

Collector of C.E. Vs. Wipro Information Technology

Collector of C.E. Vs. Wipro Information Technology

SooperKanoon Citation : sooperkanoon.com/4603

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-25-1988

Reported in : (1988)(19)LC309Tri(Delhi)

Appellant : Collector of C.E.

Respondent : Wipro Information Technology

Judgement :

1. This is an appeal filed by the department. The basic point of dispute in this appeal is whether technical service charges recovered by the respondents from their customers, but not disclosed to the department, were includible in the assessable value of computers sold by the respondents, for the charge of Central Excise duty.

2. Relying on paragraph 49 of the Hon'ble Supreme Court's judgment in the case of M/s. Bombay Tyres International Limited -1983 (13) ELT1896 (SC), in which it was held that after-sale-service charges were includible in the assessable value under Section 4 of the Central Excises and Salt Act, 1944, the Assistant Collector decided that the technical service charges collected by the respondents were to be included in the assessable value. And since the respondents had disclosed to the department only that part of the contract with their customers which related to the sale of computer hardware, kept back the other part relating to the technical service charges and software etc.

supplied by the respondents in connection with the hardware and issued separate bills for the technical service charges and software from their head office, the Assistant Collector held the respondents guilty of suppression of facts, invoked 5 years' time limit for demanding duty and confirmed demands for differential Central Excise duty amounting to Rs. 99,60,141.89 for the entire amount of technical service charges recovered during the period from March 1982 to 16.3.1985. The Assistant Collector also imposed a penalty of Rs. 250/- on the respondents under Rule 173Q of the Central Excise Rules, 1944. The Collector (Appeals) set aside the Assistant Collector's order holding that technical service charges were not expenses incurred by the respondents in manufacturing and marketing of computers but were for optional professional services rendered by the respondents to their customers in using the computers and hence the Supreme Court judgment in *Bombay Tyres International Ltd.* was not applicable. The department is now in appeal before us to have the Assistant Collector's order restored.

3. The department originally filed the appeal on the ground that the technical service charges contributed to enrich the value of the computers and gave to the article its marketability in the trade.

Later, by means of the Misc. Application listed above, for admission of additional grounds, the department sought to say that the services were, in fact, rendered free by the respondents and the money realised separately from the customers in the name of the services was for warranty charges for the computers and for supply of software and language etc. which were a part of the computer system and that this was a dubious practice adopted by the respondents for recovering a part of the real value of the computers. The respondents opposed the department's application for additional grounds saying that the department was thereby trying to make out a completely new case. The respondents pleaded that the department should not be allowed to bring in a fresh charge three years after the issue of the original show cause notices. On careful consideration, we find that the department is not really trying to make out any new case. The case of the department has all along been that the technical service charges separately recovered by the respondents from customers, but not declared to the department,

were a part of the assessable value of the computers. By the proposed amendment to the grounds of appeal, the department is only trying to pin-point that the technical service charges were mainly for warranty services which any manufacturer of sophisticated and costly gadgets like computers is duty bound to perform in the normal course of trade without charging anything for them. There is also nothing new in the documents tabled by the department in support of the additional ground. They are the respondents' own record - their price quotation and their customers' purchase orders. In the interest of justice and for a proper disposal of the valuation dispute before us, the additional ground has to be allowed and we do so.

4. Coming to the merits of the appeal, both parties referred to the Tribunal's earlier judgment at 1988 (33) ELT 787 (Tribunal) - Collector of Central Excise, Bangalore v. Sunray Computers (P) Ltd. in which the question of technical service charges had been dealt with in detail. In this judgment, the Tribunal held that cost of services having nexus with manufacturing or marketability of the goods, such as pre-manufacturing research, planning and designing, advertisements, warranty service and supply of software was includible in the assessable value while the cost of services having no such nexus, such as selection of skilled personnel for the customer, training of the customer's staff, installation and commissioning of the computer at customer's premises, was not includible. It was also stated in the same judgment that while determining the assessable value, care would have to be taken to see that a part of the real value of the computer system was not recovered by the assessee by inflating the excludible service charges. The learned representative of the department stated that he stood by the Tribunal's earlier judgment in the Sunray case aforesaid and since in the present case the Assistant Collector had included the entire amount of technical service charges collected by the respondents, he requested that the matter may be remanded to the Assistant Collector for re-determination of the value in accordance with the principles laid down in the Sunray case. The respondents stated that the principles of Sunray case were acceptable to them also subject to their following two submissions : (i) Warranty Charges : The respondents did not dispute that warranty charges should form a part of the assessable value of the machine.

They submitted, however, that though the respondents had lumped the warranty in other services till 1984, they had actually not recovered any money from their customers for the warranty services.

The learned representative of the department stated that in their price quotation the respondents had stated that training of the customer's staff was also free. We do not believe that the respondents would have rendered any service really free. What must have happened is that if a particular item was shown free or a very low price was collected for it, the price of some other service item must have been inflated to take care of the deficiency. The learned representative of the department submitted that the cost of installation and commissioning, which was an excludible item, was inflated. The Assistant Collector would have to re-determine the cost of includible items.

The second request of the respondents in connection with warranty was that charges for three months' service should alone be included since the general practice in the computer trade was to offer free warranty for only three months. We do not agree with them for two reasons. First, there is no evidence on record that the computer trade generally offered a free warranty of only three months.

Secondly, we find that the respondents themselves were giving 12 months warranty to their customers. Obviously this was so because the respondents considered it necessary to ensure marketability of their machines. The full cost of warranty service, for the actual period for which it was offered by the respondents, has, therefore, to be included in the assessable value.

(ii) Software : In the Sunray judgment aforesaid, this Tribunal has held that without software (i.e., computer language, programme and operating system etc.), the Hardware (i.e., the actual computer and its accessories) was incomplete, a mere "dumb box", and of no use at all to the customer and that Hardware, Software and peripherals together made a workable computer. All three of them, were therefore, a part and parcel of the computer. The respondents admitted that software was essential for the working of the computer but they pleaded that the cost of only one language and operating system should be included in the assessable value and the additional language, programmes and operating systems supplied to the

customer for the computer should be treated as accessories and their cost excluded. The respondents admitted that the additional languages, programmes, and operating systems etc. enhanced the functional utility of the computer to the customer. We do not agree with the respondents. No part of the software could be treated as an accessory. A customer who invests lakhs of rupees on a computer system wants to get maximum benefit out of it. The type and number of software required by a customer is determined by his needs. A customer who goes in for a bigger computer system, does so because all parts of that system are essential for him. Inasmuch as the software actually makes the computer work, the software cannot be treated as an accessory. It is an essential part and parcel of the computer system. A customer wants more than one language, programme and operating system because he wants his computer to do many things, each one of them being an essential function for the customer. We do not, therefore, think that any departure is called for from the principles laid down by us in the Sunray case.

5. Apart from the merits of individual service items as discussed above the respondents made the following further grounds : (1) Limitation : The respondents stated that the Assistant Collector had erred in holding them guilty of suppression of facts. In support of their contention that they had disclosed the service activity, the respondents referred to their letter dated 23.11.1982 addressed to the Inspector of Central Excise and their letter dated 14.5.1984 to the Assistant Collector. We have seen both these letters. The first letter talked of "activity of a non-manufacturing nature".

But, in fact, some of this activity had a very close nexus with the manufacturing and marketability of the computers but they lumped everything under the heading "technical services". Secondly, the first letter was addressed to a very junior officer of the department who was not competent to value the goods. The proper officer before whom the respondents submitted their price lists and who was charged with the duty of approving their assessable values was the Assistant Collector of Central Excise. No disclosure of the "technical services" was made to the competent officer, i.e., the Assistant Collector till 14.5.1984. It was in this letter that the respondents informed the Assistant Collector for the first time that they were billing their customers separately for services and that these charges had not been

shown in the price lists. The learned representative of the department agreed very fairly that from this date, i.e., 14.5.1984, onwards there was no suppression except insofar as the includible items were found to be under-valued. We agree that till 14.5.1984 there was no proper disclosure by the respondents of the full price structure of their computers. Till 14.5.1984, therefore, the authorities would be justified in invoking the extended time limit of 5 years for demanding the duty short-levied. However, with effect from 14.5.1984, the normal time limit of 6 months as laid down in Section 11A of the Act would be applicable.

(2) Penalty. The respondents submitted that even the token penalty of Rs. 2507/- should not be there because the original show cause notices issued on 10.7.1984 and 7.12.1984 were impliedly superseded by the later show cause notices issued on 11.3.1985 and 15.3.1985, respectively. Though the show cause notices dated 11.3.1985 and 15.3.1985 were titled as Addendum to the earlier show cause notices, the respondents contended that they were, in fact, independent show cause notices and no penalty was proposed to be imposed in the later show cause notices. We do not agree with the respondents. The show cause notices dated 11.3.1985 and 15.3.1985 were not independent show cause notices nor were they issued in supersession of the earlier show cause notices. As very clearly stated in the later show cause notices, they were only in the nature of Addendum to the earlier show cause notices. The basic case of the department, that the respondents had not disclosed and included the technical service charges in the assessable value of computers, was clearly put in the first show cause notices dated 10.7.1984 and 7.12.1984. The Addendum dated 11.3.1985 and 15.3.1985 only added a new ground for the same charge - that the respondents were getting separate orders from their customers for the technical services but were submitting to the department only the contract for supply of hardware. Secondly, the Addendum dated 11.3.1985 specified the correct amount of duty demand. Since the penalty clause had been invoked in both the show cause notices dated 10.7.1984 and 7.12.1984, there was no need to repeat it in the Addendums dated 11.3.1985 and 15.3.1985. And since we have held that the respondents were guilty of suppression of fact till 14.5.1984, the token penalty of Rs. 250/- held on them is justified and we confirm it.

(3) Gross price: The respondents submitted that the includible part of technical service charges, to be determined by the Assistant Collector after a break-up of the total service charges collected by them from their customers, should be considered as gross receipts or cum-duty price and the duty payable calculated therefrom accordingly. This is a reasonable request. The learned representative of the department did not oppose it. We allow this request.

6. The respondents stated that the goods (such as floppies), through the medium of which software was supplied, to the customers, were prepared at places other than their Mysore factory and that the question of jurisdiction would arise. We find that this is a new plea of fact raised for the first time. The learned representative of the department also submitted that this was an hypothetical ground taken by the respondents belatedly and that the facts regarding it were not clear. He suggested that the Assistant Collector, to whom the matter regarding the duty demand was proposed to be remanded, could determine the facts and then deal with the point. We agree with him.

8. In the result, while we confirm the penalty of Rs. 250/- Imposed on the respondents, we set aside the lower orders Insofar as they relate to the duty demand and remand the matter to the Assistant Collector to re-determine the differential duty payable by the respondents in the light of this Tribunal's earlier judgment In the Sunray Computers case aforesaid and our observations above. The appeal is disposed of In these terms.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com