

PETITIONER:
M/S SPRINT RPG INDIA LTD.

Vs.

RESPONDENT:
COMMISSIONER OF CUSTOMS-I, DELHI.

DATE OF JUDGMENT: 20/01/2000

BENCH:
M.B.Shah, B.N.Kirpal

JUDGMENT:

Shah, J.

Leave granted. Appeal admitted.

The short question involved in this appeal is whether custom duty on imported computer software loaded on a hard disk drive is to be levied on the basis of hard disk simplicitor or computer software. Goods imported by the appellant were examined on 9th August, 1995 and were found to be seven pieces of hard disk drive loaded with software. As per the department, custom duty on hard disk drive is leviable under Chapter Heading 84.71 at the rate of 25% and on a computer software it is at the rate of 10% as per the tariff Heading 85.24 read with notification No.59/95 dated 16.3.1995. It is admitted fact that total value of the consignment was Rs.67,75,119/- for seven hard disk drives having software loaded thereon. Value of the hard disk simplicitor would be roughly at the most Rs.60000/-. The relevant headings of the Chapter are as under:-

84.71 Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data on to data media in coded form and machines for processing such data, not elsewhere specified or included.

8471.70 Storage units. 5% 8471.80 Other units of automatic data processing machines. 20%

8471.90 Other 20%

85.23 Prepared unrecorded media for sound recording or similar recording of other phenomena, other than products of Chapter 37.

- Magnetic tapes.

85.24 Records, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of Chapter 37.

8524.10 Gramophone records. 40% - Discs for laser

reading systems;

8524.31 For reproducing phenomena other than sound or image. 25%

8524.40 Magnetic tapes for reproducing phenomena other than 25% sound or image.

- Other magnetic tapes.

8524.99 Others 40%

The Tribunal arrived at the conclusion that as the software was loaded on a hard disk, it would remain to be a hard disk drive on which software was loaded and, therefore, alongwith Chapter Note 5(A) and (B) of Chapter 84, it would be hard disk drive loaded with software and would be taxable under the Heading 84.71 and not 85.24. The Tribunal considered the decision of this Court in PSI Data Systems Ltd. vs. Collector of Central Excise, {1997 (89) ELT 3 (SC)} and observed that it would not be applicable to the facts of the present case.

For understanding of computer software and the hard disk, learned counsel for the Customs has produced on record some extracts from Modern All About Hard Disk Drive of BPB Publications, which reads as under:-

Today Hard Disk Drives are the most common storage device used with the computer system. The hard disk drive is also known as Hard Disk, Hard Drive, Fixed Disk Drive or Winchester Disk Drive. The hard disk drive is used to store data and programs permanently inside the computer. The information stored in the hard disk drive does not get erased when the power supply to the computer is switched off.

This device is known as Hard Disk Drive because compared to the other common magnetic storage device, floppy disk, which uses flexible plastic like carrier for the magnetic recording medium; the hard disk drive uses rigid, hard, aluminium or glass as the base for recording medium.

xxxx xxxx xxxx

Information is stored in the hard drive using the same magnetic recording method, which is used to store songs on a audio tape or movies on a video tape. The audio or video tape does not lose its content when the power supply given to the audio or video recorded is switched off, same way the hard drive also retains the information stored in it, even when the power supply to the hard drive is switched off.

He has also pointed out the extract from PC Power Boosting Your PCs Performance written by Stephen J. Dougherty wherein hard disk is given meaning as under:- Hard disk. A data storage device that stores the data on metal disks that have a magnetic coating. Hard disk drives provide faster access and larger storage capacities than diskettes. Sometimes referred to as a fixed disk.

He further submits that he has received information

from the Deputy Commissioner (Customs), Air Cargo, New Delhi, as per the letter which is produced on record which points out that in nutshell, a hard disk is one of the devices used in the Computer Systems. Its function is to store the data, instructions, sound images etc. including source code and object code. The moot difference between the hard disk and the software is that a hard disk is hardware whereas software is a representation of any type of data and which is stored in the hard disk. Similarly, as per the Internet information received by Customs, a hard disk is really a set of stacked disks, each of which, like phonograph records, has data recorded electromagnetically in concentric circles or tracks on the disk. A head (something like a phonograph arm but in a relatively fixed position) records (writes) or reads the information on the tracks.

appellant is hard disk In the present case, what is imported by the drive loaded with software material. Heading 84.71 apparently covers automatic data processing machines and units thereof and magnetic or optical readers not elsewhere specified or included. It is to be stated that heading 85.23 deals with prepared unrecorded media for sound recording or similar recording of other phenomena, which includes magnetic tapes. As against this, heading 85.24 covers records, tapes and other recorded media for sound or other similarly recorded phenomena which covers gramophone records or magnetic tapes for reproducing phenomena. That software material is admittedly classifiable under Tariff Heading No.85.24 which provides for taxing records, tapes and other recorded media for sound or other similarly recorded phenomena. The difference between the hard disk drives and magnetic storage devices or floppy disks is only with regard to the use of rigid, hard, aluminium or glass as the base for recording medium. What is covered by the said heading is recorded tapes, magnetic tapes or other similar recorded phenomena. As per the literature supplied by the department, hard disk drive is used to store data and programs permanently inside the computer. The difference between hard disk drive and common magnetic storage device or floppy disk is the base for recording medium. It also provides faster access and larger storage capacity; its function is to store the data instructions, sound images etc. and it is like phonograph records. Floppy disk uses flexible plastic like carrier for magnetic recording medium. Information is stored in the hard disk drive using the same magnetic recording method which is used to store songs on an audio tape or movies on a video tape. Therefore, hard disk is a refined form of floppy and serves the same purpose of recording material in more efficient way. The moot difference between the hard disk and the software is that a hard disk is a hardware whereas software is a representation of any type of data and which can be stored in the hard disk. There is no dispute that floppy on which software is stored would be taxable under Tariff Heading 85.24. Instead of storing the software on the floppy if it is stored on a hard disk drive, it would not ceased to be a software. As stated above, it is an information stored in the hard disk drive using magnetic recording method.

