

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH,
COURT NO. I

CUSTOMS APPEAL NO. 51007 OF 2020

[Arising out of the Order-in-Original No. 02/VKP (02) ADG (Adj.)/DRI/N. Delhi/2020-21 dated 28/04/2020 passed by The Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Delhi.]

M/s Videocon D2H Limited,**Appellant**
(now known as "Dish TV India Limited")
Noida, U.P. – 201 301.

Versus

Additional Director General,**Respondent**
(Adjudication),
Directorate of Revenue Intelligence,
Room No. 214, New Customs House, Near IGI Airport,
New Delhi.

APPEARANCE:

Shri A.R. Madhav Rao, Shri Mukunda Rao and Shri Krishna Rao, Advocates for the appellant.
Shri Gurdeep Singh, Special Counsel and Shri Rakesh Kumar, Authorized Representative for the Department

**WITH
CUSTOMS APPEAL NO. 50912 OF 2020**

[Arising out of the Order-in-Original No. 02/VKP (02) ADG (Adj.)/DRI/N. Delhi/2020-21 dated 28/04/2020 passed by The Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Delhi.]

Principal Commissioner of Customs,**Appellant**
ACC Import Commissionerate,
New Customs House,
New Delhi – 110 037.

Versus

M/s Videocon D2H Limited,**Respondent**
(now known as "Dish TV India Limited")
1st Floor, Techweb Centre, New Link Road,
Near Mega Mall, Oshiwara,
Mumbai – 400 102.

APPEARANCE:

Shri Gurdeep Singh, Special Counsel and Shri Rakesh Kumar, Authorized Representative for the Department
Shri A.R. Madhav Rao, Shri Mukunda Rao and Shri Krishna Rao, Advocates for the respondent.

**WITH
CUSTOMS APPEAL NO. 50913 OF 2020**

[Arising out of the Order-in-Original No. 02/VKP (02) ADG (Adj.)/DRI/N. Delhi/2020-21 dated 28/04/2020 passed by The Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Delhi.]

Shri Pankaj Mathur,Appellant
C/o M/s Dish TV India Limited,
FC-19, Sector – 16A, Film City,
Noida, U.P. – 201 301.

Versus

Additional Director General,Respondent
(Adjudication),
Directorate of Revenue Intelligence,
Room No. 214, New Customs House, Near IGI Airport,
New Delhi.

**WITH
CUSTOMS APPEAL NO. 50914 OF 2020**

[Arising out of the Order-in-Original No. 02/VKP (02) ADG (Adj.)/DRI/N. Delhi/2020-21 dated 28/04/2020 passed by The Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Delhi.]

Shri Avanthi Kanthaliya,Appellant
C/o M/s Dish TV India Limited,
FC-19, Sector – 16A, Film City,
Noida, U.P. – 201 301.

Versus

Additional Director General,Respondent
(Adjudication),
Directorate of Revenue Intelligence,
Room No. 214, New Customs House, Near IGI Airport,
New Delhi.

**AND
CUSTOMS APPEAL NO. 50915 OF 2020**

[Arising out of the Order-in-Original No. 02/VKP (02) ADG (Adj.)/DRI/N. Delhi/2020-21 dated 28/04/2020 passed by The Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Delhi.]

Shri Saurabh Dhoot,Appellant
C/o M/s Dish TV India Limited,
FC-19, Sector – 16A, Film City,
Noida, U.P. – 201 301.

Versus

Additional Director General,Respondent
(Adjudication),
Directorate of Revenue Intelligence,
Room No. 214, New Customs House, Near IGI Airport,
New Delhi.

APPEARANCE:

Shri A.R. Madhav Rao, Shri Mukunda Rao and Shri Krishna Rao, Advocates for the appellants.

