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

S.No.	Appeal No.	Appellant	Respondent
1.	E/180/2011	CCE & ST Puducherry	Tejas Network India Ltd.
Arising out of Order-in-Original No.36/2010 (C) dt. 14.12.2010 passed by Commissioner of Central Excise, Puducherry			
2.	E/248/2011	CCE & ST Puducherry	Tejas Network India Ltd.
3.	E/249/2011	-do-	-do-
4.	E/250/2011	-do-	-do-
5.	E/251/2011	-do-	-do-
6.	E/252/2011	-do-	-do-
Arising out of Order-in-Original No.03-07/2011 (C) dt. 31.01.2011 passed by Commissioner of Central Excise, Puducherry			

Appearance :

Shri K. Veerabhadra Reddy, JC (AR)
For the Appellant

Ms. Rukmani Menon, Advocate
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing : 04.06.2018
Date of pronouncement:12.06.2018

FINAL ORDER No. 41771-41776 / 2018

Per Madhu Mohan Damodhar

The facts of the case are that M/s.Tejas Network India Ltd., the respondents herein, are manufacturers of telecom optical transmission equipments / optical multiplexers. Respondents were discharging duty liability on the clearance of these multiplexers.

However, department took the view that respondents had not included the value of Tejas Network Element Software (TEJNES) in the value of these multiplexers while discharging duty liability. Accordingly, show cause notices were issued to the respondents, inter alia alleging that TEJNES software is an embedded software; that without the software, the equipment has no independent function and hence the value thereof is required to be added to the value of their multiplexers for the purpose of discharging the duty liability. Differential duties were accordingly demanded vide these show cause notices along with interest as also imposition of penalties under various provisions of law. In adjudication, the adjudicating authorities concerned, vide the orders impugned, set aside the proposals made in the SCNs. Hence the department is before this forum. The main grounds of appeal preferred by department are as follows :

(i) The adjudicating authority has failed to examine the facts and evidences available on company’s own website and company’s own literature and user manual and also from the statement of Sri A.S. Narayanchar, officer-manager in charge of General Administration and Indirect Taxes and Arvind, Senior Engineer, Testing, to the effect that the TEJNES software is embedded software as per the system guide brought out by the assessee and that the software were installed at the factory before dispatch.

ii) In the case of NCR *Corporation India Pvt. Ltd. Vs CCE Pondicherry* [2010 (251) ELT 380 (Tri.-Chennai)] the Tribunal held that Loading of imported software on Automated Teller Machines (ARMs) amounts to manufacture and its value has to be included in assessable value of ATMs since they could not function without it – immaterial whether the software was customized or packaged.

iii) In the light of the various evidences as clearly brought out in the Statement of Facts of the SCN, the STM equipment viz. Multiplexers are preloaded with TEJNES software before dispatch and that the software being embedded into the equipment falling under Chapter Heading 8517, the value of the software must be integral part of the transaction value of the equipment and excise duty ought to have been paid as proposed in the SCN.

iv) The adjudicating authority has failed to examine the merits of the issues involved and had in the face of differing opinions given by the customers of the assessee during cross examination extended the benefit of doubt. The adjudicating authority has also failed to examine whether the product viz. Multiplexer is software dependent i.e. if it is tied to a particular programme or set of programme developed for it.

2. Today when the matter came up for hearing, on behalf of the appellant, Ld.A.R Shri K. Veerabhadra Reddy reiterated the grounds of appeal. He also made other submissions which can be broadly summarized as under :

(a) Multiplexers cannot function without the use of the TEJNES software , hence they constitute the brain of the system and will have to be necessarily considered as embedded software. These facts have been conclusively evidenced by the product literature and statements of concerned persons including the Senior Engineer – Testing, of the respondent.

b) To a query posed by the Bench, ld. A.R submitted that in view of the considerable evidence from literature and statement, it was not required for obtaining any expert opinion.

c) Respondents had issued commercial invoices for the software however had not added the value thereof to the value of multiplexers and thus have evaded duty liability thereon on the entire goods.

d) Ld.A.R relied upon the case law of *Anjaleem Enterprises Pvt. Ltd. Vs Commissioner* - 2006 (194) ELT 129 (SC) and *NCR Corporation India Pvt. Ltd. Vs CCE Pondicherry* - 2010 (151) 380. Ld.

