

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT No. III

Customs Appeal No. 40406 of 2020

(Arising out of Order-in-Appeal No. 106/2020 dated 20.03.2020 passed by Commissioner of Customs (Appeals I), Custom House, No. 60, Rajaji Salai, Chennai – 600 001)

M/s. Ingram Micro India Private Limited

...Appellant

MF-7, Cipet Hostel Road,
TVK Industrial Estate,
Ekkattuthangal, Guindy,
Chennai – 600 032.

Versus

Commissioner of Customs

...Respondent

Chennai VII Commissionerate,
New Custom House,
Meenambakam,
Chennai – 600 027.

With

Customs Appeal Nos. 40420-40424 of 2020

(Arising out of Order-in-Appeal No. 115-119/2020 dated 25.03.2020 passed by Commissioner of Customs (Appeals I), Custom House, No. 60, Rajaji Salai, Chennai – 600 001)

M/s. Ingram Micro India Private Limited

...Appellant

MF-7, Cipet Hostel Road,
TVK Industrial Estate,
Ekkattuthangal, Guindy,
Chennai – 600 032.

Versus

Commissioner of Customs

...Respondent

Chennai VII Commissionerate,
New Custom House,
Meenambakam,
Chennai – 600 027.

And

Customs Appeal No. 40494 of 2020
with
Customs Cross Objection No. 40210 of 2020

(Arising out of Order-in-Appeal No. 92/2020 dated 28.02.2020 passed by Commissioner of Customs (Appeals I), Custom House, No. 60, Rajaji Salai, Chennai – 600 001)

Commissioner of Customs

Chennai VII Commissionerate,
New Custom House,
Meenambakam,
Chennai – 600 027.

...Appellant

Versus

M/s. Ingram Micro India Pvt. Ltd.

RR Warehousing Complex, No. 4/177,
Puzhal, Ambattur Road,
Surapattu,
Chennai – 600 006.

...Respondent

APPEARANCE:

For the Assessee : Shri S. Murugappan, Advocate
For the Revenue : Shri M. Ambe, Authorised Representative

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER Nos. 40707-40713 / 2024

DATE of HEARING : 22.02.2024
DATE of DECISION: 21.06.2024

Order :- [Per Mr. VASA SESHAGIRI RAO]

Customs Appeal Nos. C/40420-40424/2020 has been filed by M/s. Ingram Micro India Pvt. Ltd. assailing Order-in-Appeal Airport Cus.I Nos. 115-119/2020 dated 25.03.2020 remanding the matter to the Adjudicating Authority to pass appropriate orders on merits considering the order passed in Order-in-Appeal No. 106/2020 dated 20.03.2020 and Order-in-Appeal No.

92/2020 dated 28.02.2020 while disposing the matter. The details of the appeals have been tabulated below:-

S. No.	Appeal No.	Impugned Appeal No.	No. of Bills of Entry	Amount involved (Rs.)
1	C/40420/2023	C3/I/158/R/2019-Air	50	26,15,176/-
2	C/40421/2023	C3/I/162/R/2019-Air	63	1,34,89,366/-
3	C/40422/2023	C3/I/163/R/2019-Air	22	19,62,290/-
4	C/40423/2023	C3/I/164/R/2019-Air	99	1,87,10,089/-
5	C/40424/2023	C3/I/165/R/2019-Air	50	71,76,978/-

2. Brief facts emerging from these appeals are as detailed below:-

2.1 In the case of Sl.No. (i) above, the Appellant had imported IP Phones under 50 Bills of Entry which were classified by them under CTH85176990 and duty was paid @10% in respect of imports made between 01.07.2017 and 11.10.2018 and subsequently @20% from 12.10.2018 in terms of Notification No.57/2017-Cus. dated 30.06.2017. As the Appellant was of the view that IP Phones were correctly classifiable under 85171810 and are free from payment of any Customs duty, the Appellants filed a refund claim for Rs.26,15,176/- involving the abovesaid Bills of Entry. However, the adjudicating authority rejected the refund claim in view of the Hon'ble Supreme Court's judgement in *Priya Blue Industries vs. Commissioner of Customs* [2004 (172) E.L.T. 145 (SC)] that the claims are not maintainable without first amendment / re-assessment of the original assessment made in the Bills of Entry.

2.2 In the case of appeals at Sl.No. (ii) to (v) above, the Appellant had imported Ethernet switches and claimed the benefit of customs duty exemption in terms of Notification No. 24/2005 as amended by Notification No. 11/2014 dt.11.07.2014 which was denied by department. The Customs duty was therefore paid under protest in the case of 6 Bills of Entry and the department refused to accept payment of duty in case of subsequent Bills of Entry under Protest and hence the Appellant was forced to pay duty at higher rate and filed the refund applications. However, the adjudicating authority returned the claims without giving any opportunity of being heard.

3. Aggrieved by the return of claims, the Appellant filed appeals before the Commissioner (Appeals) on the following grounds:-

- i. that the judgement of the Apex Court in the case of M/s. Priya Blue Industries (*supra*) referred to by the respondent was no more relevant subsequent to amendments made to Section 27 of Customs Act, 1962.
- ii. that a bare perusal of erstwhile provision as well as existing provisions, it would be clear that Section 27 post amendment in 2011 allows filing of refund claim against an assessment and does not call for challenging the assessment.
- iii. post 08.04.2011, under self-assessment, there is no order of assessment by any proper officer which is unlike an assessment under old provision.
- iv. the refund application filed for the refund of excess duty paid was to be considered as re-assessment of the Bills of entry.

v. the goods under reference are "Ethernet Switches" used to connect personal computers, laptops, printers and other peripherals within the boundaries of enterprise campus/ building/floor whereas Carrier Ethernet Switches are used to connect geographically dispersed organisations through a service provider network.

4. The Commissioner (Appeals) *vide* Order-in-Appeal Airport Cus. I No. 115 to 119/2020 dated 25.03.2020, basing on the Hon'ble Supreme Court's judgement in the case of *ITC Vs. Government of India*, remanded the matter to the Adjudicating Authority to pass appropriate orders on merits:-

- i. by following the Order-in-Appeal Nos. 146 & 147/2019 dated 26.08.2019 denying the benefit of Customs Notification No. 75/2018 dated 11.10.2018 and by following the Order-in-Appeal No. 106/2020 dated 20.03.2020 rejecting refund claim barred by limitation of time, in respect of Ethernet Switches and
- ii. by considering the Order-in-Appeal No. 92/2020 in the appeal pertaining to classification of VOIP Phones.

5. Aggrieved, the present appeals have been filed before this forum by the Appellant.

6. Customs Appeal No. 40406/2020 has been filed by M/s. Ingram Micro India Pvt. Ltd. assailing Order-in-Appeal Airport Cus.I No. 106 /2020

dated 20.03.2020 dismissing the appeal filed by the Appellant by holding that the Ethernet Switches imported by the Appellant would fall under CTH 85176990 in terms of Order-in-Appeal Nos. 146&147/2019 dated 26.08.2019 and is not eligible for exemption benefit of concessional rate of duty as per Sl.No. 21 of exemption Notification No. 75/2018 dated 11.10.2018.

7. Customs Appeal No. 40494/2020 has been filed by the Department assailing Order-in-Appeal Airport Cus.I No. 92/2020 dated 28.02.2020 allowing the appeal filed by M/s. Ingram Micro Ltd. in upholding the classification of CISCO IP Phone 8841 under CTH 851718 while dismissing the classification by the department under CTH 85176990. However, in the case of Video screen phones, the classification under CTH 85176990 was upheld.

8. As the issues involved in all the seven aforesaid appeals involve similar issues, they are being taken up together for disposal by this common order.

9. The grounds of Appeal of the Appellant are summarised as below:-

- i. The Appellant contended that the number of Bills of Entry in respect of Sl.No. (i) of table above is 51 and not 50.

