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

Customs Appeal No. 85232 of 2021

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-610/2020-21 dated 21.12.2020 passed by the Commissioner of Customs (Appeals), Mumbai-III)

M/s. Ingram Micro India Pvt. Ltd. **Appellant**
5th Floor, Block-B, Godrej IT Park,
Pirojshanagar, LBS Marg,
Vikhroli (W), Mumbai 400 079.

Vs.

Commissioner of Customs, ACC, Mumbai **Respondent**
Air Cargo Complex, Sahar,
Andheri (E), Mumbai 400 099.

WITH

Customs Appeal No. 86977 of 2021

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-816/2021-22 dated 25.10.2021 passed by the Commissioner of Customs (Appeals), Mumbai-III)

M/s. Ingram Micro India Pvt. Ltd. **Appellant**
5th Floor, Building A, Empire Plaza,
Pirojshanagar, LBS Marg,
Vikhroli (W), Mumbai 400 083.

Vs.

Commissioner of Customs (I) ACC, Mumbai **Respondent**
Air Cargo Complex, Sahar,
Andheri (E), Mumbai 400 099.

AND

Customs Appeal No. 86978 of 2021

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-817/2021-22 dated 25.10.2021 passed by the Commissioner of Customs (Appeals), Mumbai-III)

M/s. Ingram Micro India Pvt. Ltd. **Appellant**
5th Floor, Building A, Empire Plaza,
Pirojshanagar, LBS Marg,
Vikhroli (W), Mumbai 400 083.

Vs.

Commissioner of Customs (I) ACC, Mumbai **Respondent**
Air Cargo Complex, Sahar,
Andheri (E), Mumbai 400 099.

Appearance:

Shri T. Viswanathan, Advocate, for the Appellant
Shri Sydney D'Silva, 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: 17.04.2023
Date of Decision: 17.04.2023

FINAL ORDER NO. 85758-85760/2023

PER: SANJIV SRIVASTAVA

These three appeals are directed against Order-in-Appeal No. MUM-CUSTM-AMP-APP-610/2020-21 dated 21.12.2020, Order-in-Appeal No. MUM-CUSTM-AMP-APP-816/2021-22 dated 25.10.2021 and Order-in-Appeal No. MUM-CUSTM-AMP-APP-817/2021-22 dated 25.10.2021 all passed by the Commissioner of Customs (Appeals), Mumbai-III.

2.1 Appellant has filed 248 Bills of Entry for clearance of the goods described as access point. The appellant self-assessed the Bills of Entry and classified the goods under Tariff Heading 85176290 and claimed the benefit of exemption under Notification No. 57/2017, Sr. No.20, wherein the effective concessional basic customs duty is @ 10%. These Bills of Entry were assessed by an order under Section 17(1) of the Customs Act, 1962. Original authority held as follows:-

"11. Importers claim of classification 851762 for "Access Point/(Multiple Input/Output (MIMO) product", does not appear to be correct, as in the Notification 057/2017-Cus Sr. No.21 (c) (as amended by Notification 75/2018 dated 11.10.2018) itself, classification of the subject item MIMO products is clearly mentioned under tariff item 85176990. Therefore, there is no scope remains left for probability of classification of Access point/MIMO product" under tariff item 851762.

12. in view of the facts mentioned above, relevant tariff heading and exemption notifications. I find that the impugned goods Access Point being MIMO Product, as per notification 057/2017-Cus Sr. No.21 (c) as amended by Notification 75/2018 dated 11.10.2018, is classifiable under tariff heading 85176990 and liable for 20% merit basic custom duty.

13. In view of above, I order to reject the classification 85176290, and exemption benefit of Notification No. 57/2017 at Sr. No. 20, claimed by the importer for the impugned goods "Access Point/(Multiple Input/Output (MIMO) product", and order to re-assess impugned goods "Access Point/(Multiple Input/Output (MIMO) product" covered under bills of entry mentioned in the table above, under tariff item 85176990 on merit BCD at the rate of 20%, under Section 17(4) of the Custom Act 1962 accordingly."

