

Meaning of Goods Under The Tax Laws



The dispute as to what would constitute goods and what would not for the purpose of levy of indirect taxes is not new. With the increasing share of intangibles in the economy, the debate has become more complicated. Many of the intangible rights such as know-how, patents, copyrights, trademarks, licenses, franchises, etc. have been held to be 'goods.' This article seeks to clarify the ambit of the term goods with respect to different commodities like electricity, software, telecom spectrum, etc. by focusing upon the meaning of goods given under the laws and the various judicial decisions held in this regard. Read on...

Definition of Goods

The term 'Goods' has been defined under Article 366 (12) of the Constitution as follows:

"(12) 'Goods' includes all materials, commodities and articles;"

Section 2(7) of The Sales of Goods Act, 1930 defines 'goods' as: *"(7) 'Goods' means every kind of movable property other than actionable claims and money; and includes stock and shares, 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."*



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The word 'property' is defined in Section (2)(11) of The Sale of Goods Act, 1930 as: "*Property means the general property in goods, and not merely a special property.*" However, this definition of property does not help in understanding the scope and meaning of the word 'goods'. The word 'property' here is defined in the sense of subject matter of ownership. This position was noted by the Supreme Court in *Vikas Sales Corporation vs. Commissioner of Commercial Taxes* in [1996] 102 STC 106 (SC). The Court quoted from the definition in the Dictionary of Commercial Law by A. H. Hudson as follows:

"Property: In commercial law, this may carry its ordinary meaning of the subject matter of ownership, e.g. in bankruptcy referring to the property of the debtor divisible amongst creditors. But elsewhere, as in sale of goods, it may be used as a synonym for ownership and lesser rights in goods..... 'General Property' is tantamount to ownership; bailees who have possession and not ownership and others with limited interests are said to have a 'special property' as their interest."

This definition by A. H. Hudson was again quoted by the Constitution Bench in *Sunrise Associates vs. Government of NCT of Delhi* [2006] 145 STC 576 (SC).

Having noted that the word 'property' as used in the definition of goods is not defined in The Sale of Goods Act, 1930, its meaning should be found in The General Clauses Act, 1897. Section 2(36) of The General Clauses Act reads as follows:

"Movable Property shall mean property of every description, except immovable property." The definition under The General Clauses Act also does not give a definite meaning to the word property. However, by use of the words 'every description', it seeks to spread the net as wide as possible. It is said to extend to every species of valuable right and interest. It denotes everything which is subject of ownership, corporeal or incorporeal, tangible or

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intangible, visible or invisible, real or personal. It includes everything that has an extendable value. It extends to every species of valuable right and interest. The expression signifies things and rights considered as having a money value. Even incorporeal rights like trademarks, copyrights, patents and rights in *personam* capable of transfer or transmission, such as debts, are also included in its ambit (*Vikas Sales Corporation (supra)* on page 118 of STC).

Attributes of Goods

Essential attributes of goods were listed by the Supreme Court in *Commissioner of Sales Tax vs. Madhya Pradesh Electricity Board* [1970] 25 STC 188. While examining whether the MP Electricity Board was a dealer within the meaning of The MP General Sales Tax Act, 1958, in respect of its activity of generation, distribution, sale and supply of electrical energy, the Court 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 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...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 Sales Tax Act."

The Constitution Bench in the *State of Andhra Pradesh vs. National Thermal Power Corporation Limited* [2002] 127 STC 280 (SC) took note of the above judgment and agreed with these characteristics of electric energy except that it can be 'stored'. The observation, to the extent of characteristics of storage, was held to be erroneous or by oversight.

The Constitution Bench in *Tata Consultancy Services vs. State of Andhra Pradesh* [2004] 137 STC 620 (SC) while holding that transfer of right to use software put in media amounts to sale of goods, held that "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" (*Para 16 on page 633 of STC*). The Hon'ble Justice S. B. Sinha, while delivering concurring judgment listed following attributes of goods (*para 78 on page 655 of STC*): (i) its utility, (ii) capable of being bought and sold, (iii) capable of being transmitted, (iv) transferred, (v) delivered, (vi) stored and (vii) possessed.

Is Capability Of Abstraction Not An Essential Test?

