CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

Regional Bench – Court No. III

Customs Appeal No.41694 of 2019

(Arising out of Order-in-Appeal Airport & Air Cargo C.Cus.No.1/146-147/2019 dt.26.08.2019 passed by the Commissioner of Customs (Appeals-I), Chennai)

M/s.Ingram Micro India Private Ltd., **: Appellant**
MF-7, CIPET Hostel Road,
TVK Industrial Estate, Ekkattuthangal,
Guindy,
Chennai 600 032.

VERSUS

The Commissioner ofCustoms, **: Respondent**
Chennai-VII,
New Custom House, Meenambakkam,
Chennai 600 027.

APPEARANCE:

Shri S. Murugappan, Advocate
For the Appellant

Shri M. Jagan Babu,AC (AR)
For the Respondent

CORAM : HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR,, MEMBER(TECHNICAL)

FINAL ORDER NO. 40817 / 2020

DATE OF HEARING: 26.10.2020

DATE OF DECISION: 26.10.2020

PER: P. ANJANI KUMAR

This appeal is against the Order-in-AppealNo.1/146-147/2019 dt.26.08.2019 passed by Commissioner of Customs (Appeals-I), Chennai.

2. The brief issue involved in the instant appeal is the classification of telecommunication internet equipment and their parts imported by the appellants i.e. Ingram Micro India Pvt Ltd., Chennai. The appellants had filed Bill of Entry 8490695 dated 17.10.2018 for clearance of imported goods declared as "(a) Access point (b) Enterprise class Ethernet switches (other than carrier Ethernet switches) and (c) Networking appliances" classifying the same under CTH 85176290 and claiming benefit of 10% BCD in terms of Notification No.57/2017 dated 30.06.2017. The department claims that the proper classification would be under 85176290 as per Sl.No.20 of the said notification.

2.1 Learned Counsel for the appellants submits that the department has erred seriously in classifying the goods on the basis of a notification; it is a settled principle of law that classification of goods is to be done as per relevant Rules of Interpretation of the Customs Tariff Act, 1975, Section Notes and Chapter Notes thereof and not on the basis of a notification; he relies upon the following.

(i). *EskayefLtd. Vs CCE* - 1990 (49) ELT 649 (SC)
(ii). M*ysore Kirloskar Ltd Vs CCE* - 1998 (98)ELT 235 (Tribunal).
(iii). *Mahindra and Mahindra Ltd. Vs UOI - 1984 (18) ELT 262 (Bom.)* (iv). *GontermanPeipers (India) Ltd Vs Additional Secretary to the Government of India*- 1986 (26) ELT 471 (Cal.).

Learned counsel submits that items imported by them are apparatus for reception, conversion and transmission or regeneration of voice, images and other data including switching and routing operators; they rightly fall under chapter headings of 8517.62 and not under 'Others' under 8517.69 as per the Customs Tariff Act, 1975.Learned counsel further submits that in terms of Customs Manual also, assessment of duty essentially involves proper classification of the imported goods as per Customs Tariff Act, 1975 having regard to its Rules of Interpretation, Chapter and Section Notes etc.

2.2 Learned Counsel submits that access points imported by the appellants are classified under 8517620050; as per clarification dated December 14, 2010 by US Customs and clarification dated 25.03.2014 by German Customs; ADG (Adjudication), D.R.I vide Order-in-Original dated 23.12.2019 held that access points imported by Ingram Micro India Pvt Ltd are classifiable under CTH 85176290 of the Customs Tariff since these access points are having MIMO technology but without LTE standard; the exemption claimed under Notification No.24/2005 dt.1.3.2005 is applicable to the same. Learned Counsel submits bills of entry where in the impugned access points are classified under CTH 85176290.

2.3 Learned Counsel submits in relation to Ethernet Switches, that the literature available in Wikipedia and other sources would show the distinction between Carrier Ethernet switches and Enterprise Ethernet switches; whereas Ethernet switches are used in a compact environment having a few users, carrier Ethernet switches are used where large numbers of users are involved say by telecom service providers. He also submits that US Customs vide rulings dated 15July, 2010, 4 August, 2010 classified the Switches under 8517620050.Learned Counsel also submitted bills of entry where in the impugned Ethernet Switches are being classified under CTH 85176290. Learned Counsel further submits that that they are importing Carrier Ethernet Switches, classified under CTH 85176290 ,and are discharging duty at the merit rate without availing the concession under the notification.

2.4 Coming to the classification of network appliances, Learned Counsel submits that the literature / brochures pertaining to the classification of network appliances and argues that the TPS imported by them is deployed in-line which has the ability to inspect and block all directions of traffic (inbound, outbound, and lateral) in real time to protect against known, unknown and undisclosed vulnerabilities; therefore they are classifiable under 85176290. Learned counsel submits that though the Deputy Commissioner accepts appellant's contention that the imported goods were only apparatus for transmission or reception of voice, images or other data including the apparatus for in a wired or wireless network; some of these goods are classifiable under CTH 85176290 and 85176990 and that appellants have been importing both the items for long, yet the Deputy Commissioner goes on to classify the goods depending on the exemption available in the impugned Notification No.57/2017 and Ld. Commissioner also accepts the same. He also submits that Learned Commissioner (Appeals), while accepting that the impugned goods carry out the functions of reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing avers that there is no specific entry available for the products imported and goes on to classify the impugned goods under 85176990, for the reason that in terms of Rule 3 (c) of General

Rules of Interpretation in case a product falls under two headings, the last of such classifications would prevail. Learned counsel submits that this ground has not been taken by the Show Cause Notice, original authority; Learned Commissioner (Appeals) has not explained as to how there were two different claims of classification in terms of tariff section or chapter notes.

2.5 Lastly, the Learned Counsel submits that ADG (Adjudication), DRI, vide order cited above, has classified the goods as per the claim of the appellant; identical goods imported, even after the impugned SCN has been issued, are being classified under 85176290 and the exemption notification is being allowed; he showed some Bills of Entry, filed all over the country, to substantiate his claim.

3. Learned Authorized Representative, for the department, reiterates the findings of OIO and OIA; submits written submissions and asserts that applicability of exemption notification should be on the basis of characteristics of the impugned products and not the classification. Learned counsel for the appellants at this juncture submits that Learned Authorised Representative, is trying to make a new case at this stage and the same is not permissible; all relevant literature along with brochures have been submitted to the original authority as well as appellate authority; therefore, this plea cannot be taken at this stage.

4. Heard both sides and perused the records of the case. We find that the impugned goods have been classified under 85176290 by the appellant in the past and learned counsel has submitted evidence to the effect that the same are being classified under same heading even afterwards at various customs locations and exemption is being allowed as claimed. We also find that ADG (Adjudication), DRI has passed a comprehensive order holding the classification of the goods in favour of the appellants. Learned counsel has demonstrated that US and German Customs have given rulings classifying the goods at six digit level as claimed by the appellants. We find that department has not made out any case for reopening of the classification of the impugned goods. We find that classification of the imported goods should be based on specific headings, section notes and chapter notes and General Rules of Interpretation of Tariff and HSN. The department has tried to change the classification of the goods being imported by the appellants from CTH 85176290 to CTH 85176990 on the basis of a notification without making any case for revising the classification of the goods. We find that this is not permissible. We also find that department's reliance on Notification No.2/2019 which is subsequently issued is misplaced; cannot be made applicable retrospectively and therefore, not applicable to the present facts of the case. We find that while Revenue was free to decide on the eligibility of the impugned products for exemption under any notification. It is to be noted that the learned counsel for the appellant submits that they are discharging duty, at the merit rate, on carrier Ethernet Switches when they are imported for supply to telecom service providers, even though classified under CTH 85176290. However, it is not open to them to change the classification on the basis of an exemption notification when there is no change in the Customs Tariff Act, 1975. Therefore, we find that the impugned goods are rightly classifiable under CTH 85176290 in view of the past and present practice of the department, Rulings of US and German Customs and the order by ADG (Adjudication), DRI. Department has not adduced any evidence to show that the said order has been stayed by any competent authority.

5. In view of the above, we hold that the impugned goods "(a) Access point (b) Enterprise class Ethernet switches (other than carrier Ethernet switches) and (c) Networking appliances" are classifiable under CTH 85176290. Therefore, the appeal is allowed with consequential relief, if any, as per law.

(Operative part of the order pronounced in open court)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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