CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT No. I

Excise Appeal No.70202 of 2017-Division Bench

(Arising out of Order-in-Original No.24/COMM./CEX/GZB/2016-17 dated 30/11/2016 passed by Commissioner of Central Excise & Service Tax, Ghaziabad)

M/s Rockwell Automation

India Pvt. Ltd. **.....Appellant**

(C-11 Site, IV Industrial Area, Sahibabad, Ghaziabad, U.P.)

VERSUS

Commissioner of Central Excise

& Service Tax, Ghaizabad **....Respondent**

(CGO Complex II, Kamla Nehru Nagar, Ghaziabad, U.P.)

APPEARANCE:

Shri A.R. Madhav Rao, Advocate & Shri Tushar Joshi, Advocate for the Appellant
Shri Gyanendra Kumar Tripathi, Authorised Representative for the Respondent

CORAM:

HON'BLE SMT. ARCHANA WADHWA, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO.- 71220 / 2019

Date of Hearing : 26 June, 2019
Date of Decision : 26 June, 2019

PER: ARCHANA WADHWA

After hearing both the sides, we find that the appellant is engaged in the manufacture of Programmable Logic Control (hereinafter referred as PLC) as also some other automation hardware devices. Same are primarily cleared by the appellant to various others big factories on payment of duty on the value of the hardware.

2. However, the appellant is also importing various types of software which are also being supplied by them to the customers of the hardware for the purpose of using the same in the hardware. Such supply of software, according to the appellant is under a cover of separate invoices.

3. Revenue by entertaining a view that the cost of the software is required to be added in the cost of the hardware and as such the duty liable to be paid would be on the assessable value inclusive of the software, had raised the demand against the appellant invoking longer period of limitation. The said demand to the tune of Rs.5 crores approximately stands confirmed by the Adjudicating Authority alongwith confirmation of interest and imposition of penalty.

4. Learned advocate appearing for the appellant draws our attention to various decisions of the Hon'ble Courts including the decision of the Hon'ble Supreme Court. The list of judgments referred to by the learned advocate is as follows:-

1. Vodafone Essar Gujarat Ltd. vs. Commissioner of Customs (Imports), Mumbai 2009 (237) E.L.T. 458 (Tri.-Mum.).

2. ITI Ltd. vs. Commissioner of Central Excise & Customs, Calicut 2009 (233) E.L.T. 277 (Tri.-Bang.).

3. PSI Data Systems Ltd. vs. Collector of Central Excise 1997 (89) E.L.T. 3 (S.C.).

4. HCL Info Systems Ltd. vs. Commissioner of Central Excise, Pondicherry 2004 (175) E.L.T. 461 (Tri.-Del.) and affirmed by Supreme Court 2006 (193) E.L.T. A144 (SC).

5. ABG Shipyard Ltd. vs. Commissioner of Customs (ACC & Import), Mumbai 2016 (332) E.L.T. 849 (Tri.-Mum.).

6. Atul Kaushik vs. Commissioner of Customs (Export), New Delhi 2015 (330) E.L.T. 417 (Tri.-Del.).

7. Commissioner of Customs, Mumbai vs. Hewlett Packard India Ltd. 2006 (199) E.L.T. 317 (Tri.-Mum.).

8. Essel Propack Ltd. vs. Commissioner of Central Excise, Mumbai-III 2011 (274) E.L.T. 3 (SC).

However, learned advocate fairly agrees that the said decisions were not placed by the appellant before the Adjudicating Authority and as such his appreciation of the same is not available on record. He further submits that the attention of the Adjudicating Authority was brought to the fact that in some cases they have sold only the hardware without the corresponding supply of software, which fact is indicative of the situation that software cannot be considered to be a part and parcel of the hardware. It is the option of the customers to buy the software or not buy the same. Similarly he submits that in some cases initially only one type of software was supplied with the sold hardware and it is only subsequently at the requisition of the customer, that the other types of software were sold separately. He clarifies that the demand confirmed against them includes even those instances where they have sold the software only.

5. Learned advocate submits that though all the above issues were raised before Original Adjudicating Authority, he has sidelined the same by observing simplicitor that no evidence to that effect has been produced by the assessee, whereas the fact is that all these documentary evidence were placed on record.

In view of the foregoing it is the prayer of the learned advocate to set aside the impugned order and remand the matter to Original Adjudicating Authority for fresh consideration.

6. Learned A.R. appearing for the Revenue agrees with the above suggestions made by the learned advocate.

7. In view of the above fact, we deem it fit to set aside the impugned order and remand the matter to Commissioner. Needless to say that the appellant would be afforded opportunity to put forth their case. We also make it clear that we have not gone into the merits of any of the contentions raised by the assessee and all the issues including the issue of limitation is kept open for re-adjudication by the Adjudicating Authority. Appeal is disposed of in above manner.

(Dictated and pronounced in open court)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Lks