www.taxguru.in

IN THE HIGH COURT OF JUDICATURE OF MADRAS

RESERVED ON : 25.09.2020

PRONOUNCED ON :29.10.2020

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.Nos.25923 & 31485 of 2018
and
WMP.Nos.30125 & 36693 of 2018

M/s.K7 Computing Private Limited,
6th Floor, Rayala Techno Park,
No.144/7, Old Mahabalipuram Road,
Kottivakkam, Chennai-600 041
rep. by its Managing Director
J.Kesavardhanan ... Petitioner in both W.Ps.

Vs.

The Commissioner,
O/o.The Commissioner of GST & Central Excise,
Chennai Sourth, 692, MHU Complex,
5th Floor, Anna Salai, Nandanam,
Chennai-600 035. ... Respondent in both W.Ps.

PRAYER in W.P.No.25923 of 2018: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records in Order in Original No.24 & 25 of 2018 dated 26.04.2018 passed by the respondent herein and to quash the same, insofar as the said impugned order has been passed in total violation to the principles of natural justice, without jurisdiction, contrary to the statutory provisions and in excess of the authority conferred on the said respondent.

http://www.judis.nic.in

PRAYER in W.P.No.31485 of 2018: Writ Petition filed under

www.taxguru.in

Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records in Order in Original No.4 to 6 of 2018 (R) dated 24.05.2018 passed by the respondent herein and to quash the same, insofar as the said impugned order has been passed in total violation to the principles of natural justice, without jurisdiction, contrary to the statutory provisions and in excess of the authority conferred on the said respondent.

For Petitioner : Mr.N.Viswanathan
in both W.Ps.

For Respondent : Mr.T.L.Thirumalaisamy, CGSC
in W.P.25923/2018

For Respondent : Mr.A.P.Srinivas, Sr. S.C
in W.P.31485/2018

COMMON ORDER

With the consent of both parties, the present Writ Petitions are taken up and heard through Video Conferencing on 25.09.2020.

2. The petitioner, namely, K7 Computing Private Limited, is engaged in Software Development and Supporting Services. The petitioner develops Anti Virus Software in the name of 'K7 Total Security' and 'K7 Anti Virus', which is a software for Anti Virus protection, Antispyware protection, Email Scanner, Firewall and Privacy protection etc. The software is downloadable from the petitioner's website.

WEB COPY

http://www.judis.nic.in

www.taxguru.in

3. The demand of service tax of Rs.4,27,99,059/- payable for the period from July 2012 to March 2013 under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as the 'Act') together with interest and penalty, is under challenge in this Writ Petition. The principal ground raised by the petitioner is that they do not provide any taxable service as defined under Section 65 (105) (zzzze) of the Act, i.e., 'Information Technology Software Service' and therefore, they are not mandated to register themselves with the Service Tax Department.

4. The learned counsel for the petitioner submitted that 'Anti Virus Software' do not fall within the ambit of taxable service, as defined under Section 65 (105) (zzzze) of the Act. It is also his contention that the petitioner has discharged VAT on the sale of Anti Virus Software, since it is deemed to be a 'sale of goods' and has been duly assessed by the authorities under the Tamil Nadu Value Added Tax Act over the statutory returns filed by them and therefore, the claim of the Department that the transactions rendered by the petitioner is amenable to service tax, cannot be substantiated.

WEB COPY

http://www.judis.nic.in

www.taxguru.in

5. Per contra, the learned Senior Standing counsel for the respondent, placed reliance on a Hon'ble Division Bench decision of the Madras High Court in the case of ***Infotech Software Dealers Association (ISODA) V. Union of India*** reported in ***2010 (20) STR 289 (Mad)*** and submitted that the petitioner's Anti Virus Software is a representation of instructions recorded in a machine readable form that provides interactivity to the End User through a computer that has working internet connectivity and therefore, Anti Virus Software squarely falls within the definition of 'Information Technology Software'. By applying the principles laid down by the Madras High Court in *ISODA* (supra), the petitioner's software is deemed to be a 'service' and therefore the Department was justified in demanding the service tax for the relevant period.

6. The primary issue that arises for consideration in the present cases is as to whether, an 'Anti Virus Software' would fall within the ambit of the definition of 'Information Technology Software' as defined under Section 65 (53a) of the Finance Act, 1994?

http://www.judis.nic.in

7. The Hon'ble Division Bench of the Madras High Court in

www.taxguru.in

ISODA (supra) has held that when the developer of a software retains his copyright and transfers the network subscriber the right to use the software, by way of an End-User Licence Agreement (EULA), it would only amount as a 'service'. It was also held that though the software are goods, when the goods as such is not transferred but the transaction of right to use as transferred to the end-user, it would only be a 'service' and not a 'sale'. The relevant portion of the order is as follows:-

> *"31.From the above, the dominant intention of the parties would show that the developer or the creator keeps back the copyright of each software, be it canned, packaged or customised, and what is transferred to the network subscriber, namely, the members of the association, is only the right to use with copyright protection. By that agreement, even the developer does not sell the software as such. By that Master End-User License Agreement, the members of petitioner-association again enter into an End-User License Agreement for marketing the software as per the conditions stipulated therein. In common parlance, end user is a person who uses a product or utilises the service. An end user of a computer software is one who does not have any significant contact with the developer/creator/designer of the*

http://www.judis.nic.in

www.taxguru.in

software. According to Webster's New World Telecom dictionary, an end user is "the ultimate user of a product or service, especially of a computer system, application or network. "on a careful reading of the above, we are of the considered view that when a transaction takes place between the members of ISODA with its customers, it is not the sale of the software as such, but only the contents of the data stored in the software which would amount to only service. To bring the deemed sale under Article 366(29A)(d) of the Constitution of India, there must be a transfer of right to use any goods and when the goods as such is not transferred, the question of deeming sale of goods does not arise and in that sense, the transaction would be only a service and not a sale.

