CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/442/2009-DB, C/443/2009-DB, C/444/2009-DB

[Arising out of Order-in-Original No. 1-2009 –Cus(Commr) dated 23/03/2009 passed by CCE,C, Thiruvananthapuram]

BPL TELECOM PVT LTD.
SYSTEM HOUSE CHANDRA NAGAR
PALAKKAD. — Appellant(s)

P. SATHASIVAM,.
M/S. BPL TELECOM PVT LTD, SYSTEM
HOUSE, CHANDRA NAGAR, PALAKKAD, — Appellant(s)

D. KRISHNAN, COMPANY SECRETARY,
M/S BPL TELECOM PVT LTD, SYSTEM HOUSE
CHANDRA NAGAR, PALAKKAD, — Appellant(s)

Versus

Commissioner of Central Excise, Customs and Service Tax TRIVANDRUM
NULL T.C.NO.26/334(1&2),
I.C.E BHAVAN,PRESS CLUB ROAD,
TRIVANDRUM - 695001
KERALA — Respondent(s)

Appearance:

Shri Kuriyan Thomas, Advocate
MENON & PAI
P.B. NO.1911
IS PRESS ROAD,
COCHIN - 682018
KERALA — For the Appellant

Shri Pakshirajan, Asst. Commissioner(AR) — For the Respondent

Date of Hearing: 20/02/2019
Date of Decision: 20/02/2019

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. SANJIV SRIVASTAVA, TECHNICAL MEMBER

Final Order No. 20188-20190 / 2019

Per : S.S GARG

The present three appeals are directed against the impugned order dt. 23/03/2009 passed by the Commissioner whereby the Commissioner has confirmed the duty liability to the extent of Rs.14,94,049/- and also imposed penalty of Rs.15,76,683/- under Section 112(a) read with Section 114A of Customs Act and also imposed penalty of Rs.10,000/- on Shri D. Krishnan, Company Secretary of the assessee under Section 112(a) read with Section 114A. He also imposed penalty of Rs.10,000/- on Shri P. Sathasivam, Deputy General Manager (Materials and Production) of the assessee under Section 112(a) read with Section 114A. Since the impugned order is common, all the appeals are being taken up for discussion and disposal.

2. Briefly the facts of the present case are that the appellants are engaged in the manufacture of Power Line Carrier Communication equipments (PLCC), Electronic Private Automatic Branch Exchange (EPABX) and other telecommunication equipments at their factory at Palakkad and they also do trading in various products including indigenous products as well as imported products. Earlier they were importing through Bangalore Air Cargo Complex but due to various factors including inordinate delay, the appellant shifted the import through Air Cargo Complex, Thiruvananthapuram. Appellant imported certain telecommunication software through Air Cargo Complex, Thiruvananthapuram and filed Bill of Entry No.330416 dt. 23/03/2007 for clearance of telecommunication software imported and they declared the

same as customized information technology software in CD falling under CTH 84 23 8020 and CETH 85 23 8020. The appellant sought exemption from the customs duty, the additional customs duty and CVD on the strength of Notification No.20/2002(Cus) dt. 01/03/2002, No.20/2006(cus) dt. 01/03/2006 and No.6/2006CE dt. 01/03/2006 respectively. The Department was of the view that the appellant is not eligible to take the benefit of the notifications referred above and summoned officers of the company to explain the nature of imported goods. Thereafter the Department conducted investigation and issued the show-cause notice and after following the due process, the original authority confirmed the demand and also imposed penalties on the appellant as well as the Company Secretary and Deputy General manager who have also filed appeals challenging the penalties imposed on them.

3. Heard both sides and perused records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and law. He further submitted that the adjudicating authority has wrongly held that software imported by the appellant is not customized software. The said software is programmed based on the particular requirement of the individual clients, prior to placing the necessary purchase order with the foreign manufacturers. He further submitted that the software is imported in the form of CD or floppy and the

said software was supplied after considering the specific requirement of a particular customer.