- ii. It was averred that the Orders-in-Appeal Nos. 146-147/2019 dated 26.08.2019 and Order-in-Appeal Airport Cus. I No.106/2020 dated 20.03.2020 not having attained finality cannot direct the Original Authority to abide by the decisions in the said orders when the issue on merits have not yet been decided where these orders were appealed against.
- iii. It was averred that the appellants were not allowed to register their protest in the formal way as per the system set in Air Cargo and therefore had to submit letters in Group 5A and took acknowledgement. Accordingly, accepting the fact that duty was paid under protest on continuing basis, the original authority should need to vacate the protest and reassess the bills of entry or issue speaking orders in respect of the 234 Bills of Entry. It was submitted that all duties of Customs were to be treated as paid under Protest till the matter stands resolved as the original authority failed to register the protest in respect of many Bills and hence the appellants submitted a letter dated 08.03.2016 clearly confirming that all duties paid towards Bills of Entries filed will be under protest. In this connection, the appellants placed reliance on the decision of the Tribunal in the case of *ITC Ltd. Vs. Commissioner of Customs (Sea), Chennai-II* reported in *[2018 (8) GSTL 418 (Tri.-Chennai)]* wherein it was held that once a protest is lodged it will remain till the disputed issue is settled finally.

Relevant portions of the above judgement read as under:-

"3. *The appellate authority rejected the appeal that even if the duty was paid under protest, the same was vacated on the passing of the order of the original adjudicating authority and as such the deposits made prior to adjudication would attain the character of duty, thus requiring to be refunded on an application by the appellant within a period of time limit laid down under the law. The appellants have relied upon the Tribunal's decision of the Gujarat Engineering Works v. CCE,*

Ahmedabad - [2013 \(292\) E.L.T. 547](#) (Tri.-Ahmd.), as also other decisions. I find that the appellant had addressed a letter on 19-11-1998 to the Assistant Commissioner, Customs intimating that since they require the consignment urgently for their product they would be clearing the goods on payment of duty under protest for the same. I find that the said plea of the appellant has not been disputed by the lower authority. If the duty has been paid under protest, there is no vacation of the protest, on adjudication having been done against the assessee. Such protest lodged by the assessee would remain till the disputed issue is settled finally by the higher appellate forums. Ld. DR appearing for the Revenue has also not been able to bring to my notice any such provision of law indicating such vacation of protest on an adverse order having been passed against the assessee. As such, I am of the view that the duty having been paid under protest would not get hit by the limitation."

Similarly, the ratio of the decision in *Shree Balaji Enterprises Vs. Commissioner of Central Excise, Meerut-I* reported in [2012 (286) ELT 65 (Tri.-Del.)] was relied, the relevant portion of which judgement has been reproduced below:-

"5. *A reading of the above letter very clearly reveals that the appellant was not in agreement with the Revenue's stand of payment of service tax. The Revenue's stand is that the last line of para-4 is to the effect as if the payment of service tax from July, 2008 onwards is only 'under protest'. However, it is the entire gist of the application which has to be taken note of. The appellants have deposited the duty for the past period and have submitted that they will be paying duty under protest. It has to be taken as if the payment for the past period was also under protest. This conclusion is further strengthened from para-5 of the above letter which uses the expression 'paid under protest'. Admittedly the word 'paid' has to refer to service tax which is deposited by the appellant and the only deposit is for the period April, 2008 to June, 2008. As such it can be very clearly concluded that it was the entire deposit which was under protest and the said letter cannot be segregated into two different parts, i.e., (i) referring to the deposits made and (ii) other, to the deposit"*

Further, the ratio of the judgement in *M/s. Posddar Pigments Ltd. Vs. Commissioner of Customs & Central Excise, Jaipur* reported in [2006 (206) ELT 563 (Tri.-Del.)] was relied upon the relevant portion of the judgement has been reproduced below:-

"5. *Considered the submissions made by both the sides and perused the records. I find from the record that the TR-6 challans specifically and clearly mention that interest is paid Under Protest. It is very clearly brought out by the appellants that they wished to pay the "interest*

under protest” when they cleared the goods from CWC. By not furnishing a letter for ‘under protest’ payment, the appellants have not done anything wrong, since TR-6 challans themselves on which the payment is made, could be considered as intention of making the payment of interest ‘under protest’. The Tribunal in the case of Sunil Synchem Ltd. (supra) has held as under :

“4. Considered the submissions. It is not in dispute that no Customs duty was payable on the goods imported under the DEEC Scheme. Where no duty was payable, there could be no liability to pay any “interest on duty” as held by the Supreme Court in Pratibha Processors (supra). It was apparently under departmental compulsion that the party had to pay “interest on duty” while clearing the goods from warehouse on 23-9-87. The refund claim in question was filed on 5-9-94. Obviously, the claim was far beyond the period of limitation prescribed under the second proviso to Section 27(1) of the Customs Act. The interest amount was admittedly paid under TR. 6 challan, wherein the party conspicuously mentioned the words ‘under protest’. The authorities below have not accepted these words as valid or sufficient protest for purposes of Section 27 of the Customs Act. The short question before me is whether the protest recorded in the TR. 6 challan could be accepted as valid and sufficient protest for purposes of the refund claim under Section 27 of the Act. According to the authorities below, the claimant ought to have filed a formal letter of protest rather than merely noting “under protest” in the TR. 6 challan. It is in this context that the decision of the Apex Court in Mafatlal Industries (supra) becomes relevant. That decision was, of course, rendered in the context of considering certain refund claim filed by the assessee under Section 11B of the Central Excise Act. In para 85 of the judgment in Mafatlal Industries, the Apex Court held that the department had no authority to sit in judgement over the grounds of protest and that it was not incumbent on the assessee to mention any such ground while making payment of duty. It has not been disputed before me that the Supreme Court’s ruling in Mafatlal Industries is applicable to refund claims under Section 27 of the Customs Act. In view of the legal position, I have to hold that the protest registered by the appellants in the TR. 6 challan while making payment of the interest amount is sufficient protest for purposes of the second proviso to Section 27 (1), particularly in the absence of any provision in the Act or Rules thereunder requiring the assessee (seeking to take the benefit of the said proviso) to file a formal letter of protest while making payment of duty/interest under the Act, and that the refund claim in question was not hit by the limitation under Section 27.”

6. *Further I find that the Division Bench in the case of CCE, Mumbai v. Piramal Spg. & Wvg. Mills (supra) has held as follows :*

“2. We have heard the Id. D.R. and perused the records. The period in dispute is prior to the introduction of Rule 233B of the Central Excise Rules which lays down the procedure for payment of duty under protest. During the relevant period, no procedure was laid down for lodging protest. The Commissioner (Appeals) has held that duty was paid under protest as the Gate passes, PLAs and RT 12 returns all carrying the endorsement “duty paid under protest”. In the absence of any procedure for lodging protest, such endorsements have rightly been held to evidence of payment of duty under protest and in the light of such endorsements, the absence of any letter of protest cannot change the character of the duty being paid under protest. We, therefore, hold that the refund claims are not time barred.”

7. *From the above facts and circumstances, it is very clear that in this case the intention of the assessee was to pay the interest “under protest”. There is no hard and fast rule for filing of the letter of “under*

protest” in each and every case, if that intention is made implicitly clear.”

- iv. It was averred that though the appellants have filed Bills of Entry claiming exemption on self-assessment, due to objections raised at the shed officers level, extra duty was paid before clearance of the goods without benefit of Basic Customs Duty exemption.
- v. It was stressed that the Original Authority never considered the subject bills for re-assessment when numerous bills were re-assessed by granting exemption claimed by the Appellants.