2.2 Commissioner (Appeals) upholding the order of the original authority holding the classification under 85176990 denied the benefit of exemption claimed under Notification No. 57/2017. Aggrieved by the impugned order, appellant has filed these appeals.

3.1 We have heard Shri T. Viswanathan, Advocate for the appellant and Shri Sydney D'Silva, Additional Commissioner for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that the issue involved in the case is no longer res integra and has been decided by the Delhi and Chennai Bench of the Tribunal in their case upholding the classification as claimed by them and allowing the benefit of exemption.

3.3 Learned AR reiterates the findings in the impugned order.

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

4.2 Vide final order No. 40817/2020 dated 26.10.2020, as further rectified by miscellaneous order No. 40007/2021 dated 12.01.2021, following has been held:-

"4. Heard both sides and perused the records of the case. We find that the impugned goods have been classified under 85176290 by the appellant in the past and learned counsel has submitted evidence to the effect that the same are being classified under same heading even afterwards at various customs locations and exemption is being allowed as claimed. We also find that ADG (Adjudication), DRI has passed a comprehensive order holding the classification of the goods in favour of the appellants. Learned counsel has demonstrated that US and German Customs have given rulings classifying the goods at six digit level as claimed by the appellants. We find that department has not made out any case for reopening of the classification of the impugned goods. We find that classification of the imported goods should be based on specific headings, section notes and chapter notes and General Rules of Interpretation of Tariff and HSN. The department has tried to change the classification of the goods being imported by the appellants from CTH 85176290 to CTH 85176990 on the basis of a notification without making any case for revising the classification of the goods. We find that this is not permissible. We also find that department's reliance on Notification No.2/2019 which is subsequently issued is misplaced; cannot be made applicable retrospectively and therefore, not applicable to the present facts of the case. We find that while Revenue was free to decide on the eligibility of the impugned products for exemption under any notification. It is to be noted that the learned counsel for the appellant submits that they are discharging duty, at the merit rate, on carrier Ethernet Switches when they are imported for supply to telecom service providers,

even though classified under CTH 85176290. However, it is not open to them to change the classification on the basis of an exemption notification when there is no change in the Customs Tariff Act, 1975. Therefore, we find that the impugned goods are rightly classifiable under CTH 85176290 in view of the past and present practice of the department, Rulings of US and German Customs and the order by ADG (Adjudication), DRI. Department has not adduced any evidence to show that the said order has been stayed by any competent authority.

*5. In view of the above, we hold that the impugned goods "**(a) Access point** (b) Enterprise class Ethernet switches (other than carrier Ethernet switches) and (c) Networking appliances" are classifiable under CTH 85176290. Therefore, the appeal is allowed with consequential relief, if any, as per law."*

4.3 Following has been held by the said miscellaneous order:

"5. On perusal of the final order, we find that competing classifications are CTH 85176290 by the appellant and 85176990 by the department. However, by mistake the classification confirmed by the department has been noted as 85176290 in the last sentence of para 2. This is an error apparent on the face of record which requires rectification. We hereby order that the classification mentioned in last sentence of para 2 be substituted as 85176990 instead of 85176290.

6. The second contention put forward by the ld. Counsel for the appellant is that the department had classified the product under CTH 85176990 and denied benefit of Notification No. 57/2017. On perusal of the final order, we find that the Tribunal had held that the goods fall under CTH 85176290, it is sufficiently implied that the appellant would then be eligible for the benefit of Notification No. 57/2017. However, only for clarity purpose, we specify that the appellant would be eligible for the benefit of exemption Notification No. 57/2017. In para 5, before the last sentence, it is hereby added as under:-

"Consequently, the appellant would be eligible for the exemption benefit as per Sl. No. 20 of Notification No. 57/2017 dated 30.7.2017"."

4.4 Noting the above order, Tribunal's Delhi Bench has held as follows:-

"14. The factual position that emerges is:

(a) MIMO is a technology and LTE is a standard;

(b) WAP imported by Ingram Micro has only MIMO technology and not LTE;

(c) WAP is classified under CTI 8517 6290;

(d) The following products may exist:

(i) MIMO products, which do not work with LTE standard

(ii) Products which work on LTE standards

(iii) Products having both MIMO and LTE technology

(e) Ingram Micro has been paying full duty without claiming exemption under the notification on goods that have both MIMO technology and LTE standard.

