

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Customs Appeal No. 85678 of 2015

(Arising out of Order-in-Original CAO No. CC-RS/08/2014-15 ACC (Adj)(I) dated 28.11.2014 passed by the Commissioner of Customs (Import), ACC, Mumbai)

M/s. Ingram Micro India Pvt. Ltd.

Appellant

Godrej IT Park, B-Block, 5th Floor,
Pirojshanagar, LBS Marg,
Vikhroli (W), Mumbai 400 079.

Vs.

**Commissioner of Customs, ACC & Import,
Mumbai**

Respondent

Air Cargo Complex, Sahar,
Andheri (E), Mumbai 400 099.

Appearance:

Shri T. Viswanathan, Advocate, for the Appellant

Shri Ashwini Kumar, Additional Commissioner, Authorised
Representative for the Respondent

CORAM:

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)**

Date of Hearing: 23.01.2023

Date of Decision: 23.01.2023

FINAL ORDER NO. A/85140/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Original CAO No. CC-RS/08/2014-15 ACC (Adj)(I) dated 28.11.2014 passed by the Commissioner of Customs (Import), ACC, Mumbai. By the impugned order, Commissioner has held as follows:-

"ORDER

(A) With respect to the goods imported through Air Cargo Complex, Sahar, Mumbai:-

(i) The 'Ext. Hard disc drives'/'Hard Disc Drives' imported by M/s. INGRAM MICRO INDIA LTD., MUMBAI, by classifying under tariff item 84717020 under various Bills of Entry as detailed in Annexure A to the Show Cause Notice are reclassified as

'Removable or exchangeable disc drives' under tariff item 84717030;

(ii) The exemption from payment of CVD, claimed under Notification No. 06/2006-CE dated 01.03.2006 (Serial No. 17) and Notification No. 12/2012-CE dated 17.03.2012 (Serial No. 255), for the goods imported under various Bills of Entry as mentioned in Annexure A to the Show Cause Notice is denied;

(iii) The additional duty of customs (CVD) is to be charged @ 10% adv. in terms of Notification no. 2/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e. f. 17.03.2012, along with Education Cess, Secondary & Higher Secondary Education Cess and SAD at the applicable rates for the goods imported under various Bills of Entry as detailed in Annexure A to the Show Cause Notice;

(iv) The demand of additional duty of customs (CVD) leviable @ 10% adv. in terms of Notification no. 2/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e. f. 17.03.2012 totally amounting to Rs 1,62,04,290/- (Rs. One Crore Sixty Two Lakhs Four Thousand Two Hundred Ninety only) along with SAD and Education Cess and Secondary & Higher Secondary Education Cess (as detailed in Annexure-A to the Show Cause Notice), which had not been paid due to willful mis-statement, is confirmed under the provisions of Section 28 of the Customs Act, 1962.

(v) The demand of interest on the aforesaid Customs duties is confirmed under the provisions of Section 28AB/Section 28AA (from 08.04.2011) of the Customs Act, 1962, as prevalent during the material time;

(vi) The amount of Rs. 1,54,54,623/- (Rs. One Crore Fifty Four Lakhs Fifty Four Thousand Six Hundred Twenty Three Only) voluntarily paid by M/s. INGRAM MICRO INDIA LTD., MUMBAI, during investigation is appropriated towards the aforesaid Customs interest and any other dues payable by them on their imports. The balance amount of duties, interest and any other dues payable are to be recovered from them.

(vii) I hold the goods of the declared CIF value of Rs. 27.22,75,187/- (Rupees Twenty Seven Crores Twenty Two Lakhs Seventy Five Thousand One Hundred Eighty Seven only) as listed in Annexure-A to the Show Cause Notice liable for confiscation under Section 111(m) of the Custom Act, 1962. Since the goods are not physically available, redemption fine is not imposable (As discussed in para 28 above).

(viii) I impose penalty equal to the duty plus applicable interest, i.e. Rs 1,62,04,290 (Rs. One Crore Sixty Two Lakhs Four Thousand Two Hundred Ninety only) plus applicable interest, under Section 114A of the Customs Act, 1962, on the importer M/S. INGRAM MICRO INDIA LTD., MUMBAI,

(B) with respect to the goods imported through Air Cargo Complex, New Delhi:-

(i) The Ext. Hard disc drives/Hard Disc Drives' imported by M/s. INGRAM MICRO INDIA LTD, MUMBAI, by classifying under tariff item 84717020 under various Bills of Entry, as detailed in Annexure-13 to the Show Cause Notice, are reclassified as 'Removable or exchangeable disc drives' under tariff item 84717030,

(ii) The exemption from payment of CVD, claimed under Notification No. 06/2006-CE dated 01.03.2006 (Serial No. 17) and Notification No. 12/2012-CE dated 17.03.2012 (Serial No. 2351 for these goods imported under various Bills of Entry as mentioned in Annexure-B to the Show Cause Notice is denied;

(iii) The additional duty of customs (CVD) is to be charged @ 10% adv. in terms of Notification no. 2/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e. f. 17.03.2012, along with Education Cess, Secondary & Higher Secondary Education Cess and SAD at the applicable rates for the goods imported under various Bills of Entry as detailed in Annexure-B to the Show Cause Notice.