10. The Ld. Advocate Shri S. Murugappan appearing for the Appellant *interalia* submitted that the availability of duty exemption for Ethernet switches was decided in favour of the appellant by the Hon'ble Tribunal in terms of Final order read with miscellaneous order reported in *[2020 (11) TMI (9)-CESTAT]* and *[2021 (2) TMI 258 CESTAT, Chennai]*. In respect of IP phones, it was stressed that the order relied upon by the lower appellate authority under reference is Order-in-Appeal No. 92/2020 dated 27.02.2020 was being contested by the department in an appeal before the Honble Tribunal in C/40494/2020 which issue was also covered in favour of the appellants in their own case decided by the Hon'ble bench in CESTAT, New Delhi and reported in *[2020 (12) TMI 870]* and also by the Hon'ble Mumbai bench of CESTAT in terms of Final orders in A86416-86753/2023 and A86754-86755/2023 dated 10.08.2023. Thus, the Ld. Advocate has submitted that on merits the appellants were eligible for exemption benefit claimed. Regarding duty payment under protest, it was submitted vide letter dated 08.03.2016 that till the issue was resolved all payments made by the

Appellants were to be treated as Payment of duty under protest and in this regard reliance was placed on the following two decisions:-

- i. *Commissioner of Central Excise, Chennai Vs. Electro Steel Castings Ltd. [2014 (299) ELT 305-Madras High Court] and*
- ii. *Commissioner of Central Excise, Aurangabad Vs. Klasspak Pvt. Ltd [2005 (179) ELT 365-Tribunal-Mumbai]*

11. The Ld. Authorised Representative Shri M. Ambe representing the Department reiterated the findings of the lower Adjudicating Authority and submitted that:-

- i. On perusal of the commercial invoice No. 114623466 date 30.09.2015, it was seen that the ultimate consignee has been mentioned as Vodafone India Ltd. who is a service provider for Telecommunications. Hence, it was concluded that the products imported are Carrier Ethernet Switches used to connect geographically dispersed organisations. Hence the averment by the Appellant in the grounds of appeal that the products imported are not carrier Ethernet Switches is devoid of merits and liable for rejection.
- ii. Notification No. 24/2005-Customs dated 01.03.2005 as amended by Notification No. 11/2014-Customs dated 11.07.2014, specifically excludes Carrier Ethernet Switches from the scope of exemption of Customs duty. Hence the self-assessment of the Bills of Entry are in order and the department has not preferred to interfere with the claim for exemption by the Appellants under the Notification *ibid*.
- iii. The marking of protest itself gives information to the department that there is a requirement for re-assessment. Assessment under Section 17 of Customs Act, 1962 cannot be said to be finalized when

respondent has marked the protest while paying duty. The mark of protest is an information to the department that the respondent is not making payment of duty voluntarily. The Department has to initiate proceedings to vacate protest and pass speaking order for reassessment as held in *Commissioner of Customs, Tuticorin Vs. Sakthi Sugars Ltd. [2020 (372) ELT 577 (Tri.-Chennai)]*. Hence the appeal filed by the Appellant in the above circumstances is infructuous and liable to be dismissed.

- iv. Wherever, respondents had paid the entire duty without any mark of protest, in order to claim refund they have to request for reassessment of Bill of Entry before the proper officer. Merely filing appeals without following due procedure vitiates the process of assessment.
- v. The appeals cannot be considered as filed against Section 47 as these appeals are filed against the impugned self-assessment done by them and not against clearances under Section 47 as correctly held in the impugned order. The proper officer under Section 17(1) does not pass any assessment order/ makes any verification of the self-assessment.
- vi. IP phones communicate through voice over internet protocol. The data travels in digital form through wired or wireless networks. VOIP has the caller ID which is not provided by the regular phone. The communication in IP phones are digitally encrypted unlike the complex circuitry of regular push type button phones.
- vii. The features of Cisco 8845 IP phone or CISCO IP phone 7841 includes, camera for video calls, monitor, microphone, input devices,

etc. are all housed in a single body through circuits. The Codec unit works to code/ decode audio and video signals for communication and the microphones within the camera is used to transmit the voices of the conference participants to a remote location. Both audio and video IP phone functions on the principle of Internet Protocol (IP) telephony and hence share common functionality. The only difference is that Video IP phone, in addition to transmission/ reception of digital voice signal, transmits/ receives digital video signal also. The Video conferencing system is nothing but a Voice Over Internet Protocol (VOIP) phone. As the impugned import goods function on the principle of Internet Protocol, Keeping the functionality of VOIP Phone in consideration, since the goods are designed to transmit audio / video or both, the same merits classification under heading 85176290.

viii. Notification No. 24/2005-Customs dated 01.03.2005 as amended by Notification No.11/2014-Customs dated 11.07.2014, specifically excludes VOIP Phones from the scope of exemption of Customs duty. Hence the self-assessment of the Bills of Entry are in order and the department has not preferred to interfere with the claim for exemption by the Appellants under the Notification *ibid*.

ix. In *Ingram Micro India Pvt. Ltd. Vs. Commissioner of Customs, ACC, Mumbai [2019 (ACR) 35 CESTAT, Mumbai]*, it was held that all VOIP Equipments are classifiable under 85176290 since the equipment under import are used for transmission, reception, conversion and transmission or regeneration of voice / video images and fall outside

the scope of Notification No. 24/2005. The above judgement is squarely applicable to the facts of the case as similar imports have been effected by the same appellant.

12. Heard both sides and carefully considered the submissions and evidences on record.

13.1 The first issue that has to be decided in these appeals is whether the refund claims filed by the appellant can be sanctioned or not in the absence of any challenge to the orders of the assessments in terms of provisions of Section 17, 27 and 128 of the Customs Act, 1962?

13.2 From the facts obtaining from these appeals, it is evident that the appellant has filed 5 refund claims as per the details given below:-

S. No.	Appeal No.	Imported Products	No. of Bills of Entry	Amount involved (Rs.)
1	C/40420/2023	IP Phones	51	26,15,176/-
2	C/40421/2023	Ethernet Switches	63	1,34,89,366/-
3	C/40422/2023	Ethernet Switches	22	19,62,290/-
4	C/40423/2023	Ethernet Switches	99	1,87,10,089/-
5	C/40424/2023	Ethernet Switches	50	71,76,978/-

13.3 In respect of refund claim filed for refund of Rs.26,15,176/- involved in the 51 Bills of Entry for import of IP Phones, the appellant have

classified the imported goods under CTH 85176990 on self-assessment basis and duty was paid @ 10% upto 11.10.2018 and @ 20% from 12.10.2018 onwards under Notification No. 57/2017-Cus dated 30.06.2017. Subsequent to the self-assessment for the imports effected as above, when the appellant came to know that IP Phones were correctly classifiable under CTH 85171810 and so were exempted from payment of Customs Duty, the appellant filed the refund claim which was rejected by the refund sanctioning authority in view of the Hon'ble Supreme Court's judgment in the case of M/s. Priya Blue Industries (*supra*) as being not maintainable without first amending and re-assessment of the self-assessed Bills of Entry. Similarly, in respect of refund claims from Sl.No. 2 to 5 in the above-mentioned table involving 234 Bills of Entry and excess duty paid of Rs.4,13,38,723/- for import of Ethernet Switches, refund claims filed by the appellant were returned by the refund sanctioning authority as not being maintainable.

13.4 At this juncture, we like to refer to the judgment of Hon'ble Supreme Court in the case of *ITC Vs. Commissioner of Central Excise, Kolkata-IV* [2019-TIOL-418-SC-CUS-LB] which has held that:-

"43. As the order of selfassessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of reassessment which is appealable but the provisions of [Section 128](#) make appealable any decision or order under the Act including that of selfassessment. The order of self assessment is an order of assessment as per [section 2\(2\)](#), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in [Section 17](#) to pass a reasoned/speaking order in the situation in case on verification, selfassessment is not found to be satisfactory, an order of re-assessment has to be passed under [section 17\(4\)](#). [Section 128](#) has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no *lis*, no speaking order is passed, as such an appeal would

not lie, is not sustainable in law, is contrary to what has been held by this Court in [Escorts](#) (supra).

44. The provisions under [section 27](#) cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which selfassessment has been made. In other words, the order of selfassessment is required to be followed unless modified before the claim for refund is entertained under [Section 27](#). The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, reassessment is not permitted nor conditions of exemption can be adjudicated. Reassessment is permitted only under [Section 17\(3\)\(4\)](#) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or reassessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under [Section 27](#). In [Hero Cycles Ltd. v. Union of India](#) 2009 (240) ELT 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in [Priya Blue Industries Ltd.](#) (supra).

45. Reliance was also placed on a decision of Rajasthan High Court with respect to service tax in Central Office Mewar Palace Org. v. Union of India 2008 (12) STR 545 (Raj.). In view of the aforesaid discussion, we are not inclined to accept the reasoning adopted by the High Court, that too is also not under the provisions of the [Customs Act](#).

