

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 86506 OF 2017

[Arising out of Order-in-Original No: PUN-SVTAX-000-COM-061-1617 dated 31st March 2017 passed by the Commissioner of Service Tax (Audit), Pune.]

Sakri IT Solutions Pvt Ltd

C-1/5 (Bldg No.C) Office No. 001,
Rakshak Nagar Phase II, Kharadi, Pune - 411014

... Appellant

versus

Commissioner of Service Tax (Audit)

41A, ICE House, Sassoon Road, Pune - 41001

...Respondent

APPEARANCE:

Shri Viraj Reshamwala, Advocate for the appellant

Shri Adeeb Pathan, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85696/2025

DATE OF HEARING:

24/02/2025

DATE OF DECISION:

24/02/2025

PER: C J MATHEW

In this appeal of M/s Sakri IT Solutions Pvt Ltd, the challenge
lies against confirmation of recovery of ₹ 8,43,69,535, under section

73 of Finance Act, 1994, along with interest under section 75 of Finance Act, 1994, for the period from October 2013 to March 2015 besides imposition of penalty under section 76 of Finance Act, 1994 in order¹ of Commissioner of Service Tax (Audit), Pune. The demand was confirmed by concluding proceedings in statement of demand dated 22nd March 2016 following show cause notice dated 11th December 2014 raising a demand in circumstances identical to that for the period from 1st April 2012 to 30th September 2013 which came to be decided.

2. Learned Counsel for the appellant submitted that confirmation of demand in the original notice, from which the impugned statement of demand leading to the impugned order emanated, in adjudicating proceedings, was set aside by the Tribunal in order² disposing off appeal³ challenging order⁴ of Additional Director General of Central Excise Intelligence, (Adjudication), New Delhi.

3. According to Learned Counsel, the appellant, a manufacturer of ‘anti virus software’ at Pune, had, in pursuance thereof, imported ‘codes’ and ‘keys’ for the network from M/s Kaspersky Lab, UK which would be utilized for converting the software into tangible form for distribution of, and for sale, in India. It was submitted that levy on

¹ [order-in-original no. PUN-SVTAX-000-COM-061-1617 dated 31st March 2017]

² [final order no. 55487/2024 dated 8th April 2024]

³ [service tax appeal no. 51776 of 2016]

⁴ [order-in-original no. 08/ST/2015-16 dated 03rd March 2016]

the value of the ‘codes’ and ‘keys’ had been discharged, by inclusion in value on clearance thereupon, as duties under Central Excise Act, 1944. According to the Learned Counsel the dispute pertains to the distribution agreement, against which M/s Kaspersky Lab, UK delivered the products, in electronic form, accompanied by the appropriate ‘keys’ for enabling installation at the consumers’ end. The procurement of ‘keys’ for unlocking the software at the retail store was sought to be taxed as enumerated under section 65(105)(zzzze) of Finance Act, 1994. It was submitted that dispute over the first of the adjudications was carried to the Tribunal, which, by placing reliance on the decision of the Tribunal in *Quick Heal Technologies Ltd v. Commissioner of Service Tax, Delhi* [2020 (41) GSTL 467 (Tri.-Del.)] and upheld by the Hon’ble Supreme Court in *Commissioner of Service Tax, Delhi v. Quick Heal Technologies Ltd* [2022 (63) GSTL 385 (SC)] dismissing the civil appeal of Revenue to hold the said transaction to be beyond the scope of section 65(105)(zzzze) of Finance Act, 1994, disposed off the proceedings.

4. We have heard Learned Authorised Representative who reiterated the findings of the original authority.

5. It is seen that, the order⁵ of the Tribunal, in *re Sakri IT*

⁵ [final order no. 55487/2024 dated 8th April 2024]

Solutions Pvt Ltd v. The Additional Director General (Adjudication), in disposing off appeal⁶ challenging order⁷ of Additional Director General of Central Excise Intelligence (Adjudication), New Delhi, had held that

‘12. As noticed above, the adjudicating authority rejected the contention of the appellant that the Kaspersky Antivirus Software supplied in CD form, being canned software, would be goods and, therefore, not liable to service tax. The adjudicating authority held that the appellant provided ‘information technology software’ service by providing License Keys/codes of Antivirus Software in retail packs and the appellant was complicating the matter to merely evade payment of service tax.

