, i.e., W.P.No.19693 of 2007, has been filed, challenging the notice issued by the second respondent/Assessing Officer, proposing to re-open the assessment for the year 2004-2005, based on the clarification, dated 29.07.2004, impugned in W.P.No.39115 of 2005. Therefore, W.P.No.39115 of 2005 is required to be decided at the first instance, as the result of W.P.No.19693 of 2007 hinges upon the result in the first Writ Petition, i.e., W.P.No.39115 of 2005.

3. The petitioner is a dealer in parts and accessories of computer and computer peripherals, and registered on the file of the second respondent, under the provisions of TNGST and Central Sales Tax Act, 1956. The petitioner approached the first respondent, during 1998, seeking for a clarification with regard to the rate of tax, payable for the following items:-

- i) Hard Disk Drives
- ii) Local Network (LAN) Products
- iii) Unix Controllers
- iv) Inter-Networking Products
- v) Storage Products
- vi) Wide-area Network (WAN) Products

4. The request made by the petitioner was considered by the first respondent, and a clarification was issued on 24.08.1998, which is to the following effect:-

i) The request of the petitioners has been considered. It is hereby clarified that the items mentioned below are liable to tax at the rate mentioned against each.

1. HARD DISK DRIVES - Parts & Accessories - 2% under Entry 1-C of Part 'A' of First Schedule to the Tamil Nadu General Sales Tax Act, 1959 w.e.f. 5.5.97.

2. Local Area Network (LAN) Products such as Hub, switch, routers - Peripherals - 4% under entry 18 of Part B of First schedule to the TNGST Act, 1959 w.e.f. 17-7-96.
3. Unix controllers Part-A of I such as a) 1/04 card board & 1/108 + card. - Parts & Accessories - 2% under Entry 1-C of schedule to the TNGST Act, 1959 w.e.f. 5-3-97.
- 3.b. Network access Schedule to server - Peripherals - 4% u/e.18 of Part B of I the TNGST Act, 1959 w.e.f. 17-7-96.
4. Inter-Networking products such as to cable, line-patch cord, fibre patch card, connector - Parts & Accessories - 2% u/e-1-C of Part A of I Schedule to the TNGST Act, 1959 w.e.f. 5-3-97.
5. Storage products such as CB-ROM CTD etc. - Parts & Accessories - 2% u/e 1-C of I Schedule to the as Floppy Disc, TNGST Act, 1959 w.e.f. 5-3-97.
6. Wide Area Network such as Eicon card C20, bicon card C21, Eicon S51, Eicon S52, Eicon DPNA C cards. - Parts & Accessories - 2% u/e 1-C of I Schedule to the (WAN) products TNGST Act, 1959 w.e.f. 5-3-97.

Sd/- Yasmin Ahmed,

Special Commissioner &
Commissioner of
Commercial Taxes. "

WEB COPY

5. It may not be necessary for this Court to go into the percentage of tax payable for the products, but, suffice to note that the three products/items, which are now the subject matter of the present Writ Petitions, viz., i) Switches, ii) Hubs and iii) Routers were classified as computer peripherals. This clarification, dated 24.08.1998, held the field, and the petitioner's assessment was accordingly completed by charging the rate of tax payable for the computer peripherals/accessories. There was no problem insofar as the petitioner is concerned till 2002-03, and this problem arose on account of a clarification issued by the first respondent in favour of WIPRO Ltd., dated 23.12.2002. In the said clarification, the Commissioner clarified that the Switches and Electronic Cables are taxable at 10% under Entry 13 (iii) in Part C of the first schedule to the TNGST Act. So far as Hubs & Routers are concerned, they are treated as peripherals used for data communication and taxed at 12% under Entry 14 (v) in Part D of the first schedule to the TNGST.