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.

http://www.judis.nic.in

www.taxguru.in

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

8. The aforesaid findings of the Hon'ble Division Bench are self explanatory and therefore, by applying the ratio laid therein, the facility provided by the petitioner by sale of 'Anti Virus Software' to the End-User, is deemed to be a 'service'.

WEB COPY

9. In order to overcome the ratio laid down in *ISODA* (supra), the learned counsel for the petitioner attempted to distinguish the said decision stating that the facts involved therein pertains only to 'Information Technology Software' and that the 'Anti Virus Software' dealt by the petitioner will not fall within the definition of the 'Information Technology Software'. To such a reasoning, the

http://www.judis.nic.in

www.taxguru.in

learned counsel did not place reliance on any other case laws, but made a reference only to the order of CESTAT, New Delhi in final order No.50022 of 2020 dated 09.01.2020 in the case of ***Quick Heal Technologies Ltd., V. Commissioner of Service Tax, New Delhi***. The decision of the CESTAT is not binding precedent on this Court and therefore, the petitioner cannot place reliance on the Tribunal's order.

10. Nevertheless, in order to analyse the submission of the learned counsel for the petitioner that 'Anti Virus Software' is not an 'Information Technology Software', it would be appropriate to examine the definition of 'Information Technology Software' as such. For an easy reference, Section 65 (53a) & 65 (105)(zzzze) of the Finance Act, 1994 are extracted hereunder:-

> *'Section 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;*
>
> *Section 65 (105)(zzzze):- to any person,*

http://www.judis.nic.in

www.taxguru.in

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;"

12. The 'Anti Virus Software' runs on computers, mobile

http://www.judis.nic.in

www.taxguru.in

phones, data processing machine, sensors, cameras and other such equipments. They provide interactions with the user under the EULA, by providing interactions, configurations and other screens or pages. They are invariably provided to the market in machine readable, executable or binary compilations and exists with the creator or producer in source code or object code forms. They are representation of instructions that include data, sounds and images.

13. The petitioner's 'Anti Virus Software' in CD forms squarely falls within the essential features of the definition of the 'Information Technology Software'. In other words, all essential conditions stipulated under the definition of 'Information Technology Software' are the essential and salient features of an 'Anti Virus Software' also. If that be so, the submissions of the petitioner that an 'Anti Virus Software' is outside the ambit of the definition of an 'Information Technology Software' is not based on any '*Intelligible Differentia*' .

WEB COPY

14. Though the order of the CESTAT referred to by the learned counsel for the petitioner is not binding on this Court, it would be worthwhile to point out that the finding of the Tribunal that the decision of the *ISODA* (supra) dealt only with the legislative competence of the parliament and held that software to be goods

http://www.judis.nic.in

www.taxguru.in

and further, opined that the ratio of the Hon'ble Division Bench was to the effect as to whether a transaction would be a 'sale' or 'service', would depend on the terms of the Agreement, is a total misinterpretation of the *ratio decidendi* in ISODA. The learned counsel for the petitioner also made similar arguments that *ISODA* (supra) is not binding on this Court since the legislative competence to insert the provisions of Section 65 (105) (zzzze) of the Act alone was under challenge in the case before the Hon'ble Division Bench and since the transaction of sale of the 'Anti Virus Software' by the petitioner is deemed to be a 'sale of goods' for which the petitioner is subjected to VAT, the decision is not binding on this Court.

15. Though the question before the Hon'ble Division Bench in ISODA was a challenge to the parliamentary legislative competence to insert the provisions of Section 65 (105) (zzzze) in the Act, one of the *ratio decidendi* therein, was that, when a transaction takes place between software developer and Information Technology Software customers, it is not the sale of the software but only the contents of the data stored in the software which would only amount to 'service'.

16. Thus, the petitioner has failed to substantiate that an 'Anti Virus Software' will not fall within the ambit of the definition of

http://www.judis.nic.in

www.taxguru.in

'Information Technology Software'. While that being so, by applying the ratio of the Hon'ble Division Bench in *ISODA* (supra), it can be held that 'Information Technology Software' is a 'service' and when the 'Anti Virus Software' of the petitioner would fall within the definition of an 'Information Technology Software', I do not find any infirmity in the action taken by the Department in demanding service tax from the petitioner, through the impugned order.

17. Since the petitioner is liable to pay service tax but had not discharged the service tax liability, the provisions of Section 68 of the Finance Act, 1994 r/w. Rule 6 of the Service Tax Rules has been violated and therefore, I do not find any infirmity on the part of the Department, in imposing interest under Section 75(i) along with penalty under Section 76(1) of the Finance Act, 1994.

18. For all the foregoing reasons, there are no merits in the Writ Petitions. Accordingly, the same stands dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

29.10.2020

Index:Yes
Order: Speaking
DP

http://www.judis.nic.in

www.taxguru.in

To

The Commissioner,
O/o.The Commissioner of GST & Central Excise,
Chennai Sourth, 692, MHU Complex,
5th Floor, Anna Salai, Nandanam,
Chennai-600 035.

WEB COPY

http://www.judis.nic.in

www.taxguru.in

M.S.RAMESH.J,

DP

ORDER MADE IN

W.P.Nos.25923 & 31485 of 2018
and
WMP.Nos.30125 & 36693 of 2018

WEB COPY

29.10.2020

http://www.judis.nic.in