13. In Quick Heal Technologies Limited, a Division Bench of this Tribunal examined a similar controversy. The show cause notice that was issued to the appellant therein alleged that the appellant had supplied “Quick Heal” brand Antivirus 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 Antivirus Software as per the conditions contained in the End User License Agreement and would, therefore, not be treated as deemed sale under article 366(29A) of the Constitution. Thus, the supply of packed Antivirus Software to the end user by charging license fee would amount to a provision of service and would not be a sale. The show cause notice, therefore, required the appellant to show cause as to why service tax for supplying Quick Heal Antivirus license

⁶ [service tax appeal no. 51776 of 2016]

⁷ [order-in-original no. 08/ST/2015-16 dated 03rd March 2016]

key/ code with the Antivirus Software replicated CDs/DVDs in retail packs through dealers during the period 1 March, 2011 to 31 March 2014 should not be demanded with interest and penalty. The demand made in the show cause notice was confirmed by the adjudicated authority. The Tribunal set aside the order of the adjudicating authority and held:

“24. The definition of „information technology software,, is same under section 65 (53a) of the Act or under section 65B (28) of the Act. „Information technology software,, has been defined to mean any representation of instructions, data, sound or image, including source code, and object code recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data process machine or any other device or equipment.

25. The contention of the Appellant is that the software developed by it can neither be manipulated nor does it provide any interactivity to a user and, therefore, does not satisfy the requirement of „information technology software,,. According to the Appellant, once the computer system is booted, the Antivirus Software begins its activity of detecting the virus and continues to do so till the time the computer system remains booted. Thus, there is no interactivity or requirement of giving any commands to the software to perform the function of detecting and removing virus from the computer system. The Appellant further contends that the software developed by it is quite distinct from software like ERP, EXCEL, MS Word, where there is a constant to and fro interaction between the user and the computer system containing the said software. These softwares perform their function only after receipt of input from the user, which is not the case in the Antivirus Software developed by the Appellant.

xxxxxxxxxx

28. The Adjudicating Authority, however, has not accepted the contention of the Appellant and has observed that the software can issue commands to scan drives, both internal and external and that it has an interface with the user to tune-up the personal computer and that it has also a parallel control feature. These features, according to the Adjudicating Authority, need a command by the user to the software and, therefore, it is interactive.

29. It is not possible to accept this finding. The Antivirus Software developed by the Appellant is complete in itself to prevent virus in the computer system. Once the computer system is booted, the Antivirus Software begins the function

of detecting the virus, which continues till the time the computer system remains booted. The computer system only displays a message that viruses existed and that they have been detected and removed. No interactivity takes place nor there is any requirement of giving any command to the software to perform its function of detecting and removing virus from the computer system. It is also seen from the meaning assigned to „interactive,, that a program should involve the user in the exchange of information. There has to be action and communication between the two. A user should communicate with the computer facility and receive rapid responses, which can be used to prepare the next inputs. In contract, in other softwares like ERP, EXCEL, MS Word, there is continuous interaction between the user and the computer system and these softwares perform only after receipt of input from the user.

30. Such being the position, no service tax was leviable under section 65(105)(zzzz) of the Act prior to 1 July, 2012. Even after 1 July, 2012 the definition of 'information technology software' under section 65B(28) remained the same and so also service tax was not leviable.

31. The matter can be examined from another angle. Section 65B (51) defines a 'taxable service' to mean any service on which service tax is leviable under section 66B. Section 66B provides that there shall be levied service tax on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed. Section 65B (44) define „service,, to mean any activity carried out by a person for consideration, and includes a declared service, but shall not include, amongst others, an activity which constitutes merely such transfer, delivery or supply of any goods which is „deemed to be a sale,, within the meaning of clause (29A) of article 366 of the Constitution.

32. The contention of the Appellant is that the Antivirus Software posses all the essential features of „goods,, as observed by the Supreme Court in Tata Consultancy Services v/s State of Andhra Pradesh. It is for this reason that the Appellant contends that it has been paying VAT on the sale of Antivirus Software and no service tax is leviable.

xxxxxxxxxx

35. It is clear from the aforesaid decision of the Supreme Court in Tata Consultancy Services that intellectual property, once it is put on the media and marketed could become „goods" and that a software may be intellectual property and such intellectual property contained in a medium is purchased and sold in various forms including CDs.

