

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86176 OF 2021

[Arising out of Order-in-Appeal No: MUM-CSTM-AMP-APP-639/2020-21 dated 24th December 2020 passed by the Commissioner of Customs (Appeals), Mumbai – III.]

Ingram Micro India Pvt Ltd

5th Floor, Building A, Empire Plaza,
LBS Marg, Vikhroli (W), Mumbai - 400083

... Appellant

versus

Commissioner of Customs (Import)

Air Cargo Complex, Sahar, Andheri (E)
Mumbai - 400099

...Respondent

APPEARANCE:

Ms Lakshmi Menon with Ms Srinidhi, Advocates for the appellant

Shri Ramesh Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 85357 /2023

DATE OF HEARING:

01/09/2022

DATE OF DECISION:

01/03/2023

PER: C J MATHEW

This dispute, purporting to be about classification of goods imported by M/s Ingram Micro India Ltd against bill of entry no.

8009620/26.06.2020, appears to have all the makings of a clash over the right side of the tariff – understandable enough on the part of an importer but certainly unacceptable as motivation of customs authorities unmindful of potential hazard in hitching their wagon to the inconstancy inherent in tax rate policy. Stable and consistent classification is not only an aid to policy formulation but is to be commended for the certainty that it engenders. Adherence to that obligation devolving on tax administrators is now in our court.

2. Much has been made of technical, and technological, exposition by both sides in their attempt to convince us of their respective takes on the ‘right’ side. In our view, however, any dispute on classification that strays too far from the illuminating circle of General Rules for the Interpretation of Import Tariff in Customs Tariff Act, 1975 will starkly resemble ‘war to end all wars’ fated to surface again and again with every change of rate or recast of the tariff at the ‘eight digit’ level.

3. M/s Ingram Micro India Ltd imported 500 nos. ‘compact disc (CD)’ of ‘WIN PRO 10 64 BIT ENG INTL 1 PK DSP OEI DVD’ valued at ₹ 51,04,510 and sought clearance at rate of duty leviable on tariff item 8523 8020 of First Schedule to Customs Tariff Act, 1975 which, in conjunction with notification no. 50/2017-Cus dated 30th June 2017 (at sl no 298), not being acceptable to the assessing officer

and re-classified to tariff item 8523 8090 of First Schedule to Customs Tariff Act, 1975 with consequent denial of 'nil' rate in the said notification; apparently, the residual entry within the same sub-heading was considered to be more appropriate description of goods that, as 'systems operating software', did not fit within

“Information Technology software” means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable being manipulated or providing interactivity to a user, by means of an “Automatic Data Processing Machine”

in the said notification. The original authority held that

‘There is no dispute that the impugned item is system software/Operating System and the same has also been accepted by the importer in their submissions made before the department. An IT software is different from a system software in such a way that System Software is general purpose software and is essential for the working of the computer whereas, IT software are designed for the users to perform their specific tasks. The System Software is designed to manage the system resources and it also provides a platform for IT software to run.

The IT software runs on the platform created by the System Software. IT software is an intermediary between the end-user and System Software. One can install multiple IT Software on a System Software. The examples for IT Software are MS Office, Photoshop, ICES etc.

Therefore, in view of the above, it can be concluded

*that the impugned item is System Software which is a general purpose software and essential for operating any computer and can be bought and used by anyone. Anyone buying a computer has to buy and install an operating system on it whether by himself or he has to buy a computer with operating system pre-installed on it by the OEM. In the second case cost of the computer includes the cost of the operating system. Without operating system, the computer is just a piece of hardware with no use. **Therefore, to make it serviceable, operating system needs to be installed on it whereas, and IT software is not mandatory for operation of a computer but is a special purpose software meant for performing some limited to specific task.*** (emphasis supplied)

The first appellate authority, on taking this finding into consideration along with the submissions of the appellant, held that

