(2021) 10 CESTAT CK 0045

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 40249 Of 2013

Commissioner Of Central Excise — APPELLANT

Vs

M/s. Measurements And Controls India Limited — RESPONDENT

Date of Decision : 20-10-2021

Acts Referred:
Cenvat Credit Rules, 2004 — Rule 3(5), 15
Central Excise Tariff Act, 1985 — Chapter 85, Section XVI

Citation : (2021) 10 CESTAT CK 0045

Hon'ble Judges : Sulekha Beevi C.S., J;P. Anjani kumar, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. The Department has filed the above appeal aggrieved by the order passed by the Commissioner (Appeals) who has set aside the demand by holding that the value of software is not includible in the assessable value during clearances of telecom equipment.

2.1 The respondents viz. M/s. Measurements & Controls India Ltd. are engaged in the manufacture of telecommunication equipment falling under Chapter Heading 8517 of the First Schedule to the Central Excise Tariff Act, 1985. They also developed software falling under the erstwhile Tariff Heading 8524 at their Bangalore office, which were cleared by them along with the telecom equipment. On 30.03.2005, foreseeing price escalation of telecom equipment, the respondent requested for provisional assessment of telecom broadband systems along with spares meant for supply to M/s. ITI Ltd., Allahabad. Their request for provisional assessment was acceded to by the jurisdictional Assistant Commissioner, Cuddalore vide his letter dated 30.03.2005. The respondent cleared telecommunication equipment and spares during March 2005, August 2005 and January 2006 under provisional assessment. They also cleared software along with telecom equipment, which was imported / developed at their Bangalore office. The value of the software, which was supplied in CD ROMS separately, was declared in the invoice separately along with the value of the telecom equipment. The respondent paid Central Excise Duty on the value of telecom equipment only and did not pay Duty on the value of the software contending that no Duty is payable as the software falls under Tariff Heading 8524 (applicable till 31.12.2006) and later under Heading 8523 (with effect from 01.01.2007) and that such software was exempted under Serial Number 27 of Notification No. 06/2006-C.E. dated 01.03.2006, as amended.

2.2 At the time of finalization of provisional assessment, the Assistant Commissioner, Central Excise Division, Cuddalore entertained the view that the software supplied with the hardware (telecom equipment) was essential for the functioning of the equipment and therefore, the value of the software is includible in the assessable value of the hardware/telecom equipment. After due process of law, he finalized the provisional assessment vide Order-in-Original No. 27/2007 dated 27.07.2007 and demanded Duty of Rs.1,04,65,400/- as differential duty payable on the value of software supplied for the telecom equipment; demand of interest was also confirmed. Aggrieved by the above order, the respondent filed appeal number 142/2007 (P) dated 24.09.2007 before the Commissioner (Appeals).

3.1 Meanwhile, the respondents availed CENVAT Credit of the Duty paid on 38,971 numbers of imported ADSL modems amounting to Rs.59,89,661/-. Out of the above, the respondent cleared 38,400 modems on payment of Rs.35,36,526/- as Duty. The Department was of the view that the ADSL modems having been removed 'as such' without undergoing any process of manufacture, the respondent ought to have reversed the CENVAT Credit taken on the 38,400 modems amounting to Rs.59,01,988/- in terms of Rule 3(5) of the CENVAT Credit Rules, 2004.

3.2 A Show Cause Notice was issued proposing to recover the wrongly availed credit. The respondents contended that the impugned modems were still assessed provisionally since their offer for withdrawal of provisional assessment was not taken cognizance of by the concerned authority; that recovery, if any, could be made only after finalizing the provisional assessment. However, Order-in-Original No. 04/2007 dated 25.01.2007 was passed confirming the recovery of CENVAT Credit and also imposed equal penalty of Rs.23,65,462/- under Rule 15 of the CENVAT Credit Rules, 2004. Aggrieved by such order, the respondent filed appeal no. 44/2007 (P) dated 29.03.2007 before the Commissioner (Appeals).

4. The Commissioner (Appeals) vide common Orders-in-Appeal Nos. 31 & 32/2008 dated 25.03.2008 upheld the orders passed by the Original Authority. Against such order, the respondent preferred appeals before the Tribunal as appeal numbers E/246 & 247/2008, whereby the Tribunal vide Final Order Nos. 690 and 691 of 2008 dated 10.07.2008 set aside the order passed by the Commissioner (Appeals) and remanded the matter, directing the Commissioner (Appeals) to hear both the appeals together as they were inter-connected.