36. Section 65B (44) of the Act also excludes from the definition of „service,, any activity which constitutes merely such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution. As noticed above, the Supreme Court in *Tata Consultancy Services* held that *Canned Software* supplied in CDs would be „goods,, chargeable to sales tax/VAT and no service tax can be levied.

37. In this connection, the CBEC Education Guide for Service Tax containing the official guidelines for new system of levy of Service Tax on the basis of negative list w.e.f. 1 July, 2012 also needs to be referred to.

xxxxxxxxx.

38. A perusal of the aforesaid guidelines would indicate that after making a reference to the judgment of Supreme Court in *Tata Consultancy Services*, it mentions that a transaction would be in the nature of sale of goods when a prepackaged or Canned Software is sold, and no service tax would be leviable. However, a license to use the software which does not involve the transfer of ‘right to use’ would neither be a transfer of title in goods nor a deemed sale of goods. Such an activity would fall in the ambit of definition of ‘service’. Thus, if a pre-packaged or Canned Software is not sold but is transferred under a license to use such software, the terms and conditions of the license to use such software would have to be seen to arrive at a conclusion whether the license to use the packaged software involves a transfer of ‘right to use’ such software in the sense the phrase has been used in sub clause (d) of article 366(29A) of the Constitution. The guidelines also provide that in case a license to use pre-packaged software imposes restrictions on the usage of such licenses, which restriction interfere with the free enjoyment of the software, then such a license would not result in transfer of ‘right to use’ the software within the meaning of Clause 29(A) of article 366 of the Constitution. However, every condition imposed would not make it leviable to service tax. The condition should be such so as to restrain the right to free enjoyment on the same lines as a person who has otherwise purchased goods is able to have.

(emphasis supplied)

14. The Division Bench of the Tribunal then examined the End-User Agreement and held as follows:

“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.

XXXXXXXXXX

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 subclause (d) of article 366(29A) of the Constitution.”

(emphasis supplied)

15. The department filed Civil Appeal before the Supreme Court against the aforesaid order of the Tribunal. Civil Appeal was also filed by the department to assail the order passed by the Madras High Court by which the order dated 26.04.2018 of the Adjudicating Authority was upheld.

16. While deciding the Civil Appeal filed by the department to assail the aforesaid order of the Tribunal, the Supreme Court observed as follows:

“34. Thus, from the aforesaid, it is evident that the Tribunal laid much emphasis on the fact that in accordance with the agreement the licensee has the right to use the software subject to the terms and the conditions laid therein. The Tribunal took notice of the fact that in accordance with the agreement the licensee is entitled to use the software/RDM service from the date of the activation of the license till the date of its expiry. The Tribunal also took into consideration the fact that the licensee is also entitled for the updates and the technical support. In view of the Tribunal, the right to use the software would amount to the “deemed sale”. The Tribunal rejected the contention of the revenue that the transaction would not be covered under sub-clause (d) of the Article 366(29A) of the Constitution.

XXXXXXXXXX

42. Tata Consultancy Services (*supra*) was a case in which the specific issue of computer software packages was considered as is the concern in the present case also. There was, however, a distinction drawn insofar as the ‘uncanned software’ and ‘canned software’ alternatively termed as

‘unbranded’ and ‘branded’ is concerned. The distinction is in that a ‘canned software’ contains programmes which can be used as such by any person purchasing it, while an ‘uncanned software’ is one prepared for a particular purchaser’s requirements by tweaking the original software to adapt to the specific requirements of a particular entity. While a ‘canned software’ could be sold over the shelf, an ‘uncanned software’ is programmed to specific and particular needs and requirements. This Court held that in India the test to determine whether a property is “goods”, for the purpose of sales tax, is not confined to whether the goods are tangible or intangible or incorporeal. The correct test would be to determine whether an item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. It was held that both in the case of ‘canned’ and ‘uncanned’ software all these are possible (sic para 16).

