

Commissioner of Customs Vs. Datamatics Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-08-2006

Judge : A Wadhwa, S T S.S.

Appellant : Commissioner of Customs

Respondent : Datamatics Ltd.

Judgement :

1.1 M/s. Datamatics Ltd. Respondent herein had filed an Ex-bond Bill of Entry against into Bond Bill of Entry No. 14/94/03.04. 1997, Igm No.A-1813/01.04.1997 for clearance of goods for home consumption declaring 380 sets of "'Hayes' Accura 336 message modem with voice and 760 (380+380) sets of Smartcom Data/Fax software for Accura 336, Smartcom message centre software for Accura 336" with a declared C.I.F. value of Rs. 713153/- & 727437/- respectively and classified the modems under heading 8517.50 with duty@ 30%+ 2%+18% and software under heading 8524.90 of CTA 75 with benefit of Notification of 11/97 Cus. Dated 01.03.1997 S.No. 173 duty @ Nil rate respectively.

1.2. Since the product was sold internationally as one package and the operation manual clearly indicated that the modem cannot work without the software in other words the modem was supplied along with the software, It appeared the importers had split up the value of modem and software in order to clear the software at lower rate of duty.

1.3 The investigation revealed that the goods were imported as one consignment of 980 sets "Hayes" Accura 336 message modem with Voice and (980 + 980) sets of Smartcom Data/Fax Pro software and Smartcom message centre software vide Invoice No. 1099 dated 26th March of M/s. Hayes (Asia) Ltd. Hongkong were cleared and bonded under into bond under Bill of Entry No. 1494 dated 03.04.1997, the value of the goods imported as one package was also split up between hardware and software. It was also seen from the "Ingram Mark comprehensive Hardware Catalogue" that the subject product is sold as one unit for price of US \$150.50. With the above it appeared that the importer has misdeclared the value of the import consignments in the import documents including the Bills of Entry, hence M/s. Datamatics Ltd. appears to have violated the provisions of Section 111(m) of the Customs Act, 1962 and thereby the goods imported appears to be liable for confiscation under Section 111(m) of the Customs Act, 1962. In this view for the 28 consignments including the impugned consignment of Smartcom software for Accura 336 Fax/Modem imported under B/E No. (as per Annexure "A") to Show Cause Notice collectively valued at Rs. 4,07,17,862/- were liable for confiscation under Section 111(m) of Customs Act, 1962. M/s. Datamatics Ltd. and their Directors by their said acts of omission had rendered the said goods liable for confiscation and therefore, they appeared to be liable for penal action under Section 114A and/or 112 of the Customs Act, 1962. Without prejudice to the above, Section 28 of the Customs Act interalia envisage that if any duty has not been levied or had been short-levied or erroneously refunded, the proper officer may, from the relevant date, serve notice on the person chargeable with the duty which has not been levied, requiring him to show cause why he should not pay the amount specified in the notice. In this case, M/s.

Datamatics Ltd. 1.4 Enquires further revealed that five more similar clearances as per past practice after the case had been detected, collectively valued Rs. 1,09,91,903/- on which Customs duty of Rs. 31,00,400/- and were assessed provisionally. Therefore M/s. Datamatics Ltd. and its Directors were called upon to explain and show cause vide order dated 3/8/1998 to the adjudicating authority as to why: a) The Assessable value of the modems imported in the above said 28 Bills of Entry should not be determined as the sum total of the value declared for modems and software (Smartcom Data/Fax/Message Centre LE).

b) The 5 clearnaces, of Smartcom Software as per Annexure 'B' which were provisionally assessed should not be reassessed for the value of modem as the sum total of value declared fro modems and software, and recover the short levy by enforcing the Bonds and Guarantees under Section 28(1) (b) of the Customs Act, 1962 after finalising the assessment.

c) The Smartcom software imported under different 28 Bill of Entry Nos. imported along with the hardware, collectively valued at Rs. 5,17,08,765/- valued at Rs. 5,17,08,765/- should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962.

d) For the act of willful suppression of facts and misdeclaration of value of goods, mandatory penalty should not be imposed under Section 114(A)/112 of the Customs Act, 1962.

e) Customs duty of Rs. 1,47,11,1195/- on the said imports shall not be demanded and determined under the proviso to Section 28(i) of the customs Act, 1962.

f) Corresponding interest @ 20% on the above said duty for the period from 7 days after payment of duty to till date of the payment of differential duty should not be recovered under Section 28AB of the Customs Act, 1962.

g) The amount of Rs. 43.00 lakhs deposited so far by them shall not be adjusted towards the above-referred liabilities.