(iv) The demand of additional duty of customs (CVD) leviable @ 10% adv. in terms of Notification no. 2/2008- CE dated

01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e. f. 17.03.2012 totally amounting to Rs 1,67,75,245/- (Rs. One Crore Sixty Seven Lakhs Seventy Five Thousand Two Hundred Forty Five only) along with SAD and Education Cess and Secondary & Higher Secondary Education Cess (as detailed in Annexure-B to the Show Cause Notice), which had not been paid due to willful mis-statement, is confirmed under the provisions of Section 28 of the Customs Act, 1962;

(v) The demand of interest on the aforesaid Customs duties is confirmed under the provisions of Section 28AB/Section 28AA (from 08.04.2011) of the Customs Act, 1962, as prevalent during the material time;

(vi) The amount of Rs.1,52,61,152/- (Rs. One Crore Fifty Two Lakhs Sixty One Thousand One Hundred Fifty Two Only) voluntarily paid by M/s. INGRAM MICRO INDIA LTD., MUMBAI, during investigation is appropriated towards the aforesaid Customs duties, interest and any other dues payable by them on their imports. The balance amount of duties, interest and any other dues payable are to be recovered from them.

(vii) I hold the goods of the declared CIF value of Rs 28,40,77,659/- (Rupees Twenty Eight Crores Forty Lakhs Seventy Seven Thousand Six Hundred Fifty Nine only) as listed in Annexure-B to the Show Cause Notice liable for confiscation under Section 111(m) of the Custom Act, 1962 Since the goods are not physically available, redemption fine is not imposable (As discussed in para 28 above).

(viii). I impose penalty equal to the duty plus applicable interest, i.e. Rs 1,67,75,245/- (Rs. One Crore Sixty Seven Lakhs Seventy Five Thousand Two Hundred Forty Five only) plus applicable interest, under Section 114A of the Customs Act, 1962, on the importer M/s. INGRAM MICRO INDIA LTD., MUMBAI

(C) With respect to the goods imported through Air Cargo Complex, Chennai:-

(i) The 'Ext. Hard disc drives/Hard Disc Drives' imported by M/s. INGRAM MICRO INDIA LTD, MUMBAI, by classifying under tariff item under various Bills of Entry, as detailed in Annexure-C to the Show Cause Notice, are reclassified as 'Removable or exchangeable disc drives under tariff item 84717030;

(ii) The exemption from payment of CVD, claimed under Notification No. 06/2006-CE dated 01.03.2006 (Serial No. 17) and Notification No. 12/2012-CE dated 17.03.2012 (Serial No. 255), for these goods imported under various Bills of Entry as mentioned in Annexure-C to the Show Cause Notice is denied;

(iii) The additional duty of customs (CVD) is to be charged @ 10% adv. in terms of Notification no. 2/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e. f. 17.03.2012, along with Education Cess, Secondary & Higher Secondary Education Cess and SAD at the applicable rates for the goods imported under various Bills of Entry as detailed in Annexure-C to the Show Cause Notice.

(iv) The demand of additional duty of customs (CVD) leviable @ 10% adv. in terms of Notification no. 2/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e. f. 17.03.2012 along with SAD and Education Cess and Secondary & Higher Secondary Education Cess totally amounting to Rs 1.93,36,959/- (Rs. One Crore Ninety Three Lakhs Thirty Six Thousand Nine Hundred Fifty Nine only) (as detailed in Annexure-C to the Show Cause Notice), which had not been paid due to willful mis-statement, is confirmed under the provisions of Section 28 of the Customs Act, 1962:

(v) The demand of interest on the aforesaid Customs duties is confirmed under the provisions of Section 28AB Section 28AA (from 08.04.2011) of the Customs Act, 1962, as prevalent during the material time;

(vi) The amount of Rs 1,71,51,83344 (Rs. One Crore Seventy One Lakhs Fifty One Thousand Eight Hundred Thirty Three Only) voluntarily paid by M/s INGRAM MICRO INDIA MUMBAI, during investigation is appropriated towards the aforesaid Customs

duties, and any other dues payable by them on their imports. The balance amount of duties, and any other dues payable are to be recovered from them.

(vii) I hold the goods of the declared CIF value of Rs 32,93,22,596/- (Rupees Thirty Two Crores Ninety Three Lakhs Twenty Two Thousand Five Hundred Ninety Six only) as listed Annexure-C to the Show Cause Notice liable for confiscation under Section 111(m) of Com Act 1962. Since the goods are not physically available, redemption fine imposable (As discussed in para 28 above).

(vii) I impose penalty equal to the duty plus applicable interest, i.e. Rs 1,93.36,959/- (Rs. One Core Ninety Three Lakhs Thirty Six Thousand Nine Hundred Fifty Nine only) plus applicable interest, under Section 114A of the Customs Act, 1962, on the importer M/s. INGPAN MICRO INDIA LTD, MUMBAI."

