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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/624/2007-625 /2007 - CU[DB] Date 17/11/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S TURNKEY SOFTWARE SOLUTIONS
GROUND FLOOR, 1, MOHAMMAD PUR BEHIND
BHIKAJI CAMA PLACE, NEW DELHI

M/S TURNKEY SOFTWARE SOLUTIONS Appellant

Vs

C.C. NEW DELHI (IMPORT & GENERAL) Respondent

I am directed to transmit herewith a certified copy of Final order No. C/596-597 2008 CU[DB] dated 14.11.08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
   C.C. NEW DELHI (IMPORT & GENERAL)
   NEW CUSTOM HOUSE, NEAR I.G.I. AIRPORT, NEW DELHI 110037.
2. Adv. / Consult
   MR.DEEPAK GANDHI & ASSOCIATES
   LAWYERS CHAMBER NO. 68, PATIALA HOUSE, NEW DELHI

3 S.D.R
4 J.C.D.R.
5 Bar association. CESTAT. New Delhi
6 M/s. Deeparchi Publications. M-93. Marg. 46. Saket. New Delhi 110017
7 M/s Centax Publictions (P) Ltd.. 1512-B. Bhishm Pitamah marg. Opp. ICICI Bank of Defence Colony. New - 3
8 Excise & Customs cases. B-37. Sector -1. NOIDA - 201301 Gautam Budh Nagar. (U.P.)
9 Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10 Nidheshak publications. I.P.Estate. new Delhi
11 Taxmann Allied Service Pvt Ltd.. 21/35. West Punjabi Bagh. New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033. No.70(Old No. 88). Thyagaraya Road. T. Nagar.Chennai
13 Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15 Office Copy
16 Guard file

Assistant Registrar
(Customs Appeal Branch)

17 - M/S RAKESH GUPTA,PROP
M/S TURNKEY SOFTWARE SOLUTIONS,
C-176, VIVEK VIHAR, DELHI – 92.

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delhi

COURT-II

C/Appeal Nos.624-625/07-Cus(Br)

Arising out of the order in original No.18/MDS/07 dated 6.7.2007 passed by the Commissioner ,Customs (Import & General), New Delhi.

For Approval and Signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	~~No.~~ Yes
2	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s Turnkey Software Solutions
Shri Rakesh Gupta, Prop.

Appellant
(Rep. by Shri Deepak Gandhi, Advocate
Shri Anil Kumar, Advocate)

Vs.

C.C., New Delhi

(Rep. by Shri Amit Jain , DR and Shri Vijai Kumar , DR)

Coram:
Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

Date of Hearing : 27.8.2008
Date of Decision : 14/11/.2008

Final Order No. C/596-597/08

Per M. Veeraiyan (for the Bench):

These two appeals are against the order of the Commissioner vide No. 18/MDS/2007 dated 6.7.2007.

2. Heard both sides.

3. Relevant facts, in brief, are as follows:

a) M/s Turnkey Software Solutions No.1 Mohamad Pur, behind Bhikaji

Cama Place, New Delhi belonging to Shri Rakesh Gupta C-176 Vivek Vihar Delhi, was registered with STPI and was granted status of a 100% EOU for development and export of software to USA; they imported data communication equipments including a multiplexer (Promina), EPABX, router and Echo Canceller and their accessories without payment of duty availing exemption under Notifications 138/91-Cus. dated 20.10.91 and 140/91-Cus dated 22.10.91. The import took place in March 1998; the duty foregone was Rs.22,17,947/- . M/s Turnkey Software Solutions has also taken a dedicated communication line from STPI on a monthly lease of Rs. 8 lacs per month. This leased line enabled direct link between New York and New Delhi through Sattelite. With the help of his brothers in USA, Shri Rakesh Gupta established business with M/s Turnkey Software Solutions LLC based in Houston.

b) Sampark Marketing Co.Ltd. was situated in the adjacent floor in the same building as that of Turnkey Software Solution. This company was also started by Shri Rakesh Gupta with Shri Anup Kumar Sinha as one of the directors. This company had in employment one Ms Gurvinder Gaur alias Sonia as receptionist and one Ashok as peon and no other person was in employment in the said company. The company had taken 125 telephone connections (60 lines in January 98 and 65 lines in March 98) from MTNL said to be for the purpose of telemarketing.

c) The above mentioned 100% EOU another 100% EOU and the connected marketing companies were searched by the Customs officers in the presence of panch witnesses and later on the officers of STPI, MTNL and BSNL were associated. The statements of concerned persons were also taken.

d) Investigations revealed that no telemarketing activity was undertaken by the marketing company; the telephone connections were diverted in a concealed manner to the premises of the above mentioned 100% EOU and connected to imported EPABX System which in turn was interconnected with imported multiplexer equipment with dedicated leased lines obtained from STPI. These were being used to receive the telephone calls from USA through the leased dedicated communication link provided by STPI and passed as local calls to MTNL subscribers.

e) By the above arrangement, international calls were received from USA, using the equipments imported for 100% EOU using the dedicated line provided by STPI and the calls were clandestinely connected to local telephone numbers at Delhi and surrounding areas. The above findings were confirmed by the verification reports of the MTNL, BSNL and STPI.

f) On the basis of show cause notice, the Commissioner passed an order, confiscating the imported goods, demanding duty and imposing penalties on the concerned persons and on appeal to the Tribunal, the matter was remanded by the Tribunal vide Final order No.21-24/04-NB(E) dated 14.1.2004 for de novo consideration after observing the principles of natural justice with the following directions:

(i) Now that the applicant have received all the relied upon documents, they shall file revised reply to the show cause notice within a period of two weeks from today.

