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

COURT-I

Date of hearing: 04.08.2017
Date of decision: 18.08.2017

Appeal No. C/51188/2014

[Arising out of the Order in Original No. 58/RKB/CC/NCH/2013 dated 22/11/2013 Passed by Commissioner of Customs (Adjudication), New Delhi]

Avenue Supermarket Pvt. Ltd. … Appellant

Vs.

CC New Delhi … Respondent

Appearance:
Present Shri Udit Jain, Advocate for the appellant
Present Shri Govind Dixit, Shri S. Nunthek, DR for the respondent

Coram: Hon'ble Justice Dr. Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

FINAL ORDER No. 55960/2017

Per: V. Padmanabhan

1. The appeal is against the Order in Appeal No. 58/2013 dated 22.11.2013. The appellant was running a chain of retail shops in the name and style of 'D-Mart'. They imported SAP Software during 2006 by entering into End Users License Agreement (EULA) on 23.06.2001 with SAP India Private Limited, which is a subsidiary of SAP AG Germany. SAP India raised an invoice dated 30.06.2006 for Rs. 2,14,75,660/- for the supply of SAP Software and its usage and such amount was paid by the appellant. The software was imported by the appellant from SAP Germany through DHL Courier. The parcel was customs cleared by DHL by filing courier bill of entry and was delivered to the appellant. In such bill of entry, only nominal value of Rs. 5987 was declared for import of SAP software, the custom duty was paid on this value by DHL and the same was recovered from the appellant.

2. Directorate of Revenue Intelligence investigated into the import of SAP software from SAP Germany through DHL Express India under courier mode during the period March, 2006 to September, 2006. The investigations revealed the following :

SAP AG Germany develops packaged software and owns proprietary rights over such software. SAP AG Germany has signed a Software Distribution Agreement (SDA) with their subsidiary in India SAP India. According to this SDA, SAP India identifies customers and procures orders from various importers in India and signs the End Users License Agreement (EULA) which entitles the end users, either to download the software electronically or to import the same in CD/DVDs through DHL courier. The Indian Customer pays license fee to SAP India, out of which they retain a part and transfer the balance to SAP AG Germany. SAP Germany ships the software CDs directly to the Indian importers, accompanied by a Performa invoice indicating a nominal value on which DHL pays the customs duty. Investigations were extended to the appellant, being one of the importers of such SAP Software from SAP Germany.

3. Upon conclusion of the investigation, the department came to the conclusion that the appellant has mis-declared the value of software imported by them. Shri Sadanand Mahadev Padhye, Director (Information Technology) of Avenue Super Markets as well as Rajeev Subramanian , CEO of SAP India admitted in their statements that the nominal assessable value of Rs. 5987 declared to customs was not the actual transaction value of the software, but the actual license fee paid by the appellant amounting to Rs. 2,14,75,660/- to SAP India should be considered as the actual value. Accordingly, show case notice dated 10.06.2011 was issued and ultimately resulted in the passing of the impugned order in which it was ordered as follows:

i. The declared assessable value was rejected and differential custom duty of Rs. 17,89,155/- was demanded along with interest.

ii. Penalties were imposed under Section 112 (a) on the appellant to the extent of Rs. 4, 47,289/-.

iii. Penalty of Rs. 17,89,155/- was imposed on SAP India under Section 112 (A) of the Custom Act.

Aggrieved by the impugned order, the present appeals have been filed.

4. With the above background we heard Shri Udit Jain, Advocate for the appellant as well as Shri Govind Dixit and S. Nunthek, DRs appearing for the revenue.

5. There was a query from the Bench whether the appellant takes the plea of jurisdiction, since the investigation into the matter has been carried out by the Directorate of Revenue Intelligence, in view of the matter pending before the Apex Court in case of the Mangli Impex. Learned Counsel for the appellant argued that the appellant is not taking such a plea since the SCN in the present case was issued by Additional Commissioner Customs, even though the investigation was carried out by DRI. Accordingly, he prays that the matter may be decided on merit.