2.1 Appellant filed Bills of Entry for clearance of the goods claimed to be "Ext. Hard disc drives" at Air Cargo Complex at Mumbai, Delhi and Chennai.

2.2 Revenue was of the opinion that the appellant has wrongly classified the said goods under CETH 84717020 as 'hard disc drives' whereas the same should have been classified under CETH 84717030 as 'removable or exchangeable disc drives'. By doing so, they have wrongly claimed the benefit under Sr. No. 17 of exemption Notification No. 06/2006-CE dated 01.03.2006 till 16.03.2012 and thereafter under Sr. No. 255 of Notification No. 12/2012-CE dated 17.03.2012.

2.3 As a result of such misclassification, appellant short paid the duty as indicated in table below:-

Port of Import	CIF value of imports (Rs.)	Differential duty payable (Rs.)	Amount paid during investigation (Rs.)
Air Cargo Complex, Mumbai	27,22,75,187/-	1,62,04,290/-	1,54,54,623/-

Air Cargo Complex, Delhi	28,40,77,659/-	1,67,75,245/-	1,52,61,152/-
Air Cargo Complex, Chennai	32,93,22,596/-	1,93,36,959/-	1,71,51,833/-
Total	88,56,75,442/-	5,23,16,494/-	4,78,67,608/-

2.4 After completion of enquiry, a show cause notice dated 05.06.2013 asking the appellant to show cause as to why:-

"(A) With respect to the goods imported through Air Cargo Complex, Sahar, Mumbai, to the Commissioner of Customs (Import) Air Cargo Complex, Mumbai, having his office at Air Cargo Complex, Sahar, Andheri (E), Mumbai - 400 099 as under:

(i) Why 'Ext. Hard disc drives'/'Hard Disc Drives' imported by them by classifying under CTH/CETH 84717020 under various Bills of Entry as detailed in Annexure A to the SCN should not be reclassified as 'Removable or exchangeable disc drives' under CTH/CETH 84717030;

(ii) why the exemption from payment of CVD, claimed under Notification No. 06/2006-CE dated 01.03.2006 (Serial No. 17) and Notification No. 12/2012-CE dated 17.03.2012 (Serial No. 255), for these goods imported under various Bills of Entry as mentioned in Annexure A to the SCN should not be denied;

(iii) why additional duty of customs (CVD) should not be charged @ 10% adv. in terms of Notification no. 2/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12 (tariff rate) w. e. f. 17.03.2012, along with Education Cess, Secondary & Higher Secondary Education Cess and SAD at the applicable rates for the goods imported under various Bills of Entry as detailed in Annexure A to the SCN;

(iv) why additional duty of customs (CVD) leviable @ 10% adv. in terms of Notification no. 02/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e f 17.03.2012 totally amounting to Rs 1,62,04,290/- (Rs. One Crore Sixty Two Lakhs Four Thousand Two Hundred Ninety only)

along with SAD and Education Cess and Secondary & Higher Secondary Education Cess (as detailed in Annexure-A to the SCN), which had not been paid due to willful mis-statement, should not be demanded and recovered under the provisions of Section 28 of the Customs Act, 1962;

(v) why interest on the aforesaid Customs duties should not be demanded and recovered under the provisions of Section 28AB/Section 28AA (from 08.04.2011) of the Customs Act, 1962, as prevalent during the material time;

(vi) why the amount of Rs. 1,54,54,623/- (Rs. One Crore Fifty Four Lakhs Fifty Four Thousand Six Hundred Twenty Three Only) voluntarily paid by M/s. INGRAM MICRO INDIA LTD., MUMBAI, during investigation should not be appropriated towards the aforesaid Customs duties, interest and any other dues payable by them on their imports.

(vii) why goods of the declared CIF value of Rs. 27,22,75,187/- (Rupees Twenty Seven Crores Twenty Two Lakhs Seventy Five Thousand One Hundred Eighty Seven only) as listed in Annexure-A to the SCN should not be held liable for confiscation under Section 111(m) of the Custom Act, 1962;

(viii) why penalty under Section 112(a) or Section 114A of the Customs Act, 1962. should not be imposed on them for their willful acts and omissions as discussed above.

(B) With respect to the goods imported through Air Cargo Complex, New Delhi, to the Commissioner of Customs (Import & General), Airport New Delhi, having his office at New Custom House, Near I. G. I. Airport, New Delhi - 110037 as under:-

(i) Why 'Ext. Hard disc drives'/'Hard Disc Drives' imported by them, by classifying under CTH/CETH 84717020 under various Bills of Entry, as detailed in Annexure-B to the SCN, should not be reclassified as 'Removable or exchangeable disc drives under CTH/CETH 84717030;

(ii) why the exemption from payment of CVD, claimed under Notification No. 06/2006-CE dated 01.03.2006 (Serial No. 17) and Notification No. 12/2012-CE dated 17.03.2012 (Serial No. 255), for these goods imported under various Bills of Entry as mentioned in Annexure-B to the SCN should not be denied;

(iii) why additional duty of customs (CVD) should not be charged @ 10% adv. in terms of Notification no. 2/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e. f. 17.03.2012, along with Education Cess, Secondary & Higher Secondary Education Cess and SAD at the applicable rates for the goods imported under various Bills of Entry as detailed in Annexure-B to the SCN.

