

(2014) 09 CESTAT CK 0004

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 652 Of 2007

Commissioner of Customs, New Delhi

APPELLANT

Vs

M/s Himachal Futuristic Communication Ltd.

RESPONDENT

Date of Decision : 10-09-2014

Acts Referred:

Citation : (2014) 09 CESTAT CK 0004

Hon'ble Judges : Archana Wadhwa, J;Rakesh Kumar, Technical Member

Bench : Division Bench

Advocate : Suchitra Sharma, L.P. Asthana, Tuhina Sinha

Final Decision : Dismissed

Judgement

1. The facts leading to filing of this appeal by Revenue are, in brief, as under.

1.1 The respondent are manufacturer of telecommunication equipment. They imported a software on CDS declared as "Customized Software -

Loader software for cellular phone (Airtone 800 IX-III) [1 CD for 10,000 users]. The goods were imported from China with declared assessable

value of Rs.55,53,775/-. The respondent claimed the benefit of exemption Notification No. 21/02-CUS (Sl. No. 157) and No. 6/06-CEX (Sl. No. 27)

on the basis that the goods imported are customized software, as both these exemption notifications exempt the customized software from the whole

of the duty of customs and the duty of Central Excise. Here it may be mentioned that software imported on media attracts customs duty under sub-

heading 85249112 of the custom tariff and same software loaded on CD or other media would attract Central Excise duty under heading 8524 of the

Central Excise Tariff. The goods were examined on first check basis and the concerned customs officers were of the view that the software loaded

on the CDs is not a customized software, as the software is to be used by nodal maintenance centres, franchise maintenance centres, channel partner

and to some extent by the end users. Accordingly, the Jurisdictional Assistant Commissioner vide order-in-original dated 08/06/06 held that the

software imported is not customized software and accordingly is not eligible for the exemption Notification No. 21/02-CUS (Sl. No. 157) and 6/06-

CEX (Sl. No. 27).

1.2 On appeal being filed to Commissioner (Appeals) against this order, the Commissioner (Appeals) vide order-in-appeal dated 28/06/07 set aside the

Assistant Commissioner's order and allowed the appeal holding that the software, in question, is customized software and that it does not conform

to the definition of "canned software" as held by the Apex court judgment in the case of Tata Consultancy Services vs. State of Andhra Pradesh

reported in 2004 (178) E.L.T. 22 (S.C.). Against this order of the Commissioner (Appeals), this appeal has been filed by the Revenue.

2. Heard both the sides.

3. Ms. Suchitra Sharma, the learned Jt. CDR, assailed the impugned order by reiterating the grounds of appeal and pleaded that -

(a) The software, in question, has been developed to meet the requirement of a variety of users and is intended or is capable of being sold off the shelf

like Window version, which is developed for Microsoft, but is sold off the shelf, as it is incorporated in the personal computer ;

(b) the software, in question, is designed for a particular hardware which may get loaded on the hardware itself and the hardware, in turn, shall be sold

to various category of end users and, therefore, the subject software is designed to meet the requirement of a number of users and not the

requirement of a specific user or a client ;

(c) the description in the bill of entry that one CD is for 10,000 user indicates that the software is meant for multiple users ; and

(d) the purchase order of the BSNL was for supply of 2,62,514 no. of WLL CDMA 2000IX integrated FWT's and 500 network interface cards

and the subject order is not for purchase of software and rather it says that FWT's supplied should have the latest version of software which

means that only hardware is to be supplied and, therefore, the description on the bill of entry that one CD is for 10,000 users, indicates that the

software is meant for multiple users.

4. Shri L.P. Asthana and Ms. Tuhina Sinha, Advocates, the learned Counsels for the respondent, defended the impugned order by reiterating the

findings of the Commissioner (Appeals) and emphasized that the software, in question, has been specifically developed for BSNL in respect of their

CDMA service and the same cannot be used by other CDMA service providers, that the respondent received an order from BSNL against tender

No. MM/SW/072004/000277 dated 17/07/04 for the software, in question, and the respondent, in turn, placed the order with the supplier in China M/s

Guangzhou Jinpeng Telecommunication Industrial Company Ltd., Guangzhou, China to develop the loader software designed as per the specifications

given by the BSNL, that the BSNL had specifically mentioned in the supply order that the supplier shall ensure that WLL terminal being supplied are

inter-operable and backward compatible to existing IS 95A WLL CDMA Systems and WLL CDMA 2000IX systems being deployed in the BSNL

network, that the respondent have also submitted a certificate from the foreign supplier certifying that the software, in question, was specifically

designed by the foreign supplier for the specific requirements of the BSNL, that the respondent have also produced a catalogue in respect of this

software from which it is clear that the software is customized software developed for performing certain specific functions in the FWTs supplied by

the foreign supplier and the opening para of the catalogue states that the software is a special interactive software tool, which is specifically developed

for use of the manufacturers and operators to do programming of wireless phone before delivery to the customers, that the software is to be used to

provide the trouble shooting of wireless phones based on CDMA, set and change the parameters, down load new software, check calibration data etc.

and this shows that the software has been developed specifically for the respondent and that in view of the above, there is no infirmity in the impugned order.

5. We have considered the submissions from both the sides and perused the records.

6. The point of dispute in this case is as to whether the software, in question, imported on CDs by the respondent is eligible for exemption under

Notification No. 21/02-CUS and 6/06-CEX. Both these notifications exempt from

the whole of basic customs duty and whole of the duty of excise,
the customized software, that is to say, any custom design software developed for a specific user or client, other than packaged and canned software.

As per the explanation in the notifications, a "packaged software" or "canned software" means a software developed to meet the needs of a variety of users. It is seen that the respondent have produced a certificate from the suppliers certifying that the software, in question, supplied to the respondent is a software design specifically for them to meet the software requirements of fixed wireless phones/terminals supplied by the respondent against order on them from BSNL against tender No. MM/SW/072004/000277 dated 17/07/04. It is also seen that opening para in the catalogue states that software is a subject interactive software, which is specifically developed for use of the manufacturers and operators to do the programming of wireless phone before delivery to the customers. Thus it is BSNL who is using the software for specific purposes and the same is loaded at the BSNL's Centres, from where the value added service is provided to the subscribers after programming their phone. The subscriber's phones are programmed to be compatible with the software used by the BSNL. From supplier's catalogue and supplier's certificate, it is clear that the software has been specifically developed for the BSNL and as such the same has to be treated as a customized software. In view of this, we do not find any infirmity in the impugned order. The Revenue's appeal is dismissed.

(Operative part of the order pronounced in the open court.)