

(2012) 01 DEL CK 0474
In the Delhi High Court
Case No : Cus. A.C. No. 3 of 2011

Commissioner of Cus.

APPELLANT

Vs

Siemens Public Communications Network Ltd.

RESPONDENT

Date of Decision : 04-01-2012

Acts Referred:

Customs Act, 1962 — Section 130A

Citation : (2012) 283 ELT 12

Hon'ble Judges : Sanjiv Khanna, J;R.V. Easwar, J

Bench : Division Bench

Advocate : A.S. Chandhiok, ASG with Kamal Nijhawan, Ms. Kumud Nijhawan, Jitender Kumar and Sumit Gaur, for the Appellant; Pradeep K. Bakshi and Rajat Navet, for the Respondent

Final Decision : Dismissed

Judgement

1. The present appeal by Revenue u/s 130A of the Customs Act, 1962 (Act, for short) is directed against the order dated 7th July, 2010 [2010 (258) E.L.T. 435 (Tri. - Del.)] passed by the Customs Excise & Service Tax Appellate Tribunal (for short, the Tribunal) in Appeal No. 347/2005-CU(DB) in the case of Siemens Public Communications Networks Pvt. Ltd., the respondent-assessee herein. The question raised in the present appeal is whether the software imported by the respondent-assessee is exempt being computer software. There is no dispute that computer software is exempt and not chargeable to duty. With effect from 11th February, 1998 vide amending Notification No. 3/98, an explanation was added to define the term "Computer Software". The said explanation reads as under :-

Explanation : "Computer 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 falling under Heading No. 84.71 but does not include software required for operation of

any machine performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine.

2. One day before the aforesaid explanation was added, the Ministry of Finance, Department of Revenue issued Circular No. 7/1998, in which it was stated as under :-

"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. However, it is to be appreciated the exemption under S. No. 173 of Notification No. 11/97-Customs is to "computer software" and not to software in general and is to be interpreted strictly on its own terms.

4. Having regard to the discussion above, it is clarified that for the purposes of the exemption under S. No. 173 of Notification No. 11/97-Cus., dated 1-3-1997, "computer software" is to be taken to mean 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 falling under Heading 84.71. Thus, the said exemption will not cover software required for operation of any machine performing a specific function other than data processing and incorporating or working in conjuncture with an automatic data processing machine. More specifically, software of telecom, medical or other applications is not eligible for exemption from duty. However, software containing encyclopedia, games, books, etc. will be eligible for the exemption wherever they satisfy the interactively criterion.

3. The import in question, it is accepted, was in October, 1997, which was before the amending Notification No. 3/1998, dated 11th February, 1998.

4. Similar controversy had arisen before the Tribunal in several other cases. It was noticed that there were conflicting decisions and accordingly the matter was referred to a Larger Bench. The decision of the Larger Bench in the case of Commissioner of Customs (Airport), Chennai v. Skycell Communications Ltd. is reported in 2008 (232) E.L.T. 434 (Tri.-LB). After examining the controversy, the Larger Bench of the Tribunal has held as under :-

The Explanation, which was added to the description of goods in Col. No. 3 against Sl. No. 173 of the Table annexed to Notification No. 11/97-Cus. Had the effect of imparting a technical meaning to the expression "computer software", according to which a software required for operation of any machine performing a specific function (other than data processing) and incorporating or working in conjunction with an automatic data processing machine would stay outside of ambit of "computer software". Such a restriction prejudicial to importers of computer software cannot be given retrospective effect. In any case, this

restriction, which was introduced only on 11-2-1998, did not affect the software imported by the respondents prior to that date.

5. In the said order reference is also made to several other decisions, which were challenged by way of civil appeal by the Revenue before the Supreme Court, but the appeals were dismissed. For the sake of convenience, the said paragraph is reproduced below :-

The learned counsel for the respondents, on the other hand, submitted that the expression "computer software" was correctly interpreted by the Tribunal in BPL Mobile Communications Ltd. v. Commissioner - 2000 (126) E.L.T. 986 (T) - 2000 (40) RLT 249 (CEGAT), which decision was followed in Usha Martin Telekom Limited v. Commissioner [2001 (138) E.L.T. 839 (T) = 2001 (45) RLT 1054 (CEGAT-Kol.)] and BPL Telecom Ltd. v. Commissioner [2002 (142) E.L.T. 258 (Tri.-Bang.)]. The learned Counsel further pointed out that the Civil Appeals filed by the Department against the Tribunal's orders in all the three cases were dismissed by the Supreme Court.

6. It may be, however, noted that the decisions mentioned in the above paragraph were in respect of imports prior to notification dated 11th February, 1998. It is, therefore, clear that prior to notification dated 11th February, 1998, in several decisions it was held that software imported by telecom operators was covered by the term "computer software" and these decisions were not upset and set aside by the Supreme Court. It was in these circumstances that the Revenue decided to interpret and has issued amending Notification No. 3/1998 dated 11th February, 1998. The Larger Bench of the Tribunal after examining the controversy came to the conclusion that the amending notification should not be given retrospective effect. We have already noticed and quoted the circular dated 10th February, 1998. The circular in question has to be read along with amending notification No. 3/1998 dated 11th February, 1998. Learned counsel for the respondent has submitted that the decision in the case of Skycell Communications Ltd. (supra) has not been challenged by the Revenue. Mr. A.S. Chandhiok, Additional Solicitor General states that he has no information in this regard. In view of the aforesaid position, we are not inclined to admit the present appeal and the same is accordingly dismissed without any order as to costs.