(iv) why additional duty of customs (CVD) leviable @ 10% adv. in terms of Notification no. 2/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e. f. 17.03.2012 totally amounting to Rs 1,67,75,245/- (Rs. One Crore Sixty Seven Lakhs Seventy Five Thousand Two Hundred Forty Five only) along with SAD and Education Cess and Secondary & Higher Secondary Education Cess (as detailed in Annexure-B to the SCN). which had not been paid due to willful mis-statement, should not be demanded and recovered under the provisions of Section 28 of the Customs Act, 1962;

(v) why interest on the aforesaid Customs duties should not be demanded and recovered under the provisions of Section 28AB/Section 28AA (from 08.04.2011) of the Customs Act, 1962, as prevalent during the material time;

(vi) why the amount of Rs.1,52,61,152/- (Rs. One Crore Fifty Two Lakhs Sixty One Thousand One Hundred Fifty Two Only) voluntarily paid by M/s. INGRAM MICRO INDIA LTD., MUMBAI, during investigation should not be appropriated towards the aforesaid Customs duties, interest and any other dues payable by them on their imports:

(vii) why goods of the declared CIF value of Rs 28,40,77,659/- (Rupees Twenty Eight Crores Forty Lakhs Seventy Seven Thousand Six Hundred Fifty Nine only) as listed in Annexure-B to

the SCN should not be held liable for confiscation under Section 111(m) of the Custom Act, 1962;

(viii) why penalty under Section 112(a) or Section 114A of the Customs Act, 1962 should not be imposed on them for their willful acts and omissions as discussed above.

(C) With respect to the goods imported through Air Cargo Complex, Chennai, to the Commissioner of Customs (Airport & Air Cargo), Chennai, having his office at New Custom House, Meenabakkam, Chennai-600 027 as under:-

(i) Why 'Ext. Hard disc drives/Hard Disc Drives' imported by them, by classifying under CTH/CETH 84717020 under various Bills of Entry, as detailed in Annexure-C to the SCN, should not be reclassified as 'Removable or exchangeable disc drives under CTH/CETH 84717030;

(ii) why the exemption from payment of CVD, claimed under Notification No. 06/2006-CE dated 01.03.2006 (Serial No. 17) and Notification No. 12/2012-CE dated 17.03.2012 (Serial No. 255), for these goods imported under various Bills of Entry as mentioned in Annexure-C to the SCN should not be denied;

(iii) why additional duty of customs (CVD) should not be charged @ 10% adv. in terms of Notification no. 2/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e. f. 17.03.2012, along with Education Cess, Secondary & Higher Secondary Education Cess and SAD at the applicable rates for the goods imported under various Bills of Entry as detailed in Annexure-C to the SCN.

(iv) why additional duty of customs (CVD) leviable @ 10% adv. in terms of Notification no. 2/2008- CE dated 01.03.2008, as amended (till 16.03.2012) and @12% (tariff rate) w. e. f. 17.03.2012 along with SAD and Education Cess and Secondary & Higher Secondary Education Cess totally amounting to Rs 1,93,36,959/- (Rs. One Crore Ninety Three Lakhs Thirty Six Thousand Nine Hundred Fifty Nine only) (as detailed in Annexure-C to the SCN), which had not been paid due to willful

mis-statement, should not be demanded and recovered under the provisions of Section 28 of the Customs Act, 1962;

(v) why interest on the aforesaid Customs duties should not be demanded and recovered under the provisions of Section 28AB/Section 28AA (from 08.04.2011) of the Customs Act, 1962, as prevalent during the material time;

(vi) why the amount of Rs. 1,71,51,833/- (Rs. One Crore Seventy One Lakhs Fifty One Thousand Eight Hundred Thirty Three Only) voluntarily paid by M/s. INGRAM MICRO INDIA LTD., MUMBAI, during investigation should not be appropriated towards the aforesaid Customs duties, interest and any other dues payable by them on their imports.

(vii) why goods of the declared CIF value of Rs 32,93,22,596/- (Rupees Thirty Two Crores Ninety Three Lakhs Twenty Two Thousand Five Hundred Ninety Six only) as listed in Annexure-C to the SCN should not be held liable for confiscation under Section 111(m) of the Custom Act, 1962;

(viii) why penalty under Section 112(a) or Section 114A of the Customs Act, 1962 should not be imposed on them for their willful acts and omissions as discussed above."

2.5 By the impugned order, all the three cases for importation made from Air Cargo Complex at Delhi, Mumbai and Chennai have been adjudicated. Aggrieved by the order, appellant has filed this appeal.