‘13. In this case, I observe that apparently, the importers of imported 500 numbers of so called software “WIN PRO 10 64 BIT ENG INTL 1 PK DSP OEI DVD”, which, as imported, is in retail packing which can be sold off the shelf either to the individual or to the OEM with a key password and the same cannot be modified/alterd in any manner and is Operating Software/Canned Software/Packaged Software. The Operating systems software manages computer hardware, software resources and provides common services for computer programs. What has been imported in this case is nothing but Operational Software/Canned/ Packaged Software with PUK (Personal Unlocking Key) conveying the right to use the software, without transferring the title of the goods/without the Source Code and not an IT Software with a source code/transferring the title/ownership of the goods. The

amount paid or payable is nothing but a license fee and not a price for the title/owning of the IT Software. Hence, I find that the additional submissions made relying on the case law quoted by the appellant in respect of their own case (Ingram Micro India Ltd V/s Commissioner of Customs, Air Cargo, Chennai (2018 (364) ELT 128 (Tri. Chennai) is different and not relevant to the present issue. The wordings used at S. No. 298 of Notification No. 050/2017-Cus dated 30.6.2017 is crystal clear i.e. (i) Information Technology Software sold along with the object code/source code (not a packaged software/canned software/OS) and (ii) Documents of title conveying the right to use Information Technology Software (not a PUK conveying the right to use IT Software). I also find that for the purpose of levy of IGST, the importers are claiming the IGST S. No. III-382 which reads as “Disc, tapes, solid-state non-volatile storage devices, smart cards and other media for the recording of the sound or of other phenomena, whether or not recorded, including matrices and masters for the production of discs, but excluding products of Chapter 37). Thus, in view of the aforesaid discussions and also the IGST entry claimed (III/382) I hold that the impugned goods are not an IT software to be classified under CTH eight 523.80.20 and are not eligible for the benefit of Notification No. 050/2017-Cus (S. No. 298) dated 30.6.2017 and a correctly classifiable under CTH 8523.80.90 (Others).

14. *In view of the above, I do not find any merit in the arguments of the appellant that the imported software has interactivity and are capable of manipulation etc. and thus fulfils the definition of IT Software. Had this been fulfilled, import of one such software is sufficient for commercial exploitation and to make en-numbers of copies and there was no need to import such a huge quantity of 500 numbers of such software. No End User License Agreement has been*

forthcoming in this case. The transactions involved in this case become sale of goods for variety of users and not a “IT Software” specially made to order for specific user/client.

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16. *Even if the argument of the appellant that the imported software is an Information Technology Software, is considered, the S. NO. 298 of Notification No. 050/2017-Cus dated 30.06.2017 categorically exempts (i) those Information Technology Software which has been imported along with the object code and source code or (ii) documents of title conveying the right to use information Technology Software. Here in this case, what has been imported a software obviously without source code and the payment involved in the case is only towards the fee for usage (PUK). Further, the goods are not a document which transfers the title of (ownership) of the goods. Hence, the case laws quoted by the importer is not applicable to the present case.’*

4. There are deducibles in the findings *supra* that have been strung together, willy-nilly, from among several disparate streams of disputes and of interpretations to convince that the impugned software does not, by any stretch, conform to the description, specified at sl no. 298 in notification 50/2017-Cus dated 30th June 2017 claimed by the appellant in the bill of entry, which, it would appear, was more germane in the proceedings before the lower authorities owing to the sweep of heading 8523 and chapter 49 of First Schedule to Custom Tariff Act, 1975 implied thereby. Before delving into those, it would

be appropriate for us to take note of two aberrations that may be got out of the way immediately.

5. The first appellate authority has fallen back on the classification adopted for discharge of duty liability imposed by section 3 (7) of Customs Tariff Act, 1975 which, according to the impugned order, being the entry corresponding to sl no. 382 in schedule III of notification no. 1/2017-Integrated Tax (Rate) dated 28th June 2017, negates the claim of goods being 'Information Technology Software' though the impugned notification does not really extend to the Integrated Goods & Services Tax (IGST). In the absence of congruity of the two and, more particularly, as the relevant description in the schedule for charging of Integrated Goods & Services Tax (IGST) accommodates the heading at four digit level within which the two rival tariff items in this dispute are fitted for ascertaining the appropriate rate of duty, the reliance placed on this juxtaposition, therefore, does not assist in conclusion of ineligibility for classification as 'Information Technology Software' as claimed by the appellant. The lower authorities also appear to have grasped the inconsequentiality of the broad sweep of the description in the tax schedule for the purpose of section 3(7) of Customs Tariff Act, 1975 but only superficially as that rate of duty would not, generally, and with the whole of it being neutralized as 'input tax credit (ITC)' almost without exception, be cause of dispute. It has also been averred

in the impugned order that the size of the consignment is also indicative of erroneous classification by the appellant at the time of import; it has been posited that the essential qualification of being interactive and capable of manipulation implies that multiple copies are not required for replication. Besides the absence of any logical consequence to this proposition, it also appear to us that the first appellate authority, a creation of the tax statute to determine correctness of assessment, has forayed into the terms of a commercial transaction without the statute or the taxing entry affording such engagement. Essaying into rhetoric is ‘big easy temptation’ in appeal to emotion but that is anathema in the disposition of a dispute on classification.