1.5 Commissioner of Customs while adjudicating the case dropped all the proceedings initiated by the show Cause Notice holding the same to be not tenable. He also ordered the provisional assessment to be finalized on the basis of the values declared by the Importer.

1.6 On going through the case records, the Board being satisfied that the order passed by the Commissioner is not proper, correct or legal for the following reasons.

a) The Commissioner while dwelling upon the issue in para 66 of the order has not taken cognizance of the fact and evidences of the documents taken over by the

department under Panchnama and the documents relied upon in the Show Cause Notice. It was not the departments contention that the modems and the software imported were integral parts of each other, meaning thereby that one cannot function without the other as was the view taken by the Commissioner in the order. The department had alleged that the Smartcom message center, voice/fax data message programme (software) supplied along with the modems were complimentary in nature, meaning thereby, that they were supplied free of cost. It was not a point to prove the departments point of view the department had relied upon various documents including the one at Annexure 'D' of the Show Cause Notice viz. the hand written advise note dated 09.06.1995 relating to purchase order No. H-106, directing their supplier to specifically indicate the individual values for modems as well as Smartcom software separately in US dollars with reference to the Proforma Invoice No. 950605 dtd. 05.06.1995 and relating to purchase order No. H106, both the documents being one of the several documents taken over under Panchnama by the department.

(b) On perusal of proforma Invoice No. 950605 dated 05.06.1995 it is seen that the same is billed for 2 pieces of the suppliers product, Ultra-144 having product code No. 08-01302/CN and valued at USD 550 each and aggregately valued at USD 1100. Further purchase order No. H106 dtd. 26.05.1995 was for the procurement of one item viz, 2 pieces of Hays Ultra 144 Modem priced at USD 550 each and aggregately valued at USD 1100. The department also seized another document having the same purchase order No. and date(H-106 dtd 26.05.1995) and for the same aggregate value of USD 1100 but for the procurement of two items viz. 2 pieces of Hays Ultra 144 Modem priced at USD 521 each and 2 pieces of Smartcom software for windows priced at USD 29 each, the 2 items collectively being priced at USD 550 each. From the above two documents seized by the department, it may be noticed that both have the same purchase order No. and date and also have the same aggregate value i.e. USD 1100, though in one document the procurement is only for one item viz. Hays Ultra 144 Modem priced at USD 550 each, while the other documents was for the procurement of 2 items viz, Hays Ultra 144 modem and Smartcom software for windows both collectively valued at USD 550 each.

Therefore, it can be established beyond doubt that the value of the item viz. Hays Ultra 144 Modem which were USD 550 is split up into 2 values that the Ultra 144 Modem priced at USD 521 and that of Smartcom software for windows priced at USD 29, which totally aggregate to USD 550. The original purchase order No. H-106 dated 26.05.1995 was based on the proforma invoice No. 950605 dated 05.06.1995 which was for 2 pieces of Ultra-144 valued at USD 550 each. Subsequently on receiving of the advice note date 09.06.1995 from their buyer M/s. Datamatics, the supplier changed the value of Ultra-144 to USD 521 each and included a new item viz. Smartcom software valued at USD 29 each, though the aggregate value was not changed. Further the purchase order number and the date was also not changed. This probably explains for the recovery of two sets of purchase order having the same number and date and the same aggregate value, but the description being altered. Thus the split up in the value was clearly the after effect of the hand written message dtd. 09.06.1995 and clearly throws light on the intention of the said company which was to evade legitimate customs duty, since the duty on software was only 10% compared to the duty on hardware which was 50% plus 20%. Scrutiny of the documents taken over under panchanama further revealed that the goods covered by the above stated proforma Invoice 950605 dtd 05.06.1995 were cleared vide Bill of Entry No. 05307 dtd 13.06.1995 (R No. A-2780 dtd 07.06.1995) by declaring the goods as one item viz. Ultra 144 (Hays Modem) by paying duty 50% plus 20% without splitting the value.

c) Therefore, it appeared that an attempt was made by the importer M/s. Datamatics to split up the value of the goods under import (pertaining to purchased order No. H-106 dated 26.05.1995) into two distinct values that of hardware and software. It may be observed that- (i) The B/E for the goods imported and pertaining to P.O. No. H-106 dated 26.05.1995 was filed on 13.06.1995 (B/E No. 5307), (ii) The rotation number or the import General Manifest number was allotted to the vessel carrying the above goods on 07.06.1995, (iii) The advice note requesting the supplier to split up the value of the above goods was dated 09.06.1995.