A.R also points out that Larger Bench decision in the case of *Bhagyanagar Metals Ltd. Vs CCE Hyderabad* - 2016 (333) ELT 395 (Tri.-LB), on appeal, has been admitted by the Apex Court as reported in 2016 (346) ELT A205(SC).

3. On the other hand, on behalf of the respondents, Ld. Counsel Ms. Rukmani Menon made number of submissions which can be summarized as under :

i) The impugned goods were removed after embedding “Linux Software” which is an operating software and the assessee has discharged liability on the cost of Linux Software.

ii) TEJNES software is customized software since for different customers it is customized as per their individual requirements.

iii) TEJNES software is loaded on to the multiplexers only in respect of supplies to Public Sector Undertakings, however in respect of clearances to private companies, this software is not loaded at the factory but at the customer’s site.

iv) In response to a query by the Bench, ld. Advocate states that the item can function on its own only on the Linux Software.

v) While admitting that Multiplexers and TEJNES software billed separately, ld. Advocate also submits that separate Annual

Maintenance Contracts (AMCs) are drawn up for hardware as well as TEJNES software separately.

vi) Ld. Counsel relied upon the following case laws :-

1) ITI Ltd. Vs CCE Calicut
2009 (233) ELT 277 (Tri.-Bang.)

2) Vodafone Essar Gujarat Ltd. Vs CC (Imports) Mumbai
2009 (237) ELT 458 (Tri.-Mumbai)

3) CCE Pondicherry Vs ACER India Ltd.
2004 (172) ELT 289 (SC)

4) PSI Data Systems Ltd. Vs CCE
1997 (89) ELT 3 (SC)

5) Anjaleem Enterprises Pvt. Ltd. Vs CCE Ahmedabad
2006 (194) ELT 129 (SC)

6) Siemens Ltd. Vs CCE & ST Pondicherry
CESTAT Chennai Final Order No.40233/2018 dt. 29.01.2018

4. Heard both sides and have gone through facts and records.

5. The issue that comes up for decision is in a very narrow compass namely whether the value of the TEJNES software loaded into / supplied along with multiplexers is required to be added to the value of multiplexers manufactured and cleared by the appellants for the purpose of arriving at assessable value and discharge of Central Excise duty.

6. The adjudicating authority in the impugned order, inter alia held that since the impugned TEJNES software has to be classified under CETH 8424 attracting Nil rate of duty upto 28.03.2006 and Nil duty after that date as customized software is exempted under Sl.No.27 of Notification No.6/2006-CE; that clearance of said software along with hardware or otherwise would not attract further incidence of duty during the relevant period. In the appeals filed by the department, it has been inter alia contended that as the TEJNES software is an embedded software hence the decision of Hon'ble Supreme Court in the case of *Anjaleem Enterprises* (supra) will apply, which held that value of embedded software has to be included in the value of the equipment for the purpose of payment of Excise duty. Per contra, Ld. Advocate for the respondents has argued that TEJNES is a customized software and that the hardware "multiplexers" can function on its own on the embedded "Linux" software which is an operating software and of which duty liability has been discharged.

7. To understand the issue better, it would be useful to appreciate what exactly are multiplexers, Linux software, TEJNES software and EEPROM software.

8.1 Multiplexors: The website w.w.w.tecopedia.com defines "multiplexer" as follows :

> "A multiplexer (MUX) is a device allowing one or more low-speed analog or digital input signals to be selected, combined and transmitted at a higher speed on a single shared medium or within a single shared device. Thus, several signals may share a single device or transmission conductor such as a copper wire or fiber optic cable. A MUX functions as a multiple-input, single-output switch.
>
> In telecommunications the combined single, analog or digital, are considered a single-output higher-speed signal transmitted on several communication channels by a particular multiplex method or technique. With two input signals and one output signal, the device is referred to as a 2-to-1 multiplexer; with four input signals it is a 4-to-1 multiplexer; etc."

In the write up given by the Ld. Advocate, "multiplexer" has been explained as under :

> "An optical multiplexer is an electronics equipment used by mobile, landline and broadband service providers in their telecommunication networks. Optical multiplexers are also used by utility companies (e.g., railways / metro rail, power transmission companies, oil and gas companies etc) for their internal communications over optical fiber. Optical multiplexers are widely deployed in national optical fiber networks rolled out by defence, central and state governments both in India and aborad.
>
> The said equipment works on optical fiber and comes in different capacities and sizes and are installed at multiple locations in telecom networks such as at cell towers, exchanges, business premises and data centers."