3.1 We have heard Shri T. Viswanathan, Advocate for the appellant and Shri Ashwini Kumar, Additional Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that:-

- Following technical opinions issued by Government organizations are in favour of the appellant as they clearly hold that even external hard disk drives are hard disk drives:

- Ministry of Communication and Information Technology dated 31.10.2013.
 - Centre for Development of Advanced Computing dated 12.11.2012.
- The issue is squarely covered in favour of the appellant by the decision of the Tribunal in the case of Supertron Electronics which was affirmed by Hon'ble Supreme Court in the case of Supertron Electronics Pvt. Ltd. [2918 (360) ELT A325 (SC)].
- Decisions passed by Tribunal at Mumbai, Chennai and Delhi on identical issue are in favour of the appellant.

3.3 Learned AR submits that the appeal filed by the appellant along with other appeals was earlier rejected by the Tribunal vide order No. A/90720-90723/WZB/CB dated 04.10.2016. Against this order, appellant had filed appeal before the Hon'ble Supreme Court. Subsequently they withdrew the appeal and filed application for rectification of mistake. By the order of Tribunal appeal of another appellant namely Fortune Marketing Pvt. Ltd., was also dismissed and Fortune Marketing Pvt. Ltd. also had filed appeal before the Hon'ble Supreme Court. Appeal filed by Fortune Marketing Pvt. Ltd. has been dismissed by Hon'ble Supreme Court as reported at [2017 (347) ELT A126 (SC)]. As the appeal against the same order has been dismissed, the issue has acquired finality and following the said order, this appeal should be dismissed.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 The arguments raised by the learned AR were considered by the Tribunal while considering the application for rectification of mistake. While allowing the ROM filed by Fortune Marketing Pvt. Ltd. vide order No. M/94486-94488/16/CB dated 13.12.2016, Tribunal recalled the order stating as follows:-

"3.1 *On careful consideration of the submissions made by both sides and perusal of our final order dated 4-10-2016, it is noticed that the clarification issued by Department of Electronics and Information Technology, GOI though produced before us,*

escaped our attention while recording the order, as also other materials like orders of first appellate authority on the same issue for subsequent periods. The said clarification of the Department of Electronics and Information Technology, GOI and other materials may throw some light as to the classification of the products in question. We have also noticed that both sides have not argued on these points elaborately during the proceedings hence it may have escaped our attention. As to the power of Tribunal to recall order once passed, Full Bench of Hon'ble High Court of Delhi in the case of Lachmandas Bhatia Hingwala v. Asstt. Commissioner of Income Tax - 2011 (121) DRJ 451 = [2016 \(344\) E.L.T. 875](#) (Del.), ruled that Tribunal has power to recall its order if some facts are not considered.

3.2 *In view of the foregoing in our considered view, the order dated 4-10-2016 to the extent it is in respect of these applicants needs to be recalled. In the interest of justice and to be fair to both the sides, we recall our Final Order Nos. A/90720-90723/2016/CB, dated 4-10-2016 and direct the Registry to relist the appeals for fresh hearing."*

4.3 In the case of the appellant, Tribunal had vide order dated 26.08.2019 rejected the application for rectification of mistake and against this order, appellant had filed Writ Petition No. 475 of 2020 before the Hon'ble High Court of Judicature at Bombay. Hon'ble High Court vide order dated 09.11.2022 observed as follows:-

"6. Heard the counsels.

The order dated 4th October 2016 is a common order and if the application of three other applicants/appellants is allowed on the ground that certain documents placed on record have not been considered and those are not party specific documents, certainly that benefit, in our view, should also be extended to petitioner in this case.

7. Another point is CESTAT, after hearing those appeals and considering the Government of India notification, has allowed those appeals in favour of other three parties. CESTAT took up the appeal filed by Fortune Marketing Pvt. Ltd. for final hearing (post the recall of the order dated 4th October 2016) and passed

final order dated 4th April 2017 allowing the appeals and deciding the issue in favour of Fortune Marketing Pvt. Ltd. The appeal filed by respondent No. 2 before this Court against the final order dated 4th April 2017 in Fortune Marketing Pvt. Ltd. was dismissed on maintainability vide order dated 19th September 2018.

Before seeking leave of the Apex Court to withdraw the appeal, petitioner had filed in the Apex Court an application to bring on record the order passed by CESTAT on the rectification application filed by Fortune Marketing Pvt. Ltd. and others allowing the same. This is evident from the Apex Court's office report dated 2nd March 2017 in respect of petitioner's case.

8. We have considered the order of the Apex Court where of course there is no specific express leave being granted. Mr. Mishra submitted that there are plethora of judgments discussing the doctrine of merger because having filed the appeal under Section 130E of the Customs Act, 1962, the order allowing withdrawal of the appeal would mean that the said order has merged with the order passed by CESTAT. Therefore, CESTAT was correct in rejecting the application. Mr. Sridharan submitted otherwise and relied upon various judgments including a judgment of the Apex Court in State of Kerala and Anr. V/s. Kondottyparambanmoosa and Ors (2008) 8 SCC 65.

