

(2014) 03 MAD CK 0212

In the Madras High Court

Case No : Civil Misc. Appeal Nos. 1013 and 1014 of 2014 and M.P. No. 1 of 2014

Aircel Cellular Ltd.

APPELLANT

Vs

Commr. of Cus. (Airport and Air Cargo)

RESPONDENT

Date of Decision : 21-03-2014

Acts Referred:

Citation : (2014) 304 ELT 655 : (2015) 31 GSTR 15

Hon'ble Judges : T.S. Sivagnanam, J;Chitra Venkataraman, J

Bench : Division Bench

Judgement

T.S. Sivagnanam, J.—These appeals by the assesseees are directed against the common order passed by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) in Miscellaneous Order Nos. 40351 and 40354 of 2014, dated 4-2-2014 2014 (304) E.L.T. 116 (Tribunal). By the said order, the Tribunal directed the assesseees to pre-deposit in the case of Aircel Cellular Ltd., a sum of Rs. 10,21,25,614/- and in the case of Aircel Ltd., a sum of Rs. 24,67,77,929/- as condition precedent for entertaining the appeals. The assesseees were granted eight weeks" time to make such deposit. The assesseees are providers of mobile telecom services and they imported certain equipments and software for running such equipments. The equipments, which were imported by the assesseees are particularly classified into four categories viz., (i) Mobile Switching Centre (MSC), (ii) Base Station Controller (BSC), (iii) Base Transceiver Station (BTS) and (iv) parts of the above equipment classifiable under Chapter Heading 85.25. The aforesaid first three equipments needed software for its functioning and such software was preloaded in the equipment. The assessee also imported media said to contain such software, in some cases in the same consignment as the equipment and in some cases in separate consignments. The assessee did not furnish separate values for each equipment and each software. It is to be noted that at the relevant point of time, the computer software was exempted from customs duty. Therefore, the assessee did not pay any customs duty on the value said to be that for the software and paid customs duty as applicable for the value declared to be that of the hardware. After the goods were cleared, the

Revenue on intelligence obtained certain information stating that the equipment that had been cleared was actually preloaded with the software having nature of embedded software and the software imported separately was only for the purpose of declaring the value of the software. Therefore, the Revenue contended that the separate import of software is a dummy transaction and that the value of the equipment should have been assessed by including the value of software and duty on the combination of the software and hardware should have been paid at the rate applicable to hardware.

2. Show cause notices were issued alleging that there was mis-declaration and the goods appear to be liable to confiscation and duty. After affording an opportunity to the assessee, the show cause notices were adjudicated and the duty was demanded as mentioned supra along with penalty equivalent to the amount of duty.

3. Aggrieved by the same, the assessee preferred appeals before the Tribunal along with the application for stay and for waiver of the pre-deposit. In the application for stay, the assessee contended that they are seeking exclusion of value of hard disk drive on which MSC, BSC is loaded or the value of the flash disk drive on which BTS software is loaded. However, the values of the hard disk drive and flash drive have already been included in the value of the hardware declared by the assessee and the assessee are only seeking exclusion of the value of the software that is pre-loaded as well as imported separately in CDs/ODs on payment of license fees. Further, it was contended that there was no evidence available before the Commissioner that the flash drive/EEPROM resides in the motherboard and that the assessee has demonstrated that the flash drive is removable in nature and the software residing therein is easily erased and/or upgraded and such a flash drive, which is easily removable and upgradable cannot form part of the motherboard and therefore, the assessee sought to distinguish the decision of the Hon'ble Supreme Court in the case of Anjaleem Enterprises Pvt. Ltd. Vs. Commissioner of Central Excise, Ahmedabad, . Further it was contended that insofar as MSC and BSC are concerned wherein the software admittedly resides in the hard disc drive, the Commissioner failed to take note of this crucial fact.

4. An alternate submission was made that even assuming that irrespective of the nature of the software contained in the flash memory card, its value is liable to be included, then only the value of BTS software can be included since only BTS software resides in flash memory and MSC and BSC are loaded onto the hard disk drive and not on flash drive/EEPROM and hence the value of the MSC and BSC software cannot be included in the value of the hardware. Accordingly, the assessee contended that the demand of duty can only be sustained for the BTS software and has to be dropped with respect to MSC and BSC software. Various other grounds were also raised as regards the invocation of the extended period of limitation as to whether penalty can be imposed in the case and whether the assessee were eligible to avail the exemption Notification No. 16/2000-Cus. (S.

No. 261), 17/2001-Cus. (S. No. 285) and 21/2002-Cus. (S. No. 157). The assessee also enclosed the balance sheet for the years ending 31-3-2012 and 31-3-2013 to explain their financial position.

5. Before the Tribunal, the assessee reiterated the contentions raised in the memorandum of appeal as well as in the application for stay and waiver of pre-deposit. It was contended that in respect of similar import in the case of Vodafone Essar Gujarat Ltd. v. Commissioner of Customs - 2009 (237) E.L.T. 458 (Tri.-Mumbai) the Tribunal held that the contention of the Revenue that the value of the software should be clubbed with the value of the hardware and charged to duty at the rate applicable to hardware was not sustainable. However, the Bangalore Bench of the Tribunal in the case of Bharti Airtel Ltd. v. Commissioner of Customs - 2012 (286) E.L.T. 270 (Tri.-Bang.) took a diametrically opposite view without referring the matter to a Larger Bench of the Tribunal. Therefore, it was contended on behalf of the assessee that the decision in the case of Bharti Airtel Ltd. (cited supra) was per incuriam inasmuch as it did not consider the decision of the Larger Bench of the Tribunal in the case of Digital Equipment (India) Ltd. v. Collector of Central Excise - 1997 (70) ECR 326 (Tri.-LB). Further the assessee sought to distinguish the decision in the case of Bharti Airtel Ltd. (cited supra) on the ground that the Tribunal ignored its decision in Vodafone Essar (cited supra). Further, it is submitted that the Tribunal in the case of Bharti Airtel Ltd. is not correct in relying upon the decision in the case of Anjaleem Enterprises Ltd. (cited supra). Further it was contended that compact discs or optical discs containing the software were imported and these physical imports were totally ignored by the Department and the Department sought to include the value of the software in the value of the hardware. Further it was submitted that when an intangible item was loaded in a tangible medium it is to be treated as separate goods with separate identity with separate value and by taking note of Note 6 of Chapter 85, there is no way in which the value of the software can be considered as that of the hardware. With the above contentions and after relying upon several other decisions of the Hon'ble Supreme Court and that of the Tribunal the assessee sought for complete waiver of pre-deposit and stay of the demand.

6. The Revenue resisted the claim of the assessee by contending that the dispute involved is about the valuation of goods rather than classification and there were no separate existence for software for which huge value has been declared and exemption from customs duly claimed. Further it was contended that the software in question was not just pre-loaded into the equipment but it formed part of the firmware of the equipment and thus an integral part of the hardware and there was no separate identity for the software and such a situation was not covered by Note 6 of Chapter 85 as it stood at the relevant point of time. Further, reliance was placed on the decision of the Hon'ble Apex Court in the case of Anjaleem Enterprises (cited supra), which was totally against the assessee. Further the Revenue contended that when the case of Vodafone Essar was argued before the Tribunal the decision of the Supreme Court in

Anjaleem Enterprises was not placed before the Tribunal. It was also submitted that the decision of the Tribunal in the case of Bharti Airtel, which is now the subject matter of appeal before the Hon''ble Supreme Court, the Hon''ble Supreme Court did not grant any stay and ordered Bharti Airtel to make the deposit of the duty amount demanded and therefore the Revenue insisted that the same treatment should be given to the assessee on hand and the Revenue sought to compare the facts of the present case with the facts of Bharti Airtel (2012 (286) E.L.T. A175 (S.C.)).

7. The Tribunal after considering the contentions raised on either side was of the prima facie view that the assessee did not disclose that the software was pre-loaded in the system. Further there was an attempt by the assessee to show separate import of software in media when such software was not put to use. So prima facie, the Tribunal found that the argument of the Revenue is acceptable. Therefore, the Tribunal taking note of the decision of the Hon''ble Apex Court in the case of Bharti Airtel directed the assessee''s herein to deposit the entire duty amount.

8. Aggrieved by the same, the assessee''s are on appeal before this Court and seek admission of the appeals by raising the following substantial questions of law:

(i) Whether the Hon''ble Tribunal erred in ordering pre-deposit of the entire duty without properly appreciating the core questions involved?

