Padmini Polymers Ltd. and Shri Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-17-2007

Reported in : (2007)(119)ECC171

Judge : N T C.N.B., M Ravindran

Appellant : Padmini Polymers Ltd. and Shri

Respondent : Cc

Judgement :

1. Appellant M/s Padmini Polymers Ltd. imported a consignment of CD Roms and sought their clearance under a bill of entry dated 05/09/97 filed before Customs, New Delhi. The consignment was described in the invoice as "Multimedia Application Software on CD ROM". The appellant also sought exemption from Customs Duty under notification No.11/97-CUS dated 01/4/97 which exempted "Computer Software". The titles of the CD Roms under import were as under: 2. Customs Authorities doubted the eligibility of the CD Roms to the exemption and issued show cause notice to the appellant. Notice also proposed confiscation of the CD Roms for mis-declaration.

3. The appellant contested the notice; but failed. In adjudication, the Commissioner held that the International Cook Book series (a to e) and "Cinderalla" (serial No. L) do not qualifying for exemption. The exemption was allowed on "College Funding Finder", "Complete Car Care", "Complete House" and "clickart Select" (serial Nos. f to I, k & m of the list). The order also confiscated

the items held as not eligible for exemption under Section 111(m) of the Customs Act and imposed a penalty of Rs. 5,000.00 each on the importing company as well as its CMD Shri Vivek Nagpal (the second appellant).

4. The first two appeals of the importers challenge the confiscation as well as the penalties. The third appeal of the revenue points out that the penalty imposed is too meager when seen in the context of the attempted duty evasion of about Rs. 39 lakhs. The appeal, therefore, seeks enhancement of the penalty.

5. As all the appeals are directed against the same order, they are being considered together and remain disposed of under this common order.

6. The contention of the importer is that the Commissioner's finding about non-availability of exemption is erroneous and self-contradictory. It is also being pointed out that the issue remains covered in favour of the importer by the decision of this Tribunal in the case of Multimedia Frontiers Ltd. v. CCE and the judgment of the Hon'ble Supreme Court in the case of Penta Media Graphics Ltd. . The learned Counsel would further point out that the decision is also contrary to the clarification of the CBEC in circular No. 7/98-CUS dated 10/2/98.

7. The importer has also an objection that while the show cause notice was issued on the basis that only software which was interactive, would fall under 'Computer Software' and interactivity meant facility for addition or deletion from the software by use of a computer. The Commissioner took a view that some of the titles were interactive and others were not, for reasons different from what was taken in the notice. The submission is that an adjudicating authority cannot go beyond the scheme of the show cause notice.

8. Circular 7/98 of the board clarified the following about Computer Software: 4. Having regard to the discussion above. It is clarified that for the purposes of the exemption under S. No. 173 of Notification No. 11/97-Cus., dated 1-3-1997, 'computer software' is to be taken to mean 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 an automatic data processing machine falling under Heading

84.71. Thus, the said exemption will not cover software required for operation of any machine performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine.

More specifically, software for telecom, medical or other applications is not eligible for exemption from duty. However, software containing encyclopedia, games, books, etc., will be eligible for the exemption wherever they satisfy the interactivity criterion.CCE, Chennai v. Pentamedia Graphics Ltd. 8. Random House Compact Unabridged Dictionary defines software to mean: "anything that is not hardware but is used with hardware esp.

audiovisual material such as film, tape records etc. " According to McGraw Hill Encyclopaedia of Science and Technology, "software" means the totality of programme usable on a particular kind of computer, together with the documentation associated with a computer program". Encyclopaedia Britannica defines "software" to mean.

"Software is an entire set of programs procedure, and routines associated with the operation of a computer system, including the operating system. The term differentiates these features from hardware, the physical components of a computer system, including the operating system. The term differentiates these features from hardware, the physical components of a computer system. Two main types of software are systems software, which controls a computer's internal functioning, and application software, which directs the computer to execute commands that solve practical problems....

Software is written by programmers in any number of programming languages. This information, the source code, must then be translated by means of a compiler into machine language, which the computer can understand and act on.

12. Submission of the learned Counsel appearing for the Revenue that the 'Capture Animation Files' are not software since another software is required to load the same is without any substance. It is evident from the book of Computers and Microprocessors by A.C. Downton, that a loader programme is required to

load software on the disk of the computer. This concept is called as boot strapping. In other words, if software is required to load a programme on the computer then the programme which has to be loaded on the computer continues to be software. Simply because the 'Motion Capture Animation Files' requires another software known as 'soft image' to get the final result does not detract the goods under import from being software. The same continues to be a software and entitled to exemption under Notification No. 20/90-Cus.

13. Prof. S. Raman, Associate Professor, of IIT Madras, who is an expert on the subject has opined that the 'Motion Capture Animation Files' are normally referred to as software in the industry and the same can be manipulated and modified by 3D animation software. These files can be interactively modified and used for various domestic requirements of the advertising, broadcast and film industry.

According to him 'Motion Capture Animation Files' on data are computer software recorded in a machine readable form and capable of being manipulated and the same are software.

10. It is clear from the above authorities that the scope of Computer Software is very broad. The Board circular has specifically clarified that encyclopedia, games books etc. will be eligible for the exemption whenever they satisfy the interactivity criteria i.e. "capable of being manipulated by means of an automatic data process machine". The Tribunal took the view in Multimedia case that interactivity required the ability to communicate with the computer by means of a terminal.

The circular also explains that ineligible software are telecom, medical and other software. The present imports are similar books containing information, advise, story etc. in CD Rom which can be accessed through a computer terminal. Therefore, they are computer software eligible for the exemption. In any case, there is no justification for treating "Car Care" as interactive and "Cook Book" as not interactive. Similar (sic) the case (sic) "Fact Book".

11. Section 111(m) of the Customs Act provides for the confiscation of any goods which do not correspond in respect of value or in any other particular with the entry made under the Customs Act. In the present case, the CD Roms were entered as

Multimedia Application Software on CD Rom. The appellant had also claimed the goods to be eligible for exemption as computer software. Since, we have held that the item is computer software eligible for the exemption, there is no justification for treating the consignment as mis-declared. Therefore, confiscation was also not justified. No penalty is attracted when goods are not liable to confiscation.

12. In the result, the appeals of M/s Padmini Polymers Ltd. and Shri Vivek Nagpal are allowed.

13. The appeal of the revenue, seeking enhancement of penalty, has no merit in view of the finding that penalties are not attracted. It fails and is rejected.