CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH REGIONAL BENCH AT HYDERABAD
BENCH - DB
COURT - I

Appeal(s) Involved:

C/260/2009-DB, C/366/2009-DB

(Arising out of Order-in-Original No. 05/2009 dated 28/01/2009 passed by Commissioner of Customs, Central Excise & Service Tax Hyderabad)

Commissioner of Customs Hyderabad-II	Appellant(s)
Idea Cellular Ltd	Appellant(s)

Versus

Idea Cellular Ltd	Respondent(s)
Commissioner of Customs, Hyderabad	Respondent(s)

Appearance:
Mr Anand Nanavati, Adv for the Assessee
Mr Bhuvaneshwara Rao, A.R for the Respondent.

CORAM:

HON'BLE Mr. M.V.RAVINDRAN, MEMBER (JUDICIAL)
HON'BLE Mr. C. J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 21/02/2018
Date of Decision: 21/02/2018

Final Order No. A/ 30381-30382 / 2018

[Order per: M.V.RAVINDRAN] .

These two appeals are directed against order-in-original No. 05/2009-Adjn-Cus dated 28/01/2009. Appeal No C/260/2009 is filed by the assesseefor confirmation of differential duty with interest and penalty imposed while Appeal No. C/366/2009 is filed by the Revenue for non-imposition of equivalent penalty to the tune of duty and interest put together. Since both the appeals are challenging the very same order-in-original, they are being disposed of by a common order.

2. The relevant facts that arise for consideration, after filtering out unnecessary details are: assessee herein imported Microwave SDH radio Software CD ROMs, Microware SDH Radio Hardware Microwave communication equipment-DMC Non-protected, Microwave communication equipment Altium protected space diversity STM-1, Altium SDH radio software CD ROMs. They filed bills of entry for discharge of duty liability in respect of bills of entry for the equipment and CD ROMs of software and claimed the benefit of Notification No. 21/2002 classifying software as falling under Chapter 85.24 and exempted from payment of duty. Assistant Commissioner of Customs and Air-cargo complex, Begumpet Hyderabad after seeking information about nature and usage of software imported along with equipment and recording statements of various employees of the importer appellant issued a show-cause notice dated 25.02.2008 on the ground that the value of software not included in the value of the goods imported is incorrect and needs to be included and separate invoices raised is only to avail ineligible benefit of duty exemption provided for software. Appellant

contested the said show-cause notice on merits as also on limitation. The adjudicating authority after following the due process of law confirmed the allegations of mis-declaration and by the impugned order included the value of software for determining the duty value of the equipment imported and coming to such a conclusion confirmed the demand of duty, appropriated the amounts already paid, demanded interest and also imposed penalty. It is the case of the Revenue in their appeal that adjudicating authority should have imposed penalty equivalent to duty liability and the interest portion thereof.

3. Learned counsel appearing for the importer appellant submits that the issue is already decided in their favour by several decisions of the Tribunal. He would bring to our notice that the orders of the Tribunal in the case of Vodafone Essar Gujarat Ltd [2009(237)ELT 458 (Tri-Mum)], ITI Ltd Vs CC Calicut [2009 (233)ELT 277 (Tri-Bang)] and Bharti Airtel Ltd Vs CC Bangalore [2012(286)ELT 270 (Tri-Bang), are specifically on the point as to non-includibility of the software imported separately and billed separately. It was also submitted that the allegation of wilful mis-declaration is without any basis or evidence as the bills of entry were filed indicating the value of hardware separately and software separately. Hence demand of duty by the show-cause notice dated 25.02.2008 for the imports made between February 2003 to October 2003 is hit by provisions of Section 28 of the Customs Act 1972 as beyond the normal period.

4. Learned A.R. would draw our attention to the findings recorded by the adjudicating authority. It is his submission that the orders on which reliance is placed by the learned counsel are not applicable in the case in hand and the facts of the case is to be considered in its own perspective. It is his submission that the statements recorded by various individuals indicate that the value of software is in fact integrally related to the equipment imported by the appellant. He would submit that the findings of the adjudicating authority are reiterated and needs to be upheld.