6. The impugned order has referred to the decision of the Hon’ble Supreme Court in *Tata Consultancy Services v. State of Andhra Pradesh [2004 (178) ELT 22 (SC)]* for asserting that ‘software’ in media are goods. This is common ground in the dispute before us and the reason for classification for the purposes of assessment under Customs Act, 1962 to be contested. Upon this, the impugned order erects the proposition of the adjudicating authority that the impugned software, whether procured in the open market by end customer or included in supply of ‘original equipment manufacturer (OEM)’ as complete system to end customer, is, owing to its criticality in the functioning of computer systems, not an optional software intended

for, and amenable to, manipulation through interface with the user and that the amount paid is nothing but the license fee for permission to use. It appears to us that the implication of this proposition, viz., the significance of note 2 in section XVI of First Schedule to Customs Tariff Act, 1975, has been lost sight of and the classification prompted thereby is tantamount to considering an alternative to tariff item 8523 8090 that was adopted as substitute by the lower authorities. The entire proceedings of re-classification is, thus, jeopardized by the lack of certainty.

7. It is also implied in the findings that ‘software packages’ are either those that can be modified/manipulated by the user or those that cannot be with the latter being ‘operating software/canned software/packaged software’ in contradistinction with ‘information technology software’ characterized by the former. This dichotomy appears to have been contrived by the lower authorities to find fitment with determination to subject the impugned goods to duty by falling back on

‘Explanation.- “Information Technology software” means any representation of instructions, data, sound more image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine.’

below the description of goods eligible for exemption in notification

no. 50/2017-Cus dated 30th June 2017 and flagging the essentiality of ‘source code and object code’ for rendering it amenable to manipulation and interactivity to distinguish ‘customized software’ from ‘packaged/canned software’, within the meaning assigned to them in circular no. 81/2/2005-ST dated 7th October 2005 of Government of India in Department of Revenue, as the only distinction between software eligible for exemption and others. In the process, the lower authorities appear to have lost sight of the significance of *Explanatory Notes* to Finance Act, 2009 which, with reference to the taxability under Finance Act, 1994, exempted ‘packaged or canned software’ from so much of the additional duty of customs as is equal to the duty payable on the portion of the value which represents the consideration paid or payable for transfer of the right to use such software that is chargeable to tax as ‘information technology software service’ and, thereby, including ‘packaged or canned software’ too within the coverage of ‘information technology software’ contrary to the proposition of the lower authorities. Notification no. 80/2009-Customs dated 7th July 2009 makes the lack of distinction between the two as covered by ‘information technology software’ further abundantly clear. The attempt to, thus, exclude ‘packaged or canned software’ by adopting a position contrary to that of the Government of India does not sit well with obligation of officials subordinate to it.

8. Having thus disposed of these blind sides centred around exemption notification controverted by the lower authorities and which, in terms of rules of engagement governing clash over classification, should follow from fitment against appropriate tariff item in First Schedule to Customs Tariff Act, 1975 and to subject it to further scrutiny only to the extent that the exemption notification particularizes the eligibility even more narrowly. The impugned notification restricts the availability of exemption from ‘basic customs duty’ to ‘information technology software’ and the explanation therein not going beyond the heading itself in the corresponding column. However, the said heading 8523 also enumerates within it the very same description as in the notification relevant to tariff item 8523 8020 as also the elaboration in supplementary note of chapter 85 with the same meaning as in the notification. Thus, all software conforming to that description, whether in chapter 85 of First Schedule to Customs Tariff Act, 1975 and/or in the *Explanation* below the description in the impugned notification, are ‘information technology software’ subject to the tax policy as prevailing from time to time.

