CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 1833 of 2011

(Arising out of Order-in-Appeal No. 21/2011-CUS(B) dated 08.04.2011 passed by the Commissioner of Customs (Appeals), Bangalore.)

M/s. ABB Limited,
Plot No. 5 & 6, II Phase,
Peenya Industrial Area,
P B No. 5806,
Bangalore – 560 058.

Appellant(s)

VERSUS

Commissioner of Customs,
C.R. Building,
P B No. 5400,
Queen Road,
Bangalore – 560 001.

Respondent(s)

WITH

Customs Appeal No. 1834 of 2011

(Arising out of Order-in-Appeal No. 21/2011-CUS(B) dated 08.04.2011 passed by the Commissioner of Customs (Appeals), Bangalore.)

M/s. ABB Limited,
Plot No. 5 & 6, II Phase,
Peenya Industrial Area,
P B No. 5806,
Bangalore – 560 058.

Appellant(s)

VERSUS

Commissioner of Customs,
C.R. Building,
P B No. 5400,
Queen Road,
Bangalore – 560 001.

Respondent(s)

APPEARANCE:

Mr. Syed Peeran with Mr. Rohan Karia and Mr. Nischal, Advocates for the Appellant

Mr. Maneesh Akhoury, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

FINAL ORDER NO. 21611 - 21612 /2024

DATE OF HEARING: 06.12.2024
DATE OF DECISION: 06.12.2024

PER: R. BHAGYA DEVI

These two appeals are filed by M/s. ABB Ltd. against Order-in-Appeal No. 21/2011 dated 08.04.2011 passed by the Commissioner of Appeals, Bangalore.

2. The appellant had filed Bills of Entry for import of Control Systems classifying same under Chapter Heading 8538 9000 of the Customs Tariff Act (CTA), 1975. They also imported software license in paper form classifying the same under 8523 8020 claiming exemption from payment of basic customs duty. On examination, it was found that the distributive control unit was imported along with the software. The hardware for all the software including optional software as claimed by the importers was also supplied with the control systems imported under the above Bills of Entry. Referring to the Technical Right-up showed that the software improves productivity, carryout route cause failure analysis, advanced reporting etc. The Commissioner (Appeals) observed that the software gets integrated to the hardware representing it as a full part of the system and delivering required function as one unit. He also observed that

the software supplied is for a specific use and appellant has no use of the license without the software. Relying on Note 2 to Section XVI of Customs Tariff Act, 1975, the subject software embedded in the system being integral part has to be necessarily classified along with the hardware. Accordingly, the value of the software license is to be included along with the value of the hardware and to be assessed to duty, accordingly. Aggrieved by this order both on account of classification and valuation, the appellant has filed this appeal.

3. The Learned Counsel on behalf of the appellant admitted to the fact that Distributed Control Systems (DCS) AC460 was imported and classified under 8538 9000 of CTA, 1975 and paper licenses which are in the form of a paper/sheet containing a key which conveys right to use the software pre-loaded into the DCS was also imported and classified under CTH 8523 8020 of the CTA by availing the benefit of Notification No. 21/2002-Cus dated 01.03.2018 (Sl. No. 157). It is further submitted that the hardware imported by the appellant is pre-loaded with the software namely 'AdvaControl Basic Software for AC460' and 'AdvaControl Basic Software Redundancy for AC460'. The value of this software was included in the value of the hardware which is an admitted fact. The Bills of Entry were finally assessed and out of charge was provided to the appellant. At a later date on investigation by SIIB, Order-in-Original No.284/2009 dated 12.10.2009 was issued classifying the goods under CTH 8538 9000. Aggrieved by this order, the appellant had filed an appeal before the Commissioner (Appeals), pending decision by the Commissioner (Appeals), a parallel show-cause notice dated 15.10.2009 was issued under Section 28 of Customs Act, 1962 demanding duty amount of Rs.1,48,02,065/-, which on adjudication was confirmed vide Order-in-Original No.417/2009

dated 26.12.2009 wherein it was held that the impugned goods are classifiable along with DCS (hardware) under CTH 8538 9000. Aggrieved by this order, the appellant filed an Appeal No. 122/2010 before the Commissioner (Appeals) and in respect of both the above appeals, the Commissioner (Appeals) in the impugned order has confirmed the demand classifying the goods under 8538 9000.

3.1. It is further submitted that the item imported was paper licenses which cannot be treated as part of the DCS (hardware) since based on the Bill of Entry and purchase order, it is evident that 'Paper License' and 'DCS' are indicated as separate line items. Relying on the decision of the Hon'ble Supreme Court in the case of **Vareli Weaves vs. UOI, 1996 (83) ELT 255 (SC)** and **Commissioner of Customs, New Delhi vs. Sony India Ltd.- 2008 (9) TMI 19 (SC),** classification has to be assessed in the form in which importation takes place. Paper licenses are to be treated independently and cannot be merged with the hardware imported by them.