On comparing the list of attributes in majority judgment and concurring judgment in *Tata Consultancy Services (supra)*, one will notice absence of attribute of 'abstraction' in concurring judgment. The Supreme Court in *Bharat Sanchar Nigam Limited and Another vs. Union of India and others [2006] 145 STC 91 (SC)* while examining whether nature of mobile telephone connection is a sale or a service, made reference to *Tata Consultancy Services (supra)* and quoted from *para 78* thereof which was part of concurring judgment by Justice S. B. Sinha, wherein 'abstraction' is not listed as one of the attributes of 'goods'. Is it an indication that like 'storage', 'abstraction' is also not an essential attributes of 'goods'? It appears that, 'abstraction' as an attribute of 'goods' is listed in the sense of capable of drawing something in lesser quantity, from something available in abundance. The Karnataka High Court in *Bharti Airtel Limited vs. State of Karnataka [2011] 44 VST 486* explained this with reference to electricity and software. One of the dictionary meanings of *abstraction* is, capable of being perceived by the senses. In *Madhya Pradesh Electricity Board judgment (supra)* which is kind of parent judgment on the meaning of word 'goods', though 'abstraction' is listed as one of the attributes of the 'goods', the Court itself noted that electricity

"may not be tangible in the sense that it cannot be touched without considerable danger of destruction or injury but it was perceptible both as an illuminant and a fuel and also in other energy giving forms." In case of intangibles, most of the times, they are insubstantial in form and nebulous in character. For many of the intangibles, like 'goodwill' or 'trade mark', it is also impossible to predicate the moment of their birth. If abstraction is considered as an essential attribute then none of the intangible rights such as patents, trademarks, copyrights and trade secrets will qualify to become goods as in all these cases, holder of these rights has merely a piece of paper issued by registering authority recognising rights. Even unregistered trademarks are capable of transfer by assignment, etc.

Whether Telecom Spectrum is Goods?

In a non-science, lay man's language, spectrum can be understood as atmosphere above the earth. This atmosphere above the earth, which is invisible to eyes, is capable of carrying light and waves. When light generated by the sun reaches to the earth, it travels through a defined path. That path can be understood as spectrum for light. Any obstruction in the path will terminate the journey of light from sun to earth. The journey of light from sun will end at the point at which it encounters with the obstruction. Path for journey of waves is called radio frequency spectrum. All the paths in atmosphere are not equally strong. Different technologies require paths of different strengths. Like the journey of light, the journey of waves also need to be uninterrupted. This need of uninterrupted journey of waves requires regulation and in turn gives rise to a valuable resource called 'radio frequency spectrum'. Over a period of time, with the advent and then popularity of wireless telecommunication, spectrum has become scarce. The Telecom Regulatory Authority of India (TRAI) has already issued recommendation for trading guidelines allowing mobile operators to buy and sell airwaves.

As understood earlier, spectrum is nothing but an atmosphere above the earth. It cannot be stored and abstracted. Even then, when it is capable of being bought and sold, there is no reason to say that it is not goods. There may be debate as to whether and when the union government grants spectrum on auction, is it merely a licensing or something more. In *Vikas Sales Corporation (supra)*, the Supreme Court, while holding that REP licenses or

The Court then concluded that "although the definition of 'goods' is an inclusive one, it is clear that materials, commodities and articles spoken of in the definition take colour from one another. In order to be 'goods', it is clear that they should be known to the market as materials, commodities and articles that are capable of being sold."

Exim Scrips are 'goods' liable for sales tax, held that "the grant of these licenses by licensing authority to the registered exporters is not a sale. The sale is when the registered exporter or the purchaser sells it to another person for consideration." However, the conclusion that grant of licenses by licensing authority to the registered exporters is not a sale is not free from doubts. The Constitution Bench in *Sunrise Associates vs. Government of NCT of Delhi (supra)* noted the view that the State can create such a right (of floating a lottery thereby granting a right to participate in a draw) for the first time, and such transfer of the right by the State as a promoter would amount to a transfer of property and being in consideration of a price can be sale of goods.

Marketability Is the Dominant Attribute

With the increasing share of intangibles in the economy, capability of being bought and sold has emerged as dominant attribute of 'goods.' If something is brought into the market for buying and selling, it is goods. In *Antrix Corporation Limited vs. Asst. Commissioner of Commercial Taxes [2010] 29 VST 308*, the Karnataka High Court upheld levy of VAT on space segment capacity located in satellite or the transponders located in the geostationary orbit outside the territory of India. The Income Tax Appellate Tribunal, Mumbai in the case of *Flag Telecom Group Limited vs. DCIT* and *vice versa* reported in TS-42-ITAT-Mumbai (2015) held that the capacity in undersea telecommunication cables can be understood as a saleable commodity, if parties to the contract intended it to be so.