5. In de novo adjudication, the Commissioner (Appeals) along with the above two appeals, linked other two appeals where demand was confirmed for the period January 2007 vide Order-in-Original No. 19/2008 dated 29.08.2008 and also the demand confirmed for the period from July 2008 and September 2008 vide Order-in-Original No. 89/2010 dated 25.03.2010. Thus, common Order-in-Appeal Nos. 137 to 140/2012 (P) dated 17.10.2012 was passed by the Commissioner (Appeals).

6. The present appeal is filed by the Department aggrieved by the decision in respondent's appeal number 142/2007 (P) dated 24.09.2007 [renumbered as 166/2008 (P) dated 28.07.2008] by which the demand of Rs.1,04,65,400/- on the value of software was set aside. The period involved is from March 2005 to January 2006.

7.1 The Learned Authorized Representative Shri Arul C. Durairaj appearing for the Department reiterated the grounds-of-appeal. He asserted that the software supplied along with the hardware (telecom equipment) is integral and specific to the machine and necessary for its functioning and was generally non-interactive. That hardware cannot be used without the associated embedded software; the software is an intrinsic part of the hardware and these two cannot be separated. That the elementary management software is used for remote monitoring and managing the system from a centralized network management and that telecom system cannot be used continuously in the absence of the software.

7.2 It is submitted by him that the respondents had paid Duty only on the hardware and they did not discharge Duty on the value of the software, claiming exemption under Notification No. 06/2006-C.E. dated 01.03.2006. That it has to be noted that the COT (Central Office Terminal) and the RT (Remote Terminal) software are specific to the equipment and the hardware and software cannot be separately imported to the exclusion of the other. The broadband systems were fully tested at the respondent's factory in Puducherry and made ready for installation at site; there was no mention of loading the software at the customer's site in any of the sections of the installation manual.

7.3 Learned Authorized Representative for the Department submitted that the respondent has classified the software under Chapter Heading 8524 3111 and claimed them to be operational / application software. That as could be seen from the Supplementary Note to Chapter 85 for the purpose of Heading 8524, "Information Technology Software" means any representation of instructions, data, sound or image including source code and object code, recorded in a machine readable form and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine; that it is pertinent to note that automatic data processing machine is classifiable under Chapter Heading 8471 whereas the respondents have classified the hardware under Chapter Heading 8517. This being so, the software used cannot be classified under CTH 8524. That therefore, even if the software is treated as a separate part, as contended by the respondents, in terms of Section Note 2 to

Section XVI of the Central Excise Tariff Act, 1985, they have to be classified as parts of the goods under Chapter Heading 8517 only.

7.4.1 That on perusal of the purchase order filed by the customers viz. M/s. ITI Ltd., and other details, it is seen that a Digital Loop Carrier (DLC) is a telecommunication system that carries telephone signals from a central office to subscribers in the local loop using digital signals as the transport mechanism. That the DLC may be used to transport signals to and from the central office over digital high speed connections to a Remote Terminal. The Remote Terminal (RT) might be located at any distance from the Central Office. That the Central Office Terminal (COT) software provides additional facilities such as database of the customer profile, etc., remote monitoring of the COT hardware from the centralized management system and that the Remote Terminal (RT) software provides the remote monitoring of the COT hardware from the centralized management system and service provisioning details. That it can be seen that the Broadband DLC system had to work as a whole with the COT and RT with respective software for effective functioning of the system. It is also seen that the functions assigned to various software as additional functions are required to be performed by the Broadband DLC systems.

7.4.2 It is argued by him that the telecom equipment supplied by the respondent carries out more functions namely connectivity of broadband to subscribers, providing interfaces for forming Ethernet ring apart from the remote monitoring and ensuring proper functioning. He argued that the Commissioner (Appeals) has erred by holding that the said network management software developed by the respondent and supplied in CD ROMs was meant for limited functions of loading into the computer system to monitor the proper functioning of the system and for database management

7.5 He referred to the grounds-of-appeal and argued that the decision of the Hon'ble Supreme Court in the case of M/s. Anjaleem Enterprises Pvt. Ltd. v. Commissioner of C.Ex., Ahmedabad reported in 2006 (194) E.L.T. 129 (S.C.) would be applicable to the issue and the value of the software has to be included in the assessable value while clearing the finished products. In the said case, the Hon'ble Supreme Court held that the STD-PCO Unit (a telecom unit) is correctly classified under Tariff Item 8517 and that the value of software is includible in the assessable value of the unit.

7.6 Learned Authorized Representative for the Department submitted that software is an essential component of the COT and RT for making it operational and therefore, the software is an integral part of the unit and it serves the purpose of transmitting signals, establishing broadband connectivity, remote monitoring, etc., and that these software are essential for making the unit operational.

