

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 2694 of 2011

*(Arising out of Order-in-Appeal No.202/2011 dated
15.7.2011 passed by the Commissioner of Central
Excise (Appeals-II), Bangalore.)*

MRO-TEK Ltd.

Bellary Road,
Hebbal,
Bangalore – 560 024.

Appellant(s)

Versus

**The Commissioner of Central
Excise (Appeals-II)
No.16/1, 5th Floor,**

SP Complex,
Lalbagh Road,
Bangalore – 560 027.

Respondent(s)

Appearance:

Mr. B. V. Kumar, Advocate

For the Appellant

Mr. Dyamappa Airani, AR

For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21250 /2023

Date of Hearing: 01/11/2023

Date of Decision: 15/11/2023

Per : DR. D.M. MISRA

This is an appeal filed against Order-in-Appeal
No.202/2011-CE (*de novo*) dated 15.7.2011 passed by
Commissioner of Central Excise (Appeals-I), Bangalore.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of Data Communication Equipment such as 'Modem' and 'Network Terminators' classifiable under Chapter Subheading 8517 of Central Excise Tariff Act, 1985. Also, they have been engaged in trading from adjoining premises of Modems, Routers, Multiplexes, Switches, etc. During the period July 1999 and August 1999, the appellant had manufactured and cleared/sold Modems against purchase Orders of the customer. They had divided the total value of Modem viz. value of hardware and value of software. Alleging that such bifurcation of value is with intention to evade payment of duty as the software was invoiced as "software for PC", show-cause notice was issued to them on 2.8.2004 alleging short payment of duty of Rs.4,75,000/- and proposed to appropriate deposits made by them on 20.07.2004 towards the duty; also interest and penalty have been proposed in the said show-cause notice. On adjudication, the demand was confirmed with interest and equivalent penalty. Aggrieved by the said order, they filed appeal before the learned Commissioner (A) who though confirmed the demand of Rs.4,75,200/-, but dropped penalty imposed under Section 11AC and interest demanded under Section 11AB of Central Excise Act, 1944. Aggrieved by the said order, the Revenue filed an appeal before the Tribunal. This Tribunal vide Final Order No.1148/2010 dated 26.8.2010 remanded the case to the learned Commissioner (A) to reconsider imposition of penalty under Section 11AC and recovery of interest under Section 11AB of the Central Excise

Act, 1944 afresh in the light of the decision of the Hon'ble Supreme Court in the case of **CCE, Pondicherry vs. Acer India Ltd.: 2004 (61) RLT 719 (SC)**.

3. In the *de novo* proceedings, the learned Commissioner (A) after analysing the facts of the case and the principles of law laid down in **Acer India Ltd.'s** case(supra) held that the appellant had suppressed the value of the product and consequently, upheld the order of the adjudicating authority imposing penalty and recovery of interest. Hence, the present appeal.

4. At the outset, the learned advocate Shri B. V. Kumar for the appellant submits that even though the learned Commissioner (A) in the impugned order has wrongly held that the manufacture and clearance of the modems took place in 1999, the judgment of the Hon'ble Supreme Court in **Acer India Ltd.** case was delivered in 2004, hence, there could not be any reason to accept the contention of the appellant that the duty was not paid under *bona fide* belief. It is his contention that he has failed to take note of the fact that the judgment of the Hon'ble Supreme Court in the case of **PSI Data Systems vs. CCE: 1997 (89) ELT 3 (SC)** was delivered earlier whereby it was held that a computer and its software are different and an assessee can sell the software separately, if so ordered by the purchaser thereof. Being carried away by the said judgment, the appellant had split the value of the modem, and sold hardware and software separately under different invoices. Further, he has submitted that since the entire amount of duty was deposited

much before the issuance of show-cause notice, imposition of penalty and recovery of interest is unwarranted.