9. Per contra, Mr. Mishra relied upon a judgment of the Apex Court in Omprakash Verma and Ors. V/s. State of Andhra Pradesh and Ors. (2010) 13 SCC 158 to submit that doctrine of merger was applicable and he brought to the attention of the Court paragraph 73 and 74 of the said judgment. In our view, this judgment is not applicable in as much as in Omprakash Verma (supra), the Apex Court has observed that once the appeal of the State has been allowed, the net result would be that the High Court's judgment which held that the proceedings under the ULC Act were vitiated, stood merged in the decision of the Apex Court in State of A.P. V/s. N. Audikesava Reddy (2002) 1 SCC 227.

In the case at hand (a) it is a statutory appeal and (b) no leave was granted or any order of admission was passed.

10. Mr. Mishra also relied upon judgment of the Apex Court in *Pernod Ricard India Pvt. Ltd. V/s. Commissioner of Customs* (2010) 8 SCC 313. In the said judgment, the Apex Court has held that once a statutory right of appeal is invoked, dismissal of appeal by the Supreme Court, whether by a speaking order or non speaking order, the doctrine of merger does apply.

Again this judgment is not applicable in as much as in the case at hand, there was no order of dismissal of the statutory appeal. Petitioner wanted to withdraw the appeal and permission to withdraw the appeal was simplicitor granted.

11. Mr. Mishra also relied upon a judgment of the Apex Court in *Sarguja Transport Service V/s. State Transport Appellate Tribunal, M.P. Gwalior and Ors* (1987) 1 SCC 5. Mr. Mishra submitted that in that case petitioner had withdrawn the petition from the High Court simplicitor and the Apex Court held that a fresh petition was not maintainable.

Again this judgment is not applicable to the facts of the case at hand because (a) that was a writ petition and not a statutory appeal and (b) there the Court held that it was not maintainable on the grounds of *res judicata*. Court held, *Res judicata* would affect petitioner's remedy under Article 226 of the Constitution of India and may not bar other remedies.

12. Having heard the counsels, in the interest of justice, we are inclined to allow the petition and direct CESTAT to consider petitioner's rectification application. Reasons for us to arrive at this conclusion are as under :

(a) the order dated 4th October 2016 has been a common order in which four appellants were heard including petitioner;

(b) rectification application of the remaining three appellants has been allowed;

(c) the reason for allowing the rectification application to those appellants is because CESTAT accepted that it had not considered the clarification issued by the Department of Electronics and Information Technology, Government of India though it was produced before CESTAT. Paragraph 3.1 of the

said order dated 13th December 2016 allowing rectification application reads as under :

3.1. On careful consideration of the submissions made by both sides and perusal of our final order dated 04.10.2016, it is noticed that the clarification issued by Department of Electronics and Information Technology, GOI though produced before us escaped our attention while recording the order as also other materials like orders of first appellate authority on the same issue for subsequent periods. The said clarification of the Department of Electronics and Information Technology, GOI and other materials may throw some light as to the classification of the products in question. We have also noticed that both sides have not argued on these points elaborately during the proceedings hence it may have escaped our attention. As to the power of Tribunal to recall order once passed, Full Bench of Hon'ble High Court of Delhi in the case of Lachmandas Bhatia Hingwala vs. Asst. Commissioner of Income Tax - 2011 (121) DRJ 451, ruled that Tribunal has power to recall its order if some facts are not considered.

(d) subsequently the appeals by Fortune Marketing Pvt. Ltd. and two others (three appeals) have been allowed by CESTAT. Only petitioner is left out.

(e) the orders passed in the rectification applications by CESTAT were also filed by petitioner in the Apex Court.

(f) the doctrine of merger, in our opinion, would not apply in this case. This is because the Apex Court while permitting leave to withdraw the appeal has not passed any order on merits. The appeal had not even been admitted. The order of the Apex Court is also not an order rejecting the appeal and, therefore, the said order cannot be said to be an order of affirmance of the order of CESTAT. That being the position, in our view, the doctrine of merger cannot be applied to the facts and circumstances of this case.

(g) gross injustice would be caused to petitioner if this petition is not allowed.

13. In the circumstances, we set aside the impugned order dated 26th August 2019 and direct CESTAT to consider petitioner's

appeal on merits once again. The Appeal No. C/85678 of 2015 be heard and disposed preferably within twelve weeks."

4.4 The arguments advanced by learned AR are contrary to the observations made by Hon'ble Bombay High Court and hence the same do not support the case of the Revenue.