Shri Gurdeep Singh, Special Counsel and Shri Rakesh Kumar, Authorized Representative for the Department

CORAM:

HON'BLE JUSTICE MR. DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51342-51346/2025

DATE OF HEARING : 07.07.2025

DATE OF DECISION: 23.09.2025

P.V. SUBBA RAO

These five appeals assail the order-in-original dated 28.4.2020¹ passed by the Additional Director General² (Adjudication), Directorate General of Revenue Intelligence³ after being appointed as the Common Adjudicating Authority by the Director General, DRI to decide the proposals in the show cause notice⁴ dated 18.7.2018 issued by the ADG, DRI to five noticees. The SCN called upon the noticees to show cause to the Principal Commissioner of Customs, Air Cargo Complex (Import), New Custom House, New Delhi and to the Principal Commissioner of Customs, Air Cargo Complex (Import), Mumbai in respect of the goods imported through the two Custom houses. Thereafter, DG, DRI appointed ADG (Adjudication) DRI as the common adjudicating authority to decide the proposals in the SCN in pursuance of which the impugned order was passed.

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- 1. impugned order**
 - 2. ADG**
 - 3. DRI**
 - 4. SCN**

2. **Customs Appeal No. 51007 of 2020** filed by **M/s. Videocon D2H Limited⁵** assails the confirmation of demand of duty of Rs. 56,47,17,639/- under section 28(4) of the Customs Act, 1962⁶ and imposition of an equal amount as penalty under section 114A of the Act. Although the SCN also proposed penalty under section 114AA of the Act, in the impugned order, no penalty was imposed under this section.

3. **Customs Appeal No. 50912 of 2020** filed by **Principal Commissioner of Customs, ACC Import, New Delhi** assails the impugned order to the extent it did not impose any penalty under section 114AA of the Act on the noticees of the SCN and no redemption fine was imposed under section 125 of the Act.

4. **Customs Appeal No. 50915 of 2020** filed by **Shri Saurabh Dhoot⁷, Executive Director of Videocon** assails the imposition of penalty of Rs. 56,00,000/- on him under section 112 of Act in the impugned order.

5. **Customs Appeal No. 50919 of 2020** filed by **Shri Avanthi Kanthaliya⁸, Chief Financial Officer of Videocon** assails the imposition of penalty of Rs. 56,00,000/- on him under section 112 of Act in the impugned order.

5. Videocon
6. the Act
7. Dhoot
8. Kanthaliya

6. **Customs Appeal No. 50913 of 2020** filed by **Shri Pankaj Mathur⁹, Associate Vice President of Videocon** assails the imposition of penalty of Rs. 56,00,000/- imposed on him under section 112 of Act in the impugned order.

7. We have heard learned counsels for the appellants and learned Special Counsel for the Revenue and perused the records.

8. The facts of the case, bereft of unnecessary details, are that Videocon provides Direct to Home (D2H) television services to its subscribers. Any D2H service provider receives signals from various broadcasters and uploads them on to its satellite transponders and installs a small dish antenna on the roof of each DTH subscriber and connects it to a Set top Box and connects the Set top box to the television of the subscriber. The dish antenna receives signals from the satellite of the D2H Service provider and transmits them to the set top box which unscrambles and strengthens the signals and sends them to the television of the subscriber. In each set top box, a smart card is also inserted with a chip in it. This smart card identifies the individual subscriber and gives appropriate information to the set top box as to which channels the subscriber can view as per his subscription package and the set top box unscrambles and allows viewing of only those channels.

9. Mathur

9. **Videocon** imported and cleared the Smart Cards by filing 144 Bills of Entry between 27.7.2013 and 19.3.2018 in the Air Cargo Complexes at Delhi and Mumbai. In these Bills of Entry, it classified the smart cards under **Customs Tariff Item¹⁰ 8523 52 90**, claimed the benefit of exemption Notification No. 24/2005-Cus dated 1/3/2005 (as amended) for basic customs duty and Notification No. 2/2011-CE dated 1.3.2011 for Additional Duty of Customs (which is commonly called as CVD).

10. The goods were cleared by the Customs officers posted at the two Air Cargo Complexes. Learned counsel for the appellant submits that in 63 of the 144 Bills of Entry, goods were cleared after examination by the customs officers. As an illustration, he showed us the printout from the Indian Customs Electronic Data Interchange System¹¹ in respect of Bill of Entry no. 5459766 dated 12.5.2014 at page 254 of Customs Appeal No.51007 of 2020 which shows that the goods were examined by the officer.