As per the website www.efxkits.com, *A multiplexer is a device that allows one of several analog or digital input signals which are to be selected and transmits the input that is selected into a single medium.*

Multiplexer is also known as Data Selector. A multiplexer of 2n inputs has n select lines that will be used to select input line to send to the output. Multiplexer is abbreviated as Mux. MUX sends digital or analog signals at higher speed on a single line in one shared device. It recovers the separate signals at the receiving end. The multiplexer boosts or amplifies the information that later transferred over network within a particular bandwidth and time. The website also further informs that *A4-to-1 multiplexer contains four input signals and 2-to-1 multiplexer has two input signals and one output signal.*

8.2 Linux software: The Linux software is an operating system software conceived and nurtured by the Linux Foundation. As per the website w.w.w. linuxfoundation.org., "*Linux is the largest and most pervasive open source software project in history. Linux is also the operating system of choice to support cutting-edge technologies such as the internet of Things, cloud computing, and big data".*

The website www.linux.com under a FAQ "what is Linux?", clarifies as under :

> "Just like Windows XP, Windows 7, Windows 8, and Mac OS X, Linux is an operating system. An operating system is software that manages all of the hardware resources associated with your desktop or laptop. To put it simple – the operating system manages the communication between your software and your hardware. Without the operating system (often referred to as the "OS"), the software wouldn't function."

8.3 TEJNES software: The website www.tejasnetworks.com informs us as follows :

> "Tejas provides intelligent network management software (NMS) for easy deployment of large-scale networks. Our NMS enables unified management of our products from a graphical and web-based user interface. Tejas optical products are designed to be SDN / NFV-ready for management by a Tejas SDN controller with support for industry standard open northbound and southbound interfaces. This includes an extensive feature set for inventory, topology, service, alarms and performance management. Software plug-ins are also made available for integration with third-party controllers and for suitable enhancements by third-party application developers."

The website of www.welku.com has this to say about Tejnes :

> "TejNES, the embedded Network Element Software suite resident in each network element provides control and management of individual network elements. Service providers can individually configure and control Tejas network elements through a simple and easy to use World Wide Web (WWW) browser interface using the widely used and popular Hypertext Transfer Protocol (HTTP). The popularity of HTTP implies that configuration and control can be performed through the public Internet (with the provided security management), bringing unsurpassed flexibility to service provider operations. Optionally, TejNES provides Simple Network Management Protocol (SNMP) interface that enables Element Management Systems (EMS) to provide centralized monitoring and control of network elements in a geographically dispersed network. Since SNMP is an industry standard protocol to manage network devices and elements. TejNES provides connectivity to industry leading network management systems, including Tejas own Tejas Element Management Systems (TejEMS)"

8.4 EEPROM software

Paragraph-5 of the show cause notice has brought out that Tejnes software was programmed in EEPROM. Wikipedia has thus to say about EEPROM :

> "EEPROM stands for *E*lectrically *E*rasable *P*rogrammable *R*ead-***Only M*emory** and is a type of non-volatile memory used in computers, integrated in microcontrollers for smart cards and remote keyless system, and other electronic devices to store relatively small amounts of data but allowing individual bytes to be erased and reprogrammed. Unlike most other kinds of non-volatile memory, an EEPROM typically allows a byte (or a word) to be erased, and re-written individually, while typical flash memory erase some region in the device at once."

9. With this increased understanding of what would constitute a multiplexer as also enhanced knowledge of Linux software, TEJNES software and EEPROM software, it appears to reason that a multiplexer is a device used in telecommunications, inter alia high speed transmission of one or more input signals on single shared medium or single device. The Linux software which is an operating system manages the communication between the multiplexer hardware and the software TEJNES. However, the most essential and indispensible item aspect which would be required to make such multiplexer operational and function in the manner that it is expected to do, is the TEJNES software. The TEJNES software is the critical

suite which provides control and management of the individual net work elements in a geographically dispersed net work. An important question that would then come up is whether, without the TEJNES software, the impugned multiplexers are operational ?. In our opinion, the answer to this question would be resoundingly in the negative. No doubt, the Linux software is also preloaded into the multiplexer, however that is only an operating system amongst one of the many operating systems that are available worldwide to support the technologies like the digital net work management which the multiplexer sets out to do. The TEJNES software is thus an integral and indispensible to the multiplexer, without which the hardware cannot function.