9. Both sides have flooded us with enormous range of technical literature with Learned Counsel, and naturally so from the appellant having been placed in a defensive position by the impugned order, attempting to demonstrate the broad sweep of the description corresponding to the tariff item adopted by them and with Learned

Authorized Representative urging us to determine the issue with reference to the manner in which ‘source code and object code’ have been specified, in the same note and *Explanation*, as central to distinguishment. At this stage before the contours of the dispute are set out, we do not consider these technical elaborations to be relevant enough to be discussed.

10. Both sides are not in disagreement that the dispute is not about the appropriate heading or sub-heading in chapter 85 of First schedule to Customs Tariff Act, 1975. The General Rules for the Interpretation of Import Tariff in Customs Tariff Act, 1975 sets out manner in which the appropriate heading is to be isolated. Likewise,

‘6. For legal purposes, the classification of goods in the sub-headings of heading shall be determined according to the terms of those sub headings and any related sub headings Notes and, mutatis mutandis, the above rules on the understanding that only sub headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes shall apply, unless the context otherwise requires.’

of the Rules, having thus extended the principles to the extent to which international uniformity has been enabled in the First Schedule to Customs Tariff Act, 1975, and, with the next level permitted to be inserted, according to national policies and priorities, within the very same Schedule, it would be a travesty for the said Rule not to prevail

at the tariff item level. Consequently, the same sequence for determining the heading should guide the determination of the tariff item. The issue is now all about the appropriateness of ‘information technology software’ within ‘others’ or ‘others’ within ‘others’ to the impugned goods.

11. The Hon’ble Supreme Court in *HPL Chemicals Ltd v. Commissioner of Central Excise, Chandigarh* [2006 (197) ELT 324 (SC)] has held that

‘29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub- heading different from that claim by the assessee, the Department has to produce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue.....’

and in *Hindustan Ferodo Ltd v. Commissioner of Central Excise, Bombay* [(1997) 2 SCC 677] that

‘It is not in dispute before us as it cannot be, that owners of establishing that the said drinks fell within Item No. 22 lay on the Revenue. Revenue has led no evidence. The onus was not discharged, therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellant, the appeal should nevertheless have been allowed.’

and, thereby, places a specific onus on customs authorities that must

be discharged for applicability of the General Rules for the Interpretation of the Import Tariff at the tariff item level, too. Unless that has been duly fulfilled, the classification declared by the appellant will prevail.

12. From the order¹ of Commissioner of Customs (Appeals), Mumbai-III impugned before us, the contours of the dispute emerge: the rival classifications are at the ‘eight digit’ level within the same sub-heading corresponding to residual ‘others’ within

‘Discs, tapes, solid-state non-volatile storage devices, “smart cards” and other media for recording of sound or other phenomena, whether or not recorded, including matrices and masters for the production of discs, but excluding products of Chapter 37’

that corresponds to heading 8523 in chapter 85 of First Schedule to Customs Tariff Act, 1975. The first part of the heading enumerates the ‘media’ and the second part to the phenomena that it is capable of recording with the inclusions specifying even those from which further production is made; there is no particular reference to software in the heading and all the specific sub-headings are about media – magnetic, optical and semi-conductor – with residuary sub-heading ‘others’ comprising of descriptions of various articles among which are ‘information technology software’ and a residual ‘others’ which customs authorities find to be most proximate to the goods. A

¹[order-in-appeal no. MUM-CUSTOM-AMP-639/2020-21 dated 24th December 2020]

residuary sub-heading that lists out specific goods and including 'others' as a final option must be read as pertaining only to those specific goods and any others identifiable with the description in the heading and excluded by incorporation in the preceding headings. To the extent that the impugned order has taken up the several sub-headings for elimination before placing the imported goods within the heading, we may accept that the onus placed on customs authorities may be held as discharged. The stark absence of such an exercise, and, that too, when a residuary of residuary sought to be the supplanting substitute, is not proper discharge of the obligation as spelt out in the decisions of the Hon'ble Supreme Court *supra*. This suffices to reject the classification of the impugned goods against tariff item 8523 8090 of First Schedule to Customs Tariff Act, 1975.