11. Thereafter, DRI, Bangalore Zonal Unit 'gathered intelligence' that Videocon was importing "Satellite/Viewing Cards' used exclusively with their Set Top Boxes but was misclassifying them under **CTI 8523 52 90** and was also misdeclaring them as 'Videocon/IRDETO U SIM Smart Cards' and

10. CTI

11. ICES

clearing them wrongly claiming the benefit of Notification No. 24/2005-Cus dated 1.3.2005 (as amended) for basic customs duty and Notification No. 2/2011-CE dated 1.3.2011 for Additional Duty of Customs. DRI searched the Office of Videocon in Mumbai, its Depot in Aurangabad and the premises of Trends Electronics in Aurangabad and seized some Satellite Viewing Cards. It also recorded statements of various persons under section 108 of the Act, investigated the matter and it appeared to DRI that :

- a) Videocon imported Satellite Card as "U-SIM Smart Card" but they were not 'Smart Cards';
- b) Since the imported cards contain both RAM and ROM and also contain active and passive electric circuits and various algorithms, they are not Smart Cards and cannot be classified as such and they were not eligible for the exemption notifications claimed.
- c) the cards were parts of Set Top Boxes as they cannot be used without the set top boxes;
- d) the appellant had wilfully and wrongly availed the benefit of exemption notification no. 24/2005-Cus dated 1.3.2005 (as amended) for basic customs duty and notification no. 2/2011-CE dated 1.3.2011 for Additional Duty of Customs;
- e) the imported cards deserve to be re-classified under **CTI 8529 90 90** and the differential duty was liable to be recovered from Videocon invoking extended period of limitation under section 28(4) with interest under section 28AA of the Act;
- f) all the cards imported by Videocon since 2013 deserve to be confiscated under section 111(m) of the Act;

- g) Videocon was liable to penalties under section 112, 114A and 114AA for (a) importing the satellite card without paying Customs duty; (b) mis-declaring the Satellite Cards as Smart Cards; and (c) intentionally making false declarations in the Bills of Entry; and;
- h) Shri Dhoot, Shri Kanthalia and Shri Mathur were liable to penalties under sections 112 and 114AA of the Act.

12. Accordingly, ADG, DRI issued the SCN answerable to the Principal Commissioner of Customs, Air Cargo Complex Mumbai and to Principal Commissioner of Customs, Air Cargo Complex, Delhi in respect of the goods imported and cleared through the respective Air Cargo complexes. Thereafter, DG DRI issued a notification appointing the ADG (Adjudication) DRI as the common adjudicating authority to decide the proposals in the SCN in respect of the goods imported through both the air cargo complex and he passed the impugned order deciding the proposals in the SCN.

13. The proposals in the SCN were based on 24 Relied Upon Documents¹² and based on the opinion of DRI that the imported cards were not smart cards, that they were liable to be classified under **CTI 8529 90 90** and not under **CTI 8523 52 90** as classified in the Bills of Entry. Of the 24 RUDs, 7 were statements (RUDs 5,6,7,8,9,10 & 11), 3 were Mahazars or Panchnamas (RUDs 2,3 & 4), 4 were copies of summons issued to various persons and their replies (RUDs 15,16,17 &

12. RUD

18), 2 were agreements (RUD 19 & 20) and the rest were copies of a Bill of Entry (RUD 12), Invoice (RUD 13), Purchase Order (RUD 14), TR-6 challan of the duty paid by Videocon (RUD 22), order of NCLT of merger of Videocon with Dish TV (RUD 23), takeover documents (RUD 21) and a letter of Dish TV (RUD 24).

