CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL NO. 51175 OF 2016

(Arising out of Order-in-Original No.04/ST/2015-16 dated 28.01.2016 passed by The Additional Director General Of Central Excise Intelligence, [Adjudication])

Quick Heal Technologies Limited ..... **Appellant**
(Marvel Edge, Office No. 7010 C& D, 7th Floor,
Viman Nagar, Pune, Maharashtra)

VERSUS

Commissioner of Service Tax, Delhi ..... **Respondent**
(MG Marg…. IP Estate, 17-B….. IAEA House….
IP ESTATE, Delhi-110002)

APPEARANCE:
Shri M.H. Patil, Kiran Chavan, J.M. Sharma, Prasad, Prasad Tendulkar, Advocates for the Appellant
Shri Vivek Pandey, Authorized Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING : 12 July, 2019
DATE OF DECISION: 09 January, 2020

Final Order No. 50022/2020

JUSTICE DILIP GUPTA

This Appeal is directed against the order dated 28 January, 2016 passed by the Additional Director General (Adjudication)[1] by which the demand of service tax amounting to Rs. 56,07,05,595/- on the services alleged to have been provided by the Appellant from 1

1. Adjudicating Authority

March, 2011 to 31 March, 2014 has been confirmed with interest and penalty.

2. The Appellant is engaged in the business of Research and Development of Antivirus Software under the brand name "Quick Heal". It contends that the unique selling proposition of all Antivirus Products/ Software is not only to eliminate the existing viruses from the computer system, but also to ensure "virus free" environment for functioning of the computer system. Thus, all anti-virus developers have to keep continuous surveillance on Viruses, Malware and Spam, and this is achieved by providing continuous updates to virus definitions. This enables "Anti-Virus Software" to maintain the computer system "virus free".

3. According to the Appellant, during the disputed period from 1 March, 2011 to 31 March, 2014, the Antivirus Software was developed by M/s Softtalk Technologies Ltd., M/s Jupiter International Ltd. and M/s IP Softcom (India) Pvt. Ltd. for the Appellant in a ready to sell condition mentioning unique Key number (license key) and MRP. Being a Canned Software[2], it was in the nature of 'goods' and was subject to Sales Tax/ VAT and so no service tax was to be paid. This Antivirus Software was, therefore, sold by the aforesaid manufactures to the Appellant on payment of VAT. They were thereafter transferred by the Appellant to various Sales Offices of the Appellants from where the ultimate sale took place on payment of applicable VAT in the respective States. The Appellant claims that this activity was initially undertaken from Pune by sending the Master CD to the Replicators like M/s Sagarika Acoustronics Pvt. Ltd. and M/s Moser Beer India Ltd.,

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2. Canned Software means that it is not specifically created for a particular customer.

who replicated the CD and supplied them to various branches/ sales offices of the Appellant, where the CDs were packed in boxes bearing MRP and sold after pasting a sticker bearing the license/ personal key number. The Appellant paid Central Excise Duty on such pre-packaged Antivirus Software. The Jurisdictional Central Excise Authorities at Pune, however formed a view that each of the Sales Offices where the Software was packed had to take separate registration and pay Central Excise duty from each of the Sale Offices situated in different parts of the country and not from the main office at Pune. The Appellant, therefore, shifted the aforesaid activity to Baddi (Himachal Pradesh) and Rudrapur (Uttarakhand).

4. A show cause notice dated 2 February, 2015 was issued by the Additional Director General demanding service tax with interest and penalty. It was stated 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[3] 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 not sale. The show cause notice, therefore, required the Appellant to show cause why service tax for supplying Quick Heal Antivirus license key/ code with the Antivirus Software replicated CDs/DVDs in retail packs through dealers during

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3. EULA

the period 1 March, 2011 to 31 March 2014 should not be demanded with interest and penalty. The relevant portion of the show cause notice is reproduced below:-

