CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 86345 of 2023

(Arising out of Order-in-Appeal No. KKS/194/Appeals Thane/TR/2022-23 dated 13.03.2023 passed by the Commissioner of GST & Central Excise (Appeals), Thane.)

M/s. Horizon Technologies ....Appellant
Room No. 9, Rahil Bldg. No. 2, Manda,
Titwala East, Thane – 421 605

VERSUS

Commissioner of CGST & ....Respondent
Central Excise, Thane Rural
Utpad Shulk Bhavan, 4th Floor,
Bandra Kurla Complex,
Bandra East, Mumbai – 400 051

APPERANCE:

Shri Ananta Khandait, Advocate for the Appellant
Shri Dhananjay Dahiwale, Dy. Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. 85960/2026

Date of Hearing: 02.07.2026
Date of Decision: 05.08.2026

Owing to mismatch between ITR filed for the period from 2015-June 2018 and Service Tax Returns filed for some of its period, a show-cause cum-demand notice was issued for recovery of ₹13,15,021/- by the Department alongwith proposal for interest and equal penalty by invoking extended period. For late filing Return of 3 quarters ₹20,000/- each totalling ₹60,000/- late fee was also imposed on Appellant under Section 70 of the Finance Act, 1994 read with Rule, 7(C) of the Service Tax Rules, 1994.

1.2 Learned Adjudicating Authority, taking into consideration the submissions made by the adversaries, allow the benefit of SSI exemption of ₹10 lakhs to the Appellant for the first financial year under dispute i.e. 2015-2016 without referring to the fact that from October, 2015, the period was taken for calculation of Service Tax which is having half year tenure while 26AS of the Income Tax statement covers the whole period but since no demand was confirmed for that period and the differential tax dues was mere ₹5,504/- it would be inappropriate to venture into this aspect since relief was being granted to the Appellant. For the period April 2017-June 2017, learned Adjudicating Authority also had taken into consideration the actual facts and figures from the data produced by the Appellant before it and given it a waiver of duty calculated @29% of its previous year turnover, by adopting best judgment method. Therefore, the dispute remained confined only to the financial year 2016-2017, against which duty demand of Service Tax of ₹2,86,812/- was confirmed alongwith appropriate interest and equal penalty under Section 78 of the Finance Act, 1994. Late fee of ₹60,000/- also got confirmed in the said Order-in-Original passed by the Adjudicating Authority. Appellant's unsuccessful attempt before the Commissioner (Appeals) has brought the dispute to this forum.

3. I had heard on the appeal from both the sides and taken note of the submissions on the other day. As could be noticed from the findings of the Commissioner (Appeals) made at para 9 & 10 after granting SSI exemption of ₹10 lakhs admissible then, duty demand of Service Tax was much more for the reason that on sale of canned software (packed software), which was subjected to Sales Tax, Service Tax was being levied, which learned Counsel for the Appellant argued on the basis of the precedent decision through which the issue has been categorically resolved that software package 'sale' can never be considered as a 'service' in view of specific provision available for such sale and Notification No. 11/2016-ST dated 01.03.2016 exempting such services in relation to Information Technology Software, recorded

on a media. To support his stand, he cited mainly two decisions passed by this Tribunal on the issue in the case of *Infrasoft Tech. India Ltd. Vs. Commissioner of Central Excise, Mumbai-II in Service Tax Appeal No. 88568 of 2014 date of decision 26.02.2020* and *Quick Heal Technologies Ltd. Vs. Commissioner of Service Tax, Delhi* reported in *2020 (1) TMI 430 – CESTAT NEW DELHI*

4. This being the issue required to be determined, it is also worthwhile to record the findings of the Commissioner (Appeals) at para 9 of the Order-in-Original that has been highlighted by learned Authorised Representative during course of hearing of the appeal. His further contention is that Appellant also had placed it on record that the disputed amount mentioned in the invoices have become bad debt, since it could not be realised from the customer, which would further justify the fact that payment of Service Tax upon invoicing was purposefully not done since proceeds were not realised.

5. I have gone through the relevant para 9 & 10 of the order passed by the Commissioner (Appeals) wherein he assigned the reason to refuse grant of benefit of that notification. For a better clarity the said paras are reproduced below:

> *"9. I find that AA examined the submission and evidences provided by appellant and extended all admissible benefits to appellant like Rs. 10 lakh exemption, arriving tax liability based on actual value etc. However, in respect of exemption claimed by appellant on Package Software, the AA observed that appellant is not fulfilling the conditions required under Notification No. 11/2016-ST and relevant facts could not be certained from the available records and therefore said exemption claimed by appellant cannot be extended.*
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> *10. I find that said Notification No 11/2016-ST Seeks to exempt services in relation to Information Technology Software recorded on a media bearing RSP, provided Central Excise Duty has been paid, on which it is required, under the provisions of the Legal Metrology Act, 2009 (1 of 2010) or the rules*

> *made thereunder or under any other law for the time being in force, to declare on package of such media thereof, the retail sale price, from whole of the service tax subject to the condition that (i) the value of the package of such media domestically produced or imported, for the purposes of levy of the duty of central excise or the additional duty of customs leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975), if imported, as the case may be, has been determined under section 4A of the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as such value), and (ii) (a) the appropriate duties of excise on such value have been paid by the manufacturer, duplicator or the person holding the copyright to such software, as the case may be, in respect of such media manufactured in India; or (b) the appropriate duties of customs including the additional duty of customs on such value, have been paid by the importer in respect of such media which has been imported into India; (iii) a declaration made by the service provider on the invoice relating to such service that no amount in excess of the retail sale price declared on such media has been recovered from the customer."*

6. Going by the gist of the Notification No. 11/2016-ST, as enumerated in para 10 of the Commissioner (Appeals) order, it can be said that concerning description of media (CD, Pen drive, etc.), through which such information technology software was being sold, is not available in the invoice in question or in the findings of the Adjudicating Authority or that of the Commissioner (Appeals). The invoice is stated in the order to have been produced before the Adjudicating Authority and it comprised of a single transaction meaning thereby that only one customised (packed) software was being sold through that invoice. Concerning payment of Central Excise duty, there might not be any reference since Appellant was not a manufacturer but a trader who subsequently brought and sold it to its customer. There is nothing mentioned in the order that special declaration as mandated in the said notification that 'no excess amount other than the retail sale price declared on such media has been recovered' from the customer. So these are the lecuna available against the Appellant for which duty was confirmed against it without

being certain whether those conditionalities were infect fulfilled or not, since the order of the Adjudicating Authority goes to show that proof of sale of software was furnished but Appellant could not explain the type of transaction in respect of the sale of software and there was no detail of the sale of software available as envisaged in Notification No. 11/2016-ST dated 01.03.2016 but he had not stated anywhere that these conditions were actually breached upon examination of the sale invoice of the software produced before him when on the contrary, learned Commissioner had confirmed it in saying that the Adjudicating Authority had observed that the Appellant was not fulfilling the conditions required under Notification No. 11/2016-ST.

7. This being the fact on record, now it is to be examined whether fulfilment of the requirement of conditions can only bring such sale of software from the purview of service so as to exempt it from payment of Service Tax. In this connection, it would be worthwhile to note here that if the Information Technology Software posses the essential features and characteristics of 'goods' as used in Article 366(12) of the Constitution of India, copies made and marketed from such goods are susceptible to sales tax since sale is not just of the media which by itself has very little value and the software and media can't be split up. This observation is borrowed from the leading case law in *Tata Consultancy Services Vs. State of Andhra Pradesh* as reported in *2004 (178) ELT 22 (S.C.).* It would be relevant to reproduce para 24 of the said judgement, also reproduced in the decision cited on behalf of Appellant in the case of *Quick Heal Technologies Ltd., cited supra:*

> *"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. <u>But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax</u>. 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". <u>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</u>. 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. <u>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</u>. 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. <u>The software programmes have all these attributes</u>."*
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> *(Emphasis supplied)*

8. Therefore, when such sale of Information Technology Software is considered as sale of goods in terms of 'goods' as defined under Article 366(12) of the Constitution of India and the definition of "service", as enumerated in Section 65B(44) of the Finance Act, 1994 excludes 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 of India, the presence or absence of any of the stipulation like 'it is sold at MRP and not at a higher price' etc. to comply with the said Notification No. 11/2016-ST would be of no consequence once such information technology software is placed out of the category of service. Therefore, in the absence of fulfilment of the conditions enumerated in the said notification or for want of it, would not bring the transaction of sale of information technology software into the category of service since Hon'ble Supreme Court had included it within the purview of goods vide above referred decisions.

The Appellant is, therefore, entitled to get relief on this ₹9.60/- lakhs amount and since for the balance amount it has already paid the duty, upon filing of Return at a belated stage, which is permissible under the provision of law, no duty liability exist for which penalty aspect could be considered. However, I fully endorse with the view of learned Commissioner (Appeals) and confirm the late fee of ₹60,000/- demanded from the Appellant for not filing the periodic Return for three quarters after obtaining registration of the firm. Hence the order.

THE ORDER

9. The appeal is allowed in part and the order passed by the Commissioner of GST & Central Excise (Appeals), Thane *vide* Order-in-Appeal No. KKS/194/Appeals Thane/TR/2022-23 dated 13.03.2023 is hereby modified to the extent of setting aside duty, interest and penalty as confirmed except late fee of ₹60,000/- for not filing of refund within the stipulated time.

(Order pronounced in the open court on 05.08.2026)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad