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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-02-2005

Reported in : (2005)(192)ELT740TriDel

Judge : S Kang, Vice, A T V.K.

Appellant : Hcl Infosystem Ltd.

Respondent : Cce

Judgement :

1. The issue involved in this appeal, filed by M/s. HCL Infosystem Ltd., is whether cost of software and charges for technical services are includible in the value of the computer.

2.1 Shri Swaminathan, learned Consultant, mentioned that the Appellants manufacture computer hardware and office machines falling under Tariff Item 33D of the erstwhile Central Excise Tariff; that the Appellants also carry out the following activities : (i) buying and selling computer peripherals, accessories, consumable, etc.

(ii) providing technical services to their buyers which is basically to indoctrinate the buyers of the computer for getting optimum benefit from the use of the computers; & (iii) developing software to suit the needs of the individual customers who require the software and place orders for the same.

2.2 He, further, mentioned that during the early eighties, when hardware production in India was at its primitive stage, the customers preferred composite services to be rendered by computer hardware manufacturers; that these services were like installation of the computer system, advice on the facilities and install the computer system/office machine, advice on any ancillary equipment, assembly and installation, training the personnel for operating the system, etc.,; that thus the supply orders specifically provided separately for technical services; that the Appellants were issuing separate invoices in respect of technical service charges known as 'T' series invoices, in respect of peripherals known s 'P' series invoices and in respects software development known as 'S' series invoices.

2.3. He, further, mentioned that show cause notice was issued to them proposing to include the charges towards cost of software, technical services and peripheral; that the Collector, Central Excise, vide Order-in-Original No. 3/89-90 dated 13.3.1990 confirmed the demand of differential excise duty and imposed penalty; that on appeal filed by the Appellants, the Appellate Tribunal, vide Final Order No. 374/99 dated 17.3.1999, remanded the matter to the Commissioner for considering the following questions in the light of the decisions of the Supreme Court in the case of PSI Data Systems Ltd. v. CCE and ORG Systems (a) whether cost of software is to be included in the value of the computers? (b) whether the cost of peripherals is to be included in the assessable value of the computers?; and (c) whether the Commissioner was justified in charging that value of hardware was diverted towards the alleged non-dutiable items? 2.4 The learned Consultant mentioned that the Commissioner, in the impugned Order, had answered these questions as under : (a) cost of software is includible in the value of the computers and office machines; (b) cost of peripherals is not includible in the value of the computers and office machines; & (c) no Technical Services were rendered by the Appellants to their customers. Technical Service charges are part of the hardware cost and are includible in the assessable value.

3. The learned Consultant submitted that in the first Adjudication Order, the Collector had imposed a penalty of Rs. 135 crores which had been enhanced in the de-novo Order which is not legally permissible as held by the Tribunal in the case of Atul Glass Industries v. CCE, 1999 (114) ELT 597; that similarly no

confiscation of land, building, machinery, etc. was ordered in the first Adjudication Order, the confiscation now ordered in the impugned Order is not sustainable; that the Commissioner had not quantified the duty demand and had directed the Deputy Commissioner to quantify the duty amount; that he Commissioner cannot relegate the quantification to a subordinate authority which vitiates the order. Reliance had been placed on the decision in Indo Asian marketing Ltd. v. CCE Chandigarh, 1999 (34) ELT 242 (Cegat).

4. The learned Consultant, further, submitted that the only finding given by the Commissioner is that they had not rendered any technical services to their customers; that, however, the Commissioner had observed that if at all any service had been rendered, it pertains to installation of the computer at the customers' premises; that the Commissioner had relied on the statements of various customers; that the Appellants had specifically requested for cross-examination of the customers which had not been granted to them and thus the impugned order had been passed in violation of the principles of natural justice; that when the allegation of under-valuation in respect of non-inclusion of technical service charge is based on statements of their customers, it is not correct to say that the request for cross-examination is general and vague and without any basis; that the commissioner had also not taken not of the various Purchase Orders filed by them alongwith reply to show cause notice, which clearly established that the customers specifically required them to provide technical service. In support of his contention, the learned Advocate referred to the Purchase Order of M/s. National Aeronautical Laboratory (page 77 of the Paper Book) which clearly mentions that "HCL will depute their Engineers for installation and assembly of the systems" and that "HCL shall undertake to train 5 persons from NAL on the relevant Hardware an Software features at their works and the entire cost of travel, boarding, lodging and training shall be borne by HCL".

He mentioned that Annexure 3 of the said Order stipulates the development work to be undertaken by them; that it is thus very clear that the technical services were indeed being provided to the customers and very specific services were being provided as demanded by their customers; that the Commissioner had ignored the documentary evidence and has relied upon untested oral evidences to conclude

that no technical service as being provided by them; that the Supreme Court in the case of PSI Data System, supra, had held that the technical service charges are not includible in the assessable value of the hardware. He also mentioned that the Commissioner had appointed an Enquiry Committee headed by Assistant Collector sometime in 1983 to find out the details regarding raising of invoices under various heads and the income sources of the Appellants; that the said Committee visited their factory on several occasions including their head office and the Appellants had furnished all the necessary information to the Committee; that there is violation of the principles of natural justice in not making available copy of the Report of the Enquiry Committee which would disprove the allegation of the Department that there was suppression. The learned Consultant also mentioned that after obtaining necessary information, the earlier proceedings initiated did not propose any demand on technical service charges; hence in subsequent proceedings on the same set of documents proposing any additional demand is clearly hit by constructive res judicate. He relied upon the decision in the case of CCE, Meerut Vs Pace Marketing Specialities Ltd., 2000 (119) ELT 77 (T).

5.1 He submitted that the value of software is not includible in the value of the computer, being in the matter of services; that according to the Commissioner, the softwares are system software of attched in or firm software and the value of the same is to be included in the value of the computers; that the reliance had been placed by the Commissioner on the judgment is PSI Data Systems. He contended that the said judgement had very clearly and categorically laid down that the value of the software supplied alongwith the hardware is not includible in the value of the computer; that the Supreme Court had observed as under : "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 the 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 purposes of excise duty. To give an example, a cassettee recorder will not function unless a cassette is inserted in it; but the two are well known and recognised to be different and distinct articles. The

value of the cassette, if sold alongwith the cassette recorder, cannot be included in the assessable value of the cassette recorder. Just so, the value of software, if sold alongwith the computer, cannot be included in the assessable value of the computer for the purposes of excise duty." 5.2 The learned Consultant also placed reliance on the recent judgment of the Supreme Court in the case of CCE, Pondicherry v. Acer India Ltd. , wherein the Supreme court observed that "it is not possible to agree that without an operating software, the computer would become disfunctional" and had held that "once it is held that the computer is complete without the operating softwares, the question of adding the cost of software therewith would not arise since what is under assessment is only the computer; that the Supreme Court had finally held as under : "Computer and operative softwares are different marketable commodities. They are available in the market separately. They are classified differently. The rate of excise duty for computer is 16% whereas that of a software is nil. Accessories of machine promote the convenience and better utilization of the machine but nevertheless they are not machine itself. The computer and software are distinct and separate, both as a matter of commercial parlance as also under the statute. Although a computer may not be capable of effective functioning unless loaded with softwares, the same would not tantamount to bringing them within the purview of the part of the computer so as to hold that if they are sold alongwith the computer their value must form part of the assessable value thereof for the purpose of excise duty. Both the computer and software must be classified having fallen under 84.71 and 85.24 and must be subject to corresponding rates of duties separately. The informations contained in a software although are loaded in the hard disc, the operational software does not lose its value and it still marketable as a separate commodity. It does not lose its character as a tangible goods being of the nature of CD-ROM. A licence to use the information contained in a software can be given irrespective of the fact as to whether they are loaded in the computer or not. The fact that the manufacturers put different prices for the computers loaded with different types of operational softwares whether separately or not would not make any difference as regard nature and character of the 'computer'. Even if the Appellants in terms of the provisions of a licence were obliged to preload a software on the computer before clearing the same from the factor, the characteristic of the software cannot

be said to have transformed into a hardware so as to make it subject to levy of excise duty alongwith computer while it is not under the Tariff Act." 5.3 The learned Consultant also submitted that the demand of duty on software is clearly time-barred sine the period of demand is from 27.9.80 to 30.11.84 and the show cause notice was issued on 27.10.86; that for the period 1.4.1981 to 31.10.1983, a demand had already been raised by the Commissioner on software charges and as such the Department had knowledge of these charges; that the their letter dated 10.11.83, the Appellants had furnished the information to the Department about software and they had also mentioned that software had no relationship whatsoever to the hardware and is related entirely to the complexivity, variety and quantitative and qualitative requirements of the customer; that in view of this, extended period cannot be invoked.

6. Finally, he submitted that the entire duty demand is time-barred since the authorities were well informed of the invoicing pattern of the Appellants as the Enquiry Committee had visited their factory and minutely examine their operations including the invoicing pattern; that further ins how cause notice dated 15.12.83, only the software charges were proposed to be included in the assessable value; that thus the authorities felt that technical service charge were not to be included in the assessable value; that if the Department itself felt that no excise duty can be charged on technical service charges, they cannot be accused of deliberate suppression of facts regarding these charges; that second show cause notice on the same issue cannot invoke the extended period of limitation. Reliance is placed on the decisions in the cases of Kapoor Lamp Shade Co. v. CCE, New Delhi 2001 136 ELT 376 (T) and ECE Industries Ltd v. CCE, New Delhi, also mentioned that the provisional assessment was finalised in September, 1984 after receipt of necessary information and conducting detailed enquiry; that, moreover, the competent authority had not reviewed and challenged the finalisation of assessment and, therefore, there can be no demand consequent to such provisional assessment finalized. He relied upon the decision in the case of CCE, v. Flock India Pvt. Ltd. 7. Countering the argument, Sh. S.M. Tata, learned SDR, reiterated the findings as contained in the impugned Order and submitted that in respect of sales of computers/office machines financed by IDBI., the price of the impugned goods had been shown the total price and no separate invoice had

been given for technical service charges; that this fact clearly indicates that technical service charges are nothing but part of the price of the computer only; that this is also apparent from the letter dated 27.9.83 of shri KPG Nair of the HCL from Delhi addressed to Shri Swaroop Chand of Madras wherein it is mentioned that "the machine had been financed under IDBI. You are well aware of the implications involved and well will request you to please explain the customer properly and close the issue." The learned SDR, further, submitted that the Appellants also had a scheme of sale of computers against exchange of old models; that for this purpose they had devised a formula to work out the trade-in-value of the computers; that as per the formula, while evaluating the price of the old machine, certain amount of depreciation was given and the value of the computer considered for giving depreciation included the amount of basic price as well as technical service charges; that this goes to show that technical service charges and nothing but part of the price of the companies.

8. We have considered the submissions of both the sides. As for as the issue regarding inclusion of the cost of software in the assessable value of the computer is concerned, we observe that recently the Constitutional Bench of the Supreme Court had dealt with this issue in the matter of Commissioner of Central Excise, Pondicherry v. Acer India Ltd. "although a computer may not be capable of effective functioning unless loaded with softwares, the same would not tantamount to bringing them within the purview of the part of the computer so as to hold that if they are sold alongwith computer, their value must form part of the assessable value for the purpose of excise duty." The benefit of this decision was not available to the adjudicating authority as the impugned order has been passed before the pronouncement of the judgement in the case of Acer India Ltd. (supra). We also observe that the appellants have contended that they are also selling the software in CD and floppies and not only software, which is found or etched software i.e. implanted into a computer. This point also had not been taken into consideration by the adjudicating authority while confirming the demand. In our view, the matter should go back to the adjudicating authority so that the decision could be taken in the light of the judgment of the Constitutional Bench of the Supreme Court in the case of Acer India Ltd., supra and also with a view to consider whether the appellants were also clearing the software in CD and floppies.

9. Regarding the question of inclusion of technical service charged in the assessable value, the submissions made by the learned Consultant that the principles of natural justice had been violated, are well founded. Once the adjudicating authority had relied upon the statements of the various customers of the appellants to arrive at the conclusion that no technical services, except installation, were provided, an opportunity of cross examination of these customers had to be afforded to the appellants. Non-affording of the opportunity of cross-examination goes against principles of natural justice. The appellants have also brought on record various purchase orders which reflect that their customers had requested them to provide various technical services. A due consideration of these purchase orders is also required to be done by the adjudicating authority. In view of this, the issue had also to go back to the adjudicating authority for re-consideration in the light of the directions contained in this Order.

10. We agree with the learned Advocate that in remand proceedings on appeal filed by the appellants, neither the amount of penalty imposed initially can be enhanced nor any new Order regarding confiscation of land, building, machinery, etc. can be passed by the Commissioner. This issue stands settled by the Tribunal in the case of Atul Glass Industries Ltd. (supra) wherein it had been held that amount of duty or penalty cannot be enhanced during the remand proceedings. Accordingly, we set aside the confiscation of land, building, machinery, etc.

ordered by the Commissioner in the impugned Order.

11. We set aside the impugned Orde and remand the matter to the adjudicating authority to adjudicate the matter afresh in the light of the directions in this Order. The adjudicating authority is at liberty to impose the penalty if any demand of duty is confirmed by him subject to the condition that the amount of penalty cannot be more than the penalty imposed initially under Order-in-Original No. 374/99 dated 17.3.99. The appellants are at liberty to furnish any material evidence in support of their contensions within two months from the receipt of this order. they are also at liberty to raise the issue of demand being time-barred. The appeal is disposed of in above terms.