WEB COPY

6. When the petitioner's assessment was sought to be re-opened based on a clarification given to another dealer, the petitioner immediately rushed to the first respondent, and submitted a representation on

23.08.2003, requesting for confirming the clarification issued in their favour on 24.08.1998 with regard to products like Switches, Hubs of Routers, by clarifying that they are computer peripherals and taxable at 4% under Entry 18 (i) of Part B of the first schedule to the TNGST Act. The petitioner's application, dated 23.08.2003 was not disposed of, and was kept pending and in the meantime, notices were issued by the respondent/Department proposing to re-open the assessment for the years 2001 onwards. Therefore, the petitioner sent a reminder, dated 29.06.2004, emphasizing that Hubs and Routers fall under wireless reception, transmission equipments and devices, as they are not used in telecommunication equipments or devices. Therefore, a request was made to the first respondent to re-consider the order passed in favour of WIPRO Ltd.,. After nearly a year, the impugned clarification has been issued, stating that, Switches, Hubs and Routers are taxable at 12% under 14 (iv) Part D of the first schedule to the TNGST Act. The petitioner submitted further representation to the first respondent to revise the clarification, but, the first respondent declined to do so, and reiterated the earlier clarification, by letter, dated 03.11.2005. The clarification, dated 29.07.2004 and the letter, dated 03.11.2005, reiterating the clarification are impugned in W.P.No.39115 of 2005.

7. Firstly, it has to be pointed out that the petitioner's assessment is sought to be revised/re-opened based on a clarification issued at the instance of a different dealer. That apart, when the Commissioner clarified the rate of duty on a request made by the WIPRO Ltd., the petitioner did not have any opportunity to put forth their objections. From the clarification, dated 23.12.2002, issued in favour of WIPRO Ltd., it is not clear, as to what was the product, for which, WIPRO sought for clarification and how the product was brought under Entry No.13 (ii) in Part C of the first schedule to the TNGST Act, and how Hubs and Routers were brought under Entry 14 (v) in Part D of the first schedule to the TNGST Act.

8. Therefore, the clarification, dated 23.12.2002, could not have been straightaway imposed on the petitioner, though such clarification may bind the Assessing Officer/respondent. Even assuming that there is a clarification in vogue, at the instance of a third party dealer, if an assessment is sought to be re-opened in respect of another dealer, dealing with similar product, the dealer is entitled to place his objections to such revision of assessment, and in such an event, the Assessing Officer has to independently decide the matter based upon the material placed by the

concerned dealer. However, in the instant case, the petitioner went before the first respondent/Commissioner of Commercial Taxes, requesting him to confirm the earlier clarification, dated 24.08.1998. However, the first respondent/Commissioner had issued the impugned clarification, stating that, the petitioner's products are taxable at 12 % under Entry 14 (iv) Part D of the first schedule to the TNGST Act.

9. As noticed above, insofar as the WIPRO Ltd., is concerned, Routers and Hubs were brought under Entry 14 (v) Part D of the first schedule to the TNGST Act. Therefore, the impugned clarification cannot be taken as further clarification to the another clarification, dated 23.12.2002, issued in favour of WIPRO Ltd. as stated in sub-para No.F of the Letter, addressed by the Assessing Officer to the Special Government Pleader, dated 27.07.2016. This is evident from the fact that, some products are sought to be taxed under three different entries. The first respondent has not given any reasons, as to why the clarification, dated 24.08.1998 should not be adhered to. That apart, there is no material placed on record in the form of counter affidavit by the first respondent, as to on what basis, the product was brought under Entry 14 (iv) Part D of the first schedule to the

TNGST Act. However, when the clarification, dated 24.08.1998 was issued, the then Special Commissioner of Commercial Taxes addressed a letter to the Electronic Corporation of Tamil Nadu Ltd. (ELCOT), dated 05.03.1998. In response to the said letter, the General Manager (Development) ELCOT addressed the first respondent, vide reply, dated 28.04.1998, which is to the following effect:-

" **ELECTRONICS CORPORTION OF TAMILNADU LTD.**

(A Govt. of Tamil Nadu Enterprises)

**REF: RC.NO.GMD/ELCOT/ST/98
Dt.28-4-98**

The Special Commissioner &
Commissioner of Commercial Taxes,
Chepauk.
Respected Sir,

Sub : TNGST Act 1959 – Rate of tax clarification under
Section 28 (A) of the Act – for certain Computer parts
and accessories – Requested – Reg.

Ref : Your Letter No.Accts Cell-II/119794/97, dt.5-3-98.

