CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03
Service Tax Appeal No. 12040 of 2016-DB

[Arising Out Of OIA-VAD-EXCUS-001-APP-222-2016-17 Dated-15/07/2016 Passed By Commissioner of Central Excise and Service Tax-VADODARA-I(Appeal)]

Edukite Software Pvt Ltd **.....Appellant**
3rd Floor, Rg Square Building,
14, Nutan Bharti Society,Alkapuri,
VADODARA, GUJARAT

VERSUS

C.C.E. & S.T.-Vadodara-I **.....Respondent**
1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat-390007

APPEARANCE:
Shri. J.C.Patel, Advocate for the Appellant
Shri. H.P. Shrimali, Superintendent (Authorized Representative) for the Appellant

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO.A / 12721 /2023

DATE OF HEARING:19.10.2023
DATE OF DECISION:06.12.2023

RAJU

This appeal has been filed by M/s. Edukite Software Pvt. Ltd., against demand of Service Tax.

2. Learned Counsel pointed out that proceedings were initiated against the appellant for non-payment of Service Tax under the head of "Information Technology Software Service". The revenue issued notice that the appellant had discharged Service Tax liability in some cases and not in others. The notice stated that the appellant had not discharged their Service Tax with respect to services rendered to M/s. Attano Media and Education Private Limited (which were later taken over by M/s. HCL Info systems Limited). It was pointed out by the learned Counsel that the appellant had

provided content to M/s. Attano Media and Education Private Limited. The content provided by the appellant was a Software product called 'Edukite Interactive Curriculum Software' containing Educational content in Science and Mathematics for students of Class 10, 11 and 12 studying under Central Board of Secondary Education (CBSE). The original adjudicating authority had granted the benefit of Small Scale Exemption, however, the balance demand was confirmed by both the original adjudicating authority as well as the first appellate authority.

3. Learned Counsel for the appellant pointed out that the Software sold by the appellant is goods and therefore not liable to Service Tax. He pointed out that the agreement with M/s. HCL Info systems Limited is an agreement for permanent transfer of intellectual property right which is not covered under Service Tax liability. He pointed out that entire software is encoded on CD and therefore, it becomes goods and therefore is not liable to Service Tax. He further pointed out that even extended period of limitation cannot be invoked to recover tax in the instance case. He relied on the decision of Hon'ble Apex Court in case of Quick Heal Technologies Ltd-2022 (63) GSTL 385 (S.C.). He also relied on the decision of Hon'ble Apex Court in the case of Tata Consultancy Services vs. State of Andhra Pradesh-2004 (178) ELT 22 (S.C.). In these cases, it has been held that when software is supplied on floppy/CDE/hard drives with ownership remaining with developer thereof and the software was capable of abstraction, consumption, use, transmission, transfer, delivery, storage, and possession etc. it amounts to sale. He further pointed out that as per MOU dated 15.10.2012, between the appellant and M/s. HCL Info systems Limited, it is clear that the memorandum of understanding dated 15.10.2012 is for sale of software and permanent transfer of the Intellectual Property Right of content therein. He pointed out that the appellant had paid CST@2% against C Form on this Sale.

4. Learned AR relies on the impugned order.

5. We have considered the rival submissions. We find that the written submissions given by the learned Counsel of the appellant, it has categorically mentioned that the software has been supplied on a medium on payment of VAT/Sales tax. It has been pointed out that the medium is in the nature of USB Stick/DVD/Hard Drive. Reliance has been placed on the decision of the Hon'ble Apex Court in the case of Quick Heal Technologies Ltd.- 2022 (63) GSTL 385 (S.C.). It is notice that the Hon'ble Apex Court in the case of Quick Heal Technologies Ltd. has clearly held that software loaded on a medium like USB/CD/Hard Drive etc. is goods and not services. Hon'ble Apex Court has observed as follows:-

> ***"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). Associated Cement Companies Ltd. v. Commissioner of Customs, (2001) 4 SCC 593 = 2001 (128) E.L.T. 21 (S.C.), was heavily relied on by this Court. It was held :-*
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> > *"27. In our view, the term "goods" as used in Article 366(12) of the Constitution and as defined under the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer*

purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes".