Definition of 'goods' under Article 366 (12) of the Constitution itself is centered on marketability. In *Escorts Limited vs. Commissioner of Central Excise, Faridabad 2015-TIOL-92-SC-CX*, the Supreme Court, for explaining meaning of word 'goods' as used in above definition, noted dictionary meaning of three words: (i) materials, (ii) commodities and (iii) articles, thus:

"Materials" – the matter of which a thing is or may be made; the constituent parts of something.

"Commodities" – a thing of use or value; a thing that is an object of trade; a thing one deals in or makes use of.

"Articles" – a particular item of business.

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Value of Own For Being Goods

Recently, there have been controversies about SIM cards, meal vouchers, *etc.* for their taxability under VAT laws and also under the entry tax/octroi legislations. SIM cards, meal vouchers (also known as food coupons) do not have value of their own. For holding that REP licenses or Exim Scrips are goods liable for sales tax, the Supreme Court in *Vikas Sales Corporation (supra)* emphasised on the fact that these scrips have their own value. The Court observed that:

"REP licenses have their own value. They are bought and sold as such. The original license or the purchaser is not bound to import the goods permissible thereunder. He can simply sell it to another and that another to yet another person. In other words, these licenses/'Exim Scrips have an inherent value of their own and are traded as such. They are treated and dealt with in the commercial world as merchandise, as goods...It has a value of its own. It is by itself a property - and it is for this reason that it is freely bought and sold in the market. For all purposes and intents, it is *goods*. Unrelated to the goods which can be imported on its basis, it commands a value and is traded as such. This is because it enables its holder to import goods which he cannot do otherwise" (on page 119 of STC): *Emphasis supplied.*



The Constitution Bench in *Sunrise Associates vs. Government of NCT of Delhi (supra)* discussed the nature of a railway ticket and observed that the sale of a ticket does not necessarily involve the sale of goods. While holding that lottery tickets are actionable claim, the Constitution Bench in *Sunrise Associates (supra)* emphasised at least twice on the fact that lottery ticket *per se* does not have a value.

In both the cases of railway ticket and cinema ticket, if there is no promise of travel or movie show backed with related infrastructure, these tickets are worthless and a mere scrap of paper. Like railway ticket is a contract of carriage, a SIM card or recharge voucher is a contract for provision of telecommunication services. The Delhi High Court in *Commissioner of Income Tax vs. Idea Cellular Limited 2010-TIOL-139-HC-Del-IT* while examining the nature of relationship between SIM cards/recharge coupon distributors and telecom service providers held that such relationship is not of seller and buyer of goods but of service provider and distributor (link between service provider and service receiver) of service. The Division Bench of the Karnataka High Court in *Bharti Airtel Limited vs. Dy Commissioner of Income Tax 2014-TIOL-2113-HC-Kar-IT* held that SIM card represents 'right to services', which is capable of being sold.

Like a railway ticket or cinema ticket, a SIM card/recharge voucher is contract for telecommunication service and its sale or purchase represents sale or purchase of 'right to services'. A meal voucher or food coupon is a contract for provision of food and its sale or purchase represents sale or purchase of right of getting food on presentation of voucher.

Recently, the Division Bench of the Bombay High court in *Sodexo SVC India Private Limited vs. The State of Maharashtra and others 2015-TIOL-746-HC-Mum-Misc* held that Sodexo Meal Vouchers are goods for the purposes of levy of octroi and local

body tax. With due respect, the Court failed to take note of essential attribute of marketability in its true sense. The High Court concluded that the said vouchers are capable of being sold, delivered and possessed and have their own utility. The fact that the said vouchers do not have any value of their own unless backed by infrastructure and mechanism of voucher redemption through food outlets, was not urged before the Court. These vouchers cannot be sold as a general commodity. Once a voucher is surrendered in exchange of food, it is necessary for food vendor to deface it. The voucher cannot be redeemed at all the food outlets. If these vouchers are treated as goods, their exchange for food will be a transaction of barter (exchange of goods for goods). Whether barter is a transaction eligible to sales tax itself is a debatable issue. If barter is not sale, then there should not be tax on exchange of vouchers with food. If barter is sale, then it creates complications about input tax credit, valuation, etc. Clause (29A) of Article 366 of the Constitution defines the expression 'tax on the sale or purchase of goods' through an inclusive definition. The current trend of judicial interpretation does not exclude barter from the ambit of 'sale'.