> "16.3**. In view of the statutory provisions discussed above, it is clear that M/s QHTPL were required to discharge Service Tax on the services (covered under the category of ` information technology software Service' prior to 01.07.2012 under item no. (vi) of clause (zzzze) of sub-section (105) of Section 65 of the Finance Act, 1994 and w.e.f. 01.07.2012, on the services covered under the category of 'information technology software service' under Section 66E(d) of the Finance Act, 1994 for providing Quick Heal brand Antivirus software license key/code supplied along with CD/DVD replicated with Quick Heal brand Antivirus software through dealers/distributors to the end-customers in India.**
> 17**. Investigations conducted against M/s QHTPL has revealed that during the period 01.03.2011 to 31.03.2014, M/s QHTPL had supplied Quick Heal brand Antivirus software key/codes in retail packs to the end-user through dealers/distributors without discharging their Service Tax liability on such transactions**. Packaged anti-virus software consists of license code which assists the end-user for receiving future updates of antivirus software electronically direct from the antivirus software owner for a certain period depending on the license to use the antivirus software. **The end-user is provided with the temporary (non-exclusive) right to use the antivirus software as per conditions of end-user license agreement entered with M/s QHTPL and the same cannot be treated as deemed sale under Article 366(29A)(d) of the Constitution.** In consideration of payment of the License Fee, which is a part of the price, evidenced by the Receipt, Quick Heal grants the Licensee, a non-exclusive and non-transferable right. Quick Heal reserves all rights not expressly granted, and retains the title and ownership of the software, including all subsequent copies in any media. This software and accompanying written materials are the property of Quick Heal and are copyrighted. Copying of the software or the written material is expressly forbidden. **Thus, the supply of packaged antivirus software to the end user by charging license fee as per end user license agreement amounts to provision of service and not sale.** The dominant nature of such transactions is provision of service and not sale in the light of Hon'ble Supreme Court's decision in the BSNL case reported as 2006 (2) S.T.R. 161 (SC).
> 17.1.----------
> 17.2**. On applying the aforesaid discussed statutory provisions and the judicial pronouncements to the facts of this case, it appears that transaction of M/s QHTPL with the end-customers through distributors and dealers is in the nature of provision of information technology software service as they are providing the end users with the license keys/codes, i.e., temporary (non exclusive) right to use Antivirus software supplied electronically in the form of updates for a limited period in the light of terms and conditions EULA.**
> 17.3. In view of the facts & evidences discussed above, M/s QHTPL is liable to pay Service Tax on their transactions with end-customers for supply of license codes/ keys of Quick Heal Antivirus software in retail packs. However, they did not pay Service Tax on consideration received for supply of Antivirus Software to the end-customers in retail packs during the period 01.03.2011 to 31.03.2014."
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> **(emphasis supplied)**

5. The Appellant filed a detailed reply dated 15 June, 2015 pointing out that providing the Antivirus Software would not mean that the Appellant was providing 'information technology software' service and so service tax was not required to be paid prior to or after 1 July, 2012. It was also pointed out that Quick Heal Antivirus Software supplied in CD form, being a Canned Software, was goods and, therefore, not leviable to service tax and that the Appellant had been paying sales tax/VAT on sale of such Quick Heal Antivirus Software. It was also pointed out that generation of license key/ code was neither a manufacturing activity nor service and that license key was neither software nor could it function or work as Antivirus Software. The updates/ upgrades were free and the activity was without consideration and, therefore, not a service. The Appellant also contended that the extended period of limitation under the proviso to section 73 of the Finance Act, 1994[4] could not have been invoked.

6. The Adjudicating Authority, however, did not accept the contentions of the Appellant and confirmed the demand of service tax with interest and penalty. The Adjudicating Authority noticed that the whole transaction could be divided in two stages, namely (a) up to the replication of the Master CD by the replicators under the terms of agreement; and (b) Supply of Antivirus Software in CD to End-Users under a separate End User Licensing Agreement. It also noticed that the second part (i.e. b) consisted of two parts, namely (i) Supply of Antivirus Software in CD and (ii) Providing electronic updates to the software originally provided. The Adjudicating Authority observed that

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4 The Act

the first stage of the transaction relating to recording of the software on the CDs and making them marketable makes them 'goods' chargeable to Central Excise Duty and so there was no dispute about duty payment at this stage. However, the second part of the transaction i.e. providing the CD containing the software to the end customer under the license agreement, was the subject matter of dispute, for which the position prior to 01 July, 2012 and subsequent to 01 July, 2012 was required to be examined.

7. In regard to the period prior to 1 July, 2012, the Adjudicating Authority observed as follows:-

> **Pre 01 July, 2012 period:**
>
> i) Supply of software in the CD:
> As narrated above the period 01 July, 2012 onwards the facts of the case don't amount to a transfer of right to use. As clarified by the Education Guide the transaction will amount to a transaction in service. It is classifiable as a service accordingly.
>
> ii) Electronic updates:
> The updates transfer the software, which are the subject matter of the license. As the transaction is in electronic form it is not a transaction in goods. Therefore, it is a transaction in service.
> It is thus observed that for the period prior to 01 July, 2012 also both components of the transaction are transactions in the nature of service. The definition of IT software service provided in section 65(zzzze) is an inclusive definition. It is not therefore necessary for the service to fall in any of the inclusive categories provided in the section. It will suffice if the transaction conforms to the definition of IT Software service laid down under section. As narrated above the transactions are in the nature of services which qualify as information Technology Services and liable to payment of duty.

