

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.41714 of 2015

(Arising out of Order-in-Appeal No. 123/2015 (STA-II) dt. 18.05.2015 passed
by Commissioner of Service Tax (Appeals-II), Chennai 600 034)

M/s. Pro – Active Solutech (India) Pvt Ltd **Appellant**
No.4, 5th Floor, Mookambika Complex
Lady Desika Road, Mylapore
Chennai 600 004

VERSUS

The Commissioner of CGST & Central Excise **Respondent**
Chennai North Commissionerate,
26/1, Mahatma Gandhi Marg
Nungambakkam, Chennai 600 034

APPEARANCE:

Shri M.N. Bharathi, Advocate for the Appellant
Shri Harendra Singh Pal, Authorised Representative For the Respondent

CORAM:

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)
HON'BLE MR. AJAYAN T.V., MEMBER (JUDICIAL)

FINAL ORDER No.40392/2025

DATE OF HEARING: 03.02.2025
DATE OF DECISION: 25.03.2025

Per Mr. Ajayan T.V.

The appellant is before this Tribunal assailing the impugned Order in Appeal (OIA) where by the Appellate Authority has upheld the Order in Original (OIO) of the Adjudicating Authority in its entirety. By the impugned OIO, the Adjudicating Authority has confirmed the demand of Rs.10,15,580/- being the Service Tax payable under 'Information Technology Software Solution' (sic) for the period from May 2008 to December 2010 along with appropriate interest imposing equivalent penalty under Section 78 of the Finance

Act as well as penalty of Rs.10,000/- under Section 77 (2) of the Finance Act.

2. The facts in brief are that the appellants are engaged in the business of providing various professional services such as corporate finance and legal consultancy accounting services, pay roll processing services, corporate secretarial services to corporate clients. The appellants are registered under service tax as a "Management Consultant" w.e.f. 25.11.1998. The appellants are also engaged in designing and developing of 'software packages' catering to corporate clients and are selling the same on payment of VAT. During the audit, the department found that in respect of design and development of software solutions to corporate clients, the appellants were raising invoices on their customers under two heads namely license fee and separate customisation fee. It is the case of the department that the appellant was paying service tax on the customisation charges, but it was not paying tax on license fee. The department being of the view that they should have paid service tax on the full value of the invoice under 'Information Technology Software Services' issued a Show Cause Notice demanding Service Tax for the period May 2008 to December 2010 along with applicable interest and imposition of penalties. After due process of law the demands were confirmed as cited supra vide Impugned OIO No. 201/2012 dated 31.10.2012.

3. Aggrieved by the impugned OIO the appellant preferred an appeal before the Commissioner of Service Tax (Appeals-II), Chennai,

who, vide OIA No.123/2015 (STA-II) dated 18.05.2015 rejected the appeal and upheld the OIO. Aggrieved by the same, the appellant has preferred this appeal and is before this Tribunal.

4. Shri M.N. Bharati, Ld. Advocate appeared and argued for the appellant. The Ld. Advocate submits that it is not disputed in the impugned OIO and OIA that the appellants had not discharged sales tax on the disputed value of license fees. It is then clearly established that Service Tax Authorities have acknowledged that such value of licence fees has suffered sales tax as sales proceeds towards sale of software. Under such circumstances, since sales tax has already been paid on the said value, it is under bonafide belief that the appellant did not pay service tax on such value of license fees on sale of software. Ld. Counsel submits that at para 8 of the Impugned order in Appeal the Commissioner (Appeals) has not disputed the development of software solutions and has in fact admitted that the appellants developed software as per the requirements of the customers and provide the same to them for which they have received consideration in money.