52. *From the judicial decisions, the settled essential requirement of a transaction for the transfer of the right to use the goods are:*

(i) It is not the transfer of the property in goods, but it is the right to use the property in goods;

(ii) Article 366(29A)(d) read with the latter part of the clause (29A) which uses the words, “and such transfer, delivery or supply”... would indicate that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use;

(iii) in the transaction for the transfer of the right to use goods, delivery of the goods is not a condition precedent, but the delivery of goods may be one of the elements of the transaction;

(iv) the effective or general control does not mean always physical control and, even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods;

(v) the approvals, concessions, licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods; and

(vi) during the period of contract exclusive right to use goods along with permits, licenses, etc., vests in the lessee.

xxxxxxxxxx

55. *The sum and substance of the ratio of the case of BSNL*

(supra) as discernible is that the contract cannot be vivisected or split into two. Once a lump sum has been charged for the sale of CD (as in the case on hand) and sale tax has been paid thereon, the revenue thereafter cannot levy service tax on the entire sale consideration once again on the ground that the updates are being provided. We are of the view that the artificial segregation of the transaction, as in the case on hand, into two parts is not tenable in law. It is, in substance, one transaction of sale of software and once it is accepted that the software put in the CD is “goods”, then there cannot be any separate service element in the transaction. We are saying so because even otherwise the user is put in possession and full control of the software. It amounts to “deemed sale” which would not attract service tax.

56. In view of the aforesaid, we have reached to the conclusion that the impugned order of the Tribunal suffers from no jurisdictional or any other legal infirmity warranting any interference at our end in the present appeal.”

(emphasis supplied)

17. While deciding the Civil Appeals filed by the department to assail the order of the Madras High Court, the Supreme Court observed as follows:

“70. These appeals should succeed in the light of the reasoning assigned by us while dismissing the Civil Appeal (Diary No. 24399 of 2020), as above.

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)(zzzzz) 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)

18. In the present case, the End User Licence Agreement is similar to the End User Licence Agreement referred to in paragraph 44 of the decision of the Tribunal and in paragraph 53 of the judgment of the Supreme Court in Quick

Heal Technologies. The relevant portions of the End User Licence Agreement in the present case are reproduced below:

Standard End User Licence Agreement

"1. Licence Grant. Subject to the payment of the applicable licence fees, and subject to the terms and conditions of this Agreement, Kaspersky Lab hereby grants to you a non-exclusive, non-transferable right to use one copy of the specified version of the Software and the accompanying documentation (the "Documentation") for the term of this Agreement solely for your own internal business purposes. You may install one copy of the Software on one computer, workstation, personal digital assistant, or other electronic device for which the Software was designed (each, a "Client Device"). If the Software is licensed as a suite or bundle with more than one specified Software product, this licence applies to all such specified Software products, subject to any restrictions or usage terms specified on the applicable price list or product packaging that apply to any of such Software products individually.

1.1. Use. The Software is licensed as a single product; it may not be used on more than one Client Device or by more than one user at a time, except as set forth in this Section.

1.1.1. The Software is 'in use' on a Client Device when it is loaded into the temporary memory (i.e., random-access memory or RAM) or installed into the permanent memory (e.g., hard disk, CD-ROM, or other storage device) of that Client Device. This licence authorizes you to make only as many back-up copies of the Software as are necessary for its lawful use and solely for backup purposes, provided that all such copies contain all of the Software's proprietary notices. You will maintain records of the number and location of all copies of the Software and Documentation and will take all reasonable precautions to protect the Software from unauthorized copying or use.

1.1.2. If you sell the Client Device on which the Software is installed, you will ensure that all copies of the Software have been previously deleted: 1.1.3. You shall not decompile, reverse engineer, disassemble or otherwise reduce any part of this Software to human readable form nor permit any third party to do so. The interface information necessary to achieve interoperability of the Software with independently created computer programs will be provided by Kaspersky Lab on request on payment of its reasonable costs and expenses for procuring and supplying such information. In the event Kaspersky Lab notifies you that it does not intend to make such information available for any reason, including (without limitation) costs you shall be permitted to take such steps to achieve interoperability provided that you may only reverse engineer or decompile to

the extent permitted by law,

1.1.4. You shall not, nor permit any third party to copy (other than as expressly permitted herein), make error corrections to or otherwise modify, adaptor; translate the Software nor create derivative works of the Software.

1.1.5. You shall not rent, lease or lend the Software to any other person, nor transfer or sub-licence your licence rights to any other person.

1.1.6. You shall not use this Software in automatic, semi-automatic or manual tools designed to create virus signatures, virus detection routines, any other data or code for detecting malicious code or data.