8. In regard to the period after 1 July, 2012, the Adjudicating Authority divided it into two parts and the observations in regard to both the parts are as follows:

> **i) Initial supply of the software in the CD form:**
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> xxxxxxxxxxx
>
> xxxxxxxxxxx
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> xxxxxxxxxxx
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> A glance at these terms indicate that M/s Quick Heal retain the ownership of the software. The buyer cannot sublet the software. Copying the software is also prohibited. Residuary rights are with

M/s Quick Heal. The buyer can enjoy the software for a specified period only. Therefore, it appears that the receiver of the software does not enjoy the same rights in the arrangement as a buyer of goods in general. As a result, the transaction is in the nature of a service and chargeable to service tax.

ii) Subsequent supply as electronic updates

It is not disputed that electronic updates are provided to the end customers under the license. Such electronic supply is an activity for a consideration. As such, it is clearly in the nature of supply of services. Hence, it is taxable.

9. The Adjudicating Authority also held that the extended period of limitation was correctly invoked and that the Appellant was also required to pay penalty and interest amount.

10. Shri M H Patil, learned Counsel for the Appellant submitted that:-

i. "Quick Heal" Antivirus Software supplied in CD is not covered under "information technology software" service either prior to 1 July, 2012 under section 65(53a) of the Act or after 1 July, 2012 under section 65B (28) of the Act;

ii. Even otherwise, Quick Heal Antivirus Software supplied in CD form is a Canned Software which would be "goods" and, therefore, not leviable to Service Tax;

iii. Service does not include any activity where "sale of goods" or "deemed sale" under article 366 (29A) of the Constitution takes place and in support of this contention reliance has been placed on the Circular dated 29 February, 2008 issued by the Central Board of Excise and Customs[5] and the Education Guide for Service Tax issued by CBEC;

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5 CBEC

iv. A license key/code is not a trigger point for manufacture of excisable goods nor is it manufacture or sale of software, nor can it function or work as Antivirus Software; and

v. As there was no suppression of facts, with any intent to avoid tax, the extended period of limitation could not have been invoked.

11. Shri Vivek Pandey, learned Authorized Representative of the Department, has however supported the impugned order and contended that:-

i. The supply of "Ouick Heal" Antivirus Software under the EULA is a service classifiable under "information technology software";

ii. "Quick Heal" Software that is supplied under EULA is not a pure sale because "Quick Heal" grants the licensee a non-exclusive and non-transferable right. The software and the accompanying written materials are the property of "Quick Heal";

iii. The dominant nature of EULA is only a grant of license to use the "Quick Heal" software; and

iv. In support of the aforesaid contentions reliance has been placed upon the decision of the Supreme Court in **Bharat Sanchar Nigam Ltd. v/s Union of India**[6] and the decision of the Madras High Court in InfoTech **Software Dealers association v/s Union of India**[7]**.**

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6 2016 (2) STR 161-SC
7 2010(20) STR 289 (Madras).

12. The submissions advanced by learned Counsel for the Appellant and the learned Authorized Representative of the Department have been considered.

13. The first issue that needs to be examined is whether the Antivirus Software provided by the Appellant to the users in packed CDs is a provision of service under "information technology software" and hence leviable to Service Tax prior to 1 July, 2012 as also after 1 July, 2012.

14. In the write-up of the process of developing the Antivirus Software, the Appellant, in their communication dated 28 February, 2010 submitted to the Department had explained the software development process as follows:-

> **"Quick Heal Technologies (P) Ltd is developer of Anti-virus software "Quick Heal". Antivirus Software Development** is a continuous process, which goes for 24/7 a week. This involves R&D; rigorous testing and surveillance. We have a "Development Centre" in Pune where we develop our Software.
>
> After developing the software we have to continuously provide updates for the same. These updates contain solution for the new viruses. All these updates/ upgrades are provided as new version. These versions are given numbers for proper Identification. **The developed software is offered to Customers in CD media, which cannot run or operate without a key password;** These CDs are required in big quantity, a third party on job work basis; at his premises does this mass replication, currently from Moser Bear. The job worker dispatches these replicated CDs to all our branches as per the quantity intimated to them.
>
> **To register our Software from this CD a special Key number is required. These unique Key Numbers are generated only in our Central Excise Registered premises right from beginning i.e. 1st March 2006; which creates verve in software and allows downloading of latest updates from website enabling the software to function as effective antivirus software.** The Antivirus Software without this Key Number the software on our CD is just a free demonstration as it does not receive any of the updates required to run the software, i.e. it cannot function as an effective anti-virus software and hence there is no value of the Software CD or the box without this serial no. **Thus process of allotment of "Unique Serial Number" is vital process of manufacture after which our software is marketable and ready for sale."**
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> **(emphasis supplied)**

15. To examine the contention, it would be pertinent to refer to the relevant provisions of the Act, both prior to 1 July, 2012 and after 1 July, 2012.

