IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. C/8/2011

(Arising out of Order-in-Appeal No. 95/Mumbai-III/2010 dated 12.10.2010 passed by Commissioner of Customs (Appeals), Mumbai-III)

Commissioner of Customs (ACC & Exp.), Mumbai Appellant

Vs.

Bytes World Respondent

Appearance:

Ms. Trupti Chauhan, Assistant Commissioner (AR), for appellant
None for respondent

CORAM:

Hon'ble Mr. Ajay Sharma, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 24.10.2018
Date of Decision: 24.10.2018

ORDER No. **A/88280/2018**

Per: Sanjiv Srivastava

The appeal filed by the revenue is directed against the order in appeal No 95/Mumbai III/2010 dated 12.10.2010 of Commissioner of Custom (Appeals) Mumbai Zone II. By the said order Commissioner (Appeal) has held allowed the appeal filed by revenue holding that Jet Flash imported by the importer (respondents) vide Bill of entry No 992064 dated

22.05.2009 were classifiable under CTH 8542 and the benefit of Central Excise exemption notification No 6/2006-CE dated 1.03.2006 shall not be available in respect of the said imports.

1.2 The above said order of Commissioner (Appeal) has been passed in respect of the appeal filed by the revenue before him against the order in original CAO No AC/SJ/582/09-Adj/ACC dated 25.06.2009 issued on 07.07.2009, holding that

"I hold that the goods imported by M/s Bytes World Bill of Entry no 992064 dated 25.05.2009 are classifiable under CTH 85235100 and exempted from basic Customs duty under serial No 15 of notification no 24/2005-Cus dated 01.03.2005 and from additional duty of Customs (CVD) under Sl No 17 of Notification no 06/2006-C Ex dated 01.03.2006."

2.1 The appeal filed by the revenue urges following ground to assail the order of Commissioner (Appeal)

"9 The Commissioner (Appeals) erred in his identification of the issue to be decided and in proceeding to take a decision based on his incorrect identification. The classification of the imported goods namely Jet Flash, determined by adjudicating Authority was not disputed in appeal before the Commissioner 9Appela). Yet, the Commissioner (Appeals) identified- "The issue to be decided is that, whether imported "Jet Flash" for various capacities are classifiable under CTH 8542 or 8523. And accordingly whether benefit of C. Ex. Notification No 6/2006 dated 1.3.2006 is admissible or not" and concluded that the imported goods Jet Flash

V.30 etc cannot enjoy the benefit of exemption under Central excise Notification No 6/2006 C Ex dated 1.03.2006 as they are classifiable under CTH 8542. Therefore, the Commissioner (Appeals) went beyond the scope of the appeal. The appeal was that Adjudicating Authority had not appropriately applied the principles in examining the issue whether Central Excise duty exemption was applicable in the present case. It was contended in the appeal memorandum that the imported goods are devices while their one component is flash memory. By itself, flash memory is not a device rather it is component used in the imported device. As a result memory in exemption Notification 6/2006-C Ex dated 01.03.2006 and hence the imported goods (Jet Flash) cannot enjoy the benefit of that exemption."

3.1 We have heard Ms Trupti Chauhan, Learned Assistant Commissioner (Authorized Representative) for the revenue. Despite notice non appeared on the behalf of respondents.

3.2 Arguing for the appellant revenue, learned Authorized Representative submitted that-

i. Department has before the Commissioner (Appeal) not challenged the Classification of imported goods as held by the adjudicating Assistant Commissioner under CTH 85235100, and by holding that the said goods are classifiable under heading 8542, Commissioner (Appeal) has gone beyond the scope of the appeal filed by the department.

ii. In the appeal filed before Commissioner (Appeal), the challenge was in respect of benefit under exemption Notification No 6/2006-CE dated 1.03.2006 which has been allowed by the adjudicating authority.

iii. The present appeal filed by the revenue is only to the extent of challenging the order of Commissioner (Appeal) where it has gone beyond the scope of appeal before him.

iv. In fact the goods imported and under consideration in the present case are correctly classifiable under heading 85235100 as held by the Adjudicating Assistant Commissioner as they are not the device in themselves but are the part of the devices. For this purpose she referred to the terms of competing tariff headings.

v. The appeal filed by the revenue should be allowed.

3.3 Since nobody had appeared on behalf of the respondents when the matter was listed for hearing on 5.6.2018, 13.08.2018 and 24.10.2018 (dated when appeal was heard by us) matter has been taken up for consideration and decision.

4.1 The appeal has been filed by the revenue, on the ground that Commissioner (Appeal) has travelled beyond the scope of appeal filed by revenue before him, but to substantiate the same have not filed the appeal filed by them before the Commissioner (Appeal). Appeal of revenue needs to be dismissed on this account as not substantiated.

4.2 In the appeal filed by the revenue not a single ground has been mentioned stating as to why the classification of the goods as held by the Commissioner (Appeal) under heading 8542 is not correct. Commissioner (Appeal) has in his order in para 11 to 17 discussed the issue in respect of classification as follows:

"11. As per chapter note Notification C.Excise Tariff Chapter 85, note 4(a) specifies that purpose of heading 85.23, 'solid-state non-volatile storage devices (for example), flash memory cards or flash electronic storage cards) are storage devices with a connecting socket, comprising in the same housing one or more flash memories (for example, FLASH E2PROM) in the form of integrated circuits mounted on a printed circuit board. They may include a controller in the form of an integrated circuit and discrete passive components, such as capacitors and resistors."

12. The HSN Note (C) to below heading 85.23 (pertaining to semi-conductor media) explains that USB Flash Drive is an example of non-volatile data storage devices and that such "devices are comprised of, in the same housing, one or more flash memories (FLASH EEPROM/E2PROM) in the form of integrated circuits mounted on a printed circuit board,.....".

13. The Indian Central Excise Tariff, Heading 85.42 refers to 'Electronic Integrated Circuits' under which is a specific sub-heading 'Memories'.

14. HSN Notes below Heading 85.42 explain that the electronic integrated circuits include memories (e.g. ……. EEPROM (or E2PROM),…..).

15. The Note 8 in Chapter 85 of Indian Central Excise Tariff describes three types of electronic integrated circuits – monolithic, hybrid & multichip. Then it states – 'For the classification of the articles defined in this note, headings …….8542 shall take precedence over any other heading in this Schedule, except in the case of heading 85.23, which might cover them by reference to, in particular, their function.'

16. It is noted that the imported Jet Flash V.30, etc. have the USB facility. They are thus USB Flash Drive. They are storage devices comprising of, inter alia, flash memory or memories. These latter goods are a type of Electrically Erasable Programmable Read Only Memory (EEPROM) in the form of electronic integrated circuit. Thus, the imported goods are devices while their one component is flash memory. By itself, flash memory is not a device rather it is a component used in the imported device. As a result, the imported goods JetFlash V.30, etc. cannot be equated to the goods described as flash memory in exemption notification 6/06-CEx. and hence the imported goods cannot enjoy the benefit of that exemption.

17. It cannot also be construed that the above interpretation makes redundant the central excise exemption. This is because, such exemption would apply to goods which, though normally classifiable under heading 85.42 but, are classified in heading 8523 51 00 (in terms of Chapter Note 8 of Chapter 85 by virtue of heading 8523 covering them by reference to, in particular, their function, provided such goods are in themselves a 'device'."

4.3 Since no ground has been stated by the revenue in their appeal as to how such classification is erroneous, we are not inclined to take up the issue of classification.

5.1 The appeal filed by the revenue is dismissed as unsubstantiated.

(Pronounced in court)

(Ajay Sharma)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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