10. We now intend to understand the import of the decisions and judgments on the issue of includibility of value of software along with value of hardware, as decided by the Tribunal and especially by the Hon'ble Apex Court, in recent times. One of the earlier decisions on this issue by the Hon'ble Apex Court was that in the case of *CCE Pondicherry Vs Acer India Ltd.* - 2004 (172) ELT 289 (SC). In that judgment, the Hon'ble Apex Court held that in respect of a computer loaded with operational software, value of operating software is not includible in the assessable value of such computers.

11. However, in their subsequent judgment in *Anjaleem Enterprises Pvt.Ltd. Vs CCE Ahmedabad* - 2006 (194) ELT 129 (SC), the Hon'ble Apex Court held that STD-PCO unit cleared from factory with Erasable Programmable Read Only Memory (EPROM) is an incomplete unit without EPROM for its functioning and that the price of EPROM is includible in the assessable value of the unit. The relevant portions of this judgment are as under :

> "**21.**The above discussion, therefore, shows that EPROM cannot be compared to a floppy. As stated above, floppy is a dumb box. That is not the case with EPROM. EPROM is basically an integrated circuit or a chip. We agree with the department. EPROM is, therefore, classifiable as an integrated circuit under tariff item 85.42.
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> **22.**The question which remains to be answered is whether a programmed EPROM is a recorded media under CH 85.24. It was argued before us that like CD-ROM or a floppy which has a programme in it, EPROM is also a programmed device. It was argued that blank EPROMs were purchased in which the appellant embodied its programme and, therefore, the recorded EPROM constituted a recorded media under tariff item 85.24.
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> **23.**We do not find any merit in this argument. In a disk operating system, the basic input is stored in a ROM which is transferred to RAM when the system gets started. The input/output routines are written into the IC at the factory. The point to be noted is that the ICs which contain semiconductor components like diodes etc. have got to be embedded in the mother board. The ROM chip is fixed at the factory. The chip is fixed in the computer and only then the programme works. Hence, this is basic difference between a mere floppy which is a recorded media under CH 85.24 and the IC under CH 85.42. In the former case, the program is a software because a floppy is a storage in which software plays the dominant role whereas in the case of IC the programme is embodied in the IC which can perform various functions only when fixed to the mother board and is not removable like a floppy from VCR. According to Encyclopaedia of Technology Terms by *Whatis.com*, an IC can function as an amplifier, oscillator, timer, microprocessor etc. On the other hand, a floppy disk is only a storage. Moreover the essential character of IC does not change with the programme being embedded in the IC and hence the IC remains classifiable under CH 85.42. This distinction is also brought out by tariff items referred to above (See: *Dictionary of Computing* by Prentice Hall).

> **24.**An embedded system is a programmed hardware device. Software written for embedded systems, especially those without a disk drive is called Firmware, the name for software embedded in hardware devices e.g. in ROM IC chips. Many embedded systems avoid mechanical moving parts, such as, disk drives, switches or buttons because they are unreliable as compared to ROM or Fast Memory IC chips. It is kept outside the reach of humans. In embedded systems, the software resides in ROM IC chips. Embedded systems are combination of hardware and software like ATMs, Cellular telephones etc. In embedded systems, the software resides in ROM IC Chip (See: *www.answers.com*). These chips are more than mere carriers. Example of embedded system: microwave ovens, cell phones, calculators etc."

The Hon'ble Apex Court distinguished its earlier judgment in *Acer India Ltd.* (supra), *PSI Data Systems Ltd.* (supra) and *Sprint R.P.G.India Ltd.* – 2000 (116) ELT 6 (SC) as under :