Prior to 1 July, 2012

16. Section 65(53a) of the Act defines 'information technology software' and is as follows:-

> **"65(53a)** "information technology software" means 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 processing machine or any other device or equipment."

17. Section 65(105)(zzzze) of the Act deals with taxable service provided or to be provided to any person by any other person in relation to 'information technology software' and is as follows:-

> **"65(105)** "Taxable service" means any service provided or to be provided –
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> ----------
>
> **(zzzze)** to any person, by any other person in relation to information technology software including, —
> (i) development of information technology software,
> (ii) study, analysis, design and programming of information technology software,
> (iii) adaptation, upgradation, enhancement, implementation and other similar services related to information technology software,
> (iv) providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specifications for a database design, guidance and assistance during the start-up phase of a new system, specifications to secure a database, advice on proprietary information technology software,
> (v) providing the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products,
> (vi) providing the right to use information technology software supplied electronically;"

After 1 July 2012

18. 'Declared service' has been defined under section 65B (22) of the Act to mean any activity carried out by any person for another person for consideration and declared as such under section 66E. In terms of section 66E (d) of the Act, the following shall constitute declared service.

> **"66E (d)** development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software;"

19. Section 65B (28) of the Act defines 'information technology software' as follows:-

> **" 65B(28)** "information technology software" means 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 processing machine or any other device or equipment;"

20. Section 65B (44) of the Act defines 'service' and the relevant portion is reproduced below:-

> **"65B (44)** "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—
> (a) an activity which constitutes merely,—
> (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
> (ii) 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; or"
> xxxxxxxxx

21. Section 65B (51) defines 'a taxable service' to mean any service on which service tax is leviable under section 66B.

22. Section 66B of the Act provides that there shall be leviable a service tax at the rate of 12 percent 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 a manner as may be prescribed.

23. It has, therefore, to be seen whether the meaning assigned to 'information technology software' under section 65(53a) of the Act for a period prior to 1 July, 2012 would cover "Quick Heal Antivirus Software". In regard to the period after 1 July, 2012, it has to be seen whether it would be excluded from the definition of 'service' under section 65B (44) and consequently service tax would not be payable.

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.

26. The Appellant has also referred to the meaning of "interactive software" and the same is as follows:-

A. "In computer science:

'**Interactive software' refers** to software which accepts and responds to input from people – for example, data or commands. Interactive software includes most popular programs, such as word processors or spreadsheet applications. By comparison, **non-interactive** programs operate without human contact: examples of these include compilers and batch processing applications. If the response is complex enough it is said that the system is conducting social interaction and some systems try to achieve this through the implementation of social interfaces."

B. McGraw-Hill Dictionary of Scientific and Technical Terms Fifth Edition

interactive information system An information system in which the user communicates with the computing facility through a terminal and receives rapid responses which can be used to prepare the next input.

C. Chambers Science and Technology Dictionary

Interactive computing - A conversational mode of communication, between computer and user. Input is commonly via a **keyboard** or a **mouse** and both input and output may be displayed on a **VDU**. See **prompt**, **multi-access**, **log in/out, light pen; teletypewriter.**

D. A Dictionary of Computer Science

Interactive Describing a system or a mode of working in which there is a response to operator instructions as they are input. The instructions may be presented via an input device such as a keyboard or mouse, and the effect is observable sufficiently rapidly that the operator can work almost continuously. This mode of working is thus sometimes referred to as **conversational mode.** An interactive system for multiple users will achieve the effect by time sharing.

27. Learned Counsel for the Appellant has also referred to the meaning of manipulated/manipulative and it is as follows:-

The New Oxford Dictionary of English

Manipulate 1 handle or control (a tool, mechanism, etc.), typically in a skillful manner:: he manipulated the dials of the set.

- Alter, edit. or move (text or data) on a computer.
  - examine or treat(a part of the body) by feeling or moving it with the hand: a system of healing based on manipulating the ligaments of the spine.

> **2.** Control or influence (a person or situation) cleverly, unfairly, or unscrupulously: the masses were deceived and manipulated by a tiny group.