With reference to your letter, our opinion regarding the clarification of the products of M/s. APCOM Computers Limited is as below:

1. Hard Disk Drives : Parts & Accessories
2. Local area network (LAN) : Peripherals
Products such as Ethernet
Adapter, Hub, Switch, Routers.
3. Unix controllers such as

- | | | |
|---|---|---------------------|
| a) 1/04 card and 1/108 + card | : | Parts & Accessories |
| c) Network access server | : | Peripherals |
| 4. Inter-networking products such as cable, Line-patch cord, fibre patch cord, connector. | : | Parts & Accessories |
| 5. Storage products such as Floppy Disc, CD-ROM, CTD etc. | : | Parts & Accessories |
| 6. Wide area network (WAN) products such as Eicon card C 20, Eicon Card C 21, Eicon S51, Eicon S52, Eicon DPNA Cards. | : | Parts & Accessories |

Thanking you,

Yours faithfully,
for ELECTRONICS CORPORATION
OF TAMILNADU LIMITED

K.S.LAKSMINARAYANAN
GENERAL MANAGER (DEVELOPMENT)"

10. Insofar as the State of Tamil Nadu is concerned, ELCOT is recognized as a technical body for supply, installation, maintenance etc., of computers and electronic products. Thus, it is an Expert Body, whose certification is of much relevance and importance, and the Taxation Expert cannot differ with such clarification, unless, there are tangible materials available with taxation Experts. ELCOT has classified Switches, Hubs and Routers as Compute Peripherals.

11. Thus, the Special Commissioner, when he issued a clarification, dated 24.08.1998, did a thorough exercise of approaching the technical body, obtaining their view and then, issued the clarification. However, there appears to be no material to show as to how, the impugned clarification has been made, which is contrary to the clarification issued to the petitioner in 1998 and also contrary to the clarification issued in favour of WIPRO Limited in 2002. The letter, dated 27.07.2016, addressed by the Assessing Officer to the learned Special Government Pleader also does not throw much light on the specific issue. However, it appears to be a general statements with regard to what is peripherals and what are the modes of communication etc., Surprisingly, the Entry, under which, the petitioner has to be taxed is electronic instruments, including the Cash Registers, tabulating and calculating machines, and other electronic apparatus for obtaining duplicating copies, electronic teleprinters, and fax machines of all kinds and electronic typewriters, indexing, card punching, etc. By no stretch of imagination, the products, which have been dealt with by the petitioner, cannot be brought under Entry 14 (Iv) in Part D of the first schedule to the TNGST, to be taxed at 12%.

12. Further to be noted is that, the impugned clarification, dated 29.07.2004 cannot be treated as superseding the clarification, dated 24.08.1998, as it does not contain any reasons to the said effect. Merely stating that the impugned clarification modifies the earlier clarification is insufficient. Even assuming that there is modification done by the Commissioner, such modification should contain reasons, as to how, the Commissioner proposes to take a different stand from that of the earlier clarification, which, in the instant case, was given, after obtaining the opinion of ELCOT, which would bind the first respondent.

13. Thus, the appropriate classification of switches, hubs and routers dealt with by the petitioner should undoubtedly fall under Entry 18 (i) in Part B of the first schedule to the TNGST. The counter affidavit filed by the second respondent does not render much assistance to the case of the respondent/Department. One more factor, to be taken into consideration is the proceedings of the Authority for Clarification and Advance Ruling under Section 60 of the Karnataka Value Added Tax Act, 2003. Though the clarification given by the said Authority will not bind the respondent, it will be a good indicator, as to how, the products dealt with by the petitioner

have been considered under the Karnataka Value Added Tax Act, 2003. In the said communication, the petitioner had sought for clarification as regards the rate of tax for switches, hubs and routers as computer peripherals and the Advance Ruling Authority, after examining the matter, found that switches and hubs falls under Central Excise Tariff under 8473; routers falls under Central Excise Tariff heading 8517; as also cables, fall under Central Excise Tariff heading 8544; and are enumerated as Serial Nos.25 and 30 of Notification, dated 30.04.2005 and Serial No.117, in notification, dated 30.04.2005 respectively and they are liable to tax at 4%. The Central Excise Tariff heading 8473, deals with computer systems and peripherals.