(iv) Invoice No. 050605 dated 05.06.1995 was raised for only one item viz. modem having code No. -08-01302.

From the above facts, it could be seen that the party was unable to produce the amended/alterd copy of the purchase order No. H-106 dated 26.05.1995 at the time of filing the B/E since the confirmation of the same would not have been received by them from the supplier before or on 13.06.1995. Further they were also not successful in replacing the invoice No. 950605 dated 05.06.1995 as the original invoice showing one value was already dispatched along with the Airway bill and was in possession of the custodians of the cargo viz. Airlines and probably could not be therefore replaced.

Thus, it clearly established that the other document bearing the same Purchase order No. viz. H-106 dtd 26.05.1995 and showing the split up in the value was a document willfully manipulated by the Importer to evade legitimate customs duty for the reasons mentioned earlier.

The Commissioner of Customs while adjudicating the case has failed to take cognizance of the above facts.

(d) The Department had all along contended that the software was supplied free and complimentary along with modems and that the software supplied were of limited edition version and were not the full version of the same and that the business conducted by the party with their supplier as well as thereafter with their local customers in India were with respect to modems only. In support of the above contention the department had relied upon the following.

(i) On import, both the modem and the software were packed in one box as evidenced by P/L No. NIL dated 26.03.1997 to Invoice No. 1099 dated 26.03.1997 and pertaining to P.O.H. 156 dated 07.03.1997.

(ii) The business conducted by the party in India with their customers clearly indicated that each and every transaction was for the modems as evidenced by the emphasis laid to the serial number of the modems in the delivery challans No. MODM/BOM/AY-97/8283 dtd.

25.08.1997 relating to the sale of modems to M/s. Indian Oil Corporation. It is pertinent to note here that the said challan does not bear the serial number or part

number of the software which appears to be against the common code of business transaction.

Usually software being licensed software and especially when sold by a reputed manufacturer always accompanies a licence agreement and includes the serial number and manufacturers code number which is prominently displayed in all the documents relating to the sale specifically the invoice.

(iii) It is a established practice in the trade especially when doing business in software, that the serial number assigned to the product is displayed in all the business documents especially the invoice to prevent piracy. However the documents presented to customs and also the documents received under panchanama during search do not indicate the serial numbers of any software product, whereas the serial number of modems was specifically and clearly indicated as evidenced in the delivery challans No. MODM/BOM/AY-97/8283 dated 25.08.1997.

(iv) The L.E. software being complementary it is the business strategy of many business houses and corporations to introduce their product into the market by giving an insight into the software which could be used to its full potential only along with the supporting hardware manufactured by them. The L.E. software appears to be one such product. Though the software does have a value, the same is supplied free in terms of the anticipated and projected marketing strategy of the company. Further, even if the values were to be shown separately it should not have been shown by splitting the value of the modem into values viz. that of software and that of hardware. It may be interesting to note that in the event of a prospective buyer choosing only the modem without the accompanying software then would the company sell the hardware at the split up price. The answer is obviously in the negative as party has not produced any evidence for the same. All they have shown in the import documents is showing the split up value.

(v) Further each product is identified in the market by the part number assigned to the product by the manufacturer and this product number or product code will remain the same, in whichever general/specific catalogue they appear. One such catalogue is the Ingrams Micro Comprehensive Hardware and Software catalog.

At page 259 of the said catalogue the product Accura 33.6 Ext. appears under the General heading "Communications - Modem, Faxes & Accessories" with the distinctive manufacture code 08=02760, whereas the software supplied by the same company viz. Hayes is projected under the general heading "Software - communications" with distinctively separate manufacture code No. 08 - 00107. What is attempted to be stated here, is that both software and hardware have distinctively different manufacturer's code number and the same is not reflected in the documents presented to Customs which shows the split values for hardware and software without showing the respective manufacturing code number (as in the usual practice).

From the above it can be seen that the part No. 08-020696 relates to the manufacturing code number of modem and not software. Secondly, the fact that this product was specially designed for use in Asia signifies that the complimentary software was also supplied to Asia and not restricted to USA and Europe as claimed by the importer.