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 continuos 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)(zzzze) 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[8].** 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.

33. Justice S. N. Variava in **Tata Consultancy Services** held that sale of computer software is clearly a sale of 'goods' and the relevant paragraph is reproduced below:-

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8. 2004 (178) ELT 22 (S.C.)

> **"24.** In our view, the term "goods" as used in Article 366(12) of the Constitution of India and as defined under the said Act are very wide and include 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 programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. 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 programme 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 programmes have all these attributes."
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> **(emphasis supplied)**

34. Justice S.B. Sinha in the concurring judgment also observed as follows:-

> **" 71. 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 leviability of the tax under a fiscal statute, it may not make a difference. A programme 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 programme 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.
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> **72.** At this juncture, we may notice the meaning of canned software as under:

> "(7) 'Canned software' means that is not specifically created for a particular consumer. The sale or lease of, or granting a license to use, canned software is not automatic data processing and computer services, but is the sale of tangible personal property. When a vendor, in a single transaction, sells canned software that has been modified or customized for that particular consumer, the transaction will be considered the sale of tangible personal property if the charge for the modification constitutes no more than half of the price of the sale."
>
> **73.** The software marketed by the Appellants herein indisputably is canned software and, thus, as would appear from the discussions made hereinbefore, would be exigible to sales tax.
>
> **74.** It is not in dispute that when a programme is created it is necessary to encode it, upload the same and thereafter unloaded. 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.
>
> **75.** Recently, in Commnr. Of Central Excise, Pondicherry v. M/s. Acer India Ltd. [2004 (8) SCALE 169] this Court has held that operational software loaded in the hard disk does not lose its character as tangible goods.
>
> **76.** If a canned software otherwise is 'goods', the Court cannot say it is not because it is an intellectual property which would tantamount to rewriting the judgment. In Madan Lal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd. [(1962) Suppl. 3 SCR 973], this Court held that the court cannot rewrite the provisions of law which clearly is the function of the Legislature which interprets them.
>
> **77.** I respectfully agree with the opinion of Variava, J. that the appellant herein is liable to pay sales tax on the softwares marketted by it and the appeals should be dismissed."
>
> **(emphasis supplied)**

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. The relevant guidelines are as follows:-

> **"6.4 Development, design, programming, customization, adaptation, up gradation, enhancement, implementation of information technology software**
>
> **6.4.1 Would sale of pre-packaged or canned software be included in this entry?**
>
> No. It is a settled position of law that pre-packaged or canned software which is put on a media is in the nature of goods [Supreme Court judgment in case of Tata Consultancy Services vs State of Andhra Pradesh [2002(178) ELT 22(SC) refers]. Sale of pre-packaged or canned software is, therefore, in the nature of sale of goods and is not covered in this entry.
>
> **6.4.4 Would providing a license to use pre-packaged software be a taxable service?**
>
> The following position of law needs to be appreciated to determine whether a license to use pre packaged software would be goods-
>
> • As held by the Hon'ble Supreme Court in the case of Tata Consultancy Services vs. State of Andhra Pradesh [2002(178) ELT 22(SC)]] pre-packaged software or canned software or shrink wrapped software put on a media like is goods. Relevant portion of para 24 of the judgment is reproduced below-
>
> > "A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. 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 programme 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 programmes have all these attributes."

Therefore, in case a pre-packaged or canned software or shrink wrapped software is sold then the transaction would be in the nature of sale of goods and no service tax would be leviable.

> • The judgement of the Supreme Court in Tata Consultancy Service case is applicable in case the pre-packaged software is put on a media before sale. In such a case the transaction will go out of the ambit of definition of service as it would be an activity involving only a transfer of title in goods.
> • As per the definition of 'service' as contained in clause (44) of section 65(B) only those transactions are outside the ambit of service which constitute only a transfer of title in goods or such transfers which are deemed to be a sale within the meaning of Clause 29(A) of article 366 of the Constitution. The relevant category of deemed sale is transfer of right to use goods contained in sub-clause (d) of clause (29A) of the Constitution.
> • 'Transfer of right to use goods' is deemed to be a sale under Article 366(29A) of the Constitution of India and transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods is a declared service under clause (f) of section 66E.
> • Transfer of right to use goods is a well-recognized constitutional and legal concept. Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods. For understanding the concept of transfer of right to use please refer to point no 6.6.1.
> • A license to use 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' and also in the declared service category specified in clause (f) of section 66E.
> • Therefore, 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 come to the conclusion as to whether the license to use packaged software involves 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. (See point no 5.6.1).
> • In case a license to use pre-packaged software imposes restrictions on the usage of such licenses, which interfere with the free enjoyment of the software, then such 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. Every condition imposed in this regard will not make it liable to service tax. The condition should be such as

