IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Appeal No. C/ 364/2009-Cu(DB)

[Arising out of Order-in-Appeal No. CC(A) Cus./I & G/ 44/09 dated 26.02.2009, by the Commissioner of Central, New Delhi].

M/s Microsoft Corporation (India)Pvt. Ltd ....Appellants

Vs.

C.C. New Delhi ....Respondent

Appearance:

Shri B.L. Narsimhan, Advocate for the Applicants
Shri Govind Dixit, DR for the Respondent

CORAM:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Date of Hearing: 31.10.2016
Date of Pronouncement: 03.03.2017

FINAL ORDER NO. 52101 /2017-Cu(DB)

Per Ashok K. Arya

1. M/s Microsoft Corporation (India) Private Limited is in appeal against the Commissioner (Appeals) order dated 25.05.2009, whereunder it is held that valuation of Time Bound Software and Beta Software is to be determined under Rule 4 of the Customs Valuation Rules, 2007.

2. The appellant has been represented by Shri B.L. Narsimhan, ld. Advocate and Shri Govind Dixit, ld. DR represent the respondent, the Revenue.

3. The matter concerns with the valuation of the goods viz. Time Bound Software and Beta Software imported the appellant from M/s. Microsoft Corportion, USA & Microsoft Operations Pte. Ltd., Singapore.

4. The ld. Advocate for the appellant based on the appeal memorandum and written submissions, inter alia mainly submits as under:-

i. The goods imported are
    a. Time Bound Software- Software launched in the market, but imported and distributed for demo/ trial purpose for a limited period of time, say 90-180 days. Such software is also available for free download.
    b. Beta Software- software released to developers, coders, etc. for testing and fixing bugs/ making improvements before the launch of the fully finished software.

ii. Valuation as per the appellant:
    a. Time Bound Software- cost of media (including replication cost) on which software is loaded.
    b. Beta Software- Cost of media (including replication cost) on which software is loaded.

iii. Valuation as per Order-in-Appeal:
    a. Time Bound Software- Identical goods Method, under Rule 4, CVR, i.e. value of software with license for perpetual use.
    b. Beta Software- Identical goods method, under Rule 4, CVR, i.e. value of final version of the software. Till such time the final version is released, assessments to be kept provisional.

iv. Demand of Customs duty: The present demand arised out of SVB (Special Valuation Branch) proceedings deciding the valuation in principle. There is no duty demand on any specific imports.

4.1 Further for this item- Time Bound Software and Beta Software, the appellant inter alia mainly submits as under:

i. Time Bound Software:

a. Unlike the software without any time restriction, no royalty is paid by the appellant to the supplier for use of the time bound software.
b. Also, identification of the time bound software vis-à-vis the software without a time limit is separate as different codes are given in the sales/ accounting systems.
c. Cost of media (including replication cost) should be accepted as the assessable value) In the present case, admittedly, the time bound software is meant for free distribution for trial/demo use. Thus, the same is to be considered as non-commercial shipments. In such a case, the cost of the media (including replication cost) alone is to be taken as the transaction value. Reliance is placed on Hon'ble Tribunal's case of *Atul Kaushik Vs. Commissioner of Customs 2015(330)ELT 417 (Tri. Del),* wherein the loading of the cost of media with the license fee for the software was held to be unsustainable in cases of non-commercial shipments i.e. cases where no licenses fee was actually paid the media was provided free of cost. Similarly, in the present case, as the time bound software is meant for free distribution and use, the same is to be valued at the cost of the CD/media (including replication cost).
d. Valuation as per Rule 4, CVR, is not sustainable as the goods are not identical considering the life span: Time bound software without the restriction are not identical in order to apply Rule 4, CVR. This

is for the reason that the life span is not the same. In determination of identical goods, one key consideration is the life span of the goods. Reliance is placed on order of the Hon'ble Tribunal in the case of Selected Creations Vs. CC, 2001 (135) ELT 333 (Tri-Del.), wherein it has been held, in the context of import of lamps, that life span is an important consideration in the pricing of goods.

e. Without prejudice, valuation should be as per Rule 9, CVR, based on proportionate value of license given for perpetual use: without prejudice to the above submission that the valuation of time bound software should be the cost of CD/ media only (including replication cost) it is submitted that by application of Rule 9, CVR (residual method), the value should be determined in the following manner:

- Value of same software, for perpetual use, to be taken; and
- Assuming that the life span of software, without a time restriction is five (5) years, the cost can be proportionately adjusted for the period the time bound software is available for use.

ii. Beta Software:

a. The beta software is made available for testing, usually through free download from the Microsoft web site or through physical CD/ media, where required. Thus, the same is a fully operative software and is not capable of being bought or sold in the market at this stage.