(e) Commissioner of Customs while adjudicating the case has also not taken the above points into consideration and has accepted the importers contentions without valid reasoning. The commissioner has also failed to take notice of the documents relating to several consignments specifically B/E No. 5307 dated 13.06,1995 pertaining to purchase order No. H-106 dated 26.05.1995 which were earlier cleared by the party wherein the goods were declared only as one item viz. modem which were having the same unit value of USD 550 and compare the same with the documents of the consignments cleared thereafter wherein the goods were declared as modem and software which when taken together was USD 550. It may also be noted that the fact that the goods earlier cleared as one unit and now cleared as 2 units were the same, was not under dispute and was accepted by the party as stated in the statement of the Chief Executive Officer Shri Mohan N. Rao and Shri Rahul Komodaya Jt. Managing Director of the firm which was recorded Under Section 108 of the Customs Act 1962.

On comparison of the two documents it is observed that the value of the modem have been split up into two values that of the modem and that of the software. This

fact clearly shows that the items under import were always modems only and the software were complimentary in nature and were supplied free, though the same may have a separate distinct value. It was not disputed by the department that the complimentary software does not have a value as was the view held by the Commissioner. The Commissioner while adjudicating the case had not appreciated the departments contention that the value of the software could not become a part of the value of the modem but ought to have been a separate and distinct value over and above the value of the modem.

(f) The Commissioner failed to take note of the fact that the Department was having in its possession the records of previous imports made by the same importer/ of similar items covered by the purchase orders bearing Nos. 102, h-103, H-104, H-105, H-106, 107 and 110 where in the description of imported goods, both in the invoices as well as in the Bill of Entry, was shown as Modem only.

In all those imports the goods were declared as one unit without separately showing the value of any software and duty was paid @ 50% + 20% which was the then prevailing duty on Modem. The Commissioner should, therefore have seen the game-plan of the importer in the subsequent imports covered by the purchase order No. H-111 onwards where in separate values for hardware and software were shown at the instance of the importer mainly for the purpose of paying lesser duty.

(g) The Commissioner should have analysed the price lists dated 01.12.1994, 01.04.1995 & 01.10.1995 and he could have observed that- [i] the price list dated 01.12.1994 shows the code no of the product and shows only one value for each item i.e. the value of hardware and software is not shown separately.

[ii] the price list dated 01.04.1995 does not show the code no of the product but show the value of hardware and software separately.

However, the aggregate total unit value of hardware and software is equal to the unit value of the corresponding product listed in the price list dated 01.12.1994.

[iii] the price list dated 01.12.1994 & 01.10.1995 does not show that value of hardware and software separately for Ultra 144 and lists the price at US\$ 550. However, price list dated 01.04.1995 shows the split up price of the same item at US\$ 521 for hardware and US\$ 29 for software, but the aggregate value for the item again in US\$ 550.

The clearly shows that the value of the goods under import were for hardware only (modems) and that the value was split up as that of hardware and software for the convenience of the importer and for claiming the concessional rate of duty which was then available for computer software other than software meant for telecom.

[i] Fax transmission sheet dated 20.06.1995 from Mohan B/Rao/Shiv Kumar advising the supplier inter-alia for confirmation of the fresh purchase Order H-111 dated 20.06.1995 and about the cancellation of purchase order No. 108 & 109.

[ii] Suppliers fax dated 26.06.1995 from Elsie Lee acknowledging inter-alia the new purchase Order H-111.

Fax dated 20.06.1995 indicates that the supplier could not accede to the request of the party to supply the modems and software separately. Further it also refers to the fresh Order H-111 dated 20.06.1995 and advised the importer specifically for order confirmation clearly indicating the description of goods exactly as per order.

The fresh order referred to in the fax H-111 shows the value of hardware and software separately. The fax also mentions that purchase order No. H-108 and 109 are cancelled. It may be observed that both the purchase Order H-108 and 109 does not show separate value for hardware and software but shows only one single unit value. The difference between purchase Order H-108, 109 and H-111 is that separate value are shown in the fresh purchase Order H-111 for hardware and software, but however, the aggregate unit value of both hardware and software taken together is same.

Suppliers fax dated 26.06.1995 states inter-alia that they are unable to pack the software and hardware separately. This clearly indicates that the hardware and software were throughout packed together in all the consignments which were

despatched to India.

[iii] Board's circular No. 7/98 Cus. Dated 10.02.1998 with reference to the scope of exemption under S.No. 173 of notification No. 11/97 Cus. Dated 07.03.1997 for computer software. Para 4 of this circular clearly stipulates that software for telecom, medical or other applications is not eligible for exemption from duty. The concessional duty claimed by the importer for software was for telecommunication and by virtue of the clarification from the Board the concessional duty benefit granted vide Notif. No. 11/97 Cus.