46. The decision in [Intex Technologies \(India\) Ltd. v. Union of India](#) has followed [Micromax](#) (supra). The reasoning employed by the High Courts of Delhi and Madras does not appear to be sound. The scope of the provisions of refund under [Section 27](#) cannot be enlarged. It has to be read with the provisions of [Sections 17, 18, 28](#) and [128](#).

47. When we consider the overall effect of the provisions prior to amendment and postamendment under [Finance Act, 2011](#), **we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or selfassessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of [Section 27](#) to set aside the order of selfassessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include selfassessment, he has to get the order modified under [Section 128](#) or under other relevant provisions of the Act.**

48. Resultantly, we find that the order(s) passed by Customs, Excise, and Service Tax Appellate Tribunal is to be upheld and that passed by the High Courts of Delhi and Madras to the contrary, deserves to be and are hereby set aside. We order accordingly. We hold that the applications for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred."

13.5 As all these imports were self-assessed and without challenging the assessments made, refund claims filed could not be sanctioned, in view of the above decision of the Hon'ble Supreme Court.

14. The second issue that is required to be decided in these appeals is about the correct classification of the imported IP Phones and Ethernet Switches.

Classification of IP Phones:-

15.1 Whether the IP Phones are classifiable under CTH 85176990 as contended by the Department or classifiable under CTH 85171810 as claimed by the appellant?

15.2 In respect of IP Phones covered under 51 Bills of Entry, we find that the subject imports were initially classified under CTH 85176990 whereas the Appellant was of the view that they were correctly classifiable under CTH 85171810 with nil rate of Customs duty. Accordingly, the Appellant filed refund claims which were rejected by the Department as not maintainable without first amending / re-assessment of the original self-assessment made in the Bill of Entry, following the ratio of the decision of Hon'ble Supreme Court judgement in M/s. Priya Blue Industries (*supra*). Upon further appeal, the lower appellate authority accepted the classification claimed by the Appellants in respect of IP Phones and directed the Original Authority to decide afresh with a direction to cause verification of duty

payments made under protest and by following the earlier decision in Order-in-Appeal no. 92/2020 in the appeal pertaining to classification of VOIP Phones. However, in the case of Video screen phones, the classification under CTH 85176990 was upheld by the lower Appellate Authority. We find that the Departmental appeal against Order-in-Appeal No. 92/2020 is also pending before this forum in C/40494/2020.

15.3 As to the classification of IP Phones, we find that the issue is no more *res integra* and stands settled by the following judgement in their own case:-

A. *Final Order No. 51640/2020 dated 17.12.2020 – Ingram Micro Indian Pvt. Ltd. Vs. Deputy Commissioner of Customs, New Delhi* wherein it was held as follows:-

"34. *In the order dated February 27, 2020, the Commissioner (Appeals) noticed that the product under consideration was IP Phone FON-175 and though the goods were classified by the importer under CTH 8517 18 10, but the Adjudicating Authority classified the goods under CTH 8517 69 90. The Commissioner (Appeals) held that the goods would be classified under CTH 8517 18 10 and for coming to this conclusion placed reliance upon the HSN Explanatory Notes. The relevant portion of the order is reproduced below :*

"6. I have carefully gone through the facts given in the appeal, the speaking order and both the submissions, written and oral, made by the Advocate of the appellant company, during the personal hearing. The issue to be decided is,

i. whether the imported CISCO IP Phone Model 8841 and FON175 Entry Level Phone of FortiFone are to be classified under CTH 8517 69 90 or under CTH 8517 18 10?

7. It is seen from the catalogue that Fortinet Companies Forti IP Telephones has various models including FON 175. These IP Phones has dedicated keys for the most common features and it has a PBX also with call forwarding, voice mail notification, one touch transfers, conference calling, speed dial, POE (Power Over Ethernet) support and Auto discovery for easy setup.

8. The CISCO IP Phone 8841 has five programmable line keys, these keys can be configured to support either multiple directory numbers or call features such as speed

dials. Fixed function keys gives one touch access to applications, messaging, directory, holding the call, transfer and conference. This phone supports the built-in Gigabyte and Ethernet Switch for PC connection also. From the catalogues, it is observed that these are push button type telephone sets and CTH 8517 covers telephone sets, including telephones for cellular networks or for other wireless networks. Since these phones can be used through internet, these cannot be classified under CTH 8517 11 10. Therefore, the right classification appears to be CTH 8517 18 (Other) and sub-classification 8517 18 10 push button type. Going by the HSN explanatory notes for CTH 8517 telephone sets including telephone for cellular networks or other networks, these items are appropriately to be classified under CTH 8517 18 only as "others". The relevant portion of the HSN explanatory notes is reproduced;

"Telephone sets, may incorporate or have fitted a memory for storing and recalling telephone numbers, a visual display for showing the number dialed, incoming callers number, date and time and duration of the call, an extra loudspeaker and microphone to enable communication without using the hand set; devices for automatically answering calls, transmitting a recorded message, recording incoming messages and playing back recorded message on command; devices for holding a connection on line while communicating with the person on another telephone. Telephone sets incorporating these devices may also have keys or push buttons which enable their operation, including a switching key which enables the telephone to be operated without removing the handset from the cradle. Many of these devices utilized a microprocessor or digital integrated circuits for their operation."

10. The AA has classified the goods as CTH 8517 69 90 as "others" as this can be made use of in the LAN and SIP (Session Initiation Protocol). **As these phones cannot be used for video call, they have to be essentially classified under CTH 8517 18 only. In the case of video screen phones, it can be classified under CTH 8517 69 90 as "others".** As these phones are meant only for audio calls, the classification claimed by the appellant M/s. Ingram Micro India Pvt. Ltd., appears to be correct. It is not understood why they have cleared the impugned goods earlier under CTH 8517 69 90. Therefore, in view of the above discussions, the AA's order classifying the impugned VoIP (Voice over Internet Protocol) Phone is set aside and he is directed to reassess the goods vide classification CTH 8517 18 10. It is further directed to verify their earlier clearances of such VoIP Phones under CTH 8517 69 90 and whether they availed wrongly any benefit of exemption notification."

35. The second order dated March 9, 2020 of the Commissioner (Appeals) relies upon the aforesaid order dated February 27, 2020 passed by the Commissioner (Appeals). After noticing that the 6 models of CICO IP Phone are not capable of making video call and are meant only for audio call, the Commissioner (Appeals) observed that the goods would be classifiable under CTH 8517 18 10. The observation are as follows :

"10. All the other 6 models of CISCO IP Phones are not capable of making video calls and as per the literature available those are meant only for audio calls. CISCO IP 7800 Series has 4 line and programmable feature keys, high resolution graphical display, dedicated fixed keys, built-in speaker phones and handset, speaker/headset. It has PCE (Power over Ethernet) Class-1 feature also, Model 8841 and 8851 has wide band audio for crystal clear voice communications, it is also supported on 3rd party hosted call control services. In addition in the Model 8851, the mobile phone also can be attached (Audio path) and this IP Phone comes with USB Port for charging.

11. As per the literature, the CISCO IP Conference Phone 8831 & 8832 are basically voice telephones having push buttons. Going by the literatures all the 6 models are having push buttons and fixed keys and are to be classified under CTH 8517 18 10 as claimed by the appellant M/s. Ingram Micro India Pvt. Ltd."

(Emphasis supplied)

36. Learned Counsel for the appellant submitted that different Collectorates of Customs cannot adopt different standards on a particular issue and in this connection placed reliance upon the decision of the Calcutta High Court in *Opal Exports Pvt. Ltd. v. Collector of Customs* [[1992 \(60\) E.L.T. 232](#) (Cal.)].

37. The Calcutta High Court held in *Opal Exports* that Customs Authorities cannot be permitted to practice discrimination and that the Collectorates of the Customs have to adopt a similar stand on a particular issue. The relevant portion of the judgment is reproduced below :

“28. The respondent Customs authorities by treating similar imports as imports of spares while adopting a different view in the case of the petitioner (who is placed in similar circumstances as other importers of similar goods) have discriminated against the petitioner in violation of the guarantee of equal protection contained in Article 14 of the Constitution of India.

29. The discriminatory treatment meted out by the Customs Authorities to the petitioner is also mala fide as is evident from the fact that subsequently the respondents have allowed import of similar goods and such goods have been treated as spares and customs duty has been levied accordingly. However, the imports forming the subject matter of the writ petition have been illegally and arbitrarily subjected to discriminatory treatment.

30. It is not open to the Customs authorities to contend that the subject goods were complete measuring instrument in view of the decision of the Customs, Excise & Gold (Control) Appellate Tribunal, West Regional Bench at Bombay in the case of *M/s. Sushu Electronic v. Collector of Customs & Central Excise, Rajkot*, in which similar goods have been classified as spares and not as complete instruments. It is a settled law that different Collectorates of Customs cannot adopt different stands on a particular issue.”

(Emphasis supplied)

38. Learned Counsel for the appellant also pointed out that another consignment of similar goods imported by the appellant at Air Cargo Complex, Chennai by Bill of Entry No. 8380173, dated August 5, 2020 was allowed to be cleared by the Department on September 8, 2020.

39. Thus, for the reasons stated above, the goods under consideration also require classification under CTH 8517 18 10.

40. Learned Counsel for the appellant, in the alternative, submitted that even if the product under consideration is prima facie classifiable under two or more Headings, the classification would be effected in the manner prescribed in (a) or (b) or (c) of Rule 3 of the General Rules and so the Heading which provides the most specific description shall be preferred to Headings providing a more general description. In such a situation also the product under consideration would fall under the Tariff Item Heading 8517.

41. This submission of Learned Counsel of the appellant deserves to be accepted. The product under consideration is an Executive IP Phone. It would satisfy the specific description of Tariff Item Heading 8517.

42. In *Moorco (India) Ltd. v. Collector of Customs, Madras* [[1994 \(74\) E.L.T. 5](#) (S.C.) = 1994 taxmann.com 265 (SC)], the Supreme Court held

that the First Schedule appended to the Customs Act lays down the General Principles for the Interpretation and classification of goods for import tariff and that the applicability of Rule 3 arises when the goods consisting of more than one material fall in two or more headings. The Supreme Court observed that each of the classes are mutually exclusive. What is covered in (a) cannot be classified in (b), and (c) operates when neither (a) or (b) applies. It is like a residuary clause. The observations are as follows :

“The primary question, therefore, is whether the goods manufactured by the appellant fall in clause (a) and if it can be classified with reference to (a) then clauses (b) and (c) would not apply. Clause (a) incorporates the common and general principle that the goods which can be classified specifically with reference to any heading should be placed in that category alone. The specific heading of classification has to be preferred over general heading. The clause contemplates goods which may be satisfying more than one description. Or it may be satisfying specific and general description. In either situation the classification which is the most specific has to be preferred over the one which is not specific or is general in nature. In other words, between the two competing entries the one most nearer to the description should be preferred. Where the class of goods manufactured by an assessee falls say in more than one heading one of which may be specific, other more specific, third most specific and fourth general. The rule requires the authorities to classify the goods in the heading which satisfies most specific description. For instance, taking the case of the appellant the item manufactured by the appellant is described and used as flow meter. It is an instrument for measuring volume as well. Flow meter is specifically classified in Heading No. 90.24. Whereas the Heading 90.26 is general in nature. It applies to every production meter or calibrating meter for gas, liquid and electricity supply. Therefore, on the finding recorded by the Assistant Collector, the goods produced by the appellant specifically fall in Heading No. 90.24. They may also fall in Heading No. 90.26 but that being more general entry preference should have been given to the entry 90.24 as the goods satisfy most specific description of being flow meter. The Tribunal or the appellate authority without adverting to it applied clause (c) and levied duty under 90.26 as it was a latter heading. But clause (c) would apply only if clauses (a) and (b) do not apply. Since the goods manufactured by the appellant satisfied the specific description of Tariff Heading 90.24 being a flow meter, the Tribunal committed an error of law in classifying it under Tariff Heading 90.26 as it was a latter item under the classification list.”

(Emphasis supplied)

43. The Commissioner (Appeals) has relied upon Rule 3(c) to hold that since Tariff Item Number 8517 69 90 falls last in the numerical order among those which equally merit consideration, the product under consideration would be classifiable under CTH 8517 69 90 and not CTH 8517 18 10.

44. The Commissioner (Appeals) clearly committed an error in straight-away jumping to Rule 3(c) without first exhausting Rule 3(a) and Rule 3(b).

45. The Commissioner (Appeals) also committed an error in holding that the goods in question are for video calling. As noticed above, the facility of video codec support is available only in model 675i, whereas the imported goods model is 670i, which does not have any feature of video support. The Order Information contained in the product literature, also describes model 675i as an "Executive Video IP Phone", while model 670i is described as an "Executive IP Phone". This clearly shows that the facility of video calling is not available in the model imported by the appellant.

46. Learned Authorized Representative of the Department also submitted that the Commissioner (Appeals) committed no legality in placing reliance upon the Exemption Notification dated January 29, 2019, which notification suggests that VoIP phones are classifiable under CTH 8517 69 90 and are not eligible for exemption.

47. This contention of the Learned Authorized Representative of the Department cannot also be accepted. The classification of goods has to be done in accordance with the terms of Headings and any relative Section or Chapter Note. The classification is not required to be done in terms of any Exemption Notification. This is what was also observed by the Tribunal in *Ruchi Soya Industries Ltd. v. Commissioner of Customs (ACC & Imp.)*, Mumbai [[2019 \(369\) E.L.T. 1529](#) (Tri. - Mumbai)]. The relevant portion of the decision is reproduced below :-

“5.3 In the present case the benefit of Exemption Notification as claimed by the appellants under Notification No. 21/2002-Cus., dated 1-3-2002 has been allowed by the lower authorities. However, the issue that appellants have raised is two folds -

(i) The classification of the goods imported by them should have been done by following the classification as per the exemption notification and not by application of Chapter Note 3 to the Chapter 12.

(ii) Since no rate of duty has been mentioned under column 5 of the Notification No. 21/2002-Cus., assessment should have been made allowing them full exemption from Additional Duty.

5.4 We are not in position to agree with the said submissions -

(i)As per Rule 1 of “General Rules of Interpretation of Import Tariff”

“1. The Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions :”

Thus by application of the said rule classification of the goods is to be done in accordance with the terms of headings and any relative Section or Chapter Note. It is not the case of the appellant that by application of the above Rule 1, the classification as done by the Revenue is erroneous but appellants are contending that the classification should have followed the exemption notification. We are not in position to agree with the said contention. The decision of Indian Tobacco Association referred by the appellants in their appeal do not advance the case of appellant as the said decision do not state so and is also not on the issue of classification. The said decision is authority for giving liberal interpretation to the exemption notification in accordance with the objective of the notifications. Hence the contentions of appellant in respect of classification cannot be agreed to.”

(Emphasis supplied)

48. Thus, for all the reasons stated above, the product under consideration, which is an Executive IP Phone (Model No. FON-670i), is classifiable under CTH 8517 18 10 and not under CTH 8517 69 90.

49. The order passed by the Commissioner (Appeals), therefore, cannot be sustained. It is, accordingly set aside and the appeal is allowed.”

B. Final Order No. A/86416-86753/2023 & A/86754-86755/2023 – M/s.

Cisco Commerce India Pvt. Ltd. Vs. Commissioner of Customs (Import)

ACC, Mumbai wherein it was held as follows:-

"24. On careful examination of the above system, we find that the Coordinate Bench had dealt with 'video conferencing systems'; whereas, in the case in hand, we are dealing with 'IP Phones', whose features are entirely different than the products dealt with by the Co-ordinate Bench. Hence, the ratio of the judgement of Co-ordinate Bench does not apply to the facts of this case. Furthermore, for ascertaining the functionality of the instrument in question, the learned Advocate for the appellants was directed by the Bench for submission of the declaration to such effect. Pursuant to such direction, the appellants had filed an affidavit (duly notarized) in respect of various models of 'CISCO IP Phones' covered in the appeals before us. It has been sworn that there are thirty three different models of IP Phones, designed to capture voice/ audio communications only, but do not have the capacity of making/ receiving video calls. It has further been stated in the affidavit that in respect of one model CP-8865-NC-K9 which has the facility of both audio/voice and video capabilities, the appellants have been classifying such IP Phones under 8517 69 90 and they are not disputing such IP phones, which are not in dispute in these bunch of appeals.

25. We also find that the Co-ordinate Bench of this Tribunal, in the case of *Ingram Micro India Pvt. Ltd. Vs. Deputy Commissioner of Customs, New Delhi* vide Final Order No. 51640/2020 dated 17.12.2020 (in Customs Appeal No. C/50865/2020), has held that IP Phone (Model No. FON-670i), is classifiable under CTH 8517 18 10 and not under CTH 8517 69 90.

26. In view of the foregoing discussions and analysis, we conclude that the product under consideration i.e., "CISCO IP Phones" of various models would appropriately be classifiable under Customs Tariff Item/ CTH 8517 18 10 and not under Customs Tariff Item/CTH 8517 69 90, as claimed by Revenue".

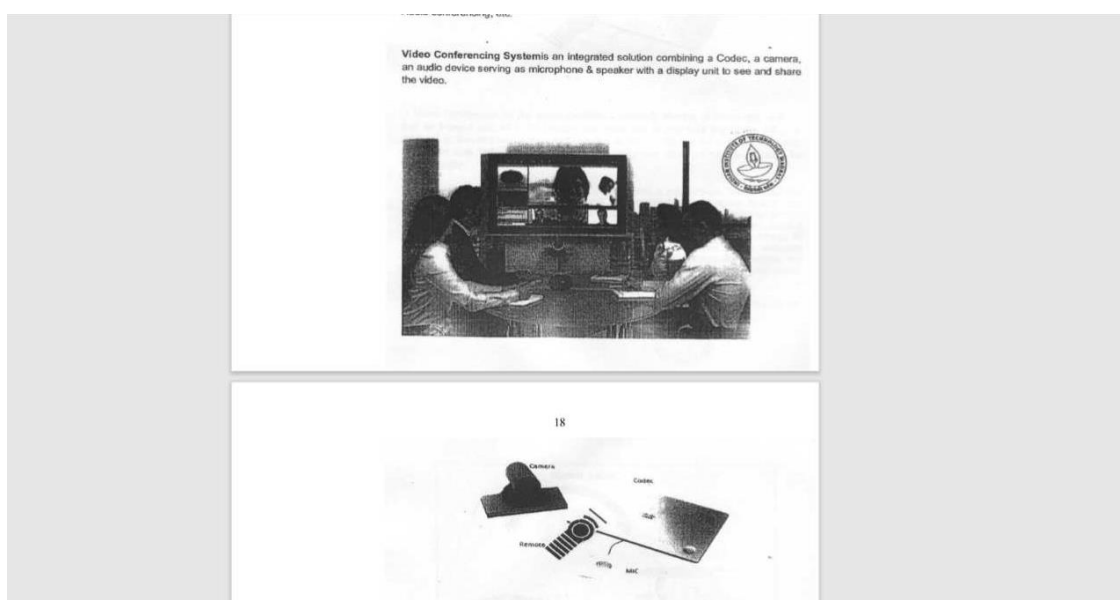
C. Final Order No. A/85085/2024 M/s. Ingram Micro India Pvt. Ltd. vs.

Commissioner of Customs (Imports), ACC, Mumbai wherein it was held as follows:-

"25. We also find that classification of CISCO IP phones have also been decided by the Co-ordinate Bench of this Tribunal in the case of the manufacturer *Cisco Commerce (I) Pvt. Ltd. Vs. Commissioner of Customs, ACC, Mumbai* in Final Order No. dated by holding that "CISCO IP Phones" of various models would appropriately be classifiable under CTH 8517 18 10.

26.1 We had also considered the submission made by the Learned AR

as he had relied upon the decision of the Coordinate Bench of the Tribunal in the case of Ingram Micro India Pvt. Ltd. (supra), to state that the classification of CISCO IP Phones shall be under tariff item 8517 62 90, inasmuch as the phone used voice over internet protocol for placing and transmitting telephone calls over an IP network such as internet. He has further stated that the said decision of Tribunal has been upheld by the Hon'ble Supreme Court, as the Civil Appeal No.6389 of 2019 filed by the party was dismissed. In order to appreciate the points put forth by the learned AR, we have carefully perused the above cited decision of the Coordinate Bench, and find that the product dealt with in that case was "SX20 QUICK SET WITH 12 XPHDCAM, IMIC, REMOTE AND TC& SW, CTS-SX20-PHD12X-K9 (Video Conferencing System)" and not "IP Phones". The pictorial representation of the goods dealt therein has also been recorded in page 17 & 18 of that order. It could be seen that the products under discussion before us and the product dealt with in the order of the Coordinate Bench in that order are entirely different. The product in question involved in the order passed by the Coordinate Bench is picturized below for proper appreciation of the facts:



26.2 On careful examination of the above system, we find that the Co-ordinate Bench had dealt with 'video conferencing systems'; whereas, in the case in hand, we are dealing with 'IP Phones', whose features are entirely different than the products dealt with by the Co-ordinate Bench. Hence, the ratio of the judgement of Co-ordinate Bench does not apply to the facts of this case. Furthermore, from the product data sheet submitted by the appellants as written submissions in respect of various models of 'CISCO IP Phones' covered in the appeals before us, it is shown that these phones capture voice/audio communications only, but do not have the capacity of making/receiving video calls. It has further been stated in the affidavit that in respect of fourth category (iv) IP Video Phones, which has the facility of both audio/voice and video capabilities, the appellants have been classifying such IP Phones under 8517 69 90 and they are not disputing such IP phones, which are not in dispute in this appeal.

27. We also find that the Co-ordinate Bench of this Tribunal, in the case of *Ingram Micro Indian Pvt. Ltd. Vs. Deputy Commissioner of Customs, New Delhi* vide Final Order No. 51640/2020 dated 17.12.2020 (in Customs Appeal No. C/50865/2020), has held that IP Phone (Model No. FON-670i), is classifiable under CTH 8517 18 10 and not under CTH 8517 69 90.

28. In view of the foregoing discussions and analysis, we conclude that the products under consideration i.e., (i) 'IP Audio Phones' (ii) 'IP Audio Conference Phones' of various models of 'CISCO' brand would appropriately be classifiable under Customs Tariff Item (CTH) 8517 18 10 and not under CTH 8517 69 90, as claimed by Revenue. Further, we also conclude that the appropriate classification for (iii) 'Wireless IP Phones' of 'CISCO' brand would be under CTH 8517 12 90 and not under CTH 8517 69 90, as claimed by Revenue.

29. Therefore, we are of the considered view that the impugned order passed by the learned Commissioner (Appeals) cannot be sustained on merits. Accordingly, the impugned order is set aside and the appeal is allowed in favour of the appellants."

15.4 In view of aforesaid, we are inclined to hold that imported IP Phones merit classification under CTH 8517 1810 and eligible for exemption under Notification No. 57/2017-Cus. Consequently, the Departmental appeals fail. Thus, the classification of IP Phones is decided in favour of the appellants.

Classification of Ethernet Switches:-

16.1 With regard to the Ethernet Switches imported by the Appellant, we find that the appellants have claimed eligibility of duty exemption in terms of Notification No. 24/2005 dated 1st March 2005 as amended by Notification No. 11/2014 dated 11th July 2014 which the Department denied as the amended Notification excluded Carrier Type Ethernet Switches for this

exemption. There are 234 Bills of Entry in which the Appellant appears to have paid duty under protest subsequent to denial of the duty exemption benefit. On further Appeal, the lower Appellate Authority, based on earlier decisions in Order-in-Appeal No. 146 & 147/2019 dated 26.08.2019 involving the same Appellant, denied the benefit of duty exemption. We also find that the Appeal against the Orders-in-Appeal Nos. 146 & 147/2019 dated 26.08.2019 is already pending before this forum in Appeal No. C/40406/2020.

16.2 Again classification of Ethernet switches is also no more *res integra* in view of the Final order No. 40817/2020 dated 26.10.2020 passed by this Hon'ble Tribunal in the Appellants own case involving the same issue which reads as under:-

"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."

Subsequently *vide* Misc. Order No. 40007/2021, this Hon'ble Tribunal in the rectification order held as follows:-

"Consequently the appellant would be eligible for the exemption benefit as per Sl.No. 20 of Notification No. 57/2017 dated 30.07.2017."

16.3 By following judicial precedents, we are of the considered opinion that imported Ethernet Switches merit classification under CTH 8517 6290 and are eligible for exemption under Notification No. 24/2005 as amended by Notification No. 11/2014 dated 11.07.2014. The appellant has categorically stated that the imported Ethernet Switches are only Enterprise Ethernet Switches and not Carrier Ethernet Switches in the submissions made before the Lower Authorities and also before the Tribunal.

17. After scrutiny of the refund claims filed along with the copies of the Bills of Entry and connected documents, we find that in respect of import of IP Phones involving 51 Bills of Entry and refund of Rs.26,15,176/- (Refund Claim No. C3/I/158R2019-Air and Appeal No. C/40420/2023), the appellant had not produced any protest letter neither any request made for reassessment or any appeal filed with the Commissioner (Appeals) challenging the order of self-assessments. However, in respect of imports of Non-Carrier Ethernet Switches involving 234 Bills of Entry and a total refund

of Rs.4,13,38,723/- (Refund Claim Nos. C3/I/162-165/2019-Air and Appeal Nos. C/40421-40424/2023), the appellant had addressed the following Letters to evidence that the duty was paid under protest:-

**INGRAM
MICRO**

DUTY UNDER PROTEST	
Registered in ACC	
Vide No:	414
Date:	22.8.14

Date: 21.8.14

The Asst. Commissioner of Customs
Group-5A
Air cargo complex
Meenambakkam
Chennai 600027.

Dear Sir

Sub: Import of Non Carrier Ethernet Switches— payment of duty under protest.

Ref: Bill of Entry No: 6500841 Dt: 21.8.14

We have been importing Non Carrier Ethernet Switches for many years and classified under heading 8517.62.90. This has been the practice across all ports in India

After classifying the goods under CTH 8517.62.90, with the exemption from BCD (Customs Duty) was been claimed by us. Since the BCD for that CTH is Nil.

Post Central Finance Budget of July'14 Customs authorities are now of the view that Carrier Ethernet Switches & Non Carrier Ethernet also will attracts BCD @ 10% under CTH 8517.62.90

We do not agree for Non Carrier Ethernet Switches attracting BCD @ 10% under CTH 8517.62.90. However, in view of the continuity of the business and till such time the matter is finally resolved we would classify the good under CTH 8517.62.90 and pay the custom duty of BCD @ 10% "UNDER PROTEST".Kindly register the same in your records accordingly and provide us the Protest Registration #.

Thanking you,

Yours truly,
For INGRAM MICRO INDIA LTD.

T.GODWIN
SR.MANAGER-IMPEX



INGRAM

Ref : Ingram/Cisco/switch/

To,

Deputy Commissioner of Customs
Group- 5A
Air Cargo complex
Meenambakkam
Chennai 600016.

Dear Sir

Sub: Import of Ethernet Switches (Other than Carrier Ethernet Switches) Bill filing with narration in description column - PAYMENT OF DUTY UNDER PROTEST - Reg.

Ref: Bill of Entry No: 2968893 Dt: 19/10/15

We have been Importing Ethernet Switches (Including Carrier Ethernet Switches) for many years and classified them under heading 8517.62.90. This has been the practice across all ports in India

After classifying the goods under CTH 8517.62.90 Exemption/Nil Basic Customs Duty was being availed.

From 11th July 2014 (Post Central Finance Budget of July 14) exemption from Basic Customs Duty on specified telecommunication products not covered under the ITA (Information Technology Agreement) were withdrawn vide Notification No. 11/2014 dtd. 11.7.2014 Sr. No. 13 which amended Notification No. 24/2005 dtd. 1.3.2005. Column 3 (iii) amongst other items includes "Carrier Ethernet Switch".

It is our submission that only Carrier Ethernet Switches are not covered by the exemption under Notification No. 24/2005, Sr. No.13 and not all types of Ethernet Switches. Carrier Ethernet Switches is one class of Ethernet Switches and not all Ethernet Switches. Carrier Ethernet switches are those that operate in a Carrier Ethernet Network and are different from Ethernet Switches that work in a LAN.

Further, we have to submit that Ethernet when prefixed with the word "Carrier" indicates its usage and additional capabilities that enable building of MAN & WAN and Service Providers to build Network Infrastructure or deliver Ethernet base MAN or WAN telecommunication Services.

We are of the view that Ethernet Switches (Other than Carrier Ethernet Switches) are eligible for the exemption under Notification No. 24/2005, Sr. No.13. However on the other hand Customs at Chennai Air Cargo is of the view that all Ethernet Switches are carrier Ethernet Switches and therefore not allowing us to clear the consignments with the benefit of this exemption.

Henceforth till the matter is resolved and to have continuity of business, we will be mentioning the sentence PAYMENT OF DUTY UNDER PROTEST on the description itself on all switch clearance BOE filed in MAA airport and such payment towards basic Customs Duty will be UNDER DUTY PROTEST. We will continue to pay duty on all similar goods in future till such time the matter is finally resolved and it is to be noted that all such duties paid to customs are to be treated as PAID UNDER PROTEST.

Thanking you,

Yours truly,
For INGRAM MICRO INDIA PVT LTD

AUTHORIZED SIGNATORY

Registered Office : 5th Floor, Block B, Godrej IT Park, Pirojshanagar, LBS Marg, Vikhroli West, Mumbai 400079
www.ingrammicro.com

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Tel +91-44-39894645
Fax +91-44-30684070/30684151Ingram Micro India Private Limited
CIN: U72900MH1896PLC136340
MF-7, Cipet Hostel Road, TVK, Industrial Estate,
Ekkattuthangal, Guindy, Chennai - 600032*The group cannot accept the request of the importer. Merit rate of duty maintained as per previous imports. The goods may be cleared as per test band. basis on execution of*

8/13/16

No (5A) / Importer



Ingram Micro India Private Limited
CIN: U72900MH1996PLC136340
MF-7, Cipel Hostel Road, TVK, Industrial Estate,
Ekkattuthangal, Guindy, Chennai - 600032

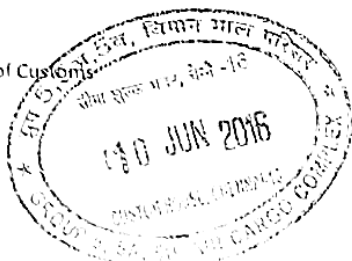
Tel: +91-44-39894645
Fax: +91-44-30684070/30684151

Ref: Ingram/Cisco/switch

Date: 10/06/2016

To,

Deputy Commissioner of Customs
Group- 5A
Air Cargo complex
Meenambakkam
Chennai 600027



Dear Sir

Sub: Import of Ethernet Switches (Other than Carrier Ethernet Switches) – PAYMENT OF DUTY UNDER PROTEST.

Ref: 1) B/E No. 5433401 Dt 28.05.16	7) B/E No. 5530333 Dt 06.06.16
2) B/E No. 5495145 Dt 03.06.16	8) B/E No. 5531184 Dt 06.06.16
3) B/E No. 5487051 Dt 02.06.16	9) B/E No. 5555131 Dt 08.06.16
4) B/E No. 5487044 Dt 02.06.16	10) B/E No. 5555140 Dt 08.06.16
5) B/E No. 5501056 Dt 03.06.16	11) B/E No. 5558242 Dt 08.06.16
6) B/E No. 5530405 Dt 06.06.16	

We have been importing Ethernet Switches (Including Carrier Ethernet Switches) for many years and classified them under heading 8517.62.90. This has been the practice across all ports in India

After classifying the goods under CTH 8517.62.90 Exemption/Nil Basic Customs Duty was being availed.

