CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALSOUTH ZONAL BENCH CHENNAI

Appeal No.C/69/2004

[Arising out of Order-in-Original No.07/2003 (ACC) dated23.12.2003 passed by the Commissioner of Customs, Chennai]

Raj Television Network Ltd. Appellant

Versus

Commissioner of Customs (Airport) Chennai Respondent

Appearance:

Shri S.Murugappan, Advocate
For the Appellant

Shri B. Balamurugan, AC (AR)
For the Respondent

CORAM :

Hon'ble Ms.Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision :28.04.2017

FINAL ORDER No. 40669/2017

Per Madhu Mohan Damodhar

The facts of the case are that the appellants had filed a Bill of Entry dt. 30.12.2002 for import of two items namely (1) Computer System with model VTP 560 SAMS workstation for an Assessable value of Rs.2,26,175/- classifying the goods under CTH 847150 and CETH 847100 with BCD 15%, CVD 16%, and SAD 4% and (2) "IT software CA" and SAM software with 2000 pieces of "Smart Cards" for an

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Assessable value of Rs.57,53,085/- classifying the goods under CTH 852499 and CETH 852420 and claimed NIL rate of duty under Customs Notification No.21/02 dated 01.03.2002 vide Sl.No.157, the above goods covered by Invoice No.5012122002-1 were supplied by M/s.Nagra Vision, SA, Route DE Genev 22 1033 CNESEA VX, Switzerland.

2. On examination, it emerged that the imported goods at Sl.No.1 container work station consisted of computer with keyboard, mouse, monitor and hub as per invoice and that Item No.2 was not found to be imported separately. However, 2000 empty smart cards without any software were also found. Importer took the stand that smart cards were dump cards and that software was preloaded into computer system on account of security reasons. Department took the view that software was very much embedded in the hardware. Accordingly, show cause notice was issued to the importer proposing classification of the imported items under CTH 8525.10 and CETH 8525.00. It appears that subsequently two corrigenda were issued, one on 18.07.2003 and another dt. 03.11.2003. The first one for change in adjudicating authority and the subsequent one proposing revised classification of work station under CTH 854389 and smart cards under CTH 8542100. In adjudication, the authority vide impugned order concluded that software being preloaded on the hardware, the identity of the software has changed, becomes vital inbuilt element of the software, and the hardware and software values will therefore be inseparable. The authority also took the view that the imported items having net work facility and data processing capacity and is useful for storage and

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rectification of data, it is liable to be classified under CTH 8471. Accordingly, the goods were finally ordered to be assessed under CTH 8471 as a composite item of hardware and software. 2000 numbers of smart cards were also ordered to be assessed under CTH 844210 and corresponding duty liability.

3. Hence this appeal before this forum.

4. It is seen that the matter is rolling on board for more than a year. There has been objections from the department for non-submission of the SCN and corrigenda alongwith appeal papers. The contention of ld. advocate that he has difficulties to argue without the show cause notice and the corrigendum has been taken note of.

5. Today when the matter came up for hearing, Shri S. Murugappan, Ld. Advocate appeared for the appellants, reiterated the grounds of appeal and contends that SCN and corrigendum proposed classification of the impugned item under CTH 852510 and thereafter under CTH 854389. However, in adjudication, a totally different classification viz. 8471 has been ordered by the Commissioner. Hence the impugned order is outside the scope of the SCN/corrigenda.

5.1 On merits, ld. advocate submits that the software is only preloaded on to a hard disk and cannot be considered as embedded software and hence the ratio of the Hon'ble Supreme Court judgement in the case of *CCE Pondicherry Vs Acer India Ltd.* – 2004 (172) ELT 289 (SC) is relied upon. Therefore Tribunal's Larger Bench decision in the case of *Bhagyanagar Metals Ltd. Vs CCE Hyderabad-I* will not apply to this case.

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6. On the other hand, Shri B. Balamurugan (AC), Ld. A.R submits that the SCN as also corrigenda have not been filed by the appellant along with their appeal which puts them into difficulty.

6.1 On merit, he submits that it is not the case that the software has been brought loaded on floppy or CD or for that matter on a hard disk in which case, classification of the composite item has been correctly arrived at by the original authority. He takes us to page-3 of the impugned order to emphasize that importer had themselves clarified vide letter dt. 18.1.2003 that software was embedded in the hardware and no separate software was imported.