Dated 01.03.1997 cannot be extended. Thus it can be seen that the software under import being telecommunications software was not eligible for concessional rate of duty and therefore the benefit of this notification ought not to have been extended to the Importers.

It may be noted here that the denial to Notif No. 11/97 dated 01.03.1997 was not an issue in the present show-cause-notice.

In view of the above, the Commissioner ought to have upheld all the allegation leveled in the show Cause Notice ordering confirmation of duty demand, confiscation of the goods under Section 111(m) of the Customs Act 1962 and ought to have imposed deterrent penalties under the provision of Section 114 A/112 of the Customs Act 1962 on the Importer.

a) The question of addition of value of a software on to hardware is new well settled. In the case of CCEx v. ACER India Ltd. it has been held that the valuation of operating software, cannot be added on to the value of the hardware when sold together, & the exemption granted to soft ware from excise duty then whether it is operating software or application software in terms or of hearing 85.24, no duty could be levied there on indirectly.

Though this decision was in terms of duty under the Central Excise Act, there is no reason why the said law as laid down by the full bench of the Apex cannot be applied in case of valuation & exemption under the Customs Act, 1962, (b) Modems imported in the present case would fall under 85.17 the chapter notes

prescribed that recorded media which they admitted yarn the said cards, in this case, would remain classified under 85.24 of the Tariff. The question, whether when presented together, the value of the 'card' will have to be assessed along with that of modem, by applying the provision of Section 19 of the Customs Act, 1962, has been answered by this Tribunal in the case of Commissioner of Customs Mumbai. V. Hewlett Packard India Ltd. 2006 (133) ECR 49 wherein the para 11 of the decisions after noticing the provision of said Section 19, it is concluded that if there is any other law in force under which the rate of duty on imported goods could be determined, then Section 19 will not apply. In this case also before us, the provision of Custom Tariff Act 1975 apply, as regards the stipulation of classification having a bearing on duty on recorded software to be classified under 85.24. Therefore, if the 'data software cards' have to be classified separately the value/there of cannot be added to the value of the Modems under dispute if combined values are declared, the same have to be split in to the value of the Modem, and the value of the card & Different rates of duty & eligibility to modification exemptions on software has to be granted on the value of the software. This position was also upheld in another case of Hewlett Packards vide final order No. 693/2005-Cus.

Dated 04.07.2005, wherein the Tribunal decided the issues of classification & assessment of software imported along with a printer. The software in that case was contained on a CD-ROM, which accompanies the printer imported. The CD-ROM was always sold with the printer and the printer could not work without the use of the software on CD-ROM loaded on to the computer which was to be hooked up with the said printer. In that case prices separately indicated for the software on the invoices were accepted and benefit of classification under 85.24 and rate of duty there under granted on such separate split prices. In the other case of the same Hewlett Packard (2006 (133) ECR 45), the importers had indicated the split of the total price unit, Printer & CD ROM (software) price & valuation was required & upheld to be based on the said split value.

c) In the present case also, the prices have been split into the price of modem and the price of a card having the software. The shows cause Notice dtd. 03.08.1998. in para 6 admits - 6. ...He stated that the value of software is decided by their

suppliers as per the application an available on the respective software and they publish the price list of these goods....

A perused of the said notice are not demonstrated to reveal, that any value of the modem has been artificially or otherwise transferred on to the software. If in this case the price of software is to be determined by the supplier based on the kind of use the software can be put into, and since price lists for the said software are available, there is no material to hold, that the prices so spilt, on an advise of buyer or otherwise by the supplier, are not in excess of the printed Price Lists of manufacturer & or supplier available & issued, there can be no reason therefore to arrive at any mens rhea on part of the importers to, in conducting the exercise of splitting of prices to evade duty. The charges of putting the value, of the cards & denial of software exemption/assessment on such values of the card therefore cannot be upheld in view of the material, in this case following the settled position in law.

(d) When under valuations charges cannot be upheld. There can be no cause for penalty.

(e) No merits are found in the plea of the Revenue to reopen the part assessments made & or the future assessment to be finalized as proposed in the appeal in absence of material on inflated card prices, if such material is available, the split of prices can be questioned. The notice does not survive.

3.1 When the Show cause notice issued does not survive, the order of Commissioner is to be upheld & Revenues appeal rejected. Benefit of the Commissioners order to be granted with consequential interest as applicable.

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