5. The Ld. Counsel further submits that the intention of the contracting parties is reflected in the agreement and the resultant payment as specified in the invoice, which clearly indicates payment of sales tax on the value of license fees which is nothing but consideration of sale of software. The Ld. Counsel submits that it is thus clear that transfer of possession of goods has taken place in the instant case. The Ld. Counsel further submits that the finding of the

Commissioner (Appeals) that in the activity of Information Technology Software there is no sale is incorrect. The knowledge that is confined in the software is the service which is intangible and the software received in tangible form as CD for utilisation is the goods. The Ld. Counsel submits that therefore the question of including value of license fees which represents sale of software in the taxable value of service, does not arise. It is emphasised that even before sales tax authorities the description is shown as license fee only. The Ld. Counsel further elaborates the methodology of product implementation as under:

- i) On agreement of the assignment with the customer, appellants' implementation team would carry the Product CD to the customer place and install the software on the customer's hardware recommended/suitable for the software to run. The CD will give a permanent license to the customer to use appellants' product for the specified license users. It is a onetime license fee for the software product.
- ii) On completion of installation, the implementation team will conduct an interview with the process / department stakeholders of the customer and collect necessary data to be migrated into the installed software. Based on the interview conducted, gaps in the installed software are identified for customisation.
- iii) On agreement with the stakeholders on the gaps/customisation, the software is tuned to suite their business process. The customised software is then demonstrated to the business process stakeholders and User Acceptance Test (UAT) will be conducted by the customer on the capability of the software to carry out all

the business transactions and data of customer is migrated into the software for GO LIVE.

- iv) On confirmation of UAT, existing data of customer is migrated into the software for GO LIVE. The migration of data includes vetting of raw data from legacy systems being used by the customer, converting the data into new software readable format and creation of master data required to carry out all transactions through the new software.
- v) As part of implementation, all the users of the software are trained and hand-held until the users are comfortable using the software. Upon generation and validation of monthly reports through the new software, the assignment is signed-off.

To summarise:

There are three steps involved in the appellants' assignment with the customer.

1. Product delivery through CD
2. Systems study and customisation
3. Implementation

The customers are not allowed to download the software package. The appellants' methodology of implementation has always been through CDs.

6. The Ld. Counsel submits that the Lower Authorities had failed to take note of the above implementation and thus failed to notice that the sales tax has been paid on tangible goods in the form of CD and presumption that there was no sale of goods is contrary to the fact that sale has taken place and sales tax has been paid. The Ld. Counsel submits that once there is a discernible value available for

sale of goods on which sales tax is paid, legally it is not permissible to tax the same value as value of IT software services to levy service tax. In this regard he places reliance and the decision in *Tally (India) Pvt. Ltd. Vs. CCE & CST, Bangalore (2024) 25 Centax 236 (Tri-Bang)*.

7. Ld. Authorised Representative Shri Harendra Singh Pal, appeared for the Respondent and reiterates the findings in the impugned order in appeal.

8. We have heard both sides and carefully perused the appeal records and citation submitted as relied upon.

9. We find that the only question is whether the licence fee collected from the appellants' customers, on which the appellant has paid value added tax treating it as sale, can thereafter be once again included in the taxable value of service rendered under the category of Information Technology Software Services and be subjected to levy of service tax.

10. It is seen that the appellate authority has acknowledged that the appellant is providing software solutions to the customer for fulfilling the business requirements. While acknowledging that appellant is customising the software as per the requirements of the client and provide the same to the client for consideration received in money, since the agreement entered with the clients neither specified any sale or supply of goods nor bifurcation of the invoice value, the transaction

as has occurred is sought to be negated as their plea of payment of sales tax on licence fee cannot be taken cognizance of as there is no concept of sale in respect of the information technology software services. We are unable to subscribe to the aforesaid view of the appellate authority for reasons elaborated infra. The impugned OIO which has been upheld in its entirety by the appellate authority, itself has recorded findings as under:

7 During the course of the Audit of the assessee, by the Department they have provided a note on 'Pro-Active Services'. They stated in the note that their Software Division provides tailor made Software solutions for their clients; that they sell these products by sale of its 'License' and charges a 'License Fee' to its clients to use the software., that it raises invoices with appropriate sales tax on sale of its Software License/ implementation' and pays Sales tax. They also stated that since most of the Software is tailor made to specific requirements of the customers, there customization of the Standard Software and pays service tax on the customization charges collected. They further stated that they are not into off the shelf software products like Tally and that the customers cannot utilize the software without implementation and customization.