4.5 On the merits of the issue we find that the issue is squarely covered by the decision of the Tribunal in the case of Supertron Electronics Pvt. Ltd. [2017 (357) ELT 401 (Tri.-Del.)]. Relevant para of the said decision is reproduced below:-

"4. We have heard both sides and perused the appeal records. We have also examined the samples of impugned goods as well as sample of removable or exchangeable disk drive during the course of hearing. We note that the classification of external hard disk drive assumes significance because of concessional rate of duty available to only hard disk drive not to removable or exchangeable disk drives. The Revenue considers the imported items under 8471 70 30 whereas the impugned order by the Commissioner (Appeals) held the product under Heading 8471 70 20. The latter entry is eligible for concessional CV duty. We have examined the impugned order and grounds of appeal, closely. First of all, we note that the exemption notification specifies tariff heading up to six digits only, 8471 70, which covers both, hard disk drive and removable or exchangeable disk drives. Further, the next column of the table for description explain the goods only as hard disk drive among many other items. On careful consideration of the technical specification furnished, and the sample of imported items along with tariff entries and the exemption notification, we are in agreement with the findings in the impugned order. The terms hard disk drive used in the notification has not been amplified either by adding "external" or "internal". On this simple premise alone, exemption to the said item cannot be denied. Admittedly, the imported items are hard disk drive and are meant for external use with computer or lap-top as plug-in device. They are portable hard disk drive. The contention of the Revenue that they are only removable or exchangeable disk drive, is not factually or

technically correct. We have perused sample of such removal or exchangeable disk drives. They have full drive mechanism in which storage media is inserted and along with such media can be removed and inserted in computer for usage. We have also perused the technical literature of the manufacturer of the impugned goods. Further, the technical opinion given by the Ministry of Communication and Information Technology, is directly on the issue. We find that in the appeal, the Revenue contested the factual findings in the impugned order. Guided by the expert opinion of the concerned Ministry and facts recorded in the impugned order, we do not find it fit to interfere with the impugned order."

4.6 Appeal filed by the Revenue against the above order has been dismissed by Hon'ble Supreme Court as reported at 2018 (360) ELT A325 (SC)]. While dismissing the appeal filed by the Revenue, Hon'ble Supreme Court observed as follows:-

"3. In view of the findings recorded by the learned Customs, Excise and Service Tax Appellate Tribunal and the O.M. dated 5-6-2013 of the Ministry of Communications and Information Technology, we find no ground to interfere. Admission is refused and the civil appeal is, accordingly, dismissed."

4.7 Chennai Bench of the Tribunal vide final order No. 42907/2018 dated 16.11.2018 in appellant's own case observed as follows:-

"4. Further, that CESTAT, Mumbai in the case of Fortune Marketing Pvt. Ltd., had originally decided the issue against the appellants vide Final Order, dt.04.10.2016 as referred to by the learned Authorised Representative. Though, M/s. Fortune Marketing Ltd., filed appeal to Supreme Court, they also filed ROM before CESTAT, Mumbai, and the ROM was allowed recalling the Final Order. He referred to the ROM order of Tribunal, dated 13.12.2016. The respondents herein M/s. Ingram Micro India Ltd., who were party to the Final Order dated 04.10.2016 of CESTAT, Mumbai had also filed appeal separately before Hon'ble Supreme Court. On coming to know that the Tribunal allowed the ROM filed by M/s. Fortune Marketing Ltd.,

M/s. Ingram Micro India Ltd, filed an application for withdrawal of appeal before the Supreme Court even before their appeal was admitted. The Hon'ble Apex Court granted permission to withdraw the appeal and the same was dismissed as withdrawn by judgment of Apex Court dated 03.03.2017. Later, M/s. Ingram Micro India Ltd., filed an ROM application before the CESTAT, Mumbai against Final Order, dated 04.10.2016.

5. Meanwhile, CESTAT, Delhi in the case of Commissioner of Customs, New Delhi Vs M/s. Supertron Electronics Ltd., as reported in 2017-TIOL-125-Cestat Del. (decided on 06.01.2017) allowed exemption on imported External/Removal Hard Disc Drive and dismissed the appeal filed by department against Commissioner (Appeals) order.

6. Pursuant to the ROM applications by M/s. Fortune Marketing Ltd., the Tribunal reheard the appeal and recalled its Final order, dated 04.10.2016 allowing the appeal filed by assessee and holding that exemption is eligible. While rehearing the appeal pursuant to ROM application, the Tribunal considered the issue of exemption on the basis of the Office memorandum, dated 05.06.2013 issued by Ministry of Communications and Information Technology (Department of Electronics & Information Technology). Consequent to the favourable decision of the Tribunal in the ROM proceedings, the appeal filed by M/s. Fortune Marketing Ltd., before the Hon'ble Apex Court was dismissed as on 13.01.2017. It was not disposed on merits as argued by the learned Authorised Representative and, therefore, is not applicable at all.

7. The department had filed appeal before the Hon'ble Supreme Court against the Order dated 06.01.2017 passed by CESTAT, Delhi in the case of M/s. Supertron Electronics Ltd. The said appeal was dismissed on merits taking into consideration the Office Memorandum, dated 05.06.2013 issued by Ministry of Communications & Information Technology. The counsel produced copies of the interim orders/dairy order in the case of M/s. Supertron Electronics Ltd. It is pointed out that in order, dated 08.09.2017, it was noted by the Apex Court that the

appellant (department) therein, had not submitted the subsequent relevant facts of the case and the respondent's counsel was permitted to file affidavit as to bring out the subsequent facts. On 18.09.2017, the Hon'ble Apex Court noted that there has been mis-statement on the part of appellant/department, so far as, to the facts relating to earlier decision of the Apex Court dismissing the CMA filed by M/s. Fortune Marketing Ltd. The appeal was posted for hearing on merits and later on 06.10.2017 was adjourned. On 25.10.2017, the appeal filed by department was dismissed by Hon'ble Supreme Court on merits upholding the decision passed by CESTAT, Delhi. That, therefore, the issue stands settled in favour of appellant as per the said judgment of Apex Court in the case of Commissioner of Customs VS M/s. Supertron Electronics Ltd., dated 25.10.2017.