b. It is also submitted that from the beta version to the final version, the software may undergo several key changes. In fact, there may also be a situation where the final version is never launched, taking into consideration the feedback received from the developer community, and others who have used the beta version for testing.

c. Cost of media (including replication cost) should be accepted as the assessable value: in the present case, admittedly, the beta software is never meant for sale in the open market. Thus, the same is to be considered as non- commercial shipments. In such a case, the cost of the media (including replication cost) alone is to be taken as the transaction value. Reliance is placed on the order of the Hon’ble Tribunal in the case of Atul Kaushik (supra), wherein the loading of the cost of media with the license fee for the software was held to be unsustainable in cases of non-commercial shipments i.e. cases where no licenses fee was actually paid the media was provided free of cost. Similarly, in the present case, as the beta software is meant for use by developers, etc., the same is to be valued at the cost of the CD/media (including replication cost)
d. Valuation as per Rule 4, CVR, is not sustainable as the goods are not identical: Beta software and software ultimately released, if at all, are not identical in order to apply Rule 4, CVR. This is for the reason that there is no final version of the software existing at the time of import of beta software on CD/media. The beta version itself from the developers, etc. Thus, the two cannot be considered to be identical. Thus, the application of Rule 4, CVR, is erroneous.
e. Proposal to continue provisional assessments till release of final version of software is erroneous: In the impugned order, the CCA has proposed to keep the assessments for the beta software provisional till the time the final version is not released. This understanding is erroneous and is liable to be set aside. For instance, in case the final version of the software is never released and is scrapped, then the assessments of the beta version will be provisional in perpetuity.

4.2. The appellant also cites additionally the following case laws in support:

a. *Gajra Bevel Gears Vs Collector of Customs, Bombay, 2000 (115) ELT 612 (S.C.)*
b. *Indian Drugs Manufacturer's Association Vs. Union of India, 2008 (222) ELT 22(Bom.)*
c. *Cadila Pharmaceuticals Ltd Vs Commissioner of Central Excise Ahmedabad-II, 2008(232) ELT 245 (Tri.-LB)*

5. Ld. AR reiterates the findings given by the lower Revenue authority in the impugned order.

6. We have carefully gone through the facts of the case, the submissions of both the sides and the case laws cited. The matter concerns with the valuation of two types of goods viz. Time Bound Software and Beta Software. We shall discuss and decide on the issues concerning these one by one.

7. It has been explained that the time Bound Software is fully released functional version of the software which has already been launched in the market which is imported for demo/trial purpose with limited operative period, which could be 90 to 180 days. The appellant submits that no separate royalty is paid by them to the supplier for the use of the Time Bound Software. Time Bound Software has separate and independent identification vis a vis FPP (Fully Packaged Product) software, which is without any time limit.

The importer claims that a separate code is maintained for FPP in company's internal sales / accounting system to facilitate identification and revenue generation considering the fact that time bound software falls under non revenue generating category. Time Bound Software is a non-commercial shipment and the transaction value for the same is the cost of media including replication cost alone.

7.1 The importer appellant submits that both the items namely "Time Bound Software" and "Beta Software" have been imported on a Compact disk (CD/DVD); these software from the supplier are at the price equivalent to the media cost only since no other cost is involved. The appellant further states that they are not selling "Time Bound Software" as they are available for specific purposes such as testing trial, evaluation etc, hence value declared at the time of import is the cost of goods sold by group company to them and the same may be accepted as the transaction value in terms of Rule 3(3)(a) of the Valuation Rules. The appellant importer further submits that "Time Bound Software" are Microsoft Patented Products available without any charge to anybody or everybody to ensure that the final Microsoft product is free from any bugs and meets the expectation level of ultimate users, hence, the motive is to develop robust software; "Time Bound Software" is at the testing and developing phase of the software releases life cycle; no sale prices of the same is available as such software is not sold to user but is given for trial, evaluation purpose free of cost for a specified time period; such software does not have any identical or similar goods for the price comparison; "Time Bound Software" cannot be compared with the finished and released product known as Fully Packaged Products (FPP), which is full version software i.e. after the software that has passed successfully through testing and development phase and it is a commercially valuable product; FTP comes in a factory sealed retail boxes with software and CD/DVD along with perpetual software licence (specifying the rights granted in respect of a such software and products-use rights); thus, "Time Bound Software" is physically different from Fully packaged Product (FPP) in terms of character, content and usage.

8. When the importer appellant explains the features of the product namely "Time Bound Software" and makes a mention that "Time Bound Software" is not a fully packaged product and its price is equivalent to the media cost only (the media here could be CD/DVSs) and when the import transaction is between the related parties, where supplier or exporter to the Indian importer is located in USA and Singapore, the assessment value of the said goods cannot be arrived under Section 14(1) of the Customs Act, 1962, where the buyer and seller have to be 'not related'.