> restraints the right to free enjoyment on the same lines as a person who has otherwise purchased goods is able to have. Any restriction of this kind on transfer of software so licensed would tantamount to such a restraint.
> • Whether the license to use software is in the paper form or in electronic form makes no material difference to the transaction.
> • However, the manner in which software is transferred makes material difference to the nature of transaction. If the software is put on the media like computer disks or even embedded on a computer before the sale the same would be treated as goods. If software or any programme contained is delivered online or is down loaded on the internet the same would not be treated as goods as software 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."

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 pre-packaged 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.

39. In this connection, it will also be relevant to refer to decisions of the Andhra Pradesh High Court in **M/s G S Lamba and Sons v/s State of Andhra Pradesh**[9] and the Guwahati High Court in **Dipak Nath v/s Oil and Natural Gas Corporation Ltd. and others**[10].

40. The Andhra Pradesh High Court in **M/s G.S. Lambha** indicated the settled essential request of a transaction for transfer of the right to use the goods. It observed that it is not on the delivery of the goods used but on the transfer of the 'right to use goods' and that the determination as to whether there has been transfer of the 'right to use goods' is to be answered on a consideration of the terms of the contract between the parties. The observations are as follows:-

> "30. From the judicial decisions, the settled essential requirement of a transaction for transfer of the right to use goods are: (i) it is not the transfer of the property in goods, but it is the right to use property in goods; (ii) Article 366(29-A)(d) read with the latter part of the Clause (29-A) which uses the words, "and such transfer, delivery or supply ..." would show 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 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; and (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, licences etc., vests in the lessee."

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9. 2012-TIOL-49-HC-AP-CT
10. 2009 SSC ONLINE GUA 420

41. In **Dipak Nath** the Guwahati High Court observed that the ONGC had a clear control over the crane during the entire period of operation of the contract, though the cranes may be operated by the crew provided by the contractor. The observations are as follows:-

> "6. The determination of the question whether there has been a transfer of the right to use the goods involved which are the subject matter of a contract has essentially to be answered on a construction of the terms of the contract between the parties. This appears to be the view deducible from the decision in State of A.P. vs. Rashtriya Ispat Nigal Ltd., (2002) 3 SCC 314. The principles for determination of the question arising in the present appeals, i.e., whether there was a transfer of the right to use the goods covered by the contract agreement between the parties, as laid down by the Apex court, having been understood, the court must now proceed to answer the said question by understanding the correct scope and meaning of the terms of the contract involved in the present cases.
>
> 19. The above analysis of the relevant provisions of the contract agreement between the parties indicate the clear dominion and control of ONGC over the crane during the entire period of operation of the contract once a crane is placed at the disposal of the ONGC under the contract. The crane is to be deployed at worksites as per the discretion of the ONGC and though the normal period of deployment is 10 hours in a day, such deployment at the discretion of the ONGC may be for any period beyond the normally contemplated 10 hours. The deployment of the crane in oil field operations as well as other hazardous situations is at the sole discretion of the ONGC. Though the cranes are operated by the crew provided by the contract such crew while operating a crane is under the effective control of the ONGC and its authorities. Therefore, under the contract though the normal operational time is 10 hours a day, the ONGC is entitled to deploy the cranes, if required, to the entire period of 24 hours to perform duties the kind of which and the locations whereof is to be decided by the ONGC. The mere fact that after the operation of the crane is over on any given day the crane may come back to the owner/operator will hardly be material to decide as to who has dominion over the crane inasmuch as the crane can be recalled for duty by the ONGC at any time. Under the contract the crane is to be operated for 26 days in a month and the remaining four days are to be treated as maintenance off days. Though the crane is not operational on the maintenance off days, yet, 50% of the operational charges is paid by the ONGC for the maintenance off days and the terms of the contract make it clear that even on the off days the crane can be called for operation by the ONGC at its sole discretion."

42. Thus, in spite of the fact that certain restrictions may have been placed in the contract, the Courts have held that there was a

transfer of the 'right to use the goods' covered by the contract agreement.

43. It would now be pertinent to analyze the terms of the agreement to find out whether there was a transfer of the 'right to use goods'.

