

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH, COURT NO. 2

Customs Appeal No. 51663/2019

[Arising out of Order-in-Original No. 25/18-19 VS/COMMR (Import) dated 30.03.2019 passed by the Commissioner of Customs (import) Air Cargo Complex (Import), New Custom house, Near IGI Airport, New Delhi 110037.]

**Shri Sukesh Naithani, CEO &
Founding Director**

M/s.Trident Techlabs Pvt Ltd. .

Corporate office House 1/18-20 Rani Jhansi Road
New Delhi 110055. .

Appellant

VERSUS

The Commissioner of, Customs (import)

Air Cargo Complex (Import), New Custom House
Near IGI Airport, New Delhi 110037.

Respondent

WITH

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A-19, Saraswati Garden, Ramesh Nagar,
New Delhi-110015.

Appellant

VERSUS

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Air Cargo Complex (Import), New Custom House
Near IGI Airport, New Delhi 110037.

Respondent

APPEARANCE:

Present for the Appellant : Shri Krishan Kant, Advocate

Present for the Respondent: Shri Rakesh Kumar, AR

**CORAM: Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. C L Mahar, Member (Technical)**

FINAL ORDER NO. 50680 /2020

Date of Hearing: 24/09/2019

Date of Decision: 04/06/2020

Per C L Mahar:

The brief facts of the matter are that the importer appellant namely M/s.Trident Techlabs Pvt Ltd. are engaged in the import of software tools and educational kits (Educational Softwares).

2. Based on an intelligence, the department has initiated investigations against the appellants suspecting that they have evaded payment of appropriate Customs duty by not adopting to and by mis-declaring the Maximum Retail Price (MRP) / Retail Sales Price (RSP) on the imported consignments of softwares. By not declaring MRP/RSP on correct MRP/RSP the appellants have allegedly evaded the payment of countervailing duty (CVD) which was leviable on the basis of Maximum Retail Price (MRP) / Retail Sales Price (RSP) as per the provisions of Section 4A of the Central Excise Act, 1944 which is applicable to the imported goods also for the purpose of levy of countervailing duty (CVD). After investigations a Show cause notice No. 14/2017-18 DRI/BZU dated 08.09.2017 had been issued to the appellants wherein it has been alleged that the software tools imported by the appellants during the period from September, 2012 to March, 2017 are liable for reassessment on the basis of MRP /RSP for the purpose of levy and assessment of the Additional Duty of Customs (CVD).

3. It has also been alleged in the above mentioned show cause notice that the Maximum Retail Price (MRP) / Retail Sales Price (RSP) declared by the importer appellant for the goods imported during the period September, 2012 to March, 2017 has also been mis-declared and thereby needed to be re-determined

as per the provisions of Notification No. 49/2008 dated 24 December, 2008 (S.No. 93 A) as amended. The SCN has also demanded short paid Additional Duty of Customs (CVD) amounting to Rs.1,43,19,109/- as per the provisions of section 28(4) of Customs Act, 1962. The provisions pertaining to confiscation under section 111(D) of Customs Act, 1962, penal provisions under 112, 114A and 114AA of the Customs Act, 1962 have also been invoked against both the appellants. The matter got adjudicated vide Order in Original No. 25/2018-19 VS-COMMR/Import dated 30.3.2019 where all the charges as alleged in the show cause notice have been confirmed by the learned adjudicating authority. The appellants are before us against the above mentioned Order-in-Original dated 30.3.2019.

4. The learned advocate appearing for the appellants has submitted that imported product namely, software tools imported by the appellant are customised softwares which have been got prepared as per the individual needs of the customers. It has further been elaborated that the technical personnel of appellant firms visit their institutional customers and understand their specific requirements. The requirement of individual customers are then conveyed to foreign based suppliers of softwares. The foreign based suppliers thereafter got the individual customised softwares developed for each individual buyers and same is supplied to the appellant by their foreign suppliers of the softwares.