From 11th July 2014 (Post Central Finance Budget of July'14) exemption from Basic Customs Duty on specified telecommunication products not covered under the ITA (Information Technology Agreement) were withdrawn vide Notification No. 11/2014 dtd. 11.7.2014 Sr. No. 13 which amended Notification No. 24/2005 dtd. 1.3.2005. Column 3 (iii) amongst other items includes "Carrier Ethernet Switch".

It is our submission that only Carrier Ethernet Switches are not covered by the exemption under Notification No. 24/2005, Sr. No.13 and not all types of Ethernet Switches. Carrier Ethernet Switches is one class of Ethernet Switches and not all Ethernet Switches. Carrier Ethernet switches are those that operate in a Carrier Ethernet Network and are different from Ethernet Switches that work in a LAN.

Further, we have to submit that Ethernet when prefixed with the word "Carrier" indicates its usage and additional capabilities that enable building of MAN & WAN and Service Providers to build Network infrastructure or deliver Ethernet base MAN or WAN telecommunication Services.

We are of the view that Ethernet Switches (Other than Carrier Ethernet Switches) are eligible for the exemption under Notification No. 24/2005, Sr. No.13. However on the other hand Customs at Chennai AirCargo is of the view that all Ethernet Switches are carrier Ethernet Switches and therefore not allowing us to clear the consignments with the benefit of this exemption.

As the goods are urgently required and to ensure continuity of business we are paying Basic Customs Duty UNDER PROTEST for the above listed 11 BOE. We will continue to pay duty on all similar goods in future till such time the matter is finally resolved and it is to be noted that all such duties are to be treated as PAID UNDER PROTEST.

Thanking you,

Yours truly,
For INGRAM MICRO INDIA PVT LTD.

T. GOKULAN
SR. MANAGER - MPEX

18. After scrutiny of the copies of the Bills of Entry filed along with the connected documents, the details as to the Appeal No. filed against the impugned order concerned, No. of Bills of Entry, amount involved, period involved, whether any protest registered or any protest letter sent, the following table gives the refund claim wise picture in a summarised fashion as ready reference:-

Appeal No.	Impugned Appeal No.	Import Item	No. of Bills of Entry	Amount Involved (Rs.)	Period Involved	Custom House Protest Registration no.	Date of Filing Refund claim	Date of receipt by Custom House	Date of rejection by Custom House	Custom House Letter reference	Reasons for rejection
C/40420/2023	C3/I/158/R/2019-Air	IP Phone devices	51	26,15,176/-	26.02.2018 to 17.01.2019	No protest	22.02.2019	25.02.2019	01.04.2019	F.NO. S25A/Gen/52/2019-refunds(Air) dated 01.04.2019	No re-assessment
C/40421/2023	C3/I/162/R/2019-Air	Non Carrier Ethernet Switches	63	1,34,89,366/-	24.10.2014 to 29.11.2014	Protest no. 411-414 all dated 22.08.2014, 417 dt.25.08.2014 and 434 dt. 28.08.2014	20.10.2015	26.10.2015	08.05.2019	F.NO. S25A/Gen/79/2015-refunds(Air) dated 08.05.2019	No re-assessment
C/40422/2023	C3/I/163/R/2019-Air	Non Carrier Ethernet Switches	22	19,62,290/-	10.01.2017 to 21.02.2017	Protest no. 411-414 all dated 22.08.2014, 417 dt.25.08.2014 and 434 dt. 28.08.2014	10.11.2017	14.11.2017	08.05.2019	F.NO. S25A/Gen/173/2017-refunds(Air) dated 08.05.2019	No re-assessment
C/40423/2023	C3/I/164/R/2019-Air	Non Carrier Ethernet Switches	99	1,87,10,089/-	12.04.2016 to 21.12.2016	Protest no. 411-414 all dated 22.08.2014, 417 dt.25.08.2014 and 434 dt. 28.08.2014	06.03.2017	09.03.2017	08.05.2019	F.NO. S25A/Gen/225/2018-refunds(Air) dated 08.05.2019	No re-assessment
C/40424/2023	C3/I/165/R/2019-Air	Non Carrier Ethernet Switches	50	71,76,978/-	01.12.2014 to 24.12.2014	Protest no. 411-414 all dated 22.08.2014, 417 dt.25.08.2014 and 434 dt. 28.08.2014	27.11.2015		08.05.2019	F.NO. S.Misc.08/2015-refunds(Air) dated 08.05.2019	No re-assessment

19. The Ld. Advocate for the appellants has submitted relying on the decisions in the cases of *Commissioner of Central Excise, Chennai Vs. Electro Steel Castings Ltd. [2014 (299) ELT 365-Madras High Court]* and in the case of *Commissioner of Central Excise, Aurangabad Vs. Klasspak Pvt. Ltd. [2005 (179) ELT 365 (Tri.-Mum.)]* that the excess duty payment made have to be treated as payment of duty under protest and their refund claims to be sanctioned without raising the ground of limitation under Section 27 of the Customs Act, 1962. The Ld. Advocate has prayed to direct the Original

Authority to reassess and grant refund in respect of 51 Bills of Entry of IP Phones covered by C/40420/2020 by extending duty exemption and, reassess and grant refund in respect of 234 Bills of Entry of Ethernet Switches covered by C/40421-40424/2020 by accepting that duties are paid under protest.

20. IP Phones come in different models with distinct features which may vary from one IP Phone to other. The classification of many IP Phones has been already finalised under CTH 85171810, except those with video call facility. It has to be noted that IP Phones with video call facility are required to be classified under CTH 85176290. Similarly, the Ethernet Switches imported by the appellant also may be of different kinds and having different features and using different technology. Enterprise Ethernet Switches are used to connect Personal Computers, Laptops, Printers and other peripherals within the boundaries of an enterprise campus / building / floor. In the case of Carrier Ethernet Switches, they are used to connect geographically dispersed organisations through a service provider network and these are largely used for telecommunication by service providers viz., Airtel, Vodafone, etc. The appellant has in his submissions both in the grounds of appeal and before the Tribunal have clearly put forth that the imported switches are only Non-Carrier Ethernet Switches i.e, Enterprise Ethernet Switches which are used basically within an organisation.

21. In view of the aforesaid discussion and findings, the appellant's classification of IP Phones under CTH 85171810 and Ethernet Switches

under CTH 8517 6290 of the Customs Tariff Act is upheld subject to verification that these are not IP Phones with video imaging facility and also they are not Carrier Ethernet Switches.

Payment of duty under protest:-

22. The summarised table at paragraph 18 above states that in respect of refund claim filed for payment of excess duty for IP Phone devices amounting to Rs.26,15,176/-, we find that 51 Bills of Entry were involved and dates of filing of these Bills of Entry were found to be from 26.02.2018 to 17.01.2019. Scrutiny of the appellate records does not indicate that the appellant has submitted any letter of protest, neither disputed the assessment nor have filed an appeal before the appellate authority against such self-assessments. As such, we are of the opinion that filing of the refund claim without challenging the self-assessments of the imported IP Phone devices is hit by limitation.

23. In respect of imports of Non-Carrier Ethernet Switches involving 234 Bills of Entry for the period from 24.10.2014 to 21.02.2017 in respect of four refund claims filed are covered by various protest letters addressed to the assessing authority. As such, in respect of Ethernet Switches, the Original Assessing Authority is directed to verify the protest letters / registration of protest and reassess these Bills of Entry in the light of the Final Order of the Tribunal in the appellant's own case reported in *[Final Order No. 40817/2020 dated 26.10.2020]* adopting the classification of Ethernet Switches under

CTH 85176290 and giving exemption benefit of Notification No. 57/2017 dated 30.07.2017.

24. Thus, the Appeals filed by the appellant assessee in C/40406/2020 on classification of Ethernet Switches and C/40421-40424/2020 for refund claims filed are allowed. Whereas, in respect of Appeal No. C/40420/2020 filed by the appellant assessee is rejected as the duties were not paid under protest. The Appeal filed by the Department in C/40494/2020 is rejected on the issue of classification of IP Phones. Cross objection filed by the assessee in C/CO/40210/2020 is accordingly disposed of.

(Order pronounced in open court on 21.06.2024)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

MK