Further, the Central Government by its Notification No.59/95-Cus. dated 16th March, 1995 provided exemption to the computer equipments which reads as under:-

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in column (3) of the Table hereto annexed and falling within Chapter or under heading No. or sub-heading No. of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), specified in the corresponding entry in column (2) of the said Table, when imported into India, from so much of that portion of the duty of customs leviable thereon which is specified in the said First Schedule, as is in excess of the amount calculated at the rates specified in the corresponding entry in column (4) of the said Table.

Sl. heading No. (3)	Chapter goods (4)	Description of No. (1)	Rate of duty or heading (2)
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40% ad valorem 1. 84.71 All goods other than Hard disk drive and Floppy disk drive.

25% ad valorem 2. 84.71 Hard disk drive or Floppy disk drive.

3. 8473.30 All goods. 35% ad valorem

4. 49 or Computer software 10% ad valorem 85.24

As per Item 2 of the above notification rate of duty is 25% for hard disk drive or floppy disk drive covered by heading or sub-heading 84.71. As against this, for computer software, if it falls under Chapter 49 or under Heading No.85.24, the rate of duty would be 10%. If simplicitor hard disk drive is imported, it may be taxable under the Heading 84.71. However, in a case where essentially a software is imported which is loaded on a hard disk drive, it would be computer software material and in that set of circumstances, it would be taxable under Heading 85.24. This is also made clear in Chapter Note 6 of Chapter 85 by providing as under:-

Records, tapes and other media of heading No.85.23 or 85.24 remain classified in those headings, whether or not they are presented with the apparatus for which they are intended.

Mr. Swami, learned counsel for the respondent relied upon the Rules of Interpretation mentioned in the First Schedule appended to the Customs Tariff Act which lay down general Rules for the interpretation and classification of goods for import tariff. Rules 2(b), 3 and 4 read as under:-

2(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference

to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

Testing it from the aforesaid Rules of Interpretation, it would be clear that the disk or a floppy on which computer data is recorded, would be covered by heading 85.24. Rule 3(a), inter-alia, provides that when two or more headings each refer to part only of the materials or composite goods, those headings are to be regarded as equally specific in relation to those goods, even if one of item gives a more complete or precise description of the goods. Further, considering imported goods to be a mixture of two substances namely hard disk drive and software as per Rule 3(b) they can be classified under the heading which gives them their essential character. In the present case, considering its price factor it would be computer software. The price of the imported consignment was approximately Rs.68 lakhs. As against this, value of the seven hard disk drives would be roughly Rs.60000/-that is to say, value of the computer software is hundred times more than its containers hard disk. Hence, the essential character of the imported goods is computer software.

Mr. Swami, learned counsel for the respondent further referred to Chapter Note 5 of Chapter 84 and submitted that for the purposes of Heading No.84.71, the expression automatic data processing machine means automatic data processing machines or a unit as being a part of a complete system if it meets the following conditions:

(a) It is of a kind solely or principally used in an automatic data processing system;

(b) It is connectable to the central processing unit either directly or through one or more other units; and

(c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

He referred to clauses (b) and (c) and contended that this hard disk drive can be used either directly or through one or more other units for processing the data and, therefore, it would be automatic data processing machine falling under Heading No.84.71. This submission cannot be accepted for the consignment in question is essentially a computer software covered by specific Heading No.85.24 which is for levying duty on records, tapes and other recorded media for sound or other similarly recorded phenomena. As mentioned in the Notification dated 16th March, 1995, computer software is covered by Heading No.85.24. The said notification also covers computer software imported in the form of printed books, pictures, manuscripts and typed scripts covered by Chapter 49. Computer software can be brought either on a floppy or magnetic tape or on a hard disk or in a printed form and hence, what is imported is software on a container which is a hard disk drive. The value of the containers (hard disks) approximately in the present case is Rs.60000/- or Rs.65000/-. As against this, the cost of the computer software is roughly Rs.67 lakhs. Therefore, it can be said that what is imported by the appellant is essentially a computer software.

In this view of the matter, the order dated 25th March, 1996 of the Commissioner of Customs and the order dated 14th May, 1999 of the Tribunal confirming the said order in Appeal No.161/96-B2 are quashed and set aside. It is held that computer software imported by the appellant on a hard disk drive is assessable at the rate of 10% as per Heading 85.24 with the Exemption Notification stated above because what was imported by the appellant was software on a hard disk and it was not hard disk in the garb of software.

In the result, the appeal is allowed accordingly with no order as to costs.