(ii) Commissioner shall fix cross-examination of witnesses on dates convenient to him starting two weeks from today so that the cross-examinations are completed within a period of one month from the date of receipt of reply to the show cause notice. We make it clear that commencement of cross-examination proceedings shall not be dependent upon the filling of revised reply to show cause notice.

(iii) The de novo adjudication proceeding shall be completed and fresh order passed within a period of three months from today."

g) In pursuance of the CESTAT's order, the Commissioner has decided the case afresh and confiscated the goods valued Rs.2,32,96,000/- belonging to Turnkey Software Solutions and allowed the same to be redeemed on payment of a fine of Rs.75 lakhs; enhanced the value in respect of certain consignments and confirmed duty of Rs.39,35,735/-; imposed a penalty Rs.50 lakhs on the company. He also imposed penalty of Rs.50 lakhs on Shri Rakesh Gupta. By the same order he confiscated goods belonging to Systech Equipment India Ltd. confirmed duty demand , imposed penalty on M/s Systech Equipment India Pvt. Ltd. In these proceedings we are not concerned with the said findings against M/s Systech Equipment India Pvt. Ltd.

4. On behalf of the appellants, following submissions were made:

a) The LOP dated 17-12-97 granted by the STPI to the 100% EOU was valid for three years and thus has three years as period of gestation up to 16-12-2000 for commencement of production. They were further granted five years after expiry of three years for fulfilling export obligations. The investigations were commenced even before completion of three years.

b) The Department offered only four witnesses for cross-examination and none of the witnesses supported the case of the Department and the adjudicating authority did not offer cross-examination of the remaining witnesses. The statements of various persons relied upon by the Department were taken under coercion and threat of authorities and hence not reliable.

c) There is no misuse of imported equipments; there was no evidence that the wires connected with EPBAX were actually coming from telephone lines.

d) The equipment were exported in March/April 98; the officers visited the premises on 12.10.98 within few months of import; the appellants were in the process of developing the software which was highly sophisticated work; the entire action of the Department was premature as they had time up to 16.12.2000 to commence commercial production of computer software and complete export obligation on or before 16.12.2005.

e) No permission of the Development Commissioner was taken before initiating recovery proceeding against 100% EOU.

f) The Department enhancing the prices based on price list adopting list price instead of the purchase price is erroneous.

5. Learned DR submits that the imported capital goods were installed; no man power for development of software was employed; the imported capital goods were utilised for providing international call facilities; the inspection reports of officials of STPI, MTNL and BSNL clearly indicate that 123 lines out of 125 lines of Sampark Marketing Systems were terminated at PABX of the appellants.

b) The e-mail which contains data 7th October, 9th October, 98 shows 49,099 incoming calls in day.

c) The cross examination was not allowed only in respect of persons who were not traceable. The cross-examination of the receptionist confirmed that only two lines were for use of Sampark Marketing. The allegations that the statements taken were not voluntary was incorrect and none of them except Shri Rakesh Gupta retracted.

6.1. We have carefully considered the submissions from both sides. It would be appropriate to decide some preliminary issues raised by the appellant before deciding the main issues. The commissioner, in pursuance of the order of remand by the Tribunal, has offered cross examination of some of the witnesses. The cross examination was not allowed in respect of persons who were former employees of the appellant and whose whereabouts were not known to the Department and to the appellant. This can not be considered as violation of principles of natural justice. Further, we find that in respect persons offered for cross examination, no questions were put to them on the core issues.

6.2. A submission has been made that no permission of the Development Commissioner was taken before initiating recovery proceeding against 100% EOU. The jurisdiction of the Customs Authorities and the powers to demand duty short levied/ short paid/ not levied are not dependent on any permission of the Development Commissioner as the same flow from the provisions of the Customs Act. If there is any violation of internal arrangement/understanding between the Development Commissioner and the Customs Authorities, the same can not a ground to hold that the customs authorities can not exercise the powers vested on them.

6.3. They were given 100% EOU status by STPI for the purpose of developing and exporting software; for the said purpose they were permitted duty free import of sophisticated equipments; they were provided STPI dedicated communication links between Delhi and Houston in USA. The import of equipments, installation of same and commencement of production are to be completed within the period of validity of LOP i.e. within three years which was to end on 16-12-2000. This period of three years is only an outer limit. In this case it is not disputed that the machinery/ equipments imported were promptly installed.