5. On a careful consideration of the submissions made, we find that the short point to be decided in this case is whether or not value of the software is liable to be included in the assessable value of equipment imported by the appellant.

6. It is undisputed that appellant had filed bills of entry for clearance of radio equipment imported by them. The said bills of entry indicate value for equipment separately and value of software separately; appellant claimed exemption from duty on the software as per Notification No 21/2002-Cus claiming the classification of software under Chapter Heading 8524. On this factual matrix we find that learned counsel was correct in stating before the Bench that the value of the software imported along with equipment need not be included. He relied upon various decisions cited herein above.

7. In the case of Vodafone Essar Gujarat Ltd (supra) the issue which came to be decided in favour of the assessee was whether value of the

software needs to be included in the assessable value of hardware imported. The appellant therein imported various equipment related to mobile/cellular telephone services like mobile switching centre, base station controller and base transreceiver from M/s Nokia Corporation which were pre-loaded with software required for operating and also imported media component software under chapter heading 8524 along with benefit of exemption under Notification No 21/2002(Sl No.157). After considering elaborate submissions made by both sides, the Bench held that software meant for telecommunication equipment is classifiable under Chapter Heading No 85.24 and the value of such software cannot be included in the value of hardware. The findings are in paragraph 20 which we reproduce.

> 20**.** We have considered the submissions. We find that it is an admitted fact that telephone equipments falling under Chapter Heading 8517 and 8525 have been imported along with operational software preloaded in the factory of the supplier and also along with CDs/Tapes loaded with such software. The issue to be decided is whether the value of such software can be added to the value of the hardware. While the revenue's contention has been that this software was not required to be imported separately as it was already preloaded in the supplier's factory which loading was a technical necessity, requiring special skills not available in India and was never used and lying in original packed condition, the appellants contention is that being operational software, it falls under Chapter Heading 8524 and its value cannot be included in the value of the hardware as held by the Supreme Court in its various decisions starting from *PSI Data Systems Ltd.*, *Acer India Ltd.*, *Hewlett Packard* (supra) and other decisions referred to in the submissions from both sides. We find that the issue whether the value of the software whether imported separately or already loaded in the hard disc of the computer can be added in the value of the hardware or has to be excluded, has been decided against the revenue by a plethora of Supreme Court and Tribunal's decisions cited by the appellants holding that it cannot be so added. The revenue's only contention is that these decisions are not applicable in the present case as the software relating to the equipment imported is integrated and incorporated in the equipments and are therefore not covered by Note 6 to Chapter 85, which relates to records and other media presented with the apparatus for which they are meant unlike Note 5E to Chapter 84 which refers to machines incorporating or working in conjunction with automatic data processing machines. We note that

importing software in CDs separately besides being preloaded on hardware is not something done unusual and is a trade practice and no evidence has been cited by the revenue to show that this is not a trade practice. The statements of the various persons concerned with the installation and commissioning of the equipments does bring out that they were required to check if the appropriate software has been loaded on the various equipments and in case it was not so found, they were required to be again loaded. Therefore the fact that the software imported separately was never used is of no consequence as it was meant for use in emergency only which emergency never arose. Even the revenue, in its submissions, has stated that such a plea was of doubtful validity, meaning there by that it cannot be ruled out. Another plea taken by the revenue is that the software in the present case was a firmware, distinct from the other software like Windows XP operating software etc. The firmware is one which is already in read only memory and is programmed in to a circuit permanently. It is normally embedded or etched and resides in the chip itself. The same is generally etched while the chip is being manufactured. Statements of various persons connected with installation and commissioning has categorically brought out that the software in question was not an embedded software or a etched software and is contained only in the Winchester hard disc and therefore this plea is to be out rightly rejected and has even not been acted upon by the Commissioner in her order. A software retains its character as a software, whether it is meant for automatic data processing machines falling under Chapter Heading 8471 or for telephone equipments falling under Chapter Heading 8517/8525, which are nothing but, special purpose computers which is build to handle specific task. Such computers can perform a specific task and no other task. The appellants in their reply to the show cause notice has referred to the extracts from the book 'Mini & Microcomputer Systems' by M.G. Hartley, wherein at page 7 it has been stated that "computers are classified loosely as microcomputers, minicomputers and mainframe computer....... Minicomputers are general-purpose machines. Sometime they may be used as part of a large piece of equipment -- for example, as the switching controller in an automatic telephone exchange...". Further at page 23 in the same book, it has been stated as under :

".... Quite often a general purpose mini or microcomputer is tailored to a communications application by using special interface hardware and appropriate real-time software."