8. it is also submitted that this Tribunal in the case of M/S. Fortune Marketing Ltd., vide F.O No.41862/2017, dated 24.08.2017 had allowed the exemption placing reliance on the decision laid in the case of M/s. Supertron Electronics Ltd. That the Mumbai Bench of the Tribunal in the case of M/s. Reddington (India) Ltd., Vs Commissioner of Customs (Imports), Mumbai as reported in 2017- TIOL-1993-CESTAT-Del., has followed the decisions in M/s. Fortune Marketing and M/s. Supertron Electronics Ltd., to hold the exemption under Notification No.12/2012-CE is eligible for External/Removable HDD.

9. Heard both sides, the issue is whether the goods imported by the respondents, namely, External/Removable HDD is eligible for exemption as per Sl.No.255 of Notification No.12/2012. This Tribunal in the case of M/s. Fortune Marketing Pvt. Ltd., vide Final Order, dated 24.08.2017 (supra) has already decided the issue in favour of the assessee by following the decision of CESTAT, Delhi in M/s. Supertron Electronics Pvt. Ltd., as reported In 2017-TIOL-125-CESTAT-DEL.

10. Although, department had filed appeal before Hon'ble Supreme Court against the decision of CESTAT, Delhi in the case of M/s. Supertron Electronics Pvt. Ltd., vide judgment dated

25.10.2017, the Apex Court has dismissed the appeal filed by the department. The Interim Order/Daily Order of Hon'ble Apex Court in the case of M/s. Supertron Electronics Pvt. Ltd., is produced by the learned counsel for respondent. On 08.09.2017, the Hon'ble Apex Court in the said appeal filed by department noted that the learned counsel for the respondents appearing before the Supreme Court has brought to the notice of the Hon'ble Court that the appellant/department has not disclosed the entire facts on the issue relevant for the case. The Hon'ble Court on the said date permitted the respondents to file affidavit, if necessary, bringing out the subsequent facts with regard to the issue. On 18.09.2017, the Hon'ble Apex Court observed that there has been a mis-statement on the part of the appellant (department) insofar as, the facts relating to the earlier decision of the Apex Court in M/s. Fortune Marketing Pvt. Ltd., and thereupon decided to hear the appeal on merits. The relevant portion of the said order of Hon'ble Apex Court, dated 18.09.2017 is reproduced as under:-

"Regarding the application filed by the respondent to bring additional documents and facts on record, it appears that there has been a mis-statement on the part of the appellant, insofar as, the facts relating to the earlier decision of this court dismissing the Special Leave Petition filed by M/s. Fortune Marketing Pvt. Ltd., is concerned.

Learned counsel for the appellant owns up the responsibility for the aforesaid mis-statement and has tendered his unconditional apology to the court. We accept the same. We, therefore, do not consider it necessary to pursue the aforesaid aspect of the matter any further.

The matter will now be considered on merits. To enable the court to do so the appellant may lay before the court the steps taken by the appellant against the other two orders of the learned Tribunal classifying the subject product under sub- heading 84717020.

List the matter after two weeks."

11. *The matter came up for hearing on subsequent days and on 25.10.2017, the appeal was heard and dismissed. The relevant portion of the judgment of the Hon'ble Apex Court is reproduced as under:*

"Delay condoned.

Heard the learned senior counsel appearing for the parties and perused the relevant material. In view of the findings recorded by the learned Customs, Excise and Service Tax Appellate Tribunal and the O.M... dated 05.06.2013 of the Ministry of Communications and Information Technology, we find no ground to interfere. Admission is refused and the Civil Appeal is, accordingly, dismissed."

12. From the above, it can be seen that the Hon'ble Apex Court has upheld the decision of the Tribunal CESTAT, Delhi in M/s. Supertron Electronics Pvt. Ltd., on the basis of the Office Memorandum issued by Ministry of Communications and Information technology. The appeal of the department having been dismissed on merits, the issue has attained finality. The argument of the learned Authorised Representative that the Hon'ble Apex Court has dismissed the appeal filed by M/s. Fortune Marketing Ltd., on merits, prior to the decision in M/s. Supertron Electronics Pvt. Ltd., is factually wrong - the appeal filed by M/s. Fortune Marketing Ltd., was dismissed by Apex Court as withdrawn pursuant to their ROM filed before Tribunal being allowed."

5.1 As the issue is squarely covered by the abode decision, we do not find any merits in the impugned order.

5.2 Appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)