> "**27.**In the case of *PSI Data Systems Ltd*. (supra) the department had conceded that the item in question was a software. Further, in that matter the subject-matter of the levy was a software, as a final product, sold with the computer. On the other hand, in the present case, the subject-matter of the levy is STD-PCO unit. The question before us in the present case is whether the programmed EPROM constituted an integral part of the STD-PCO unit classifiable under CH 85.17. As stated hereinabove, the programmed EPROM was a ROM with a circuit in which the programme was embedded. Therefore, the judgment of this Court in the case of *PSI Data Systems Ltd.* (supra) is not applicable to the facts of the present case. In fact, in para 2 of the judgment of this Court in *PSI Data Systems*, this Court has made a clear distinction between softwares, such as, disks, floppies, CD-ROMs etc. on the one hand vis-a-vis softwares which are etched into the computer. Therefore, the judgment in the case of *PSI Data Systems* has no application. On the contrary, it supports our interpretation in the present case.
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> **28.**In the case of *Sprint RPG India Ltd*. (supra) this Court observed that hard disk is a refined form of floppy which records material in an efficient manner. In that case, the question was classification, namely, whether duty was leviable on software loaded on a hard disk drive under heading 84.71 or under 85.24. This Court held that a hard disk was a form of floppy on which the programme was stored and, therefore, the character of such a programme did not change and, therefore, the imported item was a software which was stored in the hard disk and, therefore, it was classifiable under CH 85.24. In that matter the question of a software being an integral part of a machine like STD-PCO unit was not there. In that matter there was no duty imposed on the unit or machine. The question in that matter was regarding levy of duty on a floppy with the software. In that matter the question of the integrated circuit did not arise. In that matter the interpretation of entry 85.42 was not at all considered. Hence, the judgment of this Court in *Sprint RPG India Ltd*. (supra) has no application to the facts of the present case.

> **29.**In the case of *ACER India Ltd*. (supra) the demand raised by the department was for the period July 2001 to May 2002. In the year 2000 the Excise Act was amended and the concept of "transaction value" came to be introduced for the first time. Further, the argument on behalf of the department was that the loading of operational software was includible in the value of the computer manufacture by the assessee after 1-4-2000 when the concept of .transaction value came to be introduced. In the circumstances, the judgment of this Court in *ACER India Ltd*. (supra) has no application to the facts of the present case. Further, in the case of *ACER India Ltd*. (supra), the subject-matter of the levy was a computer whereas the subject-matter of the levy in the present case is STD-PCO unit. The concurrent finding of all the courts below indicate that, in the present case, the programme was etched in a particular form of circuit known as ROM which is required to be fixed to the mother board and only on such fitment the STD-PCO unit became operational. Therefore, the judgment of this Court in *ACER India Ltd.* (supra) has no application to the facts of the present case. In fact, in the judgment of this Court in *ACER India. Ltd*. (supra) the Court was not required to examine the scope of CH 85.42.

12. Relying inter alia on *Anjaleem Enterprises* (supra) and distinguishing the judgments in *Acer India* (supra), *PSI Data Systems* (supra) *and Vodafone Essar Gujarat,* the Bangalore Bench of the Tribunal in *Bharti Airtel Ltd*. *Vs CC Bangalore* - 2012 (286) ELT 270 (Tri.-Bang.), inter alia held that switch software for telecom equipment system based on programming languages with a back up preloaded and stored in imported hardware, there was no justification to "pull out" or disintegrate the preloaded software from imported equipment, grant it separate status to classify it under 85.24 of CTA 1975 and excluded its value to arrive at the value of equipment. Respondents point out that the appeal filed against this decision has been admitted by the Hon'ble Apex Court as reported in 2012 (286) ELT A175 (SC).

However, the respondents also fairly submit that to the best of their knowledge, no stay has been granted by the Apex Court.

13. The CESTAT Mumbai Bench, on an identical case, had decided an appeal filed by M/s.Bhagyanagar Metals Ltd. in favour of the appellants therein [2007 (210) ELT 707]. Revenue had filed a Civil Appeal to the Supreme Court against the said order. Appeals against contrary decisions of CESTAT Bangalore on the same issue had also been filed in the Apex Court by other assessees. In their judgement dt. 15.10.2015, reported as 2015 (325) ELT 481 (SC), the Hon'ble Apex Court inter alia, set aside the impugned decisions of the CESTAT in those appeals and remanded the matter back to the CESTAT with directions to constitute a Larger Bench and decide the matters afresh. Accordingly, a Larger Bench of the Tribunal was constituted, which decided the matter reported as *Bhagyanagar Metals Ltd. Vs CCE Hyderabad-III* - 2016 (333) ELT 395 (Tri.-LB). The facts of the *Bhagyanagar* case involved a dispute on imports having been made by the said appellant of Fixed Wireless Telephones (FWT), a type of cellular phone operated under CDMA Technology, imported as "hardware portion" of FWTs and CD-ROMS imported separately as "software portion" of the said FWTs. The Larger Bench determined that the main point for decision is whether there are two