5. On the other hand, the learned AR defended the impugned order and submitted that a detailed investigation was conducted in this case and after considering all the documents submitted by the appellant and after considering the technical literature on the issue, the Commissioner has come to the conclusion that the software imported is not customized software. In support of his submission, he relied upon the following decisions:-

i. Steag Encotec India Pvt. Ltd. Vs. CC(Airport), Mumbai [2010(250) ELT 287 (Tri. Mum.)]
ii. Yokogawa India Ltd. Vs. CC, Bangalore [2008(226) ELT 474 (Tri. Bang.)]

7. After considering the submissions of both the parties and perusal of the material on record, we find that the Commissioner in the impugned order has given detailed reasons for holding that the software imported is not a customized software and the same fall in the category of canned software. Further, we find that the Commissioner has considered all the materials during the investigation. It is relevant to reproduce the relevant findings of the Commissioner which is recorded in paras 32 to 36, as under:-

> *32. A customized software is a type of software that is developed either for a specific organization or function that differs from or is opposite of other already available software (also called off-the-shelf or COTS software). It is generally not targeted to the mass market, but usually created for companies, business entities, and organizations. In other words, it is a tailored software of the specific use of the customer who order its production. In para 11 above,*

Shri Sampath Kumar, Assistant General Manager (Production), BPL Telecom Pvt. Ltd. stated interalia that the software received from M/s. Tadiran Telecom used to be either in a floppy disc or CD. Of late they get it only in floppy discs and a key is also available in the floppy disc for downloading the software from the website of M/s. Tadiran Telecom. He also stated that the basis functions of all the products in a single series are the same and the changes as per customer requirement were of superficial nature. Hence the software imported from M/s. Tadiran Telecom were not customer specific but function specific. That is to say, the software readily available in the website of M/s. Tadiran Telecom can be downloaded and used on payment of fee required to obtain the key available in the floppy disc which was imported and cleared under exemption notification and without payment of duty. Thus the software imported was not a tailor made one for the importer's specific use, but one subjected to mass production as alleged in the show-cause notice.

33. The importer subscribes to different reasons for shifting the import from Bangalore to Trivandrum Air Cargo Complex including expense on transportation from Bangalore to Palakkad and increase in freight charges by M/s. Air India. No proof was produced by the importer to substantiate it. Further the importer neither explained the reasons for the payment of appropriate duty at Bangalore Air Cargo Complex when these software were cleared through Air Cargo Complex, Bangalore nor about the payment of duty on import of software from First Communication, Taiwan and M/s. Tecom, Taiwan.

34. All the submissions in support of the claim that the software imported from M/s. Tadiran Telecom was customized and not canned are without any cogent reasons and supporting evidence. The importer failed to distinguish the difference of software imported from Tadiran Telecom and from M/s. Tecom and First Communications and to how the first is a customized one or the second a canned one.

35. Another submission of the importer is about the exemption available to the indigenously manufactured software used in EPABX systems. There appears to be no persuasive effect to such an argument on the simple reason that the software imported from M/s. Tadiran Telecom and that is produced indigenously are not proved as identical.

36. Hence the importer failed to establish that the software imported by them from M/s. Tadiran Telecom and seized as discussed above are customized software. It is only a canned software as declared before the Customs authorities of Air Cargo Complex, Bangalore by the importer. The proposal of confiscations sustains and I confiscate the software imported and seized by the officers of DRI as per mahazar dt. 12/04/2007 and relased to the importer as per bond executed on 23/05/2007 under Section 111(m) of the Customs Act, 1962. The proposal for confiscation of other imports detailed in the show-cause notice fails for want of custody of goods.

8. Further we find that the learned counsel for the appellant has not been able to rebut the detailed findings of the Commissioner in the impugned order. In view of this, we are of the considered view that there is

no infirmity in the impugned order which we uphold by dismissing all the three appeals.

(Operative portion of the Order was pronounced
in Open Court on **20/02/2019**)

SANJIV SRIVASTAVA	**S.S GARG**
TECHNICAL MEMBER	**JUDICIAL MEMBER**

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