1.2 Service-Mode Use. You may use the Software on a Client Device or on or as a server ('Server') within a multi-user or networked environment ('Server-Mode') only if such use is permitted in the applicable price list or product packaging for the Software. A separate licence is required for each Client Device or "seat" that may connect to the Server at any time, regardless of whether such licensed Client Devices or seats are concurrently connected to or actually assessing or, using the Software. Use of software or hardware that reduces the number of Client Devices or seats directly accessing or utilizing the Software (e.g., "multiplexing" or "pooling" software or hardware) does not reduce the number of licences required (i.e., the required number of licences would equal the number of distinct inputs to the multiplexing or pooling software or hardware "frontend"). If the number of Client Devices or seats that can connect to the Software can exceed the number of licences you have obtained, then you must have a reasonable mechanism in place to ensure that your use of the Software does not exceed the use limits specified for the licence you have obtained. This licence authorizes you to make or download such copies of the Documentation for each Client Device or seat that is licensed as are necessary for its lawful use, provided that each such copy contains all of the Documentation proprietary notices.

1.3. Volume Licences. If the Software is licensed with volume licence terms specified in the applicable product invoicing or packaging for the Software, you may make, use or install as many additional copies of the Software on the number of Client Devices as the volume licence terms specify. You must have reasonable mechanisms in place to ensure that the number of Client Devices on which the Software has been installed does not exceed the number of licences you have obtained. This licence authorizes you to make or download one copy of the Documentation for each additional copy authorized by the volume licence, provided that each such copy contains all of the Documentation's proprietary notices.

2. *Term.* This Agreement is effective for the period specified in the Key File (the unique file which is required to fully enable the Software, please see Help/about Software or Software about, for Unix/Linux version of the Software see the notification about expiration date of the Key File) unless and until earlier terminated as set forth herein. The Agreement will terminate automatically if you fail to comply with any of the conditions, limitation or other requirements described herein. Upon any termination or expiration of this Agreement, you must immediately destroy all copies of the Software and the Documentation. You may terminate this Agreement at any point by destroying all copies of the Software and the Documentation.

3. *Support.*

(i) Kaspersky Lab will provide you with the support services ("Support Services") as defined below for a period of one year on:

(a) Payment of its then current support charge; and

(b) Successful completion of the Support Services Subscription Form as provided to you with this Agreement or as available on the Kaspersky Lab website, which will require you to produce the Key Identification File which will have been provided to you by Kaspersky Lab with this Agreement. It shall be in the absolute discretion of Kaspersky Lab whether or not you have satisfied this condition for the provision of Support Services.

(ii) Support Services will terminate unless renewed annually by payment of the then current annual support charge and by successful completion of the Support Services Subscription Form again.

(iii) "Support Services" means:

(a) Daily updates of antivirus databases;

(b) Free software updates, including version upgrades;

(c) Extended technical support via E-mail and hot phone-line provided by Vendor and/or Reseller;

(d) Virus detection and curing updates in 24-hours period.

4. *Ownership Rights.* The Software is protected by copyright laws. Kaspersky Lab and its suppliers own and retain all right, title and interest in and to the Software, including all copyrights, patents, trademarks and other intellectual property rights therein. Your possession, installation, or use of the Software does not transfer to you any title to the intellectual property in the Software, and you will not acquire any rights to the Software except as expressly set forth in this Agreement.

5. Confidentiality. You agree that the Software and the Documentation, including the specific design and structure of individual programs and the Key Identification File constitute confidential proprietary information of Kaspersky Lab. You shall not disclose provide or otherwise make available such Confidential information in any form to any third party" without the prior written consent of Kaspersky Lab. You shall implement reasonable security measures to protect such confidential information, but without limitation to the fore going shall use best endeavours to maintain the security of the Key Identification File."

19. Thus, as a similar End User Licence Agreement was executed in the present case, the decisions of the Tribunal and the Supreme Court in Quick Heal Technologies would apply to the facts of the present appeal. The adjudicating authority was not justified in requiring the appellant to discharge service tax liability on transactions with end users for supply of license code/keys of Kaspersky Antivirus Software in retail packs under section 65(105)(zzzze) of the Finance Act.'

6. As the issue stands settled in their own dispute for the earlier period and with the present dispute having its origin in 'statement of demand' consequent to the show cause notice issued therein, the impugned order is set aside to allow the appeal.

(Operative part of the order pronounced in the open court on 24th February 2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)