IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Customs Appeal No. 51769- 51770 of 2016

[Arising out of order-in- Original No. 19/2015 dated 29.12.15 passed by Commissioner of Customs, New Delhi.]

1. Brigadier R Deshpande **Appellant**
2. M/s. Indusind Media & Communication. Ltd.

Vs.

Commissioner of Customs **Respondent,**
New Delhi

Appearance:
Shri Monish Panda, Advocate for the Appellants assessee
Shri Govind Dixit, AR for the Respondent Revenue

CORAM:
Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing : 04.09.2017
Date of Decision : 09.11.2017

FINAL ORDER NO. 57742 – 57743 / 2017

Per: V. Padmanabhan:

The appeal is against the order in original number 19/2015 dated 29.12.2015. The appellant imported certain goods at air cargo complex, New Delhi and filed Bill of Entry 2660085 dated 26.6.2003 . They declared the goods as Multiplexor Satellite

Receivers, test and measurement equipment etc. and attached six invoices covering 19 items imported. They indicated individual classification for the various items under Chapter 84 /85 of the Customs Tariff. The bill of entry was assessed as per declaration and applicable customs duty was paid. Subsequently, information was received from SIIB Air Cargo Complex Mumbai, that investigations had been commenced against the appellant for import of similar goods at Bombay. Accordingly, Provisional Assessment was been ordered under section 18 of the Customs Act.

2 The investigation undertaken at the Mumbai revealed as follows:

The importer had placed the order at UK for purchase of equipments – one set for Mumbai and another set for Delhi. Each set of equipment, taken together constituted 'Head End' for cable TV operations' . The 'Head End' was an equipment at a local TV office that originates the cable TV services and cable TV modem services to subscriber though Conditional Access System (CAS) . All imported equipments taken together contributes towards a clearly refined function i.e. 'Head End' for cable TV operations. The complete set of equipment together merits classification under Customs Tariff Heading (CTH) 8543 8999, in the light of section 4 to section XVI . Thus, it appeared that individual classification indicated for 19 imported items amounts to mis-declaration. The search operation carried by SIIB, ACC, Mumbai at the premises of importer further revealed that the importer had also mis-declared the value of the imported consignments at Delhi and Mumbai. They had suppressed the value of embedded software as well as value of services payable to the foreign supplier for carrying out integration of the system prior to shipment and provide complete commission and installation services at the customers premises. Further, it was noticed that the purchase order placed by the importer was revised to show as CIF instead of FOB.

3. In the light of investigation carried out at Mumbai, Customs authorities at Delhi issued Show Cause Notice which resulted in impugned order as follows:

(i) The classification of all imported components were taken together and made under CTH 8543 8999 of the Customs Tariff Act

(ii) The value of imported goods was redetermined and finally provisional assessment was finalised resulting in demand of differential duty of Rs.54,19,475/- along with interest and penalty imposed under various sections of Customs Act on the importer as well as Brigadier Deshpande. Aggrieved by the impugned order, present appeals have been filed.

4. With the above background, we heard Shri Monish Panda, advocate for the appellants and Shri Govind Dixit, learned DR for the Revenue.

5. The learned counsel for the appellant argued as follows:

(i). The impugned order has been passed without giving opportunity to the importer to file written reply and without personal hearing.

(ii). There is no application for Rule 4 to section XVI in the present case. The terms 'Head End' has been used to refer to the equipments which are used to provide cable TV services with Conditional Access System. It comprises of several equipments, each with its own electronic function, meriting individual classification. The department has wrongly classified the set of equipments under Chapter 85 calling it as 'Head End'.

6. The appellant also made an alternate submission on classification of the imported goods if they are deemed to be 'Head End'. It will merit classification under CETH 8525 2019 as a transmission apparatus and not in 8543 as contended by the department. There is no undervaluation of the imported goods and the department has incorrectly included the amount towards software

and post import services by ignoring the revised offer submitted by the foreign supplier and the purchase orders placed by the appellants. They also relied on the following case laws. ***Multi Screen Media [2015 (322) ELT 421 (SC], SET India Pvt. Ltd. [2003 (152) ELT 190 (Tri-Mum)], and Essar Steel Ltd. [2004 (178) ELT 713 (Tri-Bang)]***

7. The learned DR justified the impugned order. In his written note dated 11.9.2017, DR emphasised the following:

1. The goods imported were classified under different headings but were found to be complete equipment (i.e. Head End) classified under 8543 8999. Out of 19 items indicated in the Bill of Entry, physically only 8 items were presented since several cards were already assembled in the main unit.
2. The investigation lead to the recovery of several incriminating documents, which revealed that the importer had not given proper description in the bill of entry, but the goods imported were complete 'Head End' and not parts.
3. 'Service charges' covered by invoice No. 27110 dated 17.6.2003 amounting to USD 1,00,019 was includible in the assessable value since it pertains to the service charges. Further Brigadier Deshpande, Vice President in his letter dated 26.6.03 has submitted that the software covered by

invoice dated 26.6.03 was already embedded in the equipment. However, the importer failed to declare the value of the software. The imported equipments are not classifiable under transmission apparatus under CTH 8525 and hence, Head End was classifiable under 8543 where the device cannot be classified anywhere else.

4. All the components were not imported in isolation but intended for supply of Head End .
5. Importer fabricated the document by partially suppressing the value of goods with the intention of evading the customs duty. In this regard, the Shri Srinivas Palakodeti, CEO and Brig Deshpande are on record and are liable to penalty. He prayed that impugned order be sustained.

8. After hearing both sides and perusal of record, we find that there are two major issues to be decided.

1. First is the classification of the imported goods – whether 8543 as ordered by the adjudicated authority or 8525 as claimed by the appellant.