7.7 He submitted that the decision in the case of Commissioner of Central Excise, Puducherry v. M/s. Acer India Ltd. reported in 2004 (172) E.L.T. 289 (S.C.) does not apply to the facts of this case. In the said case, the decision was rendered where the facts reveal that the computer is complete without software whereas in the present case, the hardware cannot work without the software being loaded on them. He contended that the software is to be classified under CTH 8517 as they are an integral part of the hardware (telecom equipment) and the value of software is to be included in the assessable value of the finished products.

7.8 He prayed that the appeal may be allowed.

8.1 Learned Counsel Shri Raghavendra B. Hanjer appeared and argued for the respondent. He submitted that the respondent manufactured telecom transmission equipment and also developed software in their R&D unit at Bangalore. That they also imported software which is loaded into CD ROMs and sold along with telecom transmission equipment. The respondents paid Excise Duty on the hardware portion and claimed exemption on the value of the software vide Notification No. 06/2006-C.E. dated 01.03.2006. That the software was separately shown in their invoices. The software developed by the respondent in their R&D unit at Bangalore as well as the imported software are operational / application software which is loaded into CD ROMs and supplied separately along with the hardware. That an installation maintenance manual is also supplied by the respondent. In some cases, whenever the customers require testing before clearance of the goods, the software in CD ROM is uploaded into the hardware and tested for various parameters. He asserted that the software supplied in the CD ROMs is application / operational software and hence, the value of such software cannot be included in the value of the hardware.

8.2 Learned Counsel for the respondent submitted that Chapter Note 6 to Chapter 85 of the Central Excise Tariff Act, 1985 during the relevant period (prior to 01.01.2007) specifically provided that software falling under Chapter Heading 8523 or 8524 would be assessable to Duty only under that heading, though presented along with equipment falling under different heading. That hardware and software are different and distinct commodities which are recognized separately under the Central Excise statute and classified under different headings; hence, the question of inclusion of value of software in the assessable value of hardware does not arise. That mere loading of software before its clearance from the factory solely for the purpose of testing, that too at the specific instruction of few customers, cannot by itself be a ground for inclusion of value of software in the assessable value of hardware.

8.3 He placed reliance on the decision of the Hon'ble Apex Court in the case of M/s. Acer India Ltd. (supra). That the said decision has been consistently followed by various judicial fora as reported below:

(i) C.C.E., Pondicherry v. M/s. Acer India Ltd. [2004 (172) E.L.T. 289 (S.C.)];

(ii) C.C., Mumbai v. M/s. Datamatics Ltd. [2016 (206) E.L.T. 171 (Tri. - Mum.)];

(iii) M/s. HP India Pvt. Ltd. v. C.C.E., New Delhi [2006 (193) E.L.T. 490 (Tri. -

Del.)];

(iv) C.C., Mumbai v. M/s. HP India Ltd. [2006 (199) E.L.T. 317 (Tri. - Mum.)];

(v) M/s. Baghyanagar Metals ltd. v. C.C.E., Goa [2007 (210) E.L.T. 707 (Tri. - Mum.)];

(vi) M/s. Hewlett Packard India Sales Pvt. Ltd. v. C.C., Chennai [2006 (203) E.L.T. 477 (Tri. - Chennai)];

(vii) M/s. Ericson India Pvt. Ltd. v. C.C.E., Jaipur [2004 (169) E.L.T. 76 (Tri. - Del.)];

8.4 He submitted that the Commissioner (Appeals) has correctly appreciated the facts as well the law and followed the decision in the case of M/s. Acer India Ltd. (supra) to hold that the value of software is not includible in the value of hardware.

8.5 He prayed that the impugned order may be sustained.

9. Heard both sides.

10. The respondent-assessee had given a request for provisional assessment in March 2005 in respect of purchase orders of Broadband DLC systems for supply to M/s. ITI Ltd., Allahabad. The respondent was issued provisional assessment order approving the value of individual components. In paragraph 5 of the Order-in-Original No. 27/2007 dated 27.07.2007, it is noted by the Original Authority that the items, both hardware and software required for the Broadband DLC system for supply to the customer was classified under Chapter Heading 8517 by the Deputy Commissioner during provisional assessment. However, while clearing the goods, the assessee had classified the hardware parts under Tariff Item 8517 5050 whereas the Tariff Item number shown for software was 8524 3111. That the respondents paid Duty on the hardware parts alone and indicated that they were not liable to pay duty on the software parts claiming exemption under Central Excise Notification No. 06/2006 dated 01.03.2006.

