IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

Principal Bench, COURT NO. IV

Customs Appeal No. 50702 of 2019

[Arising out of the Order-in-Appeal No. CC (A)/CUS/D-I/Import/NCH/652/2018-19 dated 29/01/2019 passed by The Principal Commissioner of Customs (Appeals), New Custom House, New Delhi.]

M/s Ingram Micro India Pvt. Ltd. **Appellant**
2 Industrial Area, Kalkaji,
New Delhi 110 019.

Versus

Deputy Commissioner of Customs **Respondent**
Group V A, New Custom House,
Near IGI Airport,
New Delhi.

Appearance

Shri Chandrashekhar Thakur and Ms. Kiran Aggarwal, Advocates – for the appellant.

Shri Sunil Kumar, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri C.L. Mahar, Member (Technical)**
Hon'ble Mrs. Rachna Gupta, Member (Judicial)

Final Order No. 50756/2019 Dated : 22/05/2019

DATE OF HEARING/DECISION : 22/05/2019.

RACHNA GUPTA :-

M/s Ingram Micro India Pvt. Ltd., the appellant in the present appeal had filed a bill of entry No. 2924883 dated 21 August 2017 for clearance of various items of network security appliances, power supply and access points. The impugned goods have been classified by the appellant under Central Tariff Heading No. 85176290 and Central Tariff Heading No. 85044010. During the assessment, licence from Wireless Planning and Coordination Wing (WPC) under the Ministry of Communication and Directorate of Telecommunication/product catalogue was asked for and the goods were examined by the shed officers under the supervision of DC (import Shed) on 8 September 2009. It is thereafter that all the items of the said bill of entry were cleared by the authorities except for 6 pieces of one item namely Fortinet Secured Indore Wireless access point. The department was of the opinion that the said item is permitted to be imported against some licence only. Since no such licence could be produced by the appellant, the Adjudicating Authority vide order No. 109 dated 12 September 2018 gave an option to the appellant to get redeeming the impugned goods for the purposes of re-export under Section 125 (1) of the Customs Act on the payment of redemption fine of Rs. 25,000/-. Penalty of Rs. 10,000/- was also imposed on the appellant under Section 112A of the Customs Act. Being aggrieved thereof, an appeal was preferred before Commissioner (Appeals), but vide order-in-appeal No. 652 dated 29 January 2009 the appeal was remitted to the original Adjudicating Authority for a fresh decision after allowing the appellant an opportunity of being heard. Being aggrieved of the said order that the appellant is before this Tribunal.

2. We have heard appellant through Shri Chandrashekhar Thakur, learned Advocate and Shri Sunil Kumar, learned Departmental Representative for the department. It is submitted on behalf of the appellant, that the order of remanding back the appeal is wrong in view of Section 128A (3) (6) of the Customs Act, in accordance whereof Commissioner (Appeals) himself was required to make such further enquiry as may be necessary for passing such an order as he thinks just an proper. Order of remand is alleged to be beyond the scope of said provision. On merits, it is submitted that the impugned goods are freely importable. The appellant has relied upon the clarification issued by the department of Telecommunication, WPC Wing, Ministry of Communication on ETA/WPC Policy dated 12th April 2019 by

virtue of which a self-declaration from the Importer/Authorized Indian Representative was allowed to be treated as sufficient evidence to process such clearance by the Customs and the Central Excise Authorities. He had also relied upon Notification No. 07/2015-2020 dated 9 May, 2016 issued by the Department of Commerce, Directorate General of Foreign Trade by which the Radio remote control apparatus which was earlier a restricted item was allowed to be freely importable. It is also submitted on behalf of the appellant that subsequent to said notification in the year 2018, DGFT vide letter dated 8 January 2018 has clarified, that the import licence from WPC is not required for the goods operating in de-licence bands. He also brought to our notice latest guidelines of DGFT issued on 16 April 2019 issued in favour of one Pranay Computer System and Services importing similar goods as the impugned goods mentioning that no separate licence is required from the WPC Wing. Reiterating the case law as was relied upon by the appellant below the Adjudicating Authority, it is prayed that the order under challenge is set aside. The goods which are held with the Custom Authority may be allowed to be cleared/released. Appeal is prayed to be allowed.