6.2. On this point, Ld. Advocate interjected and referred to pages 6 & 7 of the impugned order wherein contrary has been averred.

7. Ld. A.R also contends that the reason given by the appellant that software is preloaded for security reasons is not acceptable since once software is embedded in the system, only the importers themselves could make use of it.

In response, Ld. advocate contends that such a finding has not been given in the impugned order.

8. Heard both sides and gone through the facts of the case.

9. From the records available, what comes to the fore is that the imported goods were intended to be used as an integrated solution to manage subscribers, dealers access rights etc. The documents accompanying imported goods in the title clearly states that software is loaded along with the machine and has also certified that only Raj TV can make use of the software exclusively, as evident from the letter dt.08.01.2003 of the foreign supplier M/s.Nagra Vision. It is not in

dispute that at the time of import, appellants have claimed CTH 8471 only for the hardware and for the software portion they claimed CTH 852499. From the facts on record, it is evident that software was very much part of the hardware imported. Adjudicating authority has noted that the software has merged and formed part of the essential constituent of software for which reason, the identity of the software is lost and the hardware and software values will be inseparable. Thus, it appears to reason that the software has been embedded along with hardware. Appellants have not been able to prove otherwise, either in the original adjudication or even before this forum. On the other hand, we find that even on this aspect, they have taken contradictory stands as seen from pages 3 & 6, 7 of the impugned order.

10. Viewed in this light, the importers have made a dubious, albeit unsuccessful attempt, to import entire system by splitting into two parts, namely, computer system for a mere Rs.2,26,175/- and software with 2000 pieces of smart cards for a value of Rs.57,53,084/-. Ld. Advocate has sought to take shelter on the ratio of Hon'ble Supreme Court's decision in *Acer India* (supra). It is seen that the issue therein involved was loading of operational software in the factory and the Hon'ble Apex court held that computers and software are different and distinct goods having been classified differently. However in the instant case, it is not the issue of operational software that has been loaded on. The entire software is primarily functional and application software that would be required for the computer system to function at all. It is not the case that these were operational software like Windows etc. Shri Rajendran, Managing Director of the importer had inter alia

admitted that the machine will be a junk machine without the software. In the judgment of Hon'ble Apex Court in the case of *Sprint R.P.G India Ltd. Vs Commissioner* reported in 2002 (116) ELT 6 (SC), also relied upon by the appellant, Hon'ble Apex Court had inter alia opined that computer software loaded on to a hard disk drive is assessable under 8524, on their finding that what was imported was software of hard disk and not hard disk in the guise of software. However the present case is definitely one where predominant cost of the hard disk and the hardware have been attempted to be passed on in the garb of software.

11. More relevant to the facts of this case would be the ratio of Tribunal's Larger Bench decision in *Bhagyanagar Metals Ltd.* (supra) wherein Tribunal relied upon Apex Court's judgment in *CC Chennai Vs Hewlett Packard India Sales (P) Ltd.* – 2007 (215) ELT 484 (SC) which held that "*preloaded operating systems software in the hard drive of a laptop forms an integral part of the laptop and therefore cost of such preloaded software forms part of the value of laptop. Accordingly, only laptop is imported with inbuilt preloaded operating system recorded on the hard disk. Such items forming integral part of the laptop and has to be classified as laptop and not as computer software separately*". The Larger Bench applied that ratio to the facts before them and held that in case of fixed wireless telephones, FWT, consisting of hardware and software, without software, activation of the telephones was not possible and hence there could not be two separate / distinguished goods for classification and assessment,since the software could not be considered as optional.

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12. Learned counsel has contended that the adjudicating authority has exceeded his brief by going beyond the parameters of the show cause notice. We failed to find merit in this contention. Essentially the appellants had only claimed the computer systems under Chapter 8471. The show cause notice, no doubt, has proposed a different classification for the items. Nevertheless, after adjudication, the adjudicating authority has arrived at a reasoned finding, more or less in keeping with the appellant's own declaration. However, the only difference being that the software ought to be cleared under a separate heading has also been brought together with the computer system, as a composite unit classifiable under Chapter 8471. The contentions of the learned counsel on this score will therefore fail.

13. In the light of discussions herein above, and also respectfully following the ratio of Tribunal's Larger Bench decision (supra), we do not find merit in the appeal filed by the appellant, for which reason, the same is dismissed.

(Dictated and pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(SulekhaBeevi C.S)
Member (Judicial)

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