28. At this stage it must be mentioned that Mr. Sorabjee had pointed out that the High Court has, in the impugned judgment, held as follows :

"... In our view a correct statement would be that all intellectual properties may not be 'goods' and therefore branded software with which we are concerned here cannot be said to fall outside the purview of 'goods' merely because it is intellectual property; so far as 'unbranded software' is concerned, it is undoubtedly intellectual property but may perhaps be outside the ambit of 'goods'."

(Emphasis supplied)

29. Mr. Sorabjee submitted that the High Court correctly held that unbranded software was "undoubtedly intellectual property". Mr. Sorabjee submitted that the High Court fell in error in making a distinction between branded and unbranded software and erred in holding that branded software was "goods". We are in agreement with Mr. Sorabjee when he contends that there is no distinction between branded and unbranded software. However, we find no error in the High Court holding that branded software is goods. In both cases, the software is capable of being abstracted, consumed and use. In both cases the software can be transmitted, transferred, delivered, stored, possessed, etc. Thus even unbranded software, when it is marketed/sold, may be goods. We, however, are not dealing with this aspect and express no opinion thereon because in case of unbranded software other questions like situs of contract of sale and/or whether the contract is a service contract may arise".

43. *Associated Cement Companies Ltd. (supra) considered the question whether the drawings, designs, etc. relating to machinery or industrial technology were goods, leviable to duty of customs on their transaction value at the time of import. It was argued that the transfer of technology or know-how though valuable was intangible. The technology when transmitted to India on some media does not get converted from an intangible thing to tangible thing or chattel and that in a contract by supply of services there is no sale of goods, was the argument. Reading Section 2(22) of the Customs Act, 1962 which defines the word "goods", including clause (c) "baggage" and clause (e) "any other kind of moveable property", it was held that any moveable article brought into India by a passenger as part of his baggage can make him liable to pay customs duty as per the Customs Tariff Act, 1975. Any media whether in the form of books or computer disks or cassettes which contain information technology or ideas would necessarily be regarded as "goods" under the aforesaid provisions of the Customs Act, these items being moveable goods, covered by Section 2(22)(e) of the Customs Act. What was transferred was technical advice on information technology. But the moment the information or advice is put on a media, whether paper or diskettes or any other thing, the supply is of a chattel. It is in*

respect of the drawings, designs, etc. which are received that payment is made to the foreign collaborators. The question whether the papers or diskettes etc. containing advice and/or information are goods for the purpose of the Customs Act was answered in the affirmative. This Court clearly held that "the intellectual property when put on a media would be regarded as an article on the total value of which customs duty is payable". "When technical material is supplied whether in the form of drawings or manuals the same are goods liable to customs duty on the transaction value in respect thereof". It was concluded so in paragraph 46 :

> *'46. The concept that it is only chattel sold as chattel, which can be regarded as goods, has no role to play in the present statutory scheme as we have already observed that the word "goods" as defined under the Customs Act has an inclusive definition taking within its ambit any moveable property. The list of goods as prescribed by the law are different items mentioned in various chapters under the Customs Tariff Act, 1997 or 1999. Some of these items are clearly items containing intellectual property like designs, plans, etc.'.*

47. *Justice Dr. A.R. Lakshmanan, in his separate but concurring judgment, highlighted the following attributes in para 97 of the judgment to constitute a transaction for the transfer of right to use the goods :-*

> *"97. xx xx xx*
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> *(a) There must be goods available for delivery;*
>
> *(b) There must be a consensus ad idem as to the identity of the goods;*
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> *(c) The transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;*
>
> *(d) For the period during which the transferee has such legal right, it has to be the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;*
>
> *(e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."*

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."*

5.1 From the above it is apparent that with software is supplied loaded on a medium then the same is to be treated as sale and not a service. In the instant case, it is not in doubt that software has been supplied loaded as a medium. Therefore it attains character of goods. Consequently, the demand in the instant case cannot be sustained.

6. The impugned order is set aside and appeal is allowed.

(Pronounced in the open Court on 06.12.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Prachi