CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/315/2008-DB, C/246/2009-DB, C/1852/2010-DB

[Arising out of Order-in-Appeal No. 156/2007 dated 14/12/2007 passed by the Commissioner of Customs, Bangalore]

[Arising out of Order-in-Appeal No. 147/2008 dated 20/11/2008 passed by the Commissioner of Customs, Bangalore]

[Arising out of Order-in-Appeal No. 110/2010 dated 17/05/2010 passed by the Commissioner of Customs, Bangalore]

Chayagraphics (India) Pvt. Ltd.
#41, J.C. Industrial Estate,
Kanakapura Road,
Bangalore – 560 062

C.C-Bangalore
C.R. Building, Queens Road,
P.B. No. 5400,
Bangalore – 560 001
Karnataka

Appellant(s)

Versus

C.C-Bangalore
C.R. Building, Queens Road,
P.B. No. 5400,
Bangalore – 560 001
Karnataka

Chayagraphics Pvt. Ltd.
#41, J.C. Industrial Estate,
Kanakapura Road,
Bangalore -560 062

Respondent(s)

Appearance:

Shri M.S Manjunath, Consultant
No.884, 16th Cross, 9th Main,
D Block, Sahakaranagar,
Bangalore – 560 092

For the Appellant

Dr. J. Harish, Deputy Commissioner (AR) — For the Respondent

Date of Hearing: 12/07/2018
Date of Decision:24/07/2018

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order Nos. 20986 – 20988/2018

Per: P. ANJANI KUMAR

M/s. Chayagraphics (India) Pvt. Ltd. are engaged in import and manufacture of medical equipments in Bangalore. The appellant had imported one CR 1000-C Single Plate Phosphor Reader, an accessory for X-ray/MRI equipment and its software. A Bill of Entry No. 452986 dated 08.06.2007 was filed at ACC, Bangalore classifying the impugned goods under the heading 9022 14 90 seeking exemption under Sl. No. 410 of Notification No. 21/2007 and Sl. No. 59(ii) of Notification No. 6/2006 in respect of basic Customs duty and additional duty respectively. The software was classified under 85238020 as Information Technology Software chargeable to nil rate of duty. On the basis of assessment order they deposited a fine of Rs. 1,65,000/- (Rupees One Lakh Sixty Five Thousand only) and penalty of Rs. 16,000/- (Rupees Sixteen Thousand only) in addition to payment of duty. Aggrieved by the assessment order, the appellants have gone in appeal before the Commissioner (Appeals) who vide Order 156/2007 dated 14.12.2007 held that the stand taken by the Department in classifying the software imported along with ICR 1000 (RSC) under Chapter Heading 9022 14 90 is appropriate but reduced the fine to Rs. 42,000/- (Rupees Forty Two Thousand only) and upheld the personal penalty of Rs. 16,000/- (Rupees Sixteen Thousand only). Aggrieved by the

Order of the Commissioner (Appeals) the appellants are filed the present appeal i.e. C/315/2008. There are two other appeals connected with the matter C/246/2009 and C/1852/2010 filed by the Department against the orders of the Commissioner (Appeals) who has set aside the assessment by the Department and classified the software under CTH 18238020. As the issue involved in all the three appeals is same, all the appeals are taken together for consideration.

2. In respect of the appeal filed by the appellant, the appellant contended that they have imported computer radiology machines and while the scanner was classified under medical equipment they have classified the software under IT. However the Department has classified software also along with the scanner under medical equipment. In the instant case, there has been no show-cause notice, no speaking order no personal hearing before the assessment was finally arrived in the assessment order. The Department had wrongly contended that they have given a letter for waiver of speaking order which can be fairly seen that vide letter 08.06.2007 they have given the adequate details of the machineries and the software and have submitted that as the unit is very urgently require at the customer centre the matter may be expedited and if the assessing officer was in disagreement with any of the points submitted therein they will be obliged if the consignment could be released by accepting the duty under protest and would wait for a speaking order. Vide letter dated June 12, 2007 they have intimated that they were ready to classify the software along with the equipment under CTH 90221490. Vide letter dated June 16, 2007 they have requested for provisional assessment if any and the matter may be expedited and vide letter dated 18.06.2007 they have submitted that they

have understood that they have done a mistake while filing the Bill of Entry with a split value and they accepted to pay the duty on import for the whole equipment value as per supplier's invoice and have requested for waiver of show-cause notice.

3. The learned counsel for the appellants has submitted that the series of the letters within a short span would indicate the duress and the stress under which the acceptance letter was obtained from them committing that they had made a mistake and they do not require any show-cause notice. It is a fact that as the equipment was urgently needed by their client and they were in the danger of losing business, they have given a letter as per the details of the Department. Even then the necessity for a speaking order was never waived.

3.1. Coming to the classification of the software they submitted that they had produced certificates by various hospitals and experts in the field that the software can be QPC scan software is an image processing software with additional facilities of keeping the data base of the company in the system and the CD can be loaded on to another computer, the software is videos based application and has options for entering patient details and image processing features. A software is supplied in a compact disc. They also submitted that going by the literature and the catalogue pertaining to DICOM (Digital Imaging and Communications in Medicine) indicate that it is open software and can be downloaded and uploaded from internet. It can be loaded on any computer and is not necessarily to be used only with the scanning machine imported. They submitted that the phosphor reader however, works independently. They have offered to demonstrate during personal hearing that the software can be loaded on any ADM but Commissioner (Appeals) had not given any opportunity. The software interacts with all iCRO products.

3.2. Going by the Chapter Notes 8523 for the purposes of heading 8523, "Information Technology Software" means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to the user, by means of an automatic data processing machine." The DICOM software imported by the appellant fulfills the criteria relied upon therein. It can be seen that the learned Commissioner (Appeals) in respect of their subsequent imports in 2008-09 has classified the software under CTH 8523. Therefore, they have a strong case in their favour.