11. The items supplied to M/s. ITI Ltd., Allahabad is Digital Loop Carrier (DLC) system and are classifiable under Tariff Item 8517 5050. The said Chapter Heading during the relevant period is reproduced below:

Tariff Item

Description of goods

Unit

Rate of duty

(1)

(2)

(3)

(4)

"8517

ELECTRICAL APPARATUS FOR LINE TELEPHONY OR LINE TELEGRAPHY, INCLUDING LINE TELEPHONE SETS WITH CORDLESS HANDSETS AND TELECOMMUNICATION APPARATUS FOR CARRIER-CURRENT LINE SYSTEMS OR FOR DIGITAL LINE SYSTEMS; VIDEOPHONES

- Telephone sets; videophones:

8517 11

-- Line telephone sets with cordless handsets

8517 11 10

--- Push button type

u

16%

8517 11 90

--- Other

u

16%

8517 19

-- Other

--- Telephone sets:

8517 19 11

---- Push Button type

u

16%

8517 19 12

---- Rotary dial type

u

16%

8517 19 19

---- Other

u

16%

8517 19 20

--- Videophones

u

16%

- Facsimile machines and teleprinters:

8517 21 00

-- Facsimile machines

u

16%

8517 22 00

-- Teleprinters

u

16%

8517 30 00

- Telephonic or telegraphic switching apparatus

u

16%

8517 50

- Other apparatus, for carrier-current line systems or for digital line systems:

8517 50 10

-- PLCC equipment

u

16%

8517 50 20

-- Voice frequency telegraphy

u

16%

8517 50 30

-- Modems (modulators-demodulators)

u

16%

8517 50 40

-- High bit rate digital subscriber line system (HDSL)

u

16%

8517 50 50

-- Digital loop carrier system (DLC)

u

16%

8517 50 60

-- Synchronous digital hierarchy system (SDH)

u

16%

8517 50 70

-- Multiplexer, statistical multiplexer ....."

u

16%

(Emphasis added)

12. The software is cleared along with hardware by indicating the Tariff Item number for software parts as 8524 3111. Chapter Heading 8524 deals with records, tapes and other recorded media for sound or other similarly recorded phenomena. The relevant portion of the Heading reads as under:

Tariff Item

Description of goods

Unit

Rate of duty

(1)

(2)

(3)

(4)

"8524

RECORDS, TAPES AND OTHER RECORDED MEDIA FOR SOUND OR OTHER SIMILARLY RECORDED PHENOMENA, INCLUDING MATRICES AND MASTERS FOR THE PRODUCTION OF RECORDS, BUT EXCLUDING PRODUCTS OF CHAPTER 37

8524 10

- Gramophone records:

8524 10 10

--- Learning aids, such as language records

u

16%

8524 10 90

--- Other

u

16%

- Discs for laser reading systems:

8524 31

-- For reproducing phenomena other than sound or image:

--- Software:

8524 31 11

---- Information Technology Software

u

Nil

8524 31 19

---- Other

u

Nil

8524 31 90

--- Other

....."

u

16%

(Emphasis added)

13. The period involved is from March 2005 to January 2006. It is pertinent to note that the said Chapter Heading 8524 has been omitted with effect from 01.01.2007.

14. In this context, it is also necessary to refer to Chapter Note 6 of Chapter 85 and the Supplementary Note to Chapter 85, which read as under:

" Chapter 85

Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles

NOTES

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6. Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, when they are presented with the apparatus for which they are intended.

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SUPPLEMENTARY NOTE

For the purposes of heading 8524, "Information Technology Software" means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine."

15. The respondent has developed the software in their R&D unit at Bangalore and also imported software. It is contended by them that it is operational / application software, which is loaded into CD ROMs and that thereafter the CD ROM is supplied separately along with an installation maintenance manual. In the written submissions of the respondent, it is stated that whenever the customer requires testing before the clearance of the goods, the software in the CD ROM is

uploaded in the hardware and tested for various parameters.

16. As seen from the Order-in-Original dated 27.07.2007, in paragraph 7(i), the Original Authority has referred to the statement given by Shri P.N. Reddy, A.G.M. (Operations) of the respondent-company. It is stated by him that the CD is loaded into the servers located at their Puducherry unit for transferring the software to the hardware parts. That at the time of testing, the software is loaded into the network management system-hardware through Ethernet cable and tested for various parameters to find out whether the equipment are functioning satisfactorily. This process is same for both imported and indigenous software. It has also been clarified by him that all the software required for the COT, RT, NMS, MTCE Spare and DSL modem CPE are loaded into the Network Management System and then loaded into the respective equipment / hardware through Ethernet cable to ensure that it is working satisfactorily. This is done at the Puducherry unit of the respondent for the convenience of the customer using the CD provided while dispatching the entire system.