Submissions on behalf of M/s. Videocon, Shri Dhoot, Shri Kanthalia and Shri Mathur

14. Learned counsels made the following submissions:

(i) The main issue to be decided is if the Viewing Cards/Smart Cards imported by Videocon deserve to be classified under **CTI 8523 52 90** which is a specific heading for Smart Cards or as parts of Set Top Boxes under **CTI 8529 90 90**;

(ii) Videocon procured Set Top Boxes from local manufacturers which were classified under **8528 71 00** and it imported only the smart cards;

(iii) The SCN invoked extended period of limitation on the ground that the Smart Cards were to be used along with the Set Top Boxes, that the size of the chip was indicated in the Bill of Entry as 25 mmx15 mm whereas the total dimensions of the card including the plastic portion was 85 mm x 55 mm with an intent to evade. Of the 144 Bills of Entry under which the goods were cleared, in 63 Bills of Entry, the goods were cleared after examination by the officers and the department was not only aware of the description of the goods in the invoices and the Bills of Entry but was also aware of the actual nature of the imported goods;

(iv) The SCN relied on several statements recorded under section 108 of the Act but these

statements were not admitted as evidence by the ADG (Adj) after following the procedure prescribed under section 138B of the Act; further, even when specifically requested, cross examination of the persons who made the statements was denied;

(v) The appellants had obtained an opinion from an expert in IIT Delhi to support its contention that the imported cards satisfied Chapter Note 5(b) of Chapter 85 of the Customs Tariff; this opinion was given after physically examining the smart cards, the technical literature of the supplier and a certificate from the manufacturer that there were no other passive or active element in the smart cards. However, the ADG (Adj) brushed aside the expert opinion terming it an afterthought;

(vi) The impugned order relied on Section Note 2(b) to Section XVI of the Customs Tariff which states that 'other parts' if suitable for use solely or principally with a particular kind of machine are to be classified with that kind of machine and reasoned that since the smart cards are to be used only with Set Top Boxes falling under 8529, they should be classified accordingly. However, the well-settled principle is that simply because an article is to be used with another article, it does not become its part- for example, DVDs which are used with DVD players will not be parts of DVDs, credit cards to be used with credit card machines, do not become parts of the credit card machines;

(vii) When relying on Section Note 2(b) of Section XVI, the impugned order ignored Section Note 2(a) which states that parts which are goods falling under any of the headings or sub-headings must be classified under the headings. Note 2(b) deals with other parts, i.e., those which do not fall under Note 2(a). Since the smart

cards/viewing cards imported by Videocon were classifiable under a specific heading, Note 2(b) meant for other parts will not apply.

(viii) The smart card is intended to provide conditional access to the subscriber allowing him to view channels as per his subscription only and the Set top Box only unscrambles those channels allowing the subscriber to view.

(ix) The classification of the imported smart cards/viewer cards under **CTI 8523 52 90** may be upheld and the impugned order may be dismissed.

(x) Goods must be classified as they are imported and not based on how they will be used after their import. The mere fact that the imported viewing cards/smart card will, after import, be used with the Set Top Boxes is immaterial. Reliance is placed on **Vareli Weaves Pvt. Ltd.** versus **Union of India**¹³ and **Shakti Tools** versus **CCE**¹⁴ decided by this Tribunal and upheld by the **Supreme Court**¹⁵

(xi) **CTI 8523 52 90** is specific and it will prevail over **CTI 8529 90 90** under which the cards have been classified in the impugned order.

(xii) Personalization of the smart cards/SIM cards will not change their classification. Reliance is placed on **Sharon Solutions India Pvt. Ltd.** versus **CC, Chennai**¹⁶

(xiii) The goods were declared as per the invoices; mere claim of particular classification or an exemption notification in the Bill of Entry will not amount to mis-declaration.

13. 1996 (83) E.L.T. 255 (S.C.)

14. 2002 (143) E.L.T. 211 (Tri.-Del.)

15. 2003 (157) E.L.T. A42 (S.C.)

16. 2017 (357) E.L.T. -403 (Tri-Chennai)

(xvi) Many of the consignments were physically examined by the Customs officers before clearing and therefore, extended period of limitation cannot be invoked.