5. The learned advocate further contended that the price got by them for the software includes overhead costs such as transport, insurance and applicable Customs duty. It has further been added that based on negotiations concluded with the individual customers and depending upon their general and specific requirements, the price quoted for the softwares also

include elements of cost such as installation of the softwares at the customers site, on site training session, cost of visits to the customers premises as well as follow up measures and visits to the customers site during the given period and maintenance to ensure troublefree operations of the software tools. The learned advocate submitted that the appellants have submitted all the desired documents such as distribution agreements, purchase orders, copies of invoices, other agreements etc. which also included copies of end users licence agreement pertaining to software sold by them to various customers.

6. As a matter of fact, it is also mentioned that the appellants have been discharging additional duty of Customs on the imported consignment of the softwares up to September, 2012 on the basis of MRP price and thereafter they submitted paying the Additional Customs Duty (CVD) on the transactional value of the softwares as they bonafidely believed that supply of customised software to various Institutional buyers is exempted from mention of Maximum Retail Price (MRP) / Retail Sales Price (RSP) as per the provisions of Legal Metrology [Packaged Commodities] Rules. The learned advocate has vehemently contested that the adjudicated authority greatly erred in confirming the Customs duty against them and further added that;

- (i) that the provisions of Section 4A of the Central Excise Act relating to Valuation of goods on MRP/RSP are not applicable to the Software imported by the Appellants. Provisions of Section 4A is applicable only to those goods in relation to which it is required under the Legal Metrology Act or rules made thereunder to declare the retail sale price on the package and such goods have been specified by the Notification issued under Section 4A of the Central Excise Act.

- (ii) The MRP based assessment in respect of items falling under Heading 8523 was brought into force vide notification No. 49/2008-CE and the abatement allowed was 35%. Subsequently vide notification No. 30/2010-CE and corrigendum F.No. 354/1898/2009 TRU dated 6.1.2011 packaged software and canned software falling under Item No. 85238020 was provided at S.No.93A. The relevant entry reads as follows:

"Packaged software or canned software

Explanation - **For the purpose of this notification "packaged software or canned software" means a software developed to meet the needs of variety of users, and which is intended for sale or capable of being sold off the shelf."**

- (iii) It is thus apparent that the provisions of Section 4A of the Central Excise Act would be applicable to "Packaged Software or canned software" only if the following two conditions are satisfied –
- (i) Packaged or canned software is developed to meet the needs of variety of users; and
 - (ii) Packaged or canned Software is intended for sale or capable of being sold off the shelf.
- (iv) It is submitted that there is no material on record to the effect that the software imported by the Appellants was developed to meet the needs of variety of users and the same was intended for sale or capable of being sold off the shelf. No evidence by way of any expert opinion has been brought on record to prove the fulfilment of both these conditions. In absence of any such evidence on record, the softwares imported by the Appellants have not been notified by the Central Government under section 4A of the Central Excise Act and consequently

there was no requirement for the Appellants to declare MRP and to pay the duty on the basis of MRP value.

- (v) On the other hand, it is very apparent from the statement dated 17.04.2017 of Shri George Anil D'Silva, Associate vice President of the Appellant Company that the software was not intended for sale off the shelf. Shri George Anil D'Silva was looking after pre-sales technical requirements of the customers. On being asked he has stated in his statement dated 17.04.2017 that they go for technical visit to the customers, talk to the relevant people, understand the requirements of the customers and find out the propose for which software is required. Afterwards they would communicate the same to the corporate office which in turn would communicate to the foreign suppliers and the price for the required product would be provided to the customer.
- (vi) Similarly Shri Sukesh Chandra Naithani, Chief Executive Officer of the Appellant Company has stated in his statement dated 25.04.2017 [para 4.6 of the SCN] that their Sales Executives meet the customers and understand their requirements and Application Engineers would demonstrate the technical capability of the product. Quotation is provided to the customers by them based on the requirements of the customers. It is evident from this statement also that the software was not intended for sale off the shelf.
- (vii) It is submitted that the appellant were supplying the software to various colleges, research Institution, Defence establishments for their own specific use. The appellants had a bona fide belief on the basis of provisions of Rule 3(b) of the Legal Metrology [Packaged Commodities] Rules, 2011 that the provisions of Retail Sale were not

applicable to them. Rule 3 of the Legal Metrology [Packaged Commodities] Rules, read as under:

Rule 3. Applicability of the Chapter – The provisions of this Chapter shall not apply to –

- (a) Packages of commodities containing quantity of more than 25 Kgs or 25 Litre excluding cement and fertilizers sold in bags up to 50Kg; and
- (b) **Packaged commodities meant for industrial consumers or institutional consumers.**

B.3 Rule 2(bb) and 3(bc) of Legal Metrology [Packaged Commodities] Rules, 2011 reads as under:

(vii) It is submitted that there is no material on record that the customers of the Appellants have not used the software for their own use. In none of the information gathered by the officers from Colleges, Defence Establishments and others, it is not mentioned by any one of them that they had not used the software in their industry/ institution. It is, thus established that the software were for use by the Industrial Consumer / Institutional Consumer only. Thus, as per provisions of Rule 3(b), these were exempted from the Application of Provisions of Chapter II relating to "Packages Intended for Retail Sale" of the Legal Metrology (Packaged Commodities Rules, 2011.

(viii) It is submitted that the packed software was sent to their consumers directly after import without anything being done by the appellants. Thus, the software is deemed to have been bought by them from the manufacturer prior to 14.05.2015. With effect from 14.05.2015, provisions have been made more explicit by

providing that these consumers can buy packaged commodities from-

1. The manufacturer, or
2. An importer, or
3. Wholesale Dealer.

(ix) There is no substance in the point that the package did not have declaration 'not for retail sale'. It is submitted that such a declaration is only a procedural requirement to ensure that the packaged commodity is used by the Industrial/ Institutional Consumer only. There is no allegation in the show cause notice nor any customers from whom the DRI officers gathered the information have stated that they had themselves not used the software. Thus, from the investigation itself, it has been established that the softwares were used by the customers for their use.

The Appellant relies upon the decision of Hon'ble Supreme Court in the case of **Mangalore Chemicals & Fertilisers Ltd. Vs. Deputy Commissioner [1991 (55) ELT 437 (SC), UOI vs Suksha International and Nuton Gems [1989 (39) ELT 503 (SC), Global Sugar Ltd. Vs. CCE [2016 (334) ELT 604 (All), CCE vs JCT Electronics Ltd., [2011 (267) ELT 41 (P&H) and CCE vs. Paradeep Phospate Ltd. [2013 (296) ELT 245 (Tri)]**.

(x) It was submitted that the appellants have declared MRP correctly on the Software Packages imported by them and supplied to various Institutional / Industrial Consumers. The appellants vehemently contest the findings that the MRP declared was very low compared to the Sale Invoice Value. It has been wrongly concluded that Sukesh Chandra Nainthani, CEO and Kapil Dev Sharma, Manager of Appellants have admitted the mis-declaration of MRP /RSP of packaged software tools,. It was

emphatically submitted that they had merely stated in their respective statements that there is difference between MRP declared and the Invoice price. They have given the valid reasons for the same.

Kapil Dev Sharma has stated in his statement dated 05.06.2017 that MRP declared was based on purchase order /Sale Invoices (including Tax) value minus indirect expenses such as travelling expenses of skilled man, training, installation and on-site support for warranty period. These expenditures may range from 0% to 45% of the purchase order /sales invoice value.

In the price list of the appellants, there is a note to the effect that Training and after sales support @ 45% is inclusive in the prices.

7. It has further been submitted by the appellant that it is wrong on the part of the department to allege that the appellant importer have resorted to suppression or mis-declaration of the facts pertaining to the imported consignment. It has further been elaborated that investigations by DRI started in the year 2013 and first summon to the appellant was dated 20 December, 2013 wherein the appellants were asked to submit all the imported documents connected to M/s. Mentor Graphics Inc. EDA software and other documents relating to educational kits for the period pertaining to 2009-2013. Various kinds of information have been provided by them under their letters dated 16.01.2014, 29.01.2014 and 01.02.2014 and statements of various persons including their CEO have been recorded in the beginning of 2014. It has further been submitted that they continued to import the consignment of various kinds of softwares on the basis of price declared by them and they were in the bonafide belief that since the department did not make any observations on the declared price of the imported softwares, it

was believed that the Department has no objection on the practice being followed by them with regard to the MRP declared by them. The learned advocate has relied on decisions of this Tribunal in case of **CCE, Hyderabad vs ITW Signode India Ltd. [2005 (188) ELT 65 (Tribunal)]** wherein it has been held that if the correspondence between the assessee and the Revenue which gives the details of the nature of product imported and processes followed were known to the Revenue, in that case, wilful mis-statement or suppression of facts cannot be alleged.