6.4. The installed equipments were used for unintended and unauthorised purposes as discussed below. Using these imported equipments and the facility provided by STPI and using the MTNL lines taken in the name of a telemarketing company, they have operated as a parallel Telecom authority. America based callers have been allowed to make international calls through dedicated lines given to the appellant by STPI which landed on the Multiflexer, then PABX system from where they were connected to MTNL lines as local calls. The e-mail which contained data of large number of incoming calls on 7th October to 9th October, 98 clearly confirm this. Houston based company has transferred about Rs 1 Crore in a short time. The remittance is sought to be explained as advance payment for export of Software which claim is not acceptable.

6.5. Sampark Marketing Co.Ltd. started by Shri Rakesh Gupta was situated in the adjacent floor in the same building where Turnkey Software Solution was functioning. This company had in employment one receptionist and one peon and no other person was in employment in the said company. The company had taken 125 telephone connections (60 lines in January 98 and 65 lines in March 98) from MTNL said to be for the purpose of telemarketing. There was no disclosure as to what they were marketing! In fact it was admitted by the concerned persons including Shri Anup Kumar Sinha the founder- director, Ms Gurvinder Gaur alias Sonia, the receptionist and Shri Rakesh Gupta that there was no marketing work undertaken but some records were fabricated to show as if such work was being undertaken. The inspection reports of officials of STPI, MTNL and BSNL clearly indicate that 123 lines out of 125 lines of Sampark Marketing

Systems were terminated at PABX of the appellants. It was found that part of amount has been withdrawn from the appellant's bank accounts in cash and deposited into the accounts of Sampark Marketing Company to enable them to pay for the large number of lines taken by them and to meet other expenses in their name. The above payment clearly supports the finding that 123 lines out of 125 lines of Sampark Marketing Systems were terminated at PABX of the appellants.

6.6. LOP was granted for specified purpose namely development and export of software; the concerned exemption notification permitted import for " the said purposes" and they were required to "use them(the imported goods) within the unit". In the present case, goods have been used for unintended and unauthorised purposes. They have been used by Sampark Marketing Systems as well. With out going into any possible violation under other acts, it is clear case of violation the conditions of the Notification No140/91-Cus dated 22-10-91 and therefore, the goods are liable for confiscation under Section 111(o) of the Customs Act. Section 111(d) of the Customs Act is not applicable. However, it is not denied that the show cause has clearly indicated the nature of post import violation indulged in by the appellant and therefore the confiscation should be treated as under Section 111(o) of the Customs Act and upheld. Ld DR made a submission that the duty becomes payable even if the appellant does not redeem the goods and for the said purpose he relied on the decision of the Larger Bench in the case of Bombay Hospital Trust 2005(188)ELT 374. In the light of the above, we hold that the applicable duty shall be "payable irrespective of whether they redeem the same or not independently of Section 125(2) as the duty is recoverable under Section 12".

6.7. However, a submission has been made that the value declared at Rs.42,47,509/- was enhanced to Rs 75,16,374/- based on list price of M/s Harbour Technologies Inc which is not proper. It was contended that the actual purchase price shall be based on negotiation and the list price is only a basis for negotiation and normally discount shall be allowed from the list price. In their case the declared price is the purchase price and Department has not shown any contrary evidence including any extra payment. In the absence of any other evidence of higher price having been adopted or paid for, enhancing the assessable value merely based on the list price is not warranted. The submission by the appellant deserves acceptance. The duty demand shall be accordingly restricted.

6.8 We find that the goods have been imported about a decade back and the equipments are reportedly out-dated. Therefore, reduction in the amount of redemption fine imposed is justified.

6.9 As regards the penalty imposed on Shri Rakesh Gupta, it is seen that Shri Rakesh Gupta is being referred to as owner of Turnkey Software Solution in the statements and that he has filed the appeal as proprietor of M/s. Turnkey Software Solution. However, he has played the role in forming the marketing company

7. In the light of the above, we dispose of the appeals as follows:

a) It is held that the goods imported by M/s. Turnkey Software Solution have been used for purposes other than those permitted under the Notification and therefore, they are liable for confiscation. Confiscation is upheld. However, the redemption fine is reduced from Rs. 75 lakhs to Rs.10, 00,000/- (Rupees Ten lakhs only).

b) The duty demand requires to be confirmed. However, the value enhancement for consignment covered by Bill of Entry No. 206745 dated

30.3.98 cannot be sustained. Accordingly, the duty demand shall be restricted.

c) It is also confirmed that the duty demanded shall be payable even if the appellant firm does not take release of goods on payment of redemption fine as mentioned above.

d) The penalty imposed on the appellant firm is reduced from Rs. 50 lakhs to Rs. 10 lakhs (Rupees Ten lakhs only).

e) As regards the separate penalty of Rs. 50 lakhs imposed on Shri Rakesh Gupta is concerned, the same is set aside, as a separate penalty on the proprietor is not justified.

(Pronounced in open Court on 14-11 .2008)

(M. Veeraiyan)
Member (Technical)

(P.K. Das)
Member (Judicial)

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