8.0 I find that the assessee have entered into "letter of engagement for implementation of Secondary Sales Management for VVD(M/s VV. Dhanushkodi & Sons) dt. 15.7.2008 and an indepth study is made to know the nature of the transaction, being the illustrative model Agreement between the assessee and their clients. As per the letter of engagement the value of the contract is Rs. 15 Lakhs.

8.1 The Executive Summary of the agreement is as follows

- VV Dhanushkodi & Sons (VVD) is a leading manufacturer of edible oils like coconut Oil, Sun flower Oil, Gingelly Oil etc. and owns several popular brands like VVD, Arogya etc. All sales*

related activities are carried out by VVD Sales Management Services.

- *Pro-Active is an ISO 9001: 2000 Certified Professional Services Organization having a team of distinguished professionals combining analytical expertise, academic excellence, industrial experience & exposure to corporate realities Our team consists of distinguished professionals qualified in the field of Finance, Corporate Secretarial Practices, Law, Cost Accounting and Management,*
- *Pro-Active offers integrated solutions from strategy to implementation and are committed to long term relationships with clients. Quick response time, Goal oriented consulting with accountability for results has made Pro- Active a preferred vendor for most leading corporate.*
- *The purpose of this document is to provide an outline of the requirements of VVD and the solution proposed by Pro- Active in addressing these requirements.*

8.2 The 'Business Requirement of the agreement specifies the areas of operation, requiring solution to be provided by Pro- Active in addressing the requirement. The requirements are Sales Calendar, Sales Force Management, Secondary Sales Market information, Cheque Inventory, Cheque return. Advance Delivery Orders: Employee Self Services (ESS) Weekly Expense Statement. Distributor Stock Transfer, Distributor Invoicing and Sales Analysis

8.3 The other salient features of the Agreement are as below

- ***Customization is required to integrate the software Solution provided by Pro Active with other existing legacy/ERP systems like MS Project. SAP etc***

- ***The entire Solution is web enabled for online transactions***
- ***The IPR (Intellectual Property Rights) of all the products of Pro-Active that is implemented / used for developing the solution to VVD will belong to Pro-Active***
- *Delivery of the solution will be in phases and the payment is linked to the phased delivery of the solution.*
- *The bug removal facility is provided free of charge during the warranty period and commences on the date of installation.*
- *The Annual maintenance cost will be charged at the rate of 20% of the total order value. (**emphasis supplied**)*

11. Apart from the summarised version above, we have also perused the agreement provided in the appeal records. It can be seen from a perusal of the agreement as a whole that the solution which the appellant provides is a software solution. The solution is to meet the specified business requirements of the client. The solution is to be made available in the customer/client's system as per the deliverables indicated in the delivery schedule. Such customisation required to integrate with the existing legacy/ERP system, includes all activities such as installation, training and enhancements to the standard product by change of source code. Thus, it is evident from the agreement that the solution that the appellant provides is in the form of the appellant's product, i.e., the software which it customises as per the client's requirements, including making changes in the source code as required. It is also clear from the agreement that while the intellectual property rights of all the products of the appellant that is

implemented/used for developing and providing the solution to the client belongs to the appellant, nevertheless, the client is put in full control and possession of the appellant's product, i.e. the customised software, so delivered with its exclusive right to use. That the itemisation has been made in the invoice doesn't detract from the fact that the parties were *ad idem* as to the aforementioned transactions stated in the agreement and it is not in dispute that such solution by way of customised software has been delivered to the client as indicated in the agreement for the client's use. The appellant has also stated that the appellant's implementation team would carry the product CD to the customer's place and install the software on the customer's hardware recommended/suitable for the software to run and that the CD will give a permanent licence to the customer to use appellant's product for the specified licence users and that the licence fee is a one time fee for the software product. In these circumstances, in our view, the transaction between the appellant and its customer in terms of this agreement has resulted in sale of the appellants' software along with the right to use such software and the licence fee for the same has therefore been rightly made exigible to sales tax by the appellant and cannot therefore be yet again subjected to levy of service tax. Payment of service tax as well as VAT are mutually exclusive. The Judgement in ***Imagic Creative Pvt Ltd v. CCT, 2008 (9) STR 337 (SC)*** refers.