13. However, before parting with this matter, we would be less than diligent in not disposing one aspect of the meaning assigned to 'information technology software' in the supplementary note in chapter 85 of First Schedule to Customs Tariff Act, 1975, viz, the arrangement of the expressions therein and, more particularly, of 'including source code and object code' preceded and succeeded by punctuating commas. Common usage of the language would lead us to the conclusion that it is a clause intended to ensure that presence of 'source code and object code', even if not covered by the preceding 'representation of instructions, data, sound or image' for any reason

whatsoever, ‘recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine’ would, yet, be ‘information technology software’; non-existence of such ‘source code and object code’ will not detract the package from being ‘information technology software’ intended by tariff item 8523 8020 of First Schedule to Customs Tariff Act, 1975. The position of the phrase precludes the interpretation of convenience adopted by lower authorities that the ‘representation of instructions, data, sound or image’ must include ‘source code and object code’ for it to so qualify. Strange as the English language may appear, the deployment of the parts of speech and punctuation marks makes for sensible syntax in accordance with long established rules of grammar. At times, the work of late Mr PC Wren suffices for clarification that tomes may fail to. A verb in a sentence addresses the activity of the subject and a preposition in a sentence is a word placed before a noun, or noun phrase, to show in what relation the person or thing denoted stands in regard to something else; thus the verb ‘include’ assigns a principal role to the subject and activity while the preposition ‘including’ depicts a subordinate role in the arrangement of a sentence and, if used interchangeably, can wreak havoc in communication – oral and written. In our view, no further elaboration is called for.

14. The present dispute has its genesis in the distinction drawn by

customs authorities between two types of software and the restriction of the exemption under notification 50/2017-Cus dated 30th June 2017 to software that is ‘customisable’ and on the premise that the *Explanation* below the entry in the said notification places a premium on ‘capability of manipulation’ and ‘interactivity with user’ for which the inclusion of ‘source code and object code’ in the package is essential; that is the interpretation in the impugned order and order of the original authority and it is those very premises that are at the core of the submissions made by both sides. Learned Counsel took us through the principles governing interpretation of statutes for elucidating the scope of definitions that are laid out in the manner that the said *Explanation* has been and placed reliance on the exposition by Justice GP Singh² for contending that it stands broadened and, thereby, despite limiting framework of the rest of it. It was further submitted that communication of 27th April 2021 from the supplier is unambiguously clear that source code written by their programmers is manifested into an object code that is machine readable.

15. Reliance was placed on the decision of the Tribunal in *Ingram Micro India Ltd v. Commissioner of Customs (Airport & Cargo), Chennai [2018 (8) TMI 1529-CESTAT Chennai]* by Learned Counsel to demonstrate the link between licence key and software. It was also pointed out that the Hon’ble Supreme Court, in *Commissioner of*

² [Principles of Statutory Interpretation (14th edition, 2016) Lexis Nexis]

Customs, Chennai v. Pentamedia Graphics Ltd [2006 (5) TMI 90 – SUPREME COURT], had held that ‘motion capture animation files’ are ‘information technology software’ for assessment to customs duty.

16. According to Learned Authorized Representative, the submissions on behalf of the appellants admits that the package does not contain source code without which it is not possible for the software to be manipulated by end user. He contended that ‘object code’ merely makes the programme machine-readable and, for it to be manipulated, the original code, or source code, in programming language is necessary. He placed emphasis on the limited purpose of operating systems by drawing upon authoritative text in Britannica Online Encyclopedia.

17. We are not concerned here with the functioning of operating system which the impugned goods, admittedly, is but with the description corresponding to tariff item in First Schedule to Customs Tariff Act, 1975 claimed by both sides. The specificity of the expression in tariff item 8523 8020 is in contrast with that in tariff item 8523 8090 and the crux of the issue is the appropriation of the latter in the absence of any elaboration in the chapter 85 of First Schedule to Customs Tariff Act, 1975 or in the *Explanatory Notes* to Harmonized System of Nomenclature (HSN) Classification. There is no guiderail either in the description at the ‘mother level’ in heading 8523 of First Schedule to Customs Tariff Act, 1975 which is all about

media for recording of phenomena whether recorded or not.