5. Per contra, the learned Authorised Representative for the Revenue reiterating the findings of the learned Commissioner (A) has submitted that the claim of the appellant that they have been carried away by the judgment of the **PSI Data System Ltd's** case is without any merit in as much as after detecting the evasion, statement of Shri R. Ramaswamy, CFO, of the Appellant company was recorded; he has stated that even though the purchase order was for whole of modem which included value of software and value of hardware; the value was split into two, one for hardware portion and the balance amount as the value of software by raising invoices under traded series. Therefore, the learned Commissioner (A) has rightly upheld the imposition of penalty and recovery of interest, besides confirming demand of duty.

6. Heard both sides and perused the records. This is the second round of litigation before this Tribunal. In the earlier round of litigation, the Revenue had challenged the setting aside of penalty and interest by the learned Commissioner (A) in his Order dated 12.9.2005, while confirming the demand, before this Tribunal. Consequently, it was remanded to the learned Commissioner (A) to re-examine the issue of imposition of penalty under Section 11AC and recovery of interest under Section 11AB of CEA,1944 in the light of the judgment of the Hon'ble Supreme Court in **Acer India Ltd.'s** case(supra). After

analysing the judgments, the learned Commissioner (A) has held as follows:

“4.2 Leaving at rest the above issue of valuation, let me come to the core issue of imposing of interest and penalty on the appellants which I feel must be primarily on the premise whether they indeed entertained a bonafide view as upheld in the Acer case. In this regard the following trivia can not be lost sight of. The issue of non-inclusion of software value in the assessable value pertained to the months of July and August 1999 itself where as the above judgment was passed much thereafter i.e., on 24.9.2004. Thus, it would be far fetched to say that the appellants had already entertained the said view at the point of time itself. In this regard the fact can not be ignored that the said practice of non-inclusion of software value was stopped thereafter on their own for reasons best known to them. The above fact of not including the value of software in the assessable value in the impugned two months was kept under wraps till they paid duty for the said clearances only on 20.07.2004. Here the facts to be noted are the appellants had adopted the above practice only for a short period which was discontinued on their own obviously on the premise that the practice is wrong. However, the duty for the impugned period was paid much after. All these things clearly point out to the fact that they had neither entertained any firm view on the matter as upheld in the Acer decision nor were fully convinced of any such view. Further once a practice was discontinued they were duty bound to keep the department informed of the same more so when they had felt that the practice adopted by them was wrong. They were equally duty bound to pay the duty forth with and not wait for four long years.

4.3 Further it also brought on record by the original authority that the invoices for software were raised from the trading Division although the same were embedded in the modem which was manufactured in the factory and the same were marked as “software for PC” although they were for the modems.

5. All the above facts leads one to conclude that it is clear cut case of suppression of facts on the part of the appellants with an intent to evade payment of appropriate Central Excise duty as rightly observed by the original authority in the impugned order. Taking all these factors into consideration and also taking into account that the view held by the Supreme Court in the case of CCE Pondicherry vs. Acer India Limited [2004 (61) RLT 719 (SC)] has not reached finality in the real sense for the reasons discussed at Para 4.1 above, I find that there is no need to interfere with the impugned order.”

7. No contrary evidence has been placed by the appellant to rebut the aforesaid findings of the learned Commissioner (A). Also, we do not find merit in the pleading of the learned advocate for the appellant that harbouring a *bona fide* belief, on the basis of the judgment in the case of **PSI Data Systems Ltd.** the appellant had split the value of Modem into Hardware and software. The evidence on record is otherwise. Even though the purchase orders by the customers were for the total value of the Modem, and the software is embedded to the Modem being indispensable, it is the appellant who has knowingly split the value of modem artificially as value of Hardware and value of Software so as to evade payment of duty. In these circumstances, we do not find merit in the contention of the learned advocate for the appellant that the Appellant were under a *bonafide* belief in declaring the value of software separately. Hence, there is no reason to interfere with the order of the learned Commissioner (A).

8. In the result, the impugned order is upheld and the appeal is dismissed.

(Order pronounced in Open Court on 15.11.2023.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)