12. In this regard, it would be pertinent to note the Judgement in ***State of Kerala v V.C. Vinod, (2023) 9 Centax 326 (Ker)***. The relevant portions are reproduced below:

"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, punch cards, 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 levability 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 noncustomised, 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." (emphasis supplied)

13. In this regard, we also find it apposite to reproduce the findings in the decision of this Tribunal in ***Quick Heal Technologies v. CST, Delhi, 2020 (41) GSTL 467 (Tri-Del)***. In the said case the facts were that the appellant therein had supplied "Quick Heal" brand Anti-virus Software key/codes to the end users through dealers/distributors without discharging the service tax liability on such transactions. It was further stated that the end user was provided with a temporary/non-exclusive right to use the Anti-virus Software as per the conditions contained in the End User License Agreement (EULA) and would, therefore, not be treated as deemed sale under Article 366(29A) of the Constitution. Thus, on the view that the supply of packed Anti-virus Software to the end user by charging license fee would amount to a provision of service and not sale, the Department had demanded

service tax on the appellant. The relevant portions of the said order are as under:

"45. The agreement provides that the licensee shall have right to use software subject to terms and the conditions mentioned in the agreement. The licensee is entitled to use the software/RDM services from the date of license activation until the expiry date of the license. The licensee is also entitled for the updates and technical support. The conditions set out in the agreement do not interfere with the free enjoyment of the software by the licensee. Merely because "Quick Heal" retains title and ownership of the software does not mean that it interferes with the right of the licensee to use the software.

***46.** In this connection, it would be useful to refer to a decision of the Bombay High Court in Mahyco Monsanto Biotech (India) Pvt. Ltd. v. Union of India, [2016 (44) S.T.R. 161 (Bom.)]. In the writ petition filed by the Monsanto India, the petitioner supplied a certain type of hybrid cotton seed to third parties which generated a large quantity of sowable seeds and then sold them to cotton farmers. According to Monsanto India, it provided a service liable to be taxed under the Finance Act when it gave the third party the parent impregnated seed and so it would not amount to a 'deemed sale' within the meaning of Clause (29A)(d) of Article 366 of the Constitution. The Court found there was a deemed transfer within the meaning of Clause (29A)(d) of Article 366 of the Constitution and the observation in this connection are as follows :-*

*"37. ----- **The first question is whether there is a 'transfer' within the meaning of article 366(29A)(d). We believe there is.** It is true that the essence of a 'transfer' is the divesting of a right or goods from transferor and the investing of the same in the transferee, and this is what Salmond on Jurisprudence and Corpus Juris Secundum both say. **In our opinion, the seeds embedded with the technology are, in fact, transferred. Monsanto India is divested of that portion of the technology embedded in these fifty seeds and these are fully vested in the sub-licensee.** Mr. Venkatraman is not correct when he says that the effective control of the 'goods' is with Monsanto India. In RINL, the Supreme Court concluded that the contractor (transferee) did not have effective control over the machinery, despite the fact that he was using it, since he could not make such use of it as he liked. He could not use the machinery for any*

project other than that of the transferor's, nor could he move it out during the period of the project. We do not see how we can draw a parallel from that case to the one at hand. The effective control over the seeds, and, therefore that portion of the technology that is embedded in the seeds, is entirely with the sub-licensee. That sub-licensee is not bound to use the seeds (and the embedded technology) in accordance with Monsanto India's wishes.-----"

47. The Court further in Paragraph 47 of the judgment examined the nature of intangible goods and it is reproduced below :-