18. There are several aspects to this dispute that harkens to evolution of software, chronology of taxing information technology products and judicial pronouncements in the context of jurisdiction to tax. Software, itself, existed only in rarified circles when the First Schedule to Customs Tariff Act, 1975 was enacted and, not unnaturally, software is not described therein. The relatively belated attention paid to software by the taxing mechanism is clear from

‘7..... Prior to 1996, there was no separate sub- heading in Heading 85.24 specifically for software. In 1996, a sub- heading 20 was introduced covering “computer software”. Appellants excited before the Commissioner (Appeals) the Board’s circular 7/98, dated 12-2-98. This circular explained that the term “computer software” figuring in entry 173 of Notification 11/97, which exempted from customs duty, would not cover “software required for operation of any machine performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine. More specifically, software for telecom, medical or other applications is not eligible for exemption from duty. However software containing encyclopedia, games, books, etc. will be eligible for the exemption wherever they satisfy the interactivity criterion.” As stated in the circular, the definition of the term “computer software” was incorporated as an Explanation below entry 173. The appellant’s contention was that even prior to the amendment of sub- heading 20 in 1998 to broaden its scope by omitting from it the word “computer”, making it available to all software, the Board had interpreted an identically worded entry to provide exemptions to software of

the kind that is manufactured.'

in the decision of the Tribunal in *Multimedia Frontiers Ltd v. Commissioner of Central Excise, Ahmedabad-II* [2003 (5) TMI 110-CESTAT MUMBAI] and, doubtlessly, prompted by the commitment to the Information Technology Agreement (ITA-1) of 13th December 2016 that India, though not a major force in the industry then but as one of the original participants, had committed itself to in the larger interest of communication development and necessitating progressive reduction in import tariff by 2005. Software was, initially, sold on media and it was but natural for its placement in heading 8523 in First Schedule to Customs Tariff Act, 1975 even though the value of the media was of negligible relevance to the value of its contents; correspondingly, the Schedule to Central Excise Tariff Act, 1985 placed it within heading 8524 as 'software' without any further elaboration. Storage or medium was also not in the ken of the Agreement even as 'information software' was and, thus, facilitating this particular placement.

19. The software industry in India underwent 'big bang' to proliferate in several directions and, in a manner of speaking, led the world in some of them capturing the attention of tax authorities to the value of software packages. By the division of taxing empowerment in the Seventh Schedule of the Constitution between the Centre and the constituent states, the initiative for 'first strike' came from the 'commercial tax' administration and the decision of the Hon'ble Supreme Court in *re Tata*

Consultancy Services set the tone for future policy formulation by the tax administrations of the Centre. In the meanwhile, ‘service tax’ was at maturity stage with tax boundaries being expanded substantially to include ‘information technology software service’ within its ambit, and after initial exemption from ‘business auxiliary service’ incorporated in Finance Act, 1994 through amendment of 20th June 2003, by incorporation in Finance Act, 1994 on 10th May 2008 with definition of ‘information technology software’ identical to the supplementary note in chapter 85 of First Schedule to Customs Tariff Act, 1975.

20. The judicial decisions therefrom and the response of the tax administration issued as circulars, and placing emphasis on the distinction in software owing to the constitutional delineation of empowerment to tax, are the basis for the segregation in the impugned dispute. The lack of such jurisdictional constraints, insofar as levy of customs duty is concerned, and the placement of software *per se* as specific description within heading 8523 of First Schedule to Customs Tariff Act, 1962 and the service element, manifested as documented transfer of licence, within heading 4907 0030 and on identical supplementary note in chapter 49 of First Schedule to Customs Tariff Act, 1975 invalidates recourse to judicial determination, or clarifications arising therefrom, in service tax jurisprudence including the segregation so critical to jurisdiction for taxing domestic transactions. In the absence of articulation of legislative intent to sub-divide

‘software’ for assessment to duties of customs, the nuanced approach of the lower authorities in the dispute, necessary in the other tax laws, is irrelevant here.

21. Considering that the tariff items within heading 8523 of First Schedule to Customs Tariff Act, 1975 do not offer scope for inclusion of ‘software’, of any type, in the residual entry ‘others’ owing to the exhaustive enumeration in description in that heading and that choice of the heading for incorporation of ‘information technology software’, prompted by the jurisdictional constraint of duty leviable only on goods, fell to media on which it was recorded, the potential for claiming an alternative tariff item as intended for the impugned goods is lacking. Consequently, the onus placed on customs authorities before taking up declared classification for substitution has not been discharged. The re-classification in the impugned order, therefore, is without authority of law.

22. Accordingly, the impugned order is set aside and appeal allowed.

(Order pronounced in the open court on 01/03/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)