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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-21-2004

Reported in : (2004)(115)LC478Tri(Delhi)

Judge : K Usha, N T C.N.B.

Appellant : Hcl Info Systems Ltd.

Respondent : Cce

Judgement :

1. The appellants are manufacturers of computers. They pay central excise duty on the value of the computers at the rate applicable under tariff heading 4871.00. They supply software also along with computers.

The software is either loaded or is supplied separately. So is the manual of the software. Under the order impugned in the present appeal, Commissioner of Central Excise, Pondicherry has held that the appellant should discharge duty on the computers after including the value of the software also in the assessable value. Para 39(i) of the Order states as under: 39(i) That the value/cost of the Operational Software installed by the assessee on the computers before clearance from the factory is includible in the assessable value/transaction value of the computer system and therefore, the differential duty demanded in the two Show Cause Notices need to be confirmed.

From the foregoing, it is clear that duty demands have been made on the basis that computer system (not computer alone) is being assessed.

Penalty has also been imposed along with demand of interest.

2. The contention of the appellant is that duty demand is entirely contrary to the settled law. They submit that it is well settled *PSI Data Systems Ltd. v. CCE* that computer and computer system are different and what is subjected to duty under 84.71 is computers only and not computer systems. The learned Counsel for the appellant has stressed that Commissioner has confirmed the duty demand on account of confusing computer system with computers. He has submitted that computer comes into existence and is complete and functional without the loaded operating software. The software that forms part of the computer is the software etched or burnt into the integrated circuit called Electrically Erasable Programmable Read only Memory (EEPROM) that is soldered on to the mother board. Operating software like Windows do not form part of the software of a computer.

These are additional and optional and are loaded at the demand of the buyer.

3. According to the appellant, the Commissioner has also fallen into the error of believing that the valuation provision for treating transaction value as assessable value of excisable goods provides for treating the sale value of items sold in a particular sale as the assessable value of excisable goods, even when the excisable goods under sale constitute only part of the items under sale. According to the learned Counsel, since only computers are liable to central excise duty, the transaction value of the computers only should form assessable value and not the value of software sold along with computers. Learned Counsel has pointed out that the distinction between computers and software is clearly understood. Learned Counsel has also relied on the decision of the Apex Court in the case of *Sprint RPG India Ltd. v. CC-I, Delhi* and many other decisions on the subject.

4. We have perused the records and have considered the submission made by both sides. The demand in the case is on account of a finding that value of operating software should be included in the assessable value of the computers.

This finding of the Commissioner is clearly contrary to the decision of the Apex Court on the subject. In *PSI Data Systems Ltd. v. CCE.*, the Supreme Court¹². In the first place, the Tribunal confused a computer system with a computer; what was being charged to excise duty was the computer.

13. Secondly, that a computer and its software are distinct and separate is clear, both as a matter of commercial parlance as also upon the material on record. A computer may not be capable of effective functioning unless loaded with software such as discs, floppies and C.D. rhoms, but that is not to say that these are part of the computer or to hold that, if they are sold along with the computer, their value must form part of the assessable value of the computer for the purpose of excise duty. To give an example, a cassette recorder will not function unless a cassette is inserted in it, but the two are well known and recognized to be different and distinct articles. The value of the cassette, if sold along with the cassette recorder, cannot be included in the assessable value of the cassette recorder. Just so, the value of software, if sold along with the computer, cannot be included in the assessable value of the computer for the purpose of excise duty. In *Sprint RPG India Ltd. v. CC-I, Delhi*, the question that arose was whether customs duty on imported computer software loaded on a hard disk drive is to be levied as hard disk simplicitor or computer software. The Supreme Court has held as under: 11. Testing it from the aforesaid Rules of interpretation, it would be clear that the disk or a floppy on which computer data is recorded, would be covered by Heading 85.24. Rule 3(a), inter alia, provides that when two or more headings each refer to part only of the materials or composite goods, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. Further considering imported goods to be a mixture of two substances namely 'hard disk drive' and 'software' as per Rule 3(b) they can be classified under the heading which gives them their essential character. In the present case, considering its price factor it would be computer software. The price of the imported consignment was approximately Rs. 68 lakhs. As against this value of the seven hard disk drives would be roughly Rs. 60,000/- that is to say, value of the computer software is hundred times more than its containers hard disk. Hence, the essential character of the imported goods is computer software.

14. ...It is held that computer software imported by the appellant on a hard disk drive is assessable at the rate of 10% as per Heading 85.24 with the Exemption Notification stated above because what was imported by the appellant was software on a hard disk and it was not hard disk in the garb of software.

6. A clear distinction exists between software that is part of a computer (EEPROM etc.) and software which is additional to such software. Windows and other software in question are of that latter type. They cannot be treated as part of computer and subjected to central excise duty. Commissioner's finding based on transaction value is also not correct. If a sale includes both the sale of computer and sale of software, only that portion of the transaction value which relates to sale price of computer is to form assessable value and not the entire consideration for the sale, because what is being subjected to excise duty is the computer and not the sale as such. Only the transaction value of the computer is relevant for levying excise duty on the computer and not the full sale price.

7. In view of what is stated above, the appeal is allowed with consequential relief, if any, to the appellants.

(Operative part of the order was already pronounced in the open Court at the end of hearing on 14.1.2004)

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