3.3. On the issue of levying redemption fine and penalty, where show-cause notice and speaking order was not issued, the learned counsel for the appellants has relied upon the following case-law:

a. *Laxmi Cotton Industry Vs. Union of India – 2015 (323) E.L.T. 264 (Gau.)*
b. *CCE & Cus. Vs. Nakoda Textile Industries Ltd. – 2009 (240) E.L.T. 199 (Bom.)*
c. *Henkel India Ltd. Vs. CC (Sea Port), Chennai – 2007 (217) E.L.T. 61 (Tri.-Chennai)*
d. *R. Sivakumar Vs. CC, Chennai – 2007 (213) E.L.T. 526 (Tri.-Chennai)*
e. *Kothari Metals Ltd. Vs. Union of India – 2011 (274) E.L.T. 488 (Cal.)*

f. *Varun Overseas Vs. CC, Delhi-IV – 2011 (272) E.L.T. 579 (Tri.-Del.)*

g. *RV General Trading Vs. Union of India – 2016 (341) E.L.T. 220 (P&H)*

h. *CC (Import) Vs. Charmi Enterprises – 2016 (339) E.L.T. 268 (Tri.-Mumbai)*

i. *Juneja Chemical Industries (P) Ltd. Vs. CC (Prev.), Kolkata – 2009 (245) E.L.T. 225 (Tri.-Kolkata)*

j. *Commr. of Cus. (Sea Port Import), Chennai Vs. Unistar World Trade – 2009 (235) E.L.T. 770 (Mad.)*

4. Learned authorized representative for the Department submitted that the appellants were against the classification. It is established that the scanner cannot work without a software such a software which is tailor-made to suit the working of a particular machine is justified to be classified along with machines. It is a point to note that the classification offered by the Department attracted a lower rate of duty and even then they have challenged the classification in view of the merits of the case. The importer has specified in their letter dated 08.06.2007 that the QPC X Scan 32 CR scan and review software is used for obtaining X-ray images captured by the Phosphor reader and combine and compare images obtained from other medical equipments installed/networked in the center. The software has several capabilities for diagnosing medical images and interfacing with other radiology equipment. The Commissioner (Appeals) has given a categorical and clear finding on the classification of a software. In para 8 of the Order-in-Appeal 156/2007 the learned Commissioner (Appeals) has categorically stated that the case-law cited by the appellants were in respect

of a machine software and hence were not relevant to the instant issue.

5. Heard both the sides and perused the records. The brief issue to be decided in this case is whether the impugned software is IT software or a software tailor-made to a particular machine and as to whether the software is eligible for exemption under Notification No. 7/2007. We find that the Chapter Note to Chapter 85 states that for the purposes of heading 8523, "Information Technology Software" means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to the user, by means of an automatic data processing machine." We find from the copy of the Bill of Entry available in the records that the appellants themselves have classified the software along with machine. The appellants have put forth submissions that a series of letters were written by them justifying the classification of software under CTH 8523 8020 and requested for speaking order. However the Department did not hear to their request and due to the pressing commercial reasons they had to comply with the classification suggested by the Department and that it was in no way take away their right to get a speaking order or to represent or appeal. On going through the series of letters in a short span it appears that the appellant's contentions are justified as there are no other justifiable reasons which make the appellants change their stand overnight on the issue of classification. Going by the catalogue it is seen that the QPC X Scan 32 is a DICOM 3.0 compliant software and includes DICOM worklist query, advanced image processing, measurements, report generation, ortho templating, stitching and advanced DICOM print. The manual specifically stated that the advanced image processing, measurements, report

generation, ortho templating includes functioning on a PC anywhere and allows HIPPA compliant remote operation of software over a modem or direct internet connection. It is to note that the manual at 4.0 giving instructions for software installation states the QPC XScan 32 software comes bundled with the CR unit. This software package will allow you to control the CR unit and further states that if the QPC XScan 32 is already installed on the computer, the new conversion requires to be reinstalled. Going by the terminology used in the manual it gives an understanding that the software is manufactured of functioning independently and can be loaded on any computers. This fulfills the requisite conditions of the Chapter Notes 8523 for software under 8523. The certificates issued by the Radiologists or in-charge of radiologist centres/hospitals also pointed out to this effect that the QPC X software is a image processing software with additional facilities of QPC, the data base of the computer system and the CD can be loaded to any computer. Moreover two different learned Commissioner (Appeals) in respect of Bill of Entry No. 116494 dated 21.04.2009 and 703021 dated 19.03.2008, have given a findings that the software is correctly classified under CTH 8523 8020 holding that the invoice separately identifies that the software has 500-0112 QPC CR Scan and reviewed with 500-0112 CD/DVD Creator Software, 500-0112 Work list Query Software Module. This is not be construed as a customer built software in the instant case.

In view of the above, we do not find any justification for interfering with the opinion expressed by two learned Commissioner (Appeals) in classifying the product under 8523 8020. Therefore, we conclude that the software imported by the appellants is a standalone independent software as given in the form of CD and can be loaded on any ADM. Under these circumstances it is rightly classifiable under CTH 8523 8020. Coming to the other issues of changing the classification, imposition of redemption fine and penalty without observing to the principles of natural justice and without issuing a speaking order is bad in law as per the case-law cited by the appellant. Therefore, we allow the appeal of the appellant M/s. Chayagraphics (India) Pvt. Ltd. C/315/2008 and reject the appeals of the Department C/246/2009 and C/1852/2010.

(Order pronounced in Open Court on **24/07/2018**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(S.S GARG)
JUDICIAL MEMBER

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