44. The relevant provisions of the "Quick Heal" Internet Security End-User License Agreement are as follows:-

> " 16. BY USING THIS SOFTWARE OR BY ACCEPTING OUR SOFTWARE USAGE AGREEMENT POLICY OR ATTEMPTING TO LOAD THE SOFTWARE IN ANY WAY, (SUCH ACTION WILL CONSTITUTE A SYMBOL OF YOUR CONSENT AND SIGNATURE), YOU ACKNOWLEDGE AND ADMIT THAT YOU HAVE READ, UNDERSTOOD AND AGREED TO ALL THE TERMS AND CONDITIONS OF THIS AGREEMENT, THIS AGREEMENT ONCE ACCEPTED BY "YOU"[AS AN INDIVIDUAL (ASSUMING YOU ARE ABOVE 18 YEARS AND/OR HAVING LEGAL CAPACITY TO ENTER INTO AN AGREEMENT), OR THE COMPANY OR ANY LEGAL ENTITY THAT WILL BE USING THE SOFTWARE (HEREINAFTER REFERRED TO AS YOU' OR YOUR' FOR THE SAKE OF BREVITY] SHALL BE A LEGALLY ENFORCEABLE AGREEMENT BETWEEN YOU AND QUICK HEAL TECHNOLOGIES PRIVATE LIMITED, PUNE, INDIA (HEREINAFTER REFERRED TO AS "QUICK HEAL") AND YOU SHALL HAVE THE RIGHTS TO USE THE SOFTWARE SUBJECT TO THE TERMS AND CONDITIONS MENTIONED IN THIS AGREEMENT OR AS AMENDED BY QUICK HEAL FROM TIME TO TIME. IF YOU DO NOT AGREE TO ALL THE TERMS AND CONDITIONS BELOW, DO NOT USE THIS SOFTWARE IN ANY WAY AND PROMPTLY RETURN IT OR DELETE ALL THE COPIES OF THIS SOFTWARE IN YOUR POSSESSION.
>
> In consideration of payment of the License Fee, which is a part of the price, evidenced by the Receipt. Quick Heal grants the Licensee, a non-exclusive and non-transferable right. Quick Heal reserves all rights not expressly granted, and retains the title and ownership of the software, including all subsequent copies in any media. This software and the accompanying written materials are the property of Quick Heal and are copyrighted. Copying of the software or the written material is expressly forbidden.
>
> In addition to this security software, Quick Heal offers you Quick Heal Remote Device Management Services to manage your device(s).
>
> Quick Heal reserves all rights not expressly granted, and retains the title and ownership of the software, including all subsequent copies in any media, This software and the accompanying written materials are the property of Quick Heal and are copyrighted.
>
> **1. DEFINITIONS**
>
> ----------
> B. "License period" means the period as more particularly described in this Agreement.
>
> ----------
> G. Updates" means collections of any or all among virus definition files including detections and solutions for new viruses along with the corrections, improvements or modifications to the software.

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2. DO's & DON'TS

You can:

A. make copy of the software for backup purpose or for the purpose of sharing through various means (and such backup copy must be destroyed when you lose the right to use the Software or is terminated for any other reason according to the legislation in force in the country of your principal residence or in the country where You are using the software) and replace lost, destroyed, or becomes unusable.

B. use one copy of the software on a single computer. In case of multiuser pack, use of the software only on the said number of systems as mentioned on the packaging.

C. install the software on a network, provided you have a licensed copy of the software for each computer that can access the software over that network.

D. avail Quick Heal RDM service to manage your device (a maximum of 10 devices in one account.)

You cannot:

A. emulate, or adapt any portion of the software.

B. sublicense, rent or lease any portion of the software.

C. try making an attempt to reveal/discover the source code of the software.

D. debug, decompile, disassemble, modify, translate, reverse engineer the software.

E. create derivative works based on the software or any portion thereof with sole exception of a non-waivable right granted to You by any applicable legislation.

F. remove or alter any copyright notices or other proprietary notices on any copies of the software.

G. reduce any part of the software to human readable form.

H. use the software in the creation of data or software used for detection, blocking or treating threats described in the user manual.

I. use for unlicensed and illegal purpose.

J. remove your user account from Quick Heal RDM service once registered

K. retrieve deleted location entries and back up data from the user account on the Quick Heal RDM service.

L. attempt to gain unauthorized access to Quick Heal RDM networks.

5. LICENSE PERIOD

A. You are entitled to use this software/ RDM Services from the date of license activation until the expiry date of the license.

B. You understand, agree and accept that you are entitled for the updates and technical support via the Internet and telephone. Any use of this software/RDM Services for any other purposes is strictly forbidden and probhibited and Quick Heal reserves to take any action against such unauthorized usage.

C. License for use of Quick Heal RDM service to manage devices shell be valid till your device secutiry software license is valid.