"47. We pause here momentarily to consider the nature of these intangible goods. We believe this is necessary, because this is perhaps a case where the law is yet evolving to keep abreast of technology. **If what Mr. Venkatraman suggests is correct, then every sale of software as we currently know it is never a sale but only a service.** In his formulation, the 'medium' (CD, pen drive, etc.) is irrelevant. Surely this cannot be correct. Software may be downloaded too, without any 'physical medium' intervening - the medium is as intangible as the goods. **It is impossible, we think, and does not stand to reason to suggest that unless, say, Microsoft or Adobe wholly cede all control over their software products there is no sale, and when they allow a user to download and use their software they are only providing a service.** Indeed, this is demonstrably incorrect. Microsoft and Adobe both have alternative distributions models. One may 'purchase' a license to Microsoft Office or Adobe Photoshop. This may be a one-off, standalone product, delivered either by download or on physical media. That is for the user to keep and do with it what he wishes (except, of course, attempting to decompile it). He does not have to use it all; he can destroy the media and all personal copies of it. The same software is also available nowadays for a subscription - for an annual or monthly fee, the software can be downloaded and used; if the subscription ends, at the very least updates end and very possibly the software will not function optimally. The latter may be a service, very like car rental or book borrowing from a library. The former is clearly a sale. The difficulty with Mr. Venkatraman's argument is that it tries to draw a completely unnecessary distinction between the technology and the medium in which it is delivered. Neither is the subject of the levy. The subject of the levy is not the technology nor the medium. It is the license; and the terms of that license are determinative. **Where a license is purchased, it is still a sale, although what the user has 'purchased' is the right to use the software. Every license has a unique key and every sale is therefore uniquely identified. The purchase is therefore a transfer of the right to use that particular, identified software. The proprietary rights to the software do not have to be 'sold' or 'transferred'.**

Microsoft and Adobe retain all those rights, and all intellectual property continues to vest in them. This is, therefore, a transfer of the right to use that software, and to that extent, the intangible (the software) is sold; but the terms of that license allow the software vendor to retain complete seizin and dominion over all intellectual property rights. The transfer is not of those intellectual property rights, but of the right to use an identified and identifiable version of that software.” (emphasis supplied)

48. Learned Authorized Representative of the Department has placed reliance on the judgment of the Supreme Court in *Bharat Sanchar Nigam Ltd. v. Union of India* [2006 (2) S.T.R. 161 (S.C.)]. The issue was whether VAT was payable on SIM cards used for providing telecommunication services and about the nature of the transaction by which mobile phone connections were enjoyed. The Supreme Court held that the issue would ultimately depend upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authority to levy sales tax thereon, but if the sale of the same was merely incidental to a service being provided and it only facilitated the identification of subscribers, it would not be assessable to Sales Tax. This decision, therefore, does not help the Revenue so far as the controversy in this appeal is concerned.

49. The decision of the Madras High Court in *Infotech Software Dealers Association v. Union of India* [2010 (20) S.T.R. 289 (Mad.)], has also been relied upon by the Learned Authorized Representative of the Department. The issue was whether the Parliament had the legislative competence to insert provisions of Section 65(105)(zzzzze) in the Act in 2019 by virtue of powers under Entry 97 of List II of Schedule VII of the Constitution. The Madras High Court observed as follows :-

"32. The above discussion as to the canned/packaged software or customised software is in respect of the transactions that are prevalent among the software re-sellers and their customers and the discussion is not with reference to any specific transaction. The challenge to the amended provision is only on the ground that the software is goods and all transaction would amount to sales. The said challenge is

opposed on the ground that though the software is goods, the transaction may not amount to a sale in all cases and it may vary depending upon the End User Licence Agreement. **As already pointed out, the Parliament has the legislative competency to bring in enactments to include certain services provided or to be provided in terms of information technology software for use in the course or furtherance of business or commerce to mean a taxable service,** in terms of the residuary Entry 97 of List I of Schedule VII, the challenge to the amended provision cannot be accepted so long as the residuary power is available. **However, the question as to whether a transaction would amount to sale or service depends upon the individual transaction and on that ground, the vires of a provision cannot be questioned.**

35. For all the above reasons, we dismiss the writ petitions holding that the software is goods and whether the transaction would amount to sale or service would depend upon the individual transaction and for the reason of that challenge, the amended provision cannot be held to be unconstitutional so long as the Parliament has the legislative competency to enact law in respect of tax on service in exercise of powers under Entry 97 of List I of Schedule VII.”(**emphasis supplied**)

50. This decision also does not help the Revenue as only the legislative competence of the Parliament was upheld. Software was held to be ‘goods’, but whether the transaction would be sale or service, it was held, would depend upon the terms of the agreement.