3. While rebutting these arguments, it is submitted on behalf of the department that the impugned article is admittedly a wireless equipment. Under Indian Telegraph Act such equipments mandatorily require licences. It is appellant’s own admission that WPC clearances/licence used to be required for the impugned goods. The arguments of the appellant that DGFT has given various clarifications about the impugned products to be freely importable without any exemption of equipment approval (ETA) and without any further licence from WPC but the clarification as have been relied upon itself shows that irrespective the products like the impugned one were held to no more the restricted products, but still a WPC licence from Ministry of Telecommunication was required for import of such products. Since the appellant in the present case admittedly could not

produce any licence for the item to be on hold that Original Adjudicating Authorities has rightly adjudicated against the appellant. The order under challenge has remanded the matter back to the Original Adjudicating Authority only on the ground that the proper opportunity of being heard was not given. Hence, there appears no infirmity in the order of remand which is very much permissible under Section 128A of the Customs Act. Appeal is accordingly prayed to be dismissed.

4. After hearing both the parties and perusing the entire record, we are of the opinion as follows :

There is no dispute about the nature of the product held by the Customs Authorities and the classification thereof. The only controversy herein is as to whether the Fortinet Secured Indore Wireless access point, the impugned goods, required a licence from Wireless Planning and Coordination Wing of Ministry of Telecommunication i.e. a WPC licence. The first written response of the appellant against the demand of the said licence and praying for clearance of the wireless equipment/impugned goods imported vide bill of entry No. 2924883 dated 21 August 2017, was made to the department vide their letter dated 4 September 2017. It was acknowledged that they understand the view of the department about necessity of the import licence to be issued by WPC over and above the ETA produced by the appellant. It is also the acknowledgement that the industry/appellant is under the bonafide impression that the goods imported by them are de-licenced under Indian Telegraphy Act, 1985 and there is no restriction under the import policy under CTH 5176290.

5. Further, we have examined the documents on the basis of which the appellant claimed to be under bonafide impression for their product, the impugned goods to be freely importable and to have been de-licenced. The Notification No. 07/2015-2020 dated 9 May, 2016, no doubt has made Radio remote control apparatus to be freely importable but the said notification puts a rider that

the apparatus has to be imported against a licence to be issued by WPC Wing of Department of Telecommunication under Ministry of Telecommunication. Letter of DGFT dated 8 January 2018 is also perused no doubt it has clarified for some items of wireless products alongwith their ITC (HS Codes) to be free, hence, no more required any import licence but the said clarification itself puts a rider that the import of such item may require to comply with certain rules/regulations prescribed by WPC, hence, permission/NOC from the WPC may be required for import of these items. DGFT in the year 2015 also specifically with respect to secured wireless access point (Forti AP) having frequency of 2412-2472 MHz. and also of frequency 5180-5240 MHz. had held that separate import licence is required to be obtained for each import as per WPC procedures. Though vide latest clarification of DGFT dated 16 April 2019 there is a mention that no separate licence is required from WPC Wing but the said clarification being a post-event than the holding of the impugned goods, we are of the opinion that the same cannot be given retrospective effect. The appellant though has contended that the item as have been held no more require the WPC licence, as being same as that of the goods, mentioned in letter dated 16 April 2019 the benefit may be extended to the appellant also. Keeping in view the said contention but simultaneously the above observations that at the relevant time, the WPC licence was required for wireless products. Also observing that the orders of the authorities below were solely based on a public notice and that we are not the technical person to appreciate the applicability of the clearances to the specifications of the impugned goods. Finally in the interest of justice we deem it appropriate that the samples from the impugned consignment be sent to the Wireless Planning and Coordination Wing of Ministry of Telecommunication. The department shall be giving random four samples to WPC within 15 days of this order. WPC in 15 days thereafter, that is after receiving the said samples, shall give a technical report about the specifications of the impugned goods with a clear finding of the necessity of the WPC licence for the import of the said item at the relevant time. The said report shall form the basis for further adjudication by the Original Adjudicating Authority who shall be re-adjudicating the impugned issue based on the said report within a month of receiving the said report. With these findings appeal in hand is allowed by way of remand in the aforesaid terms. The argument of the appellant that Commissioner (Appeals) was not competent for ordering re-adjudication of the appeal by the original Adjudicating Authority. The original Adjudicating Authority is directed to give the copy of report to the appellant as well and decision shall be taken after giving a due opportunity of being heard to the appellant.

(Dictated and pronounced in open court)

(C.L. Mahar)
Member (Technical)

(Rachna Gupta)
Member (Judicial)

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