14. Thus, in respect of the assessee's own case, under Karnataka Value Added Tax Act, 2003, Advance Ruling Authority under the KVAT Act has ruled in favour of the petitioner and held that the products dealt with by them are computer peripherals. Thus, for the above reasons, it is held that the impugned clarification is not sustainable, and the clarification issued in favour of the petitioner, dated 24.08.1998 after obtaining the Expert's opinion of ELCOT will be valid and sustainable for all purpose.

15. In State of Tamil Nadu Vs. CMS Limited reported in **(2014) 75 VST 413 (Mad)**, the Revenue raised a question as to whether the goods sold by the respondent therein is exigible to tax at the rate of 4%, as the goods fall under S.No.22 of Entry 68 of Part B of the first schedule or fall under Entry 69 of Part C of the first schedule to the Tamil Nadu Value Added Tax Act, 2006. The respondent/assessee therein was a dealer in computer and spares. The Tribunal decided the issue in favour of the assessee and held as follows:-

" We find that the definition 'peripheral', as has been concluded by the Appellate Deputy Commissioner as well as by the Tribunal, is clearly an ancillary device of a computer, similar to that of key board, floppy disk or hard drive, which enables the transmission of data from one computer to another or one area to another. The definition of the term 'peripheral' as per the dictionary meaning is as follows:

"lying at the outside or away from the central part; outer; external"

10. It is not in dispute that 'router' is a device falling outside the main part, namely, computer and it is partially or completely dependent on the host and expands the capabilities of the computer and it does not

form part of the core architecture. What are all computer peripherals have not been defined in Serial No.22 of Entry 68 of Part B of I Schedule to TNVAT Act, 2006. Therefore, whatever goods, which are falling within the definition of 'peripheral' would be entitled to such a benefit. We find that 'router', from the nature of its use in conjunction with the computer as has been defined by the Appellate Deputy Commissioner and the Tribunal based on relevant computer related dictionary and data, is a peripheral of a computer. It is also held by the Tribunal that 'router' is a computer network device that transmits data from one area to another and expands the capabilities of the computer, hence, it does not form part of core computer architecture. Therefore, we find that the Appellate Deputy Commissioner as well as the Tribunal are justified in holding that the goods sold by the assessee, namely, router, is a computer peripheral, falls under Serial No.22, Entry 68 of Part B of I Schedule of TNVAT Act, 2006. "जयते

16. The above findings rendered by the Tribunal was confirmed by the Hon'ble Division Bench of this Court. Therefore, the decision, in the case of **C.M.C Ltd., (supra)** would support the petitioner's case, insofar as

the the product, routers is concerned. Further, it is interesting to note that the Dean of the College of Engineering, Guindy Anna University, Chennai, has given a certificate, dated 24.09.2014, to confirm that the products categorized as hubs and switches are used in connecting the computers on a Local Area Network (LAN) and these are computer peripherals. Similarly, routers, that forward data packets from Computers in one Local Area Network (LAN) or in a Wide Area Network (WAN) to another LAN/WAN and used for internet are also computer peripherals. This certificate cannot be disputed by the respondent/Department, as there is no tangible material placed before this Court to discredit the opinion of an Expert.

17. Accordingly, W.P.No.39115 of 2005, challenging the clarification dated 29.07.2004 is allowed and the said impugned clarification, dated 29.07.2004 is set aside. In the light of the order passed in W.P.No.39115 of 2005, the other Writ Petition No.19693 of 2007, challenging the notice issued by the second respondent/Assessing Officer, proposing to re-open the assessment for the year 2004-2005, is not sustainable, as there is no jurisdiction for the respondent/Department to re-open the assessment, since the said re-opening notice was based on the

impugned clarification, dated 29.07.2004, which is set aside by this Court, in this Order. Accordingly, the impugned notice, dated 27.04.2007 is also set aside.

18. In the result, both the Writ Petitions are allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

06.11.2017

sd/msm
Index : yes/no

To

1. The Commissioner of Commercial Taxes,
Ezhilagam Chepauk,
Chennai - 600 005.
2. The Commercial Tax Officer,
Adyar, I Assessment Circle,
Chennai - 600 028.

सत्यमेव जयते
WEB COPY

T.S.Sivagnanam, J.

sd/msm



**Writ Petition No.39115 of 2005
and
W.P.No.19693 of 2007**

WEB COPY

06.11.2017