15. What needs to be decided in the present appeal is regarding the availability of the exemption from the whole of the customs duty claimed by Ingram Micro under the notification. The Central Government, by the said notification, exempted the goods described in column (3) of the Table when imported into India, from the whole of the duty of customs leviable thereon. Serial No. 13 of heading 8517 exempts all goods, except those mentioned in (i), (ii), (iii) and (iv). Ingram Micro had claimed exemption under Serial No. 13 (iv) which is:

"(iv) Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) Products."

(emphasis supplied)

16. A bare perusal of the exclusion clause (iv) under Sl. No. 13 of notification shows that it covers MIMO and LTE products. The sole dispute in this appeal is whether this exclusion clause covers *products having only MIMO technology and not working on LTE standard. Exclusion clause (iv) uses the conjunction 'and' and, therefore, it can be urged that the scope of clause (iv) can be restricted to those products that have MIMO and LTE both and that the product that only has MIMO technology may, therefore, not be covered by this exclusion clause and, therefore, may not be excluded from the scope of Serial No. 13.*

17. The contention of the Department is that 'and' should be read as 'or' in clause (iv) so that it would cover MIMO products or LTE products. The contention advanced on behalf of Ingram Micro is that since the exclusion clause (iv) uses the conjunction 'and' its scope would be restricted to those products that have both MIMO and LTE. Thus, according to Ingram Micro a product that has only MIMO technology would not be covered by the exclusion clause and, therefore, would not be excluded from the scope of Serial No. 13 (iv).

18. The submission advanced by learned counsel for the respondent deserves to be accepted.

19. It needs to be remembered that 'and' is a conjunctive and is used to connect and join. The dictionary meaning of 'and' is as follows.

"The New International Webster's Comprehensive Dictionary of the English Language: And: Also; added to; as well as; a particle denoting addition, emphasis, or union, used as a connective between words, phrases, clauses, and sentences; shoes and ships and sealing wax ... Or: Introducing an alternative: stop or go: red or white.

Oxford Dictionary of English, Third Edition: And: Used to connect words of the same part of speech, clauses or sentences, that are to be taken jointly; bread and butter they can read and write a hundred and fifty. Or: Used to link alternatives: a cup of tea or coffee are you coming or not either take taxis or walk everywhere...

Collins Cobuild English Dictionary for Advanced Learners: And: You can use 'and' to link two or more words, groups, or clauses. When he returned, she and Simon had already gone... Or: You can use 'or' to link two or more alternatives. Tea or coffee?...

Cambridge Advanced Learner's Dictionary, Fourth Edition: And: Used to join two words, phrases, parts of sentences, or related statements together: Ann and Jim; Boys and Girls; Knives and Forks And/ or used to mean that either one of two things or both of them is possible: Many pupils have extra classes in the evenings and/or at weekends. Or: Used to connect different possibilities. Is it Tuesday or Wednesday today?"

20. It is also seen that the word 'products' is not used after the words 'Multiple Input/Multiple Output (MIMO)'. Infact, 'and' is used after the words 'Multiple Input/Multiple Output (MIMO)'. It is seen that in entry (iii) of the same Serial No. 13 of notification, every technology is followed by the word 'products':

"Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching- transport Profile (MPLS-TP) products;"

21. Learned special counsel for the appellant contended that clause (iv) would effectively mean and cover two categories of products, namely, (i) Multiple Input/Multiple Output (MIMO) products and (ii) Long Term Evolution (LTE) products and that MIMO products and LTE products are products which have distinct identities. Learned special counsel also contended that the expression 'Multiple Input/Multiple Output (MIMO)' appearing before 'and' does not, by itself, mean anything unless it is followed by expressions like 'technology' or 'products'. Since the exception carved out has to be 'goods', this expression has to be interpreted to connote products based on MIMO technology. Thus, the expression 'products', appearing after 'LTE' has to be read with 'MIMO' to mean and cover MIMO products. Further, 'products' being the common factor for both MIMO technology and LTE standard, the expression 'and' has been used in a conjunctive way to cover individually MIMO products and LTE *products. Learned special counsel, therefore, contended that as there are only two types of products at Serial No. 13 (iv), the conjunctive 'and' has been used without using the term 'products' twice. There is, therefore, no ambiguity and the expression 'Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) Products" denotes Multiply Input/Multiple Output (MIMO) products on the one hand and Long Term Evolution (LTE) products on the other. There is, therefore, no need to refer to the World Trade Organisation ITA.*