2 Second issue is of valuation - whether the value of software already embedded in the equipment as well as service charges are required to be included in the assessable value .

9. First we take the issue of classification. In the relevant bill of entry filed by the appellant, goods covered under six invoices were declared under 19 serial numbers. Individual classification of these equipments were also indicated but during examination of the goods, it was found that only 8 number of goods were found as several cards were already assembled and embedded into the main unit. The investigation by the department revealed that the order placed by the appellant on M/s. Tandbarg, UK supplier is for supply of a suite of equipments which will function together as 'Head end' for cable TV operations. After inter-connecting all the imported equipments these were to be used for transmission of cable TV under the Conditional Access System.

10. The adjudicating authority has taken the view that all the equipments, after inter connection, will contribute towards a common function and hence in terms of Section Note 4 to section XVI the same will be classifiable under 8543. Section Note 4 to Section XVI is reproduced below:

> "4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in

Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function."

11. From the relevant purchase order, we note that different equipments have been ordered which are meant to be interconnected in such a way as to perform a common clearly defined function. This is the function of 'Head End' . Department has taken a view that this function is to be classified under 8543. But this heading is a residual heading only for machines not included elsewhere. The function performed by 'Head End' is that of transmission of TV channels over cable TV. Such a function will be clearly covered by the heading 8525 which is reproduced below:

> "*Transmission apparatus for radio telephony, radio-telegraphy, radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television, cameras; still image video cameras and other video camera recorders; digital cameras."*

12. We find similar equipments were held to be classified under 8525 in the case of ***Set India Pvt. Ltd. vs. CC (supra)*** wherein the Tribunal has observed that

> ***"8.*** *These goods therefore should equally be described as transmission incorporating reception apparatus. It is significant to consider similar goods in Heading 85.25 which includes transmission apparatus for radio-telephony, radio-*

telegraphy. Heading 85.25 also includes transmission apparatus for radio-telephony, radio-telegraphy and radio-broadcasting. The explanatory notes to the heading include any transmission apparatus for radio-telephony or radio-telegraphy, such goods as portable radio-telephones, usually battery operated, of the walkie-talkie as well as transmitters/receivers of telemetric signals and separately presented cordless handsets for line telephone sets. Each of these three items transmit as well as receive wireless signals. Applying the arguments of the departmental representative, these goods must rightly be classified in Heading 85.27 which covers only reception apparatus for radio-telephony, radio-telegraphy or radio-broadcasting. It would be reasonable to say that an apparatus which is capable of receiving and transmitting such signals could equally have been included in a heading either for the reception or for transmission and the fact that such apparatus have been specified in apparatus for transmission, and not apparatus for reception, is hence not of significance.

9. *The explanatory notes included in Heading 85.25 television transmitters for industrial use explaining that with these apparatus, the transmission is often by line. They include in Heading 85.28 television receivers for industrial use explaining also with the apparatus, the transmission is often by line. It is not possible to conclude from this as the departmental representative wants us to do, that where transmission is by line, the goods should be classified in Heading 85.28. The real answer is transmission referred to in the Heading 85.25 refers to the transmission made by the transmitter for industrial use and the transmission by line referred to in the reception* *apparatus of Heading 85.28 refers to the transmission that is received by such apparatus by line. Obviously, if the transmission apparatus transmits the signal by line, the corresponding reception apparatus will necessarily receive the signal that is transmitted, only by line, we are unable to see the relevance of this point to the classification of the goods under consideration."*

13. Similar views have also been held in the case of ***Commissioner Customs vs. Multi Screen Media Pvt. Ltd. (supra***). By following the above decisions, we are of the view that the imported goods are rightly classifiable under 8525 . The differential duty payable is required to be requantified and for this purpose the case is required to be remanded.

14. Next we consider the question of valuation. During the course of investigation the department has recovered the purchase order which was placed by the appellant on the supplier. From this, it is evident that the supply included, apart from supply of equipment, also the necessary software which is to be embedded in the equipment before supply of the same. The PO further includes setting up of equipments in India after receipt thereof in this country. The adjudicating authority has included both the above values for purposes of charging customs duty.

15. The Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 provide the methodology for determination of assessable value in cases where transaction value does not reflect the true value of import transaction. Rule 10 provides for addition of certain cost and services under certain conditions. What is relevant in the present case is Rule 10 which is as under:

(1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods –

(a) …………

(b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:-

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) Materials consumed in the production of the imported goods;

(iv) Engineering, development, art work, design work and plans and sketches undertaken elsewhere than

in India and necessary for the production of the imported goods;

(c)

(d)

(e)

Explanation - *Where the royalty, license fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods. ”*

16 Since the software is already incorporated in the imported goods the value of same is required to be added to the transaction value. Likewise the purchase order also includes the process of installation of equipment after importation. The Explanation as above provides for addition of the charges towards this service also.

17. In view of the above discussions, that addition of the above changes paid by appellant to supplier, to the declared value for purpose of charging duty is upheld. ‘

18 In the result, the classification of imported goods are ordered to be done 8525 and not under 8543 as held by the adjudicating

authority. We uphold the addition in the assessable value made in the impugned order.

19. In view of the mis-declaration established in respect of valuation, the imported goods will be liable for confiscation under section 111 of the Customs Act and the appellant will also be liable for penalty.

20. The issue is to be remanded to the adjudicating authority only for the purpose of recomputing the differential duty in the light of the above. He will also decide the penalties leviable under various sections in the light of the differential duty which will arise as above, after hearing the appellants.

21. In the result, impugned order is modified and remanded only for requantification.

[Order Pronounced in the open court on 09.11.2017]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

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