9. The impugned order observes that "Time Bound Software" is not different from the final version of the said "Time Bound Software". The impugned order makes a mention that identical software with no time limit restrictions is similar to "Time Bound

Software", 'only difference being that Time Bound Software is for free distribution to popularize the same in the market'. The impugned order says that intrinsic value and nature of both "Time Bound Software" and identical software with no time restriction are same and therefore the money value cannot be lower than the value of identical software without time limit. The impugned order gives the findings that valuation of "Time Bound Software" is to be determined as per Rule 4 of the Customs Valuation Rules, 2007, which is for determination of the transaction value of identical goods.

9.1 However, we are not in agreement with the findings of the impugned order in case of valuation of "Time Bound Software" , when "Time Bound Software" has got the life of only 90 days to 180 days whereas identical software (FPP Software) with which impugned order compared and which has got no time limit, cannot have same values and they cannot be called identical or similar products. Therefore, to decide on the valuation of "Time Bound Software", which is one of the imported items the present case, one has to go beyond Rule 4 of the Customs Valuation Rules 2007 as the value of identical goods which are imported around the same time is not available in this case. It has to be noted that Rule 3(4) of Customs Valuation (Determination of Value of Imported Goods), 2007 (CVR) says that value shall be determined by proceeding sequentially through Rule 4 to 9, if value cannot be determined under Rule 3(1) of CVR, 2007.

9.2 We find that in the present case of "Time Bound Software" transaction value of identical or similar goods is not available which is the requirement of Rule 4 of CVR, 2007; therefore, we are to go further to Rule 6 of the said CV Rules. Rule 6 of the said Rules say that if value under Rules 3, 4 and 5 cannot be determined, value shall be determined under Rule 7 or when it cannot be determined under Rule 7, it will be decided under Rule 8. It also says that at the request of the importer with the approval of the proper officer the order of application of Rule 7 & 8 of these Rules shall be reversed. Rule 7 talks about Deductive value but with reference to sale of identical or similar import goods to unrelated buyers in India and talks about certain deductions. Rule 8 talks about Computed value where the elements for computation are cost or value of materials and fabrication or other processing employed, and amount or profit and general expenses and also the cost or value of all others expenses.

10. From the facts or record, submissions of both the sides and the case laws cited, it appears that the elements required for arriving at Deductive value under Rule 7 or for arriving at Computed value under Rule 8 of the said Rules are not present for the imported item namely "Time Bound Software". Therefore, the valuation is to be decided under Rule 9 of CV Rules, 2007. Rule 9 says that subject to the provisions of Rule 3, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using

reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India. Consequently, the orders of lower Revenue authorities are set aside and the matter remanded to the original adjudication authority for deciding the valuation issue afresh under Rule 9 of CVR, 2007 read with provisions of Section 14 (1) of Customs Act, 1962.

11. Now, we take up the issue of valuation of 'Beta Software'. The appellant importer argues that 'Beta Software' is not 'goods' under Section 2(22) of the Customs Act; therefore, no customs duty is liable to be paid on the said item. However, this argument of the appellant does not have sufficient force. The "Beta Software" has been imported in the form of media i.e. CD/DVSs though with the purpose of feedback but that does not mean that it is not 'goods'. The item is definitely 'goods', which are being used by the target group and the target group is giving the feedback for its further improvement. Importer does claim that their object is to develop robust software based on the feedback given by the people, who would be using the said "Beta software" imported by the appellant. The importer has claimed that "Beta Software" is the second stage of final software of life cycle; first stage is Alpha and second stage is Beta and third stage is Fully packaged product (FPP), which is called full version software. The item imported being beta software, one cannot be allowed to state that the said item is not "goods" in terms of Section 2(22) of the Customs Act. The item is a kind of

moveable property which has been put into a media- CD/DVSs and is being transacted/ passed over/ traded as such.

11.1 However because of the reasons (which are also applicable to the item, Beta Software), mentioned earlier in paras 9.2 and 10 for the item "Time Bound Software" the impugned order saying that valuation of the item "Beta Software" can be determined under Rule 4 of CVR, 2007 is not based on facts and cannot be called correct. Therefore, the impugned order in this regard is set aside. And matter is remanded to the original adjudicating authority to decide afresh the valuation in the light of the observations made here under Rule 9 of CVR, 2007 read with Section 14(1) of Customs Act, 1962.

12. In the result , the orders of lower Revenue authorities are set aside and the appeal is allowed by way of remand to Original adjudicating authority, who shall decide the matter denovo in the light of observations made above within four months of receipt of this order after giving hearing to the appellants and the evidence may also be admitted as per law.

[Pronounced in the Open court on 03.03.2017]

(Justice Dr. Satish Chandra)
President

(Ashok K. Arya)
Member (Technical)

Ritu S.