51. Thus, viewed from any angle, the transaction in the present appeal results in the right to use the software and would amount to ‘deemed sale’. It is, therefore, not possible to accept the contention of the Learned Authorized Representative of the Department that the transaction would not be covered under sub-clause (d) of Article 366(29A) of the Constitution.”
(**emphasis supplied**)

14. The aforementioned tribunal decision in Quick Heal Technologies case has been affirmed by the Honourable Supreme Court in **CST.**

Delhi v Quick Heal Technologies, 2022 (63) GSTL 385 (SC), which supreme court judgement, was referred to in the judgement of the Kerala High Court in ***State of Kerala v V.C. Vinod, (2023) 9 Centax 326 (Ker)*** reproduced supra. It is seen that in the said Judgement of the Honourable Apex Court in Quick Heal Technologies case, Civil Appeals arising out of S.L.P. (Civil) Nos. 6715-6716 of 2022 directed against order of Madras High Court in Writ Appeal No. 1881 of 2021 [2022 (58) G.S.T.L. 31 (Mad.)] and CMP No.11998 of 2021, decided on 5-8-2021 also came to be considered. The Honourable Supreme Court while narrating the factual matrix therein, observed that it was with respect to an appellant who had sold packaged or canned software, both indigenously by remitting appropriate VAT or exporting the same, had preferred an appeal to the Honourable Supreme Court against an order of the High Court of Madras which had dismissed their appeal against an order of a single judge confirming the demand of service tax on the appellant finding that they were covered under the Information Technology Software Service as defined under Section 65(105)(zzzzz) of the Act. The Apex Court further observed that the Division Bench vide order dated 5-8-2021 declined to interfere with the order of the Learned Single Judge on the ground that an earlier Division Bench decision of the Madras High Court in the case of ***M/s. Infotech Software Dealers Association v. Union of India*** (supra) covered the issue. The Hon'ble Supreme Court while allowing the appeal preferred by the appellant in light of their judgement in Civil Appeal (Diary No. 24399 of 2020) of Quick Heal Technologies, observed as under:

"71. However, while allowing these appeals, we may only observe that in the case of M/s. Infotech Software Dealers Association v. Union of India (supra) the challenge was to the validity of Section 65(105)(zzzze) levying service tax on the information technology software service. The High Court held that the question whether the software is "goods" or not would depend on the facts and circumstances of individual case. It is evident on plain reading of the judgment rendered by the Madras High Court in the case of M/s. Infotech Software Dealers Association (supra) that it has not referred to the decision of this Court in the case of TATA Consultancy Services (supra). (emphasis supplied)

72. We take notice of the fact that the appellant herein had also filed a Review Petition No. 205 of 2021 against the order dated 5-8-2021 [2022 (59) G.S.T.L. 129 (Mad.)] in the Writ Appeal No. 1881 of 2021, which came to be rejected vide order dated 20-12-2021.

73. In view of the judgment rendered above in Civil Appeal (Diary No. 24399 of 2020), these appeals should succeed and deserve to be allowed.

74. In the result, the appeals are allowed. The impugned order passed by the High Court dated 5-8-2021 in the Writ Appeal No. 1881 of 2021 as also the order dated 20-12-2021 passed in the Review Petition No. 205 of 2021 in Writ Appeal No. 1881 of 2021 are hereby set aside."

15. In view of the discussions above, we hold that impugned order in appeal upholding the demand along with applicable interest as well as imposing penalties, cannot sustain and is liable to be set aside. We also find that the appellant having displayed its bonafides by not only indicating the levy of sales tax on the invoice but also remitting the same and reflecting it in its sales tax returns, no malafide can be attributed to them. The imposition of penalties is unsustainable on this count too. We therefore set aside the impugned order in appeal that

has upheld the order in original demanding service tax along with interest and imposing penalties. The appeal is allowed with consequential relief as per law, if any.

(Order pronounced in open court on 25.03.2025)

(AJAYAN T.V.)
Member (Judicial)

(VASA SESHAGIRI RAO)
Member (Technical)

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