8. The learned advocate has also relied on **Pushpam Pharmaceuticals vs CCE, Bombay [1995 (78) ELT 401 (SC)]** wherein it was held by the Apex Court that when the facts were known to both the parties, the omission of one to do what he might have done and not that he must have done, does not lead to suppression of facts. The learned advocate has also relied of various other decisions in this regard.

9. We have also considered the submissions both written and oral made by the learned DR which are primarily reiteration of the findings given in the Order-in-Original.

10. We have heard both the sides and also perused the record of the appeal. We find that basic question for answer before us is whether the software tools and softwares imported by the appellant importer during the period September, 2012 to March, 2017 are liable for assessment for payment of Additional duty of Customs (CVD) on the basis of Maximum Retail Price (MRP) / Retail Sales Price (RSP) or on the CIF value declared by the appellants.

11. We find from the record of the appeal that the appellant manufacturer had been declaring in almost all the Bills of Entry

that the software imported by them were for use for 'Industrial use' or for 'educational use' or institutional use' . Before proceeding further in the matter, it will be appropriate to have a look in the relevant notification No. 30/2010 CE (NT) dated 21 December, 2010 as amended from time to time which is reproduced hereinbelow:-

Notification No. 30/2010-CE(NT) dated 21.12.2010 inter alia states that - In exercise of the powers conferred by sub-sections (1) and (2) of section 4A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 49/2008-Central Excise (N.T.), dated the 24th December, 2008, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 882(E), dated the 24th December, 2008, namely :-

In the said notification, in the Table, after S. No. 93 and the entries relating thereto, the following shall be inserted, namely :-

(1)	(2)	(3)	(4)
"93A	8523	Packaged software or canned software	15".

Explanation.- For the purposes of this notification, "packaged software or canned software" means a software developed to meet the needs of variety of users, and which is intended for sale or capable of being sold off the shelf.

12. Thus from the perusal of the provisions of above notification, it appears to us that for a software to be 'packaged software' or 'canned software', it needs to fulfil two conditions:

- (i) That such a software is developed to meet the needs of variety of users; and
- (ii) That such software is also saleable /available off the shelf for sale.

It is also relevant to have a glance at the provisions of Legal Metrology [Packaged Commodities] Rules, 2011 (as amended):

9.9. Legal Metrology (Packaged Commodities) Rules, 2011.

The Notification dated 07.03.2011 issued by the Food and Public Distributions, Department of Consumer Affairs, Ministry of Consumer

Affairs, New Delhi, contained the Legal Metrology (Packaged Commodities) Rules, 2011, which inter alia states that:

In exercise of the powers conferred by sub-section (1) read with clause (j) and (q) of sub-section (2) of section 52 of the Legal Metrology Act 2009, (1 of 2010), the Central Government hereby makes the following rules and they shall come into force on 1st day of April, 2011.

RULE 2. Definitions. —

(l) "retail sale", in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales shops, agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer;

(m) "retail sale price" means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer.

CHAPTER-II Provisions applicable to Packages intended for retail sale

RULE 3. Application of Chapter. - The provisions of this chapter shall not apply to -

(b) packages commodities meant for industrial consumers or institutional consumers.

Explanation:- For the purpose of this rule-

(i) **"Institutional consumer"** means the institutional consumer like transportation, Airways, Railways, Hotels, Hospitals or any other service **institution who buy packaged commodities directly** from the manufacturer for use by that institution;

(ii) **"Industrial consumer"** means the industrial consumer who buy packaged commodities **directly from** the manufacturer for use by that industry.