6. On merit the Ld. Counsel Shri Udhav Jain made the following main arguments.

i. The appellant cannot be considered as the importer and hence no duty can be demanded from them. SAP India is to be considered as the importer, since the SCN has accepted that the item in question was imported in terms of the stipulation in the Software Distribution Agreement between SAP Germany and SAP India.

ii. The bill of entry for clearance of the software was filed by DHL on behalf of the appellants, however, the appellant should not be considered as the importer since they have not granted any authorization to DHL to file such bill of entry as is required in terms of Regulation 13 of the Courier Imports and Exports (Clearance Regulations 1998).

iii. The interim is barred by limitation since the show cause notice has been issued on 10.06.2011 in relation to imports made on 02.07.2006.

iv. The duty involved on the software has already been paid by SAP India. Hence, the department cannot demand the same once again from the appellant which will amount to unjust enrichment to the department.

7. The Ld. DR supported the impugned order. He argued that the goods have, in fact been, imported by the appellant. The investigation undertaken by DRI has clearly proved that the correct value of the software is what has been paid by the appellant to SAP India. Further, he submitted that the appellant will not be in a position to make use of the importer's software unless he has paid the license fee to SAP Germany through SAP India. Ld. DR further relied upon the decision of the Tribunal in the case of Oracle India Vs CCE, New Delhi 2015-TIOL-1766-CESTAT-DEL which has also been upheld by the Hon'ble Supreme Court of India in civil Appeal No 13443/2015 wherein the importers appeal was dismissed by the Apex Court. The Tribunal had categorically held in the Oracle Case that the license fee paid by the importer in India to the foreign supplier of software through the Indian subsidiary is to be included in the assessable value of goods (software). The Ld. DR further submitted that the appellant and SAP India are also liable for penalty for engineering the under valuation of the software imports.

8. We have heard both sides and perused records. The appellant has claimed that they cannot be considered as the importer, since they have made payment to SAP India in INR for procurement of software

which is only a domestic transaction. They have also claimed that they did not file the bill of entry nor did they authorised M/S DHL to file bill of entry.

We find that the above pleas have been dealt with elaborately by the Adjudicating Authority. It is evident that the software was directly supplied by SAP Germany to the appellant and DHL has filed the bill of entry on behalf of the appellant. Though no authorization was given by the appellant to DHL, it is an undisputed position that the software has, in fact, been ordered by the appellant and have been delivered to them by DHL. These actions clearly establish that the appellant is to be considered as the importer under Customs Act and, therefore, liable to the payment of customs duty.

9. The appellant has also raised the plea of limitation and claimed and the show case notice has been issued beyond the normal time limit and there is no evidence which implicates the appellants. We note from the record that the appellant has entered into EULA with SAP India and has paid the full value of Rs. 2,14,75,660/- to SAP India. There were also very much aware that such software was to be supplied by SAP Germany and is an import transaction. But for the detailed investigations carried out by DRI, the evasion of custom duty would have gone unnoticed. Hence, we find no merit in the argument that there was no willful suppression of facts by the appellant.

10. The appellant has also raised the argument that duty involved in the consignment has already been paid by SAP India and hence, same cannot be demanded from the appellant, once again. From the record, we find that SAP has paid some custom duty during the course of investigation undertaken by DRI. It is also seen that most of the amounts paid by SAP India have also been claimed back by them by filing refund claims. Further, we note that the appellant has also paid customs duty

amounting to Rs. 17,86,775/- during the course of investigation which stands appropriate by the adjudicating authority.

11. We have gone through the Tribunal's decision in the case of Oracle India Private Limited (supra) where the Tribunal had occasion to examine a similar scenario in which imports of software were done from Oracle USA / Ireland through Oracle India and DHL. In the Oracle case also license fee was charged by Oracle India by the buyer of software, a part of which was retained by them and the balance repatriated to Oracle USA. On the question of including the license fee paid by the customer on the value of imported software, Tribunal held as follows :

> The portion of the license fee, which was paid by the importer of software which was repatriated to the foreign supplier of software, needs to be included in the assessable value of imported goods.

10. By following the decision of the Tribunal in the above case which has also been upheld by Apex Court, we find no reason to interfere with the impugned order which is upheld and the appeal dismissed.

[Order Pronounced in the open court on_18/08/2017_]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

Rekha