Values printed on vouchers do not pertain to value of the voucher itself. The value printed on the voucher conveys value of goods or services which can be bought or availed in exchange of that voucher. A voucher carrying value of ₹5 or ₹10 or ₹20 or ₹50 consumes same amount of paper and ink for its printing. If these vouchers are allowed to be taxed on value printed on them, this would lead to an absurd result and fly in the face of common sense.

Indian Accounting Standard (Ind AS) 115 also recognises 'rights to goods or services' (such as ticket) as capable of resale [para 26(c)]. However, when an entity merely arranges for another party to transfer goods or services to a customer, activity remains a service only [para 26(f)]. Paras B34 to B38 of Ind AS describe criteria for determining whether activity is of resale or provision of service. Facts that another party is primarily responsible for fulfilling the contract, the entity (reseller) does not have inventory

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risk at any point of time in transaction; prices for goods or services are determined by another party are indicators of the entity merely being an agent or service provider (para B37). In such circumstances, entity is required to recognise the amount of fee or commission only to which it is entitled in exchange for arranging for the other party to provide the goods or services. In resale of SIM card/recharge voucher or Sodexo coupon, the reseller falls within the scope of criteria laid down in para B37 above. It merely acts as conduit between buyer/consumer and seller/provider of goods or services. Thus, even for accounting purposes, dealing in SIM card/recharge voucher or Sodexo coupon is not considered as an activity liable to tax on goods.

It is pertinent to note that under various jurisdictions such as European Union, New Zealand, United Kingdom, Australia, prepaid vouchers are recognised under VAT laws and point of taxation for vouchers has been prescribed. In these jurisdictions, generally vouchers have been categorised as: (i) Single purpose voucher (SPV) and (ii) Multipurpose voucher (MPV). A SPV is one that carries the right to receive goods or services of one type which are subject to a single rate of VAT, for example, telecommunication, a particular kind of car wash. SPV is subjected to VAT on its issue. On redemption, no VAT is due as VAT has already been brought to account on issue. In case of MPV, VAT is not due until the time of redemption and the consequences depend on the goods or services supplied for the voucher.

Software without Physical Media - Whether Goods?

After judgment of the Constitution Bench in *Tata Consultancy Services (supra)*, there is impression that a software, only when put in physical media for transfer or marketing is 'goods' and if such transfer or marketing happens through intangible modes like online transfer or download, it is not goods. Even tax administrators are carrying such a view. Education Guide released by the Central Board of Excise and Customs (CBEC) (TRU circular dated 20th June, 2012) in para 6.4.4 declares that 'if software or any programme content is delivered online or downloaded on the internet, the same would not be treated as goods, as the judgment of the Supreme Court in *Tata Consultancy Service* case is applicable only in case the pre-packaged software is put on a media before sale. Delivery of content online



would also not amount to a transaction in goods as the content has not been put on a media before sale. Delivery of content online for consideration would, therefore, amount to provision of service.' The understanding and reasoning is fallacious. The Supreme Court, itself in TCS case held that the term 'goods' for the purposes of sales tax, cannot be given a narrow meaning. Properties which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed, *etc.* are 'goods' for the purpose of sales tax. We have already seen that like attribute of 'storage,' attribute of 'abstraction' is also not an essential attribute. What is essential is capability of being bought and sold, i.e., marketability. Like electricity, though goods, lacks attribute of storage and abstraction in its true sense, so are the softwares. Like electricity is delivered through cables and wires, in case of online transmission or download, softwares are delivered through electromagnetic waves which travel through physical medium like towers and cables. If electricity is goods without putting it on physical media, if telecom spectrum is goods, without being capable of storage and abstraction, there is no reason why software, which is not put on physical media, is not goods. The rationale as explained by the Education Guide that the manner of delivery of software or a programme determines the character of the transaction is hard to digest. Commentary on Article 12 of OECD Model Tax Convention on taxes on income and on capital, while laying down principles for distinguishing between business profits (Article 7) and royalties (Article 12), in para 14.1 of the commentary provides that "the method of transferring the computer program to the transferee is not relevant. For example, it does not matter whether the transferee acquires a computer disk containing a copy of the program or directly receives a copy on the hard disk of the computer via a modem connection. It is also of no relevance that there may be restriction on the use to which the transferee can put the software." ■