9.10 Legal Metrology (Packaged Commodities) (Amendment) Rules, 2015.

The Notification dated 14th May, 2015 issued by the Food and Public Distributions, Department of Consumer Affairs, Ministry of Consumer Affairs, New Delhi, contained the **Legal Metrology [Packaged Commodities](Amendment) Rules, 2015** by which the Central Government amended the Legal Metrology [Packaged Commodities) Rules, 2011 which are as under

1. In the Legal Metrology [Packaged Commodities) Rules, 2011(hereinafter referred to as the said rules), in rule 2-

(i) For clauses (bb) and (bc), the following clauses shall be substituted, namely:-

(bb) **'industrial consumer'** means the consumer who buys packaged commodities directly from the manufacturer or from an importer or from wholesale dealer for use by that industry and the package **shall have declaration 'not for retail sale'**.

(bc) **"Institutional consumer"** means the institution who hires or avails of the facilities or services in connection with transport, hotel, hospital or other organisation which buy packaged commodities directly from the manufacturer or from an importer or from wholesale dealer for use by the institution and the package **shall have declaration 'not for retail sale'**.

13. Thus as per the Legal Metrology [Packaged] Commodities Rules, 2011 a person who wants exemption of the packaged commodities rules he needs to be an industrial customer/ buyer who purchased the packaged commodity directly from the manufacture in bulk and same should not be for retail sale, but for the industrial customer's own use. Similarly in the case of institutional consumer who buy packaged commodity directly from the manufacture or from the importer or for wholesale dealer for use by the institution himself and not meant for any further retail sale.

14. During the course of hearing, the learned advocate has taken us through various orders which have been received by the appellant importer from various institutions such as DRDO, Ministry of Defence, Government of India, department of Atomic Energy, Department of Space technology etc. We find that these softwares have been procured by the appellant/importer from foreign suppliers on the basis of customised orders placed by these institutions to meet their specific needs. We find that where the customised orders have been procured by the importer appellant after detailed discussions with the concerned departments regarding their specific requirement for a particular kind of software and such software have been got prepared by the importer appellant from foreign suppliers and imported. We feel that such softwares cannot be considered as 'packaged

softwares' because such softwares are developed to meet the specific requirement of particular customer / buyer and it cannot be used by variety of users. We also feel that such software cannot be put for sale off the shelf and as same has been developed for a particular customer/ department for their specific requirement. Thus we feel that such software will certainly not fall under the category of packaged software and therefore, same cannot be put to the assessment on the basis of MRP price. Further, we also find that the appellant importer has also been supplying same softwares to various educational institution such as engineering colleges, universities etc. Primarily, we are of the opinion that educational software meant for engineering colleges etc. may be of a general nature. All the software meant for educational purposes and can be used by a variety of educational institutions and such software can be available for sale off the shelf, however we find from the record of the appeal that no such specifications/ details are available. We find that details of specifications and uses of each software need to ascertain specifically to determine its nature whether it can be categorised as to its general and varied use and can be sold off the shelf.

15. From the detailed perusal of the impugned order in original, we find that the order-in-original has failed to analyse the nature of individual software imported by the appellant importer and has not determined individual as to how every consignment of a particular software can be considered as a packaged software. We are also of the opinion that Tribunal is not right forum to undertake primary examination of nature of each individual software to determine whether the same is liable for assessment on the basis of MRP price or RSP value or not. We, therefore, feel that the original adjudicating authority need to undertake a detailed examination of the individual software and its related

literature, specifications etc. for determining whether they fall under the category of 'packaged software' or not. And to further ascertain whether a particular software requires assessment as per the provisions of Section 4A of Central Excise Act, 1944. In view of the above, we feel that the impugned order in original is without any application of mind and therefore, we set aside the same and order that in view of the above instructions, the adjudicating authority needs to undertake re-adjudication of the matter and decide the matter afresh.

16. In view of the above, the appeal is allowed by way of remand. The department is directed to re-adjudicate the matter within a period of three months from the date of receipt of the order.

(pronounced in the open Court on 04/06/2020)

(C L Mahar)
Member(Technical)

(Anil Choudhary)
Member(Judicial)

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