3.2. Also advacning alternative submission, it is submitted that CTH 4907 0030 covers 'Documents of title conveying the right to use Information Technology software', the paper licenses essentially being documents conveying the right to use IT software embedded into DCS (hardware) would merit classification under CTH 4507 0030. Relied on the Circular No. 15/2011-Cus dated 18.03.2011 and also relied on the decision in the case of **Commissioner of Customs vs. NCR Corporation India Pvt. Ltd.: Final Order No. 20028/2024** and the following decisions:

- **Ingram Micro India Ltd. Vs. Commr. Of Cus. (Air Port & Cargo), Chennai 2018 (364) ELT 128 (Tri. – Chennai)**
- **Hewlett Packard India Sales Pvt. Ltd. Vs. Commissioner: Final Order No. 20661 of 2019, CESTAT Bengaluru**
- **Priya Limited vs. Commissioner of Customs 2019 (370) ELT 1688 (Tri.-Mumbai)**

3.3. Further, it is also submitted that the show-cause notice and Order-in-Original issued/passed relying on Order-in-Original No.34/2008 dated 26.04.2008 and Order-in-Appeal No.33/2009 dated 30.03.2009 in the case of **M/s Hewlett Packard India Sales Pvt. Ltd**, this decision was set aside by the Tribunal vide Final Order No.20661/2019 dated 21.08.2019, hence the impugned order also needs to be set aside.

4. The Authorized Representative reiterating the findings of the Commissioner (Appeals) argued that the imported goods are rightly classified under CTH 8538 9000 as part of 'hardware' and hence, the impugned order needs to be sustained.

5. Heard both sides. The admitted facts are Distributive Control Unit AC460 BOT system and the software imported are embedded in the hardware. It is also not in dispute that the software license in paper form is also received along with this hardware. The impugned Order-in-Appeal No.21/2011-Cus dated 31.03.2011 is a common order against Order-in-Original 284/2009 dated 12.10.2009 and No.417/2009 dated 26.12.2009. Both these Order-in-Originals have been considered by Commissioner (Appeals) in Order No.33/2009 dated 30.03.2009 wherein it was held that "the software and the

license fees goes hand-in-hand and are classifiable together, the software to be classified along with the hardware and the claim of the appellant under CTH 4907 or 8523 was rejected". Accordingly, the impugned order confirmed the classification of the software paper license as part of hardware under 8538 9000. The decision relied upon by the Original Authorities based on which the Commissioner (Appeals) also confirmed the demands was set aside by this Tribunal vide Final Order No.20661/2019 dated 21.08.2019. The case before the Tribunal was regarding classification of software under CTH 49 or 8524 which attracted 'Nil' rate of duty are to be classified under CTH 8471 as seen from the facts reproduced below:

> "The appellants had imported IT Software license with part No. 452158 – B21 HP ILO Select NM 1 Ser 24x7 Support, 452141 – B21 HP ILO ADV NM1 Ser 24x7 Support, 436747 – B 22 HP IC Environment BL No. Media & Licenses, and sought clearance of the same vide Bill of Entry No. 723637 dated 10.04.2008. The appellants claimed classification under Tariff Heading 49070030 of the CTA and claimed benefit of NIL rate of duty under Sl. No. 157 of Customs Notification No. 21/2002 dated 1.3.2002 (as amended), vide which goods falling under heading 49 or 85.24 attract nil rate of duty. The assessing officer did not accept the classification sought by the appellants and instead classified the same under heading 8471 with a duty structure of 0 (BCD) + 14% (CVD) + 3% (Cess) + 4% (Addl. Duty). Aggrieved by the Order-in-Original, appellant filed appeal before the Commissioner who rejected the same.
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> 6. After considering the submissions of both the parties and perusal of the material on record, we find that in the present case, the appellants have only imported paper licences which are documents of title conveying the right to use software loaded in the HP ILO Proliant Server. Further we find that the CBEC has also clarified vide Circular 15/2011 that documents conveying the right to use software do not merit classification under CTH 8523 8020 but merits classification under CTH 4907. Further we find that this identical issue has been decided in favour of the importer by the

Chennai Bench in the case of Ingram Micro India Ltd. cited supra and subsequently also the appellant imported the paper licence under CTH 4907 and the same was not disputed by the Department".

6. The Tribunal rejected the claim of the Revenue to classify software license in paper form under CTH 8471 along with the product imported by the appellant, instead classified under CTH 4907 as per the Board's Circular and as per the decision in the case of **Ingram Micro India Ltd. 2018 (364) ELT 128 (Tri.Chennai).** It is also an admitted fact that duty has been paid on the software which has already been embedded on to the hardware. The dispute is only regarding the software paper license which is a key to the software already embedded to the hardware. As rightly submitted by the appellant based on the decisions relied upon by them, it has ben held that the goods are rightly classifiable under 49 or 8523 as 'Information Technology Software' and not as part of 'Hardware'.

7. In view of the above, we do not find any reason to uphold the classification of the software license in paper form under CTH 8538 9000. Accordingly, the impugned order is set aside.

Appeals are allowed with consequential relief if any, as per law.

(Operative portion of the order was pronounced
in open court on conclusion of hearing)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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