

Customs & Excise: Value of Embedded Software includible for Duty: CESTAT LB

Surana Telecom Ltd. and Bhagyanagar Metals Ltd. imported Fixed Wireless Terminals (FWT), a type of Cellular phones which are operated under CDMA Technology. These imports were from M/s L.G. Electronics, Korea and M/s Huawei Technologies Co. Ltd., China. Alongwith these phones the appellants also imported CD ROMS and filed B/Es separately for phones and CD-ROMS claiming phones as "hardware portion" of FWTs and CD-ROMS as "Software Portion" of the said FWTs.

A dispute arose on the nature of goods imported, mainly with reference to split up of hardware and software portions of FWTs for assessment purposes. Customs duty is payable on phones but exempted on imported software. Revenue conducted detailed follow up investigations and came to the conclusion that the 'Software' claimed to have been contained in the CD ROMS are already pre-loaded in the phones and there is no software as goods to be assessed separately for claiming exemption.

The issue for decision by the Larger Bench is whether there are two distinct goods - hardware part of fixed wireless phone and the software part of the said phone - for Customs duty assessment. In other words, is there, as claimed by the appellants, identifiable goods as software in a media falling under Heading 85.24 of the Customs Tariff, in the imports by the appellants for the purpose of Customs Valuation and assessment.

No Separate Software:

The Larger Bench found that there is no separate media containing software that can be presented with the phone and classified under Tariff Heading 85.24. In other words, there are no two separate, distinct goods for assessment, namely (a) CDMA Fixed Wireless Telephone and (b) a media containing software presented with such telephone. The Bench further noted that the claim of the appellant all along, till the current proceedings, is that the software is contained in CD-ROM presented separately along the FWT cell phones at the time of import. Now, for the first time they have made this claim that the memory unit is in built and part of the main circuit inside the phone; should be considered as a media for classification and consequently eligible for exemption available to software. The technical literature, nature of the said memory unit and nature of the software contained in the memory unit clearly rule out the possibility of calling this part of the printed circuit board separately as a media for software. It is also not the claim of the appellant that such media carrying the software for FWT phones is anywhere available separately for trading.

It is the clearly admitted fact that the software/data loaded on the Flash memory is specific to the user/customer. It contains caller ID and caller block software. The phones imported have embedded software with required parameters for its functioning.

After close analysis of the ratio and finding in the several precedents, the Tribunal came to the compelling conclusion that in the present case, the Fixed Wireless phones as imported require to be classified and assessed as phones with no segregation of value assignable to the software separately, as claimed by the importers.

Interest Liability

The appellants contested the interest liability in the present case. The imports took place in 2003-2004. The goods were assessed provisionally to duty and were allowed to be cleared in terms of Section 18 of the Customs Act, 1962 on execution of PD Bonds. Counsel for the appellants emphasized that prior to 13/7/2006, there was no provision authorizing collection of interest on differential duty arising on finalization of a provisional assessment. Held: Since, at the time of resorting to the provisional assessment there was no statutory provision authorizing imposing of interest on the differential duty, (the provision which was introduced w.e.f. 13/07/2006) there is no interest liability in these cases.

Redemption Fine

Counsel pleaded that the fine is payable, if at all, only on redemption of goods. Here there is neither a seizure nor provisional release under bond and, hence, the question of payment of redemption fine either to release the goods or in terms of the bond does not arise. Held: there can be no redemption fine in the absence of any seizure or provisional release of such seized goods under proper bond. In the present case in the absence of such events, redemption fine imposed is not sustainable.

Penalties

The person who is liable to pay duty as determined under sub-Section (8) of Section 28 shall be liable to pay penalty equal to the duty so determined. It is found in the present case, the duty has not been determined under Section 28 of the Customs Act. The differential duty was determined in terms of Section 14 (1) [without any reference to Section 28] of the Customs Act for which invoking Section 114A is not legally tenable. As such, considering that the main appellants are held to be not liable for penalty in view of the above legal position, held that the individual appellants are also not liable for penalty.

Decision: Held

- The impugned orders upheld in so far as they relate to valuation and assessment of imported Fixed Wireless Telephones (FWT) considering them as single goods for assessment without any segregation of value for software;
- The appellant/assessee are not liable to interest, redemption fine and penalties; and
- Penalties on other appellants (individuals and the exporting companies) are also found unsustainable.