distinguished goods – hardware part of Fixed Wireless Phones and the software part of the said phones, for customs duty assessment. The Larger Bench referred to a number of decisions, including the earlier judgments of the Hon'ble Apex Court in *Anjaleem Enterprises (*supra), *Acer India* (supra), *Hewett Packard India* (supra) *PSI Data Systems* (supra) and *Sprint R.P.G. India Ltd*. (supra). The Larger Bench followed the ratio laid down by Tribunal in *Bharti Airtel Ltd.* (supra) and by the Hon'ble Supreme Court in *Anjaleem Enterprises Pvt. Ltd.* (supra) and that in the matters of valuation one of the important aspects to be taken into account is the condition of the goods at the time that leaves the factory. The Larger Bench concluded that Fixed Wireless Phones as imported, require to be classified and assessed as phones with no segregation of value assignable to the software separately, as claimed by the importer. The relevant portions of the Larger Bench conclusions are as under :

> "....The memory unit/chip is an essential part of PCB inside the telephone and is an integral functional component. Hence, in the present case there are no two items for valuation. The item of import is FWT and as such should be subjected to classification and assessment accordingly...
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> **40.** Close analysis of the ratio and finding in the several precedents placed before us, lead to the compelling conclusion that in the present case, the Fixed Wireless phones as imported require to be classified and assessed as phones with no segregation of value assignable to the software separately, as claimed by the importers."

While arriving at these conclusions, the Larger Bench has also taken note of the decision of the Tribunal in *Jabil Circuit India Pvt. Ltd. Vs CCE Pune* 2014 (307) ELT 891 (Tri.-Mumbai), where the Tribunal considered the inclusion of the cost of the software loaded in the "Flash Memory Chip" inside the Set Top Boxes (STB). The Tribunal in that decision had held as under :

> "5.12 The next question for consideration is with regard to the inclusion of cost of software which were downloaded and incorporated in the flash memory chip which was soldered onto the PCB of the STB. As per the literature available, flash memory is EPROM (Erasable Programmable Read Only Memory) and is an integrated chip. Thus, it is a rewriteable memory chip on which programmes are written with an external programming device before being placed on the PCBs. Thus, the flash memory is an integral part of the STB and therefore, its cost would include the cost of software loaded on to it. It is in this factual context, the decisions relied upon by the appellant have to be examined. The appellant has relied on the decisions of the Apex Court in the case of *PSI Data Systems* and *Acer India Ltd*. wherein it was held that software has independent existence and has to be classified separately as a recorded media falling under CETH 85.24. It is also contended that Note 6 to Chapter 85 also provides that "records, tapes and other media of Heading 8523 or 8524 remain classified in those headings, when they are presented with the apparatus for which they are intended". The said note was deleted with effect from 1-1-2007 and no longer applies. *The PSI Data System* and *Acer India Ltd*. cases dealt with a situation where computer software was stored in a Hard Disk of

the computer and the question arose whether the value of software could be included in the value of the hardware. In that context, the Hon'ble Apex Court held that the value of software sold along with the computer is not includible in the assessable value of the computer since there is a distinction between a computer and its software. However, these decisions of the Hon'ble Apex Court later on came to be examined in the case of *Anjaleem Enterprises Pvt. Ltd*. by the Hon'ble Apex Court where the software was recorded on an EPROM. The Hon'ble Apex Court held that EPROM cannot be compared to a floppy which is only a dump box. EPROM is basically an integrated circuit or chip and classifiable under CETH 8542. Accordingly, it was held that the value of software embedded in the programmed EPROM, which is an integral part of the system is includible in the value of the goods supplied. In the case before us, the flash memory is not the goods under clearance but it is the STB. The memory chip has been soldered onto the PCB of the STB and is not easily removable. The programme embedded in the flash memory is also not removable. Therefore, it will not fall under the category of recorded media under CETH 8424. In view of the above position, the ratio of the decision of the Hon'ble Apex Court in the case of *Anjaleem Enterprises Pvt. Ltd*. would be more appropriate and correct in the facts of the case before us. This ratio of the Apex Court was followed by this Tribunal in the case of *Avaya Global Connect Ltd*. (supra) wherein also it was held that software supplied along with system, namely, EPROM, as embedded in the system becomes an integral part and the value of such software is includible in the assessable value of the system supplied. This Tribunal further held that when the software is embedded in the system and becomes an integral part of the equipment, it is not a case of charging duty on software but it is a case of charging duty on the equipment which includes the value of such basic software. In the *Hewlett Packard Sales (P) Ltd*. case, the