17. The description of the goods in the provisional purchase order and final purchase order correspond to the following details:

COT without CPE

COT HW

Central Office Terminal (Hardware)

COT SW

Central Office Terminal (Software)

RT without CPE

RT HW

Remote Terminal (Hardware)

RT SW

Remote Terminal (Software)

NMS

NMS HW

Network Management System (Hardware)

NMS SW

Network ManagementSystem (Software)

Maintenance Spares

MTC SPR HW

Maintenance Spare (Hardware)

MTC SPR SW

Maintenance Spare(Software)

DSL Modem CPE

DSL Modem CPE HW

Digital System Line Modem Customer Premises Equipment Hardware

DSL Modem CPE SW

Digital System Line Modem Customer Premises Equipment Software

18. The respondents have also submitted a write-up on their finished products viz. Broadband DLC System (Hardware and Software), which is part of the Order-in-Original, which reads as under:

"WRITE-UP ON BROAD BAND DLC SYSTEMS (HARDWARE & SOFTWARE)

COT Hardware:

COT Hardware provides the following functionalities:

? DSALAM (to extend DSL lines to the connected subscriber) with 256 DSL lines capacity. The broadband connection is extended to the subscribers through these lines.

? Ethernet aggregation and switching to aggregate the DSLAM output

? Bandwidth control to control the bandwidth for every subscriber connection

? Provides interfaces for forming RPR (Resilient Packet Ring) Ethernet ring.

COT Software:

COT Software is provided in a CD. By loading this software into the COD hardware the following additional functionalities will be available.

? Data base of the customer profile, address, customer special privileges, customer connection location

? CDR (call data record) for billing generation

? Remote monitoring of the COT hardware from centralized management system

? Service provisioning details

RT Hardware:

RT Hardware provides the following functionalities:

? DSALAM (to extend DSL lines to the connected subscriber) with 128 DSL lines capacity. The broadband connection is extended to the subscribers through these lines.

? Ethernet aggregation and switching to aggregate the DSLAM output

? Provides interfaces for forming RPR (Resilient Packet Ring) Ethernet ring.

RT Software:

RT Software is provided in a CD. By loading the software into the RT hardware the following additional functionalities will be available.

? Remote monitoring of the COT hardware from centralized management system.

? Service provisioning details. "

19. In page 9 of the Order-in-Original dated 27.07.2007, the Original Authority has extracted a write-up on the Broadband DLC System (Hardware and Software). This write-up shows that the software provides only 'additional functionalities'. If the software is of such a nature that it provides only additional functionalities to the telecom equipment in question, the said software cannot be considered to be integral part of hardware and the value cannot be included in the assessable value of the telecom equipment / hardware.

20.1 The Commissioner (Appeals) has not gone into the details as to whether the software is only an operational / application software, as contended by the respondent, whether the software is an integral part of the telecom equipment/ hardware without which the telecom equipment cannot function. In paragraph 4.2 of the impugned order, it is merely stated that "the telecom equipment can function without the usage of said Network Management Software". This finding is not seen supported by discussion of necessary evidence.

20.2 If the software is operational / application software, the decision in M/s. Acer India Ltd. (supra) would apply and the value need not be included. If the software is integral to the hardware and the said equipment cannot function without the use of such software, the value of the software has to be included in the assessable value of the hardware and it is immaterial whether it is embedded/ etched software or not. The Commissioner (Appeals) has not considered in detail any of these facts with regard to the functionality of the software.

21. At the time of hearing, the Bench had directed the parties to furnish further details of the equipment as well as the software to understand the issue. However, both the parties were not able to furnish facts regarding the finished product. The description of the product in the form of brochures, pamphlets, photographs, etc., would help to bring out the nature of the software used in the telecom equipment.

22. Though the Department has put forward contentions explaining the function of COT, RT, NMS, etc., and argued that without the software the hardware cannot function, there is no reliable evidence placed before us by the Department to support the above arguments. On such score, we have no other option but to

remand the matter to the Adjudicating Authority. The matter is remanded to the Adjudicating Authority for reconsideration of the issue in the light of the above discussions.

23. In the result, the impugned order to the extent of setting aside the demand of Rs.1,04,65,400/- on the value of software, is remanded for fresh consideration.

24. The appeal is allowed by way of remand, as indicated above.

(Order pronounced in the open court on 20.10.2021)