D. You agree, understand that any unauthorized usage of the software/ RDM services or breach of any/all terms and conditions stated herein the Agreement shall result in automatic and immediate termination of this Agreement and the License granted hereunder and which may result in criminal and/ Or civil action by Quick Heal and/ Or its agents against you including but not limited to right to block the key file/ License key/ product key and without any refund to You and without any prior intimation/ notice to you in this regard.

E. If you have acquired the specific language localization of the softwar/ RDM service, you will not be able to activate the software by applying the activation code of other language localization.

F. Quick Heal does not guarantee the protection from the threats more particularly described in the user manual after the License to use the software/RDM service is terminated for any reason.

6. FEATURES OF SOFTWARE

A. During the license period of the software/RDM services, You have the right to use features of software/RDM service.

B. During the license Period of the Software/RDM, You have the right to receive free updates of the software and Quick Heal RDM service via Internet as and when Quick Heal publishes the updated virus- database and free version upgrade as and when Quick Heal releases new version upgrade. You agree, understand and accept that You will be required to regularly download the updates published by Quick Heal. Any and all updates/ upgrades you receive from Quick Heal shall be governed by this Agreement, or as amended from time to time by Quick Heal.

C. You agree, accept and acknowledge:

I. that You are solely responsible for the configuration of the software/ RDM services settings and the result, actions, inactions initiated due to the same and Quick Heal assumes no liability/ responsibility in any case and the Clause of Indemnification shall be applicable.

II. that Quick Heal assumes no liability/responsibility for any date deletion, including but not limited to any deletion/ loss of personal, and/or confidential date; and/or uninstallation of third-party apps; and/or change in settings; specifically authorized by You or occurs due to the actions, inactions (whether intentional or not) by You or any third party whom

You have authorized to use, handle you Device due to features or software/RDM services.

III. that to avail/use certain features of the software/RDM services, you may be required to incur some cost and that Quick Heal does not warrant that the usage of certain features of the software/RDM services are free of cost and that Quick Heal shall not entertain and expressly disclaims, any claim for reimbursement of any expenses including but not limited to any direct or incidental expenses arinsing out of Your usage of such features of the software/RDM services.

IV. that you be solely responsible and shall comply all applicable laws, regulations of India and any foreign laws including without limitation, privacy, obscenity, confidentiality, copyright laws for using any report, date, information derived as a result of using the software and Quick Heal RDM services.

V. that while using the software, Quick Heal suggests some actions to be initiated by You in your sole benefit, for example "Quick Heal software may suggest You to uninstall infected applications", however such actions are suggestive and Quick Heal takes no responsibility/liability if you perform such suggestive actions or not and Quick Heal assumes no responsibility/ liability for any liability arising out of such actions/inactions.

9. QUICK HEAL STATUS UPDATE

Upon every update of licensed copy, Quick Heal Update module will send current product status information to Quick Heal Internet Centre. The information that will be sent to the Internet Centre includes the Quick Heal protection health status like, which monitoring service is in what state in the system. The information collected does not contain any files or personal date. The information will be used to provide quick and better technical support for legitimate customers.
All the registered user/subscribers will get the updates free of cost from the date of license activation until the expiry date of the license.

13. Intellectual Property

The software, source code, activation code, license keys, documentation, systems, ideas, information, content, design, and other matters related to the software, Quick Heal RDM services, trademarks are the sole proprietary and intellectual property rights of Quick Heal protected under the Intellectual Property Laws and belongs to Quick Heal. Nothing contained in this Agreement grant You any rights, title, interest to intellectual property, including without limitation any error corrections, enhancements, updates, or modifications to the software and Quick Heal RDM service whether made by Quick Heal or any third party. You understand and acknowledge that you are provided with a license to use this software and Quick Heal RDM services subject to the terms and conditions of this Agreement. "

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/s Union of India[11].** 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 29(A)(d) of article 366 of the Constitution. The Court found there was a deemed transfer within the meaning of Clause 29(A)(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

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11 2016 (44) STR 161 (Bombay)

> 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 proprietory 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/s Union of India[12]. 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/s Union of India[13]**, 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) (zzzze) 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**

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12. 2006 (2) STR 161 (S.C.)
13 2010 (20) STR 289 (Madras)

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.

52. Thus, none of the contentions advanced by learned Authorized Representative of the Department have any tax.

53. It is, therefore, not possible to sustain the impugned order for all the reasons stated above. It is, accordingly, set aside and the Appeal is allowed.

(Order pronounced in the open court on 09/01/2020)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

Rekha