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CESTAT decision – Scope of the expression 'Customized Software'¹

Brief Facts

M/s Steag Encotec India Pvt. Ltd. ('Appellant') imported Performance Analysis and Diagnostic Optimization System ('PADO') software package and Boiler Performance Optimization System software package ('BPOS') vide four Bills of Entry for use in coal based power plants run by Bharat Heavy Electrical Ltd. ('BHEL'). The appellant claimed that the software so imported was for specific use by BHEL plants and that they had been customized to suit the requirements of BHEL. Based on this contention, the appellant treated the software as 'customized software.' The appellant claimed exemption from Additional Customs Duty and Education Cess, which are levied in lieu of Central Excise Duty at the time of importation of goods, vide in terms of Exemption Notification no. 6/2006-CE dated 01.03.2006 ('subject notification') wherein customized software is exempted from Central Excise Duty.

The Department's view was that the same is not a custom designed software and hence ineligible for the exemption under the subject notification was confirmed by the adjudicating authority and upheld by the Commissioner (Appeals).

Being aggrieved by the Order of the Commissioner of Central Excise (Appeals), the Appellant preferred an appeal to the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT').

Contentions of the Appellant

The Appellant put forth the following contentions to substantiate the plea that they were eligible to the exemption under the subject Notification -

- The subject software were customized in Germany as per the specific parameters suited to each plant of BHEL, pursuant to a consultation process with BHEL ;

- Expert opinion tendered by BHEL specifying the nature of the impugned software wherein it was specifically mentioned that the said software are customized software can be relied to justify the claim for exemption. Further, it is a settled principle that once an expert opinion is furnished, the adjudicating authorities were bound to either follow the same or rely upon another “equal expert opinion”. Reference was made to the Supreme Court decision in case of *BPL Pharmaceuticals Ltd. Vs. Collector of Central Excise (2002-TIOL-63-SC-CX)*;
- The assertion regarding the fact that the software were prepared for each unit based on design and operating conditions, which may vary from one power plant to another, has been totally ignored by the Revenue authorities in arriving at conclusion contrary to the meaning and connotation of customized software which was exempt by virtue of the subject notification; and
- Relying on the decision in the case of *Yokogawa India Ltd. Vs. Commissioner of Customs, Bangalore (2008-TIOL-486-CESTAT-BANG)*, it can be said that it does not matter whether the software is just modified from standard software or is virgin developed software to call it a customized software. What really matters is whether at the time of import, the software was packaged software or customized software.

Contentions of the Respondent

In order to advance its case justifying the denial of exemption and the demand for duty, the Respondents made the following submissions –

- Software can be standard or canned software. Standard software is the one which can be customized by modifying the existing software also. However, custom made or custom designed software are the software which are designed right from the beginning keeping in mind the exact requirements of the client;
- In this context, the wording in the subject notification are unambiguous and customized software at Sl. No. 27 of the subject notification, has been clarified to mean “custom designed software”. Further, the intention of the Government is very clear from the description of customized software as given in the Service Tax Circular 81/2/2005-ST dated 07 October, 2005 which reads “in the case of unbranded/customized software, the supplier develops the software and thereafter transfers the software so developed in a media and it is taken to the customers’ premises for loading in their system”;
- The imported software was not custom developed for BHEL as the basic components or modules of the said software are already installed in many power plants worldwide and the Appellant has just adapted or modified the said software to suit to the specific parameters of BHEL’s power plant. Hence, the said software can only be regarded as Modified Packaged Software and not Customized Software;
- Further, as the duty incidence is directly on BHEL, the opinion of BHEL cannot be considered as an expert opinion, since it is an interested party as discussed in the Hon’ble Supreme Court judgment in the case of *Novopan India Ltd. Vs. Collector of Central Excise and Customs, Hyderabad (2002-TIOL-89-SC-CX)*;
- The fact that the ownership rights of the said software still remain with the Appellant, suggest that the software is a Standard/Packaged software; and
- Hence, the impugned software does not represent customized software so as to merit the exemption as per the subject notification.

Observations of CESTAT

The following observations were made by the Hon’ble CESTAT –

- Since the duty liability in the present case falls squarely on BHEL, BHEL very much becomes an interested

party and hence, the expert opinion of BHEL can at best be seen as a defense of an interested party. This position is well supported by the relevant decision of the Hon'ble Apex Court in the case of *Novopan India Ltd. vs. Collector of Central Excise and Customs, Hyderabad* cited supra;

- The impugned software/its constituent modules did exist prior to importation and have been installed and employed in many coal based power plants in many parts of the world including India. The fact that software has been merely licensed and the proprietary rights continue to vest with the software developer point strongly towards the nature of software being a packaged software;
- The said software was modified to suit the various parameters as required by the power plants. Hence, the impugned imported PADO software and BPOS software can be regarded as modified packaged software and not custom designed software;
- Further, as per Serial No. 27 Of the subject notification, it is amply clear that only customized software merit exemption under the subject notification. In this respect, only 'custom designed software' can pass the acid test of eligibility to the exemption and that the party will have to categorically prove the same to claim the exemption. There is no scope for any ambiguity under the subject notification.
- If the benefit is given to assessee through an exemption notification and there exists a scope for ambiguity in interpreting such exemption notification, then in terms of the Supreme Court decision on case of *Novopan* cited above, such ambiguity should be construed in favour of the Revenue only; and
- If the argument of the appellant that even modification/tuning/adaptation of standard software will make it a customized software is accepted then it would defeat the very purpose of the notification. This would undoubtedly lead to unintended benefits.

Conclusion

Based on the aforementioned observation, the CESTAT held that the software imported by Appellant was only modified packaged software and not 'Customized Software' and would not be eligible to the exemption under the subject notification, which applies only to the Custom designed software. Hence, CESTAT upheld the impugned order passed by the Commissioner of Customs (Appeals) and rejected the appeal.

Source

1. *CESTAT decision in the case of M/s. Steag Encotec India Pvt. Ltd. Vs. Commissioner of Customs (Airport), Mumbai (2009-TIOL-1776-CESTAT-MUM).*

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