This all show that even the telecommunication equipment imported by the appellants are nothing but computers and therefore the software meant for such computers is also classifiable under Chapter Heading 85.24. This has also been held by the Tribunal in the case of *BPL Communications* (supra) where the software for MSC, BSC and BTS have been specifically held to be classifiable under Chapter Heading 85.24 and this decision has been upheld by the Apex Court. The appellant's contention that the decision relates to exemption notification is therefore not relevant is not correct as this very exemption notification treats software for telecommunication as also falling under Chapter Heading 8524 but only excludes it from the purview of exemption notification. Data processing machines may be general purpose and special purpose. While a general purpose data processing machine is classifiable under Chapter Heading 84.71 the special purpose data processing machine incorporated or acting in conjunction with a machine is classified on merits by virtue of Note 5E to Chapter 84. Further, special

> purpose data processing machines do not cease to be data processing machines merely because by virtue of special rules of classification embodied for such machines in Note 5E to Chapter 84, they are classified under headings other than 8471. The ld. counsel for the revenue has made a distinction between a software which is 'integrated' and a software which is 'presented with'. We, however, feel that there is no such distinction as software which was preloaded in the hardware in the general purpose computer was also equated as 'presented with' and classified as a software under Chapter Heading 8524 and this is the manner in which software under dispute has also been loaded. In both cases, it gets integrated. It is another matter that in case of telecommunications, the loading of the software may not be that simple as in general purpose computers but that would not render it as a software of a character which is incorporated in a machine. A software can be said to be incorporated only when it is etched or embedded in the microprocessor/memory chips and whose value has also been held to be includable even by the Apex Court in the case of *Acer India Ltd.* Since the software in the present case has come in a recorded media in the form of tapes/CDs, separately also, it is clear that it is not of the type which is embedded or etched. In view of this no distinction can be made between the software in dispute and other softwares. The value of such software cannot be added in the value of the hardware as has been conclusively held by the Apex Court in the case of *Hewlett Packard* (supra) where the value of the laptop was arrived at by excluding the value of the software. The question of invoking Rule 9(1)(c) of the Customs Valuation Rules, 1988 does not arise firstly for the reason that this is a new ground, which cannot be taken in the assessee's appeal. Besides, we are in agreement with the appellant's view that licence relates to software to which alone the value of the licence, if at all, can be added."

8. Similar issue came up before the Tribunal in the case of Manjit Singh Vs CC [2015(323)ELT 377 (Tri-Mum)] wherein the appellant therein was alleged to have split the price artificially for software and the telecom equipment in order to evade duty by not including the value of software though both were imported together. In that case also, the Tribunal held in favour of the appellant therein relying upon the judgement of the Tribunal in the case of Vodafone Essar Gujarat Ltd (supra). In the case in hand it is undisputed that software imported is in relation to the software which is embedded in the equipment and this software is used for exporting certain controlling ....in the equipment. We are of the view that separate sale of hardware and software thereof is

not the criteria for determining whether the price of software is to be included in the price of hardware or otherwise. This ratio flows from the judgement of the Apex Court in the case of Hewlett Packard (India) Sales Pvt Ltd [2007(215)ELT 484 (S.C.). In view of the foregoing judicial interpretation of the issue involved, we hold that the demand confirmed by the adjudicating authority by including the value of the software is unsustainable and liable to be set aside and we do so. Accordingly, the demand is set aside. Consequentially interest liability and penalty also set aside.

9. Since we have set aside the demands on merits itself, appeal filed by the Revenue being in connection with the penalty imposed also stands disposed of as infructuous.

10. Appeal filed by the appellant importer is allowed and Revenue's appeal is rejected.

(Order pronounced and dictated in open court)

C. J. MATHEW
MEMBER (TECHNICAL)

M.V.RAVINDRAN
MEMBER (JUDICIAL)

Neela Reddy