> Hon'ble Apex Court once again reiterated the above view, wherein it was held that pre-loaded operating systems software in the Hard Disk Drive of the laptop forms an integral part of the laptop and therefore, the cost of such pre-loaded software forms part of the value of the laptop. Accordingly, the Hon'ble Apex Court held that when a laptop is imported with inbuilt preloaded operating system recorded on the hard disk, the said item forms an integral part of the laptop and has to be classified as laptop and not as computer software separately. Applying the ratio of these decisions to the facts of the present case, it becomes abundantly clear that the cost of software which has been loaded on to the flash memory which in turn has been soldered onto the PCB of the STB forms an integral part of the STB and therefore, the value of the STB shall include the value of such software also".

We do note that the appeal filed against the Larger Bench decision in *Bhagyanagar Metals* has been admitted by the Hon'ble Supreme Court reported as 2016 (340) ELT A205 (SC). However, it is pertinent to note that Hon'ble Apex Court has not stayed the Larger Bench decision.

14. Viewed in this light, the ratio laid down by Larger Bench will require to be followed by this Division Bench of the Tribunal. As already found in para-9, in the present appeals also, the TEJNES software is an integral and indispensible requirement software, without which the multiplexer will have any functionality. The Operating System, Linux also loaded into the multiplexer cannot in

any case by itself cannot make the multiplexer perform the functions it is required to do. The Ld. Advocate for the respondent has been at pains to contend to the contrary, however, no technical or expert evidence has been adduced to support those arguments. Thus, TEJNES takes the colour of “embedded software”, hence as held by the Tribunal in *Jabil Circuit India Pvt. Ltd*. (supra) a decision which was approved by the Larger Bench in *Bhagyanagar Metals* (supra), it is not a case of charging duty of software but it is a case of charging duty on the equipment which includes the value of such basic software.

15. Ld. Advocate for respondent has also drawn our attention to a very recent decision passed by another Division Bench of CESTAT Chennai in the case of *Siemens Ltd.* In Final Order No.40233/2018 dt. 29.01.2018 wherein apparently, it was held that software which is supplied separately for loading in the computer of the client cannot be considered as part and parcel of the Access Control Device and hence value thereof cannot be included for the purpose of discharging duty liability. However on a closer examination of this decision, the facts of the case therein were that concerned safety equipment manufactured and supplied by the appellants therein for

Access Control System used for restricting the entry to a particular area or room. The basic operating software is loaded into the system which alone controls entry of any person based on the approved access cards. What was disputed in that case was another software developed by the appellant for retrieval and monitoring the exit of various persons for statistical purposes. The Tribunal held that "*it is clear that a device should suffer Central Excise duty along with essential operating software which is part and parcel of the same. The same has been the case here. However, the software which is supplied separately for loading in the computer of the client linked to the devise for retrieval and monitoring of data cannot be considered as part and parcel of he said access control device*". Discernably, the Tribunal decision in *Siemens* (supra) is not concerning the integral software like TEJNES but that of an additional software loaded on for monitoring and collecting statistical information. It does not certainly help the case of the respondents. On the other hand, it strengthens the appeal made by Revenue.

16. In view of the discussions herein above, we have no hesitation in concluding that the TEJNES software has to be held as an integral and vital requirement of the multiplexers and as a software without

the embedding of which, the hardware cannot function. Hence value of the TEJNES software will require to be included for the purpose of arriving at the assessable value and discharging duty liability. This being so, the impugned orders to the contrary cannot sustain. The impugned orders dropping the proceedings initiated in the related SCNs are therefore set aside and the matter remanded back to the adjudicating authority, only for the limited purpose of quantifying the differential duty liability, interest and penalty/ies as proposed in the related SCNs, based on the *ratio decidendi* supra.

Department appeals are allowed.

(Pronounced in court on 12.06.2018)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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