Supreme Court of India
M/S O.R.G. Systems, Baroda vs Collector Of Central Excise, ... on 21 July, 1998
Author: K Venkataswami
Bench: Sujata V. Manohar, K. Venkataswami

PETITIONER:
M/S O.R.G. SYSTEMS, BARODA

Vs.

RESPONDENT:
COLLECTOR OF CENTRAL EXCISE, VADODARA

DATE OF JUDGMENT: 21/07/1998

BENCH:
SUJATA V. MANOHAR, K. VENKATASWAMI

ACT:

HEADNOTE:

JUDGMENT:

J U D G E M E N T K. VENKATASWAMI, J.

These two appeals arise out of a common order dated 5.7.94 of the Customs Excise & Gold (Control) Appellate Tribunal, New Delhi (hereinafter called "the Tribunal"). The issues that arise out of the order of the Tribunal under appeal are no longer res integra. The decision of this Court in PSI Data Systems Ltd. Vs. Collector of Central Excise [1997 (89) E.L.T. 3 (S.C.)] settles the controversial issues raised in these appeals.

Briefly stated the facts are the following :- The appellant is engaged in the manufacture of Computers falling under Tariff Item 33-DD from May, 1982 when they got the necessary licence. Prior to May, 1982 the appellant got the Computers manufactured by (a) M/s Orbit Electronics (for short 'Orbit') by supplying raw materials and also by supplying specifications and designs. The computers so manufactured by the appellant, as stated above, as well as those manufactured by the appellant after May, 1982 were marketed by M/s Adprint Services Limited, baroda (for short 'Adprint'). At this stage, it is necessary to make it clear that the Revenue seriously claimed all through that DSI and Orbit were the dummy units of the appellant. The Tribunal, as final fact finding authority, has held that they ere not dummy units. However, the contention of the appellant that Adprint is an independent concern, was not accepted by the Tribunal and the Tribunal has

given a clear finding that Adprint is a dummy unit of the appellant. We proceed on the basis of these findings given by the Tribunal as they are binding on the parties.

The principal issues in controversy are: (a) whether the Computers manufactured and cleared by the DSI and Orbit are liable to be treated as the Computers manufactured and cleared by the appellant and, therefore, liable for excise duty at the hands of the Appellant; (b) whether the value of peripheral devices and/or Computer systems sold by Adprint along with Computers and includible in the assessable value of the Computer; and (c) whether the amount or value of the service charges recovered by the appellant under service contracts can be included in the assessable value of the Computer. The other subsidiary issues are: (1) in the event of this Court coming to the conclusion that the peripheral devices and the amount of service charges are includible in the assessable value of the Computer, then what is the correct amount that would be liable to be so included and (2) whether the penalty initially levied in a sum of Rs. 25 lacs and ultimately reduced by the Tribunal to Rs. 10 lacs, is sustainable in the facts and circumstances of the case.

The authorities, overruling the objections raised by the appellant, held that the Computers manufactured by DSI and Orbit must be deemed to have been manufactured by the appellant and as such liable for excise duty. It was also held that the value of peripherals and systems software supplied is includible in the value of the Computers. Likewise, the Revenue held that non-disclosure of the values of service charges, peripherals and systems software attracts levy of penalty. Accordingly the demand was raised against the appellant in a sum of Rs. 3, 32, 96,010.58 and a penalty of Rs. 25 lacs was also levied. Before the Tribunal, the appellant got some relief on duty part and penalty was reduced from Rs. 25 lacs to Rs. 10 lacs.

The Tribunal, after analysing the facts, held that the supply of raw materials alone does not make the appellant as manufacturer of the Computers factually manufactured by DSI and Orbit. However, the Tribunal was of the view that the supply of specifications and designs was actually at par with the supply of specific designs of a tailor made item and hence will constitute manufacture. On that basis, the Tribunal held that the case of supply of specifications and designs for Computers will amount to manufacture and price charged therefore shall be includible in the assessable value. Similarly, the Tribunal held that the vale of peripherals at the time of supply of computers would make the appellant as computer manufacturer as, according to the Tribunal, the supply of those peripherals and computer systems bring into existence a new product. The value of those supplies should also be included in the value of computer supplied. The Tribunal declined to accept the arguments of the appellant that the software was already burnt in the chips of the computer to make the computer complete and that the systems software and other peripherals are only additions to a computer that was complete even without those peripherals and systems software. The Tribunal relied on its own decision in PSI Data System for rejecting the case of the appellants, which has since been reversed by this Court in PSI's case (supra).

In these appeals, we heard arguments of counsel on both sides. Naturally, the learned counsel, Mr. Ganesh, appearing for the appellant, placed reliance on the judgment of this Court in PSI case (supra). This Court in PSI Data system's case considered identical issues and Bharucha, J., speaking for the Bench, held as follows :-

" The appellants before us have sold only a computer, or a computer along with software, and the software might have been imported or bought out. Some contracts in this behalf are lump-sum contracts and some are for the computer and the software separately. Sample contracts are on the record. Learned counsel for the appellants submitted that the test that had been applied by the Tribunal in the impugned judgements was erroneous. Our attention was drawn to the judgement of this Court in State of Uttar Pradesh V. M/s Kores (India) Limited - (1977) 1 SCR 837, where it was held that a typewriter ribbon was an accessory to a typewriter and not a part of the typewriter though it might not be possible to type out any matter on the typewriter without the ribbon. This Court quoted with approval the following observation of the High Court of Mysore in State of Mysore V. Kores (India) ltd.

"Whether a typewriter ribbon is a part of a typewriter is to be considered in the light of what is meant by a typewriter in the commercial sense. Typewriters are being sold in the market without the typewriter ribbons and therefore typewriter ribbon is not an essential part of a typewriter so as to attract tax as per Entry 18 of the Second Schedule to the Mysore Sales Tax Act, 1957."

On the same reasoning, it was submitted, the software that was sold by the appellants along with their computers was not an essential part of the computers. What a computer was had to be judged in the light of its commercial sense and, in that sense, the software was not understood to be a part of the Computer. Reference was made to Section 80 HHL of the Income Tax Act which provides for deduction of profits from export of "computer software". Reference was also made to the provisions of the Copyright Act, 1967, where a computer is defined as including any electronic or similar device having information processing capabilities and a computer programme is defined to mean a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result. interestingly, the copyright Act defines 'literary work ' to include computer programmes, tables and compilations including computer data bases. Reference was also made to the aforementioned contracts which indicate the distinction that buyers made between the computer and the software.

In the appeals of wipro Information Technology Limited and PSI Data Systems Limited , the charges for installation of the computer and the training of the purchaser's personnel to operate and maintain it were also included in the assessable value of the computer, and the argument that was advanced in respect of the value of the software was also advanced in respect of these charges.

Learned counsel for the respondent, fairly, did not dispute that the value of the software that the appellants might sell with their computers, if so ordered by the purchasers thereof, could not be included in the assessable value of the computers. He was, however, at pains to urge that this did not apply to the firm software that was

> etched into the computer; this is not even the appellant's case. In the first place, the Tribunal confused a computer system with a computer; what was being charged to excise duty was the computer.
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> Secondly, that a computer and its software are distinct and separate is clear, both as a matter of commercial parlance as also upon the material on record. A computer may not be capable of effective functioning unless loaded with software such as discs, floppies and C.D. rhoms, but that is not to say that these are part of the computer or to hold that, if they are sold along with the computer, their value must form part of the assessable value of the computer for the purposes of excise duty. To give an example, a cassette recorder will not function unless a cassette is inserted in it, but the two are well known and recognised to be different and distinct articles. The value of the cassette, if sold along with the cassette recorder, cannot be included in the assessable value of the cassette recorder. Just so, the value of software, if sold along with the computer, cannot be included in the assessable value of the computer for the purposes of excise duty.
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> Having regard to the view that we take, it becomes unnecessary to deal with the subsidiary arguments on behalf of the appellants and the intervenor, M/s Digital Equipment (India) Limited."

The above judgment of this Court completely answers the principal issues in controversy in favour of the appellant. In the case on hand, it cannot be disputed that the computers manufactured and supplied y Orbit, DSI or the appellant (from May, 1982 onwards) were complete computers, which had a Central processing Unit, with "etched-in" or "burnt-in" software, a key Board (input device) the monitor (output device) and Disc drives. The computers, as above, were cleared after complying with all requirements under the Excise Law and proper duty as computed was paid. The peripheral devices and other systems software were merely additional devices meant to increase the memory or storage capacity of the computers and other facilities. It is also not disputed by the Revenue that the peripheral devices were imported by the appellant and the appellant had paid counter-vailing duty on such imported peripherals. In the light of these facts, we have no difficulty to apply the ratio in the judgment of this court in PSI Data systems (supra) and grant relief to the appellant. The Tribunal itself has placed reliance on its earlier decision in PSI Data Systems, which has been reversed by this Court, as noticed above. Likewise, the value of service charges also cannot be included in the light of the ratio laid down by this Court in PSI Data Systems. The Tribunal went wrong in assuming that the appellant must have given warranty to its customers at the time of purchase of computers when it was the case of the appellant that no such warranty was given and no such case was specifically put forward in the show- cause notice.

For all these reasons, we do not think that we can accept the contentions to the contrary by the learned counsel appearing for the Revenue.

In the result, the appeals succeed and the impugned demand including the levy of penalty is set aside. The appeals are accordingly allowed with no order as to costs.