22. Though it is correct that clause (iv) would effectively mean include two categories of products namely MIMO and LTE and that they have distinct identities, but it is not possible to accept the contention advanced by learned special counsel for the Department that MIMO does not by itself mean anything unless it is followed by the expressions 'technology' or 'products' and, therefore, since the exception carved out has to be 'goods', this expression has to be interpreted to connote products based on MIMO technology.

23. What needs to be remembered is that MIMO is a technology and cannot be treated as an independent product. If the intention was to exclude even products having only MIMO technology, then the word 'products' should have been used after MIMO as well as after LTE. It, therefore, follows that the scope of 'products' excluded by entry (iv) would be products which use both MIMO and LTE. Thus, the term 'Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) Products' means products which contain both MIMO and LTE. This view finds support from the following decisions.

24. In British Health Products, a Division Bench of the Tribunal held as follows:

"7. We have carefully considered the pleas advanced from both sides. From a reading of Tariff Heading 19.01, we observe that the expression used in relation to food preparation of milk and cream is "milk" and "cream". The word `and' is generally used in the sense of conjunctive word. Therefore ld. Advocate submits

rightly that the word has been used in conjunctive sense in the tariff heading. This sense is also apparent if we look into the first part of the Tariff heading where a reference has been made to the disjunctive word `or' in the expression preparation of flour, meal, starch or malt extract under Tariff Heading 19.01. Hence the expression "milk and cream" in the second portion of the Tariff Heading 19.01 would mean that both milk and cream should be present in the food preparation classifiable under the said heading. We do not agree with the plea of the ld. JDR that by use of "whole milk powder" and "cream" being necessarily contained in the whole milk powder, the preparation should be deemed to have contained both milk and cream. The two products, viz., "milk" and "cream" are commercially known differently. When the Tariff heading uses names of two different commercial commodities joined by a conjunctive word, the preparation must contain those commodities in their natural form as available in the market. There are preparations which are made of both milk and cream. One of the examples given by the ld. Advocate, is, `Gulab Jamum' being a preparation of milk and cream."

(emphasis supplied)

25. The Punjab and Haryana High Court in Kulcip Medicines also observed as follows:

"11. The question which falls for consideration is whether word 'and' used after the word 'clearing' but before the word 'forwarding' at two places in clause (j) be considered in a conjunctive sense or dis-injunctive sense. It appears to be fairly well settled that the context and intention of legislature are the guiding principles. In that regard reliance may be placed on the judgment of Hon'ble the Supreme Court in the case of Mazagaon Dock Ltd. v. CIT (1958) 34 ITR 368 = 2002-TIOL-613-SC-IT-CB. By necessary intendment the expression 'a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner' contemplates only one person rendering service as 'clearing and forwarding agent' in relation to

'clearing and forwarding operations'. To say that if, one person has rendered service as 'forwarding agent' without rendering any service as 'clearing agent' and he be deemed to have rendered both services would amount to replacing the conjunctive 'and' by a disjunctive which is not possible."

(emphasis supplied)

26. A Division Bench of the Tribunal in Ingram Micro India in the matter of the appellant also confirmed the classification of identical product (i.e. WAP) under CTI 8517 62 90 and extended the benefit of the subsequent notification dated 30.07.2017. The Department has accepted the Order passed by the Tribunal. Therefore, once the benefit has been granted to Ingram Micro in the subsequent notification for an identical product, the benefit under the notification dated 01.03.2005, as amended on 11.07.2014 should also be extended to Ingram Micro."

5.1 In view of the above decisions, we do not find any merits in the impugned order and set aside the same allowing the appeals.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu