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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-16-1994

Reported in : (1995)LC91Tri(Delhi)

Appellant : international Computers Indian

Respondent : C.C.E.

Judgement :
1. This appeal is directed against the order dated 28-10-1986 passed by the Collector of Central Excise, Pune. The brief facts are that the Central Excise Officers visited the premises of the appellants in Pune on 27-11-1985 for verifying their accounts. The appellants are engaged in the manufacture of office machines, apparatus and computers falling under 33D & 33DD respectively of the Central Excise Tariff. The officers found that the appellants were billing for certain charges in the nature of installation and commissioning which, to the department, appeared to be far in excess of the services provided on that account.

It was also found that certain essential peripherals and software items forming a part of the minimum Computer System were being cleared without payment of duty. The department was also of the view that additional amounts of duty had been evaded by means of certain basis/compulsory software items and the essential peripherals forming a part of the minimum Computer System being cleared by the appellants without payment of duty on the ground that these are bought out items and not manufactured by them. After further investigation, a show cause notice was issued on 31-12-1982 to the appellants in as much as they

have failed to include the value of installation and commissioning charges in the price declared and they have also not included the value of certain basic software and other essential peripherals in their declaration to the department. The Collector, on hearing the appellants and considering their reply, decided the case by the impugned order.

The Collector confirmed the demand of Rs. 94,55,215.50 for the period from 1-1-1981 to 31-12-1985 invoking the longer period under Section 11A of the Central Excises & Salt Act, 1944. This demand was worked out on the amount of duty on account of installation and commissioning charges and on account of basic software.

2. Addressing the arguments on behalf of the appellants, Shri Ramasubramanyam, ld. Counsel, submitted that the demand in this case is for the period 1-1-1981 to 31-12-1985 and it is time-barred being beyond six months. The ld. Counsel submitted that the appellants have fully disclosed all particulars about their activity to the department.

He referred to the letter dated 28-5-1982 of the Superintendent addressed to the appellants wherein there is a reference to the collecting of installation charges by the appellant and the Superintendent noted that this was not included in the price list and have called for particulars in this regard. This letter of the Superintendent has also been replied to by the appellants on 26-3-1983 wherein they have stated that installation charges do not form part of selling price for computer system and that they have not included it in the price list. The ld. Counsel urged that they have been showing the amounts of installation charges in their invoices. Thus, when there is disclosure of the collection of installation and commissioning charges by the appellants and explanation as to why it was not included in the price list, the longer period cannot be invoked for demanding duty from them. The fact that there has been correspondence regarding these charges with the appellants is also evidence in the narration of the Collector's order. The ld. Counsel in this context relied upon the Supreme Court decision in the case of Collector of Central Excise v.Chemphar Drugs & LinimentsLakshmi Engineering Works v. Collector of Central Excise -1989 (44) E.L.T. 353 (Tribunal); Mahabir Jute Mills v. Collector of Central

Excise -1988 (35) E.L.T. 119 (Tribunal); and Aroma Apparels v. Collector of Central Excise -1986 (25) E.L.T. 90 (Tribunal). The ld. Counsel also argued that there is a factual error in the order of the Collector. He referred to ground 53 of their grounds of appeal. The show cause notice, inter alia, referred to essential peripherals. Non-essential peripherals were not the subject-matter of adjudication. This fact has been accepted in para 20 of the impugned order. The Collector has observed, therein, that he is inclined to hold that essential peripherals are not an integral part of the computer and has observed that show cause notice in this case has confused the two, namely, a computer and a computer system and thereby included certain devices which can be called a part of the computer system, but not the computer. Para 20 of the Collector's order is referred to. The ld.Counsel submitted that if peripherals are not the part of the computers, the installation and commissioning charges relating thereto should be excluded from the demand. As regards demand of software, the ld. Counsel contended that software is exempt under Notification and software is also covered by the tariff description under Item 35DD of the Central Excise Tariff. As regards the installation and commissioning charges, the ld. Counsel referred to their contract, copy of which has been put on record to indicate the nature of installation.

It says in the contract that before delivery, the customer at his own expense will suitably prepare the premises for the equipment and provide all necessary electrical and other installations and fittings.

Appellants, according to the contract, will assemble the equipment and submit to it standard tests. These are the terms of the contract regarding installation. The ld. Counsel also relied upon the case reported in 1988 (33) E.L.T. 787 in the case of Collector of Central Excise v. Sun Ray Computers in which it has been held by the Tribunal that installation and commissioning charges at customers' premises is not includible in the assessable value of computer, these charges being in the nature of post removal expenses.

3. Smt. C.G. Lal, ld. S.D.R. for the Revenue, submitted that the demand is not hit by limitation and pointed out that the case arose out of a visit to the appellants' factory by the departmental officers in February, 1984. The appellants had not

supplied the copies of the contract to the Assistant Collector at the time of approval of their price list. Therefore, the department was not aware that the appellants were not including installation and commissioning charges, which was discovered only on officers' visit. The annexures 6 & 7 of the show cause notice would indicate that full particulars were not being disclosed by the appellants. There is, thus, clear evidence of the appellants holding back relevant information from the department about the valuation of their goods. Hence, the longer period can be invoked.

The ld. S.D.R. relied upon the case law reported in the case of Continental Engg. Industries (P) Ltd. v. Collector of Central Excise, saying that the department can invoke longer period on fresh material coming to light. The Tribunal's decision in the case of Annapurna Glass Works (P) Ltd. v. Collector of Central Excise -1989 (41) E.L.T. 655A (Tribunal) was also relied upon; that the department can invoke the longer period when there is suppression of facts in the price list submitted, is supported by the Tribunal's decision in the case of IOE & Diesel Engg. Works v. Collector of Central Excise -1991 (53) E.L.T. 70.

The ld. S.D.R. argued that for the purpose of extended period, mere suppression by itself will do. The department need not to show wilful suppression. See the decision FACT v. Collector of Central Excise -1987 (31) E.L.T. 292 and in the case of Formica India Division v. Collector of Central Excise -1984 (17) E.L.T. 590. Onus of correct declaration in the price list is on the assessee. As regards the valuation of software, the ld. S.D.R. contended that even if the items are bought out items, they are still includible in the assessable value for which she relied upon the case law reported in 1985 (39) E.L.T. 113 in the case of Collector of Central Excise v. WIPRO Information Technology Ltd. andCollector of Central Excise v. Sunray Computers (P) Ltd. - 1988 (33) E.L.T. 787 and Order No. 168/94-A, dated 23-6-1994 in the case of ORG System v. Collector of Central Excise [since reported in 1994 (73) E.L.T. 450 (Tri.)]. Relating to installation and commissioning charges, the ld. S.D.R. argued that contract did not indicate whether it is optional or not. The department case is that the appellants have passed on part of the cost of the goods. The point to be noted is that these were also found to be disproportionate compared to the cost of computers. The Tribunal's decision in the

case of Sunray Computers also lays down that it is not permissible to use this as a facility for diversion of cost as noted in para 4 of the Tribunal's order. The Tribunal has observed that there should be no attempt to divert a part of the true price of the goods to service charges.

4. The submissions made by both the sides, have been carefully considered. On the question of includibility of installation and commissioning charges in the assessable value, the ratio of Tribunal's decision in Sunray Computers will clearly apply. While holding that such charges are not includible in the assessable value as these are post removal expenses, yet the Tribunal has also laid down at the same time, "But if there is a single contract for supply of the goods as well as services; care may have to be taken to see that there is no attempt at diverting a part of the true price of the goods to service charges." The burden of the Deptt. case herein is on these lines. It is also found that the appellants have also been unable to furnish the exact amounts transaction-wise and the Deptt. has found that it is on an average comes to a uniform percentage of 28.5% or 33.33% and the appellants' plea is that the general practice in the trade was to make these charges at a uniform percentage. But the fact remains that the installation and commissioning charges on being quantified as such have to be excluded from the assessable value. This exercise of quantification of installation and commissioning charges for the material period in this case has to be done. There is an indication in the Collector's order at para 14 of his "Findings", wherein the Collector has accepted appellants' submission that the total cost of these charges for the period on an average comes to 50%. But he has not allowed any notional profit thereon. Yet according to the Tribunal's decision in Sunray Computers (supra), this has to be allowed on the ground that a reasonable margin of profit for service activity should be taken into consideration. Therefore, in respect of installation and commissioning charges in this case, it is directed that the Collector may determine the actual expenses relating to these charges and allow exclusion of that portion which can be solely attributable to installation and commissioning charges. The appellants are also to furnish the necessary particulars in this regard to the Collector for such a determination so as to arrive at a workable formula for fixing the assessable value. It is ordered accordingly.

5. As regards the next issue of includibility of the value of software in the assessable value of computer, it is now well-settled that such costs are includible in the assessable value of computer. It has also been held by the Tribunal that for this purpose it is immaterial that the software is bought out item not manufactured by the producer of the main computer, see in this regard recent Tribunal's decision in the case of Tata Unisys v. Collector of Central Excise -1994 (73) E.L.T. 96 wherein a catenna of case law on the subject has been referred and the relevance of Sunray Computers decision (supra) has been endorsed and reiterated. The Collector's order in this regard, therefore, calls for no interference. Consequently, the ground in the Appeal Memo No. 53 about apparent mistake in Collector's order in this regard also stands disposed of.

6. On the next question of limitation, it is felt that the appellants have made out a case against invoking the longer period under Section 11A for demanding duty. This is because of the correspondence in 1982 on their price list between the Superintendent (Central Excise) and the appellants referred to above. Also, the Collector himself says in para 3 of his "Findings" that the Department was aware of the recovery of installation and commissioning charges, but holds it against them on the proportion thereof not being disclosed; but this is a matter of detail and further enquiry by the Department and it may not be fair to put the blame only on the appellants. Moreover, the observation as follows by the Collector in para 21 of his "Findings" for not imposing penalty on them, would also support the conclusion that in the facts of this case the appellants cannot be said to have deliberately withheld information from the Department. The Collector has observed : "I have carefully gone through the submissions made on behalf of the company and its Directors. I find that the assessee has been recovering installation charges in excess of actuals by following some other organisations in this trade. In view of this, the interests of revenue as well as of equity and justice will be served, if the amount of duty less paid, under some misconception, regarding the true scope of Departmental instructions is realised.

I accept the party's contentions regarding errors and mistakes in computations as pointed out by them in annexure No. 13 of the reply to the show cause notice only to the extent of 1(a), 1(b), 1(c) & 1(f)." 7. Therefore, the demand in this case

beyond the period of six months is hit by limitation. The appeal is disposed of in the above terms.

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