IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

C/203/2012

(Arising out of Order-in-Appeal C. Cus. No. 475/2012 dated 13.06.2012 passed by the Commissioner of Customs (Appeals), Chennai).

M/s. Ingram Micro India Ltd. : Appellant

Vs.

CC (Air Port & Cargo), Chennai : Respondent

Appearance

Shri Raghavan Ramabhadran, Advocate,
for the Appellant

Shri A. Cletus, ADC (AR)
for the Respondent.

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing/Decision: **07.6.2018**

FINAL ORDER No**.** **<u>41818 /2018</u>**

Per Madhu Mohan Damodhar

The facts of the case are that M/s. Ingram Micro India Ltd., the appellant herein had imported "Licences for Software" on paper media under various Bills of Entry during the period June 2008 to January 2009. The appellants had classified the goods under the Customs Tariff Heading (CTH) No. 4907 0030, which covers "Documents of title conveying the right to use Information Technology Software". It however appeared to the department that the imported goods are actually "paper licences" for software and hence they are required to be classified under CTH No. 8523 8020 as ""Information Technology software". The appellants cleared the impugned items under protest under the classification insisted on by the department. They however filed an appeal before the Commissioner (Appeals), which in the first instance was remanded for issue of a speaking order which in turn culminated in an order No. 324/2010 dated 29.05.2010, holding that the classification of the licences imported by the appellant is required to be classified under CTH 8523 8020. In the second round of appeal, the Commissioner (Appeals) vide the impugned order No. 475/2012 dated 13.06.2012, upheld the order of the original authority and rejected the appeal. Aggrieved appellants are before this forum.

2. Today when the matter came up for hearing, the Ld. Advocate, Shri Raghavan Ramabhadran made oral and written submissions which can be summarized as under:-

i) The appellant had only imported the paper licences without the media packs containing the software. It is submitted that the goods should be assessed in the form they are imported. Hence the classification and valuation of paper licences should be looked into and not the classification of the software.

ii) The product key which is featured on the licences for software "is required for the purpose of installing the software while the licence per se gives the right to use the software and is a document of title conveying the right to use the software.

iii) The licence in software cannot be classified and valued as one product. They are required to be classified separately as per the scheme of classification under the Customs Tariff.

iv) The Ld. Advocate clarifies that the order of the Settlement Commission referred to the interim order dated 10.06.2014 of this Bench concerns the application made by M/s. Microsoft wherein which involved import of both software along with paper licence. In the present case, only the paper licences have been imported by the appellant.

v) On the basis of representations made by the Industry Association, Board had issued a Circular No. 15/2011 dated 18.03.2011, which had interalia clarified that the paper licences which are essential documents conveying the right to use the software, and merits classification under CTH 4907. Hence, the controversy has been resolved by the Board's Circular in the appellant's favour.

3. On the other hand, the Ld. points out that the said Board's Circular has given two classifications one under CTH 4907 for paper licences and 4911 in case of PUK (Personal unlocking key)

card. Since in the present case paper licences imported by the appellant would contain a personal unlocking key, this would require that items should be under the classification CTH 4911 which would take the impugned goods out of the scope of the Notification No. 21/2002-Cus. dated 01.03.2002.

4. In response, the Ld. Advocate contends that the case of the department was only that the item was under CTH 8523 and there was no reference to CTH 4911 in any case. Further, the imported item is only a paper licence which is a document conveying the right use the software not a PUK card which is in the nature of a scratch card where the key would be meriting only on scratch card.

4. Heard both sides and have gone through the facts.

5. We find, merit in the observations of the Ld. Advocate that the issue is covered in their favour by the Board's Circular. The relevant portion of the said Circular dated 18.03.2011 is reproduced for ready reference:-

Customs Circular No- 15/2011-Cus. dated 18.03.2011

F.No.354/189 /2009-TRU

Sub:- Applicability of indirect taxes on packaged software - regarding

Representations have been received from some industry association on behalf of software dealers about difficulties being expressed in the assessment to customs duty of documents of title for IT software or documents that enable the transfer of the right to use such software at the time of its sale. It has been reported that there are frequent imports of such documents without any accompanying software. Such packages do not contain software but consist of paper licenses or PUK (Personal Unlocking Key, usually in the form of a scratch card of paper board or plastic) that are used to convey the right to use such IT software. The software in these cases could be freely downloadable or loaded by the OEM supplier under an arrangement with the software company as pre-loaded trial version of software on the computer system requiring the customer to purchase license or PUK after the trial period. Typically these licenses are used either to authorize additional uses against a sale of IT software that has already taken place in the past or to service transactions where the connected software is downloaded electronically by the customer. It has been pointed out that some of the field formations are insisting on the classification of such documents, even when imported without the packaged software, under CTH 8523 i.e. the heading applicable to IT software. It has also been represented that in certain cases the entire value of the license representing the right to use such IT software is sought to be loaded to the value of past imports of IT software by the importer.

2. The issue has been examined. According to Rule 1 of the Rules for the interpretation of the Tariff Schedule, classification is to be determined according to the terms of the heading and any relative Section or Chapter Notes. Heading No. 85.23 refers to "Discs, Tapes, Solid-State Non- Volatile Storage Devices, "Smart Cards" and other Media for the recording of Sound or of other phenomena, whether or not recorded, including Matrices and Masters for the production of Discs, but excluding products of Chapter 37." Tariff item 85238020 of this heading covers "Information Technology software." The supplementary note to Chapter 85 defines "Information Technology Software" to mean 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 a user, by means of an automatic data processing machine. It is evident that document conveying the right to use software by themselves do not satisfy this definition and therefore do not qualify for classification under this tariff item because they do not contain any representation of instructions, data, sound or image recorded in a machine readable form, which is capable of being manipulated or providing interactivity to a user. On the other hand, tariff item 49070030 of heading 4907 refers directly to "Documents of title conveying the right to use Information Technology software". Hence as per the said Rule 1 mentioned above, such paper licenses which are essentially documents conveying the right to use such IT software, merit classification under CTH 49070030. PUK cards on the other hand are not documents of title conveying the right to use Information Technology software per se but are actually printed matter containing numbers which when entered, enable the importer to access right to use such IT software. Hence they are liable to classified under CTH 4911 as "other printed matter".

3. It is, therefore, clarified that paper licenses or PUKs merit classification as per their individual character under heading 4907 in case of paper license and heading 4911 in case of PUK card, the same being other printed matter.

6. We also find ourselves in agreement with the Ld. Advocate's assertion that the imported items are not PUK cards per se but are paper licences only. This being so, in view of the CBEC clarification supra, there should not be any more controversy on the classification of this item. The item is correctly classified only under Heading 4907 of the CTA.

7. In the event, the impugned order cannot be sustained and is therefore set aside. Appeal is allowed with consequential reliefs, if any, as per law.

(Order dictated and pronounced in the open Court)

(P.DINESHA)
MEMBER (JUDICIAL)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

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