(ii) Whether the Tribunal was correct in not holding that on application of Note 6 to Chapter 85, the hardware and the software will be classifiable as two different commodities particularly in view of the decisions of Hon''ble Supreme Court in CCE v. Acer India Ltd. and CC v. Barbership Management (I) Pvt. Ltd., irrespective of whether the software was pre-loaded or not, so long as the software was presented separately in a media specified in heading 8523?

(iii) Whether the Hon''ble Tribunal was correct in proceeding on the assumption based on the Order-in-Original that the software was embedded software by ignoring the reply and appeal memorandum and expert evidences filed by the appellant at various stages?

(iv) Whether the Hon''ble Tribunal was correct in not following CCE v. Acer India Ltd., and in following Anjaleem Enterprises P. Ltd. v. CC when the software in the present case was loaded only on the nonvolatile storage device and not on the EPROM or IC?

(v) Whether the Hon''ble Tribunal has erred in holding that the extended period of limitation was applicable when the question involved is a question of law involving interpretation of Chapter Note 6 to Chapter 85 as interpreted by the Larger Bench of Hon''ble Supreme Court in assessee''s favour?

9. Shri Lakshmi Kumaran, learned counsel appearing for the assessee''s made elaborate submission about the nature of the product, which was imported and

the use, which has to be put into. Learned Counsel submitted when the assessee's case was taken up for consideration, the Tribunal considering the divergent views rendered by it in the case of Vodafone Essar and in the case of Bharti Airtel ought to have referred the matter to a Larger Bench for consideration but without resorting to such procedure the Tribunal had ordered pre-deposit of the demand. Therefore the case calls for total stay of the demand. It is further submitted that the core issue is on what media is the software loaded and if the media is classifiable under Chapter Tariff Heading 8523, then the software is also classifiable under Chapter Tariff Heading 8523 by virtue of Note 6 to Chapter 85 and the media is classifiable under Chapter Tariff Heading 8542 then the software along with the media is classifiable under Chapter Tariff Heading 8542 by virtue of Note 5 to Chapter 85. Further, the learned Counsel sought to distinguish the case of Bharti Airtel on facts and as to how the decision of the Hon''ble Apex Court in the case of Anjaleem Enterprises could not be applied to the facts and circumstances of the present case.

10. We have heard Mohana Murali, learned Standing Counsel appearing on behalf of the Revenue on the above submission.

11. After hearing, learned counsel for the parties and perusing the materials placed on record the legal issue to be decided is as to whether the case of the assessee is one similar to the case of Bharti Airtel or that of Vodafone Essar Limited and whether the same has to be considered only at the time of final hearing of the appeal before the Tribunal. It is seen that there were two divergent views of the Tribunal in the case of Vodafone Essar Limited and in the case of Bharti Airtel and that the assessee has placed materials before the Tribunal to distinguish the decision in the case of Bharti Airtel on facts and with regard to the nature of software imported. If the Tribunal did not agree with the assessee and was inclined to refuse to follow the decision in Bharti Airtel the proper procedure for the Tribunal is to refer the matter to the Larger Bench.

12. Learned counsel for the assessee submitted that in any event, the issue is before the Hon''ble Supreme Court and therefore, the Tribunal ought to have placed the matter before the Larger Bench and taken a decision in the matter. As pointed out earlier this is a factual issue, which has to be adjudicated at the time of final hearing of the appeal by the Tribunal.

13. As regards the nature of software, which was imported and to whether the assessee had disclosed the same, we do not propose to venture into this aspect at this stage. All that is required to be seen is as to whether the assessee has made out a prima facie case for grant of complete waiver. On examination of the facts placed before the Tribunal and before this Court, we do not think that the assessee has made out a case for complete waiver of the pre-deposit and stay of the entire due. Nevertheless when there were two divergent views rendered by the Tribunal and the assessee had placed certain materials before the Tribunal to distinguish their case from that of the case of Bharti Airtel and supported by the decision of the Co-ordinate Bench of the Tribunal in the case of Vodafone

Essar, we are of the view that the assessee has made out a prima facie for at least partial waiver of the pre-deposit.

14. Considering the point raised and bearing in mind the interest of Revenue we deem it fit to direct the assessees to pay 50% of the demand of duty made, in each case, pending appeal before the Tribunal and the assessees are directed to deposit the same within a period of eight weeks from the date of receipt of a copy of this order. On such deposit being made, within the time stipulated there shall be a stay on the balance amount payable by the assessees. With the above direction, both these appeals are allowed in part. No costs. Consequently, the connected miscellaneous petitions are closed.