(xv) The SCN mainly relied on the statements made by various persons under section 108 of the Customs Act which cannot be relied upon as they have not been admitted as evidence by the ADG (Adj.) by following the procedure prescribed under section 138B of the Act. Reliance is placed on **Additional Director General versus Its My Name Pvt. Ltd.**¹⁷ and **Jindal Drugs Pvt. Ltd. versus Union of India**¹⁸

(xvi) The impugned order may be set aside and the appeals of Videocon, Dhoot, Kanthalia and Mathur may be allowed and the appeal by Revenue may be dismissed.

Submissions on behalf of the Revenue

15. Learned Special Counsel for the Revenue made the following submissions:

(i) The impugned order is correct and proper except to the extent that it did not impose penalties under section 114AA of the Act on Videocon, Dhoot, Kanthalia and Mathur and also did not impose any redemption fine under section 125 of the Act in respect of the goods which were seized and which were provisionally released on bond.

(ii) The ADG (Adj), DRI did not impose penalties by wrongly relying on the 27th Report of the Standing Committee on Finance which is irrelevant to the interpretation and application of the law.

17. 2021(375) E.L.T. 545 (Del.)

18. 2016(340) E.L.T. 67 (P&H)

(iii) Section 114AA of the Act provides for penalty for use of false or incorrect information knowingly and in the facts of the case, it will squarely apply to Videocon, Dhoot, Kanthalia and Mathur. Reliance is placed on **Ilishan Biotech(P) Ltd. versus Principal Commissioner of Customs, New Delhi¹⁹, CELEBI Delhi Cargo Terminal Management Pvt. Ltd. versus Principal Commissioner of Customs, ACC Imports, Delhi²⁰ and Sunil Aidasani @ Vicky versus Principal Commissioner of Customs (Import), New Delhi²¹**

(iv) Once the seized goods have been found liable to confiscation, redemption fine in lieu of confiscation should have been imposed on the goods which were seized and which were provisionally released. Reliance is placed on **Weston Components Ltd. versus Commissioner of Customs, New Delhi²², Commissioner of Customs, Chennai versus Madras Petrochem Ltd.²³ and T. Elavasaran versus Commissioner of Customs (Airport) Chennai²⁴.**

(v) The appeals filed by Videocon, Dhoot, Kanthalia and Mathur may be dismissed and the impugned order may be modified by imposing penalties under section 114AA of the Act and imposition of redemption fine under section 125 of the Act

19. (2025) 26 Centax 166 (Tri-Del)

20. (2024) 18 Centax 413 (Tri-Del)

21. (2024) 18 Centax 321 (Tri-Del.)

22. 2000 (115) E.L.T. 278 (S.C.)

23. 2020 (372) E.L.T. 652 (Mad.)

24. 2011(266) E.L.T. 167 (Mad.)

Findings

16. We have considered the submissions advanced by both sides and perused the records. The impugned order was passed in pursuance of the SCN which proposed re-classification of the smart card/viewing cards imported by Videocon based on (a) the analysis and interpretation of the Customs Tariff by DRI (which was different from the classification of the goods in the Bills of Entry); and (b) based on 24 RUDs.

17. Of the 24 RUDs, 7 were statements (RUDs 5,6,7,8,9,10 & 11), 3 were Mahazars or Panchnamas (RUDs 2,3 & 4), 4 were copies of summons issued to various persons and their replies (RUDs 15,16,17 & 18), 2 were agreements (RUD 19 & 20) and the rest were copies of a Bill of Entry (RUD 12), Invoice (RUD 13), Purchase Order (RUD 14), TR-6 challan of the duty paid by Videocon (RUD 22), order of NCLT of merger of Videocon with Dish TV (RUD 23), takeover documents(RUD 21) and a letter of Dish TV (RUD 24).

18. The statements recorded by a customs officer under section 108 of the Act are relevant to prove the contents of the statement if, the adjudicating authority, admits them as evidence as per section 138B. This reads as follows:

Section 138B. Relevancy of statements under certain circumstances. –

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any

inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court.

19. There is nothing in the impugned order to show that the ADG (Adj), DRI had followed the procedure under section 138B and admitted the statements as evidence. Therefore, of the 24 RUDs, the seven statements need to be ignored.

20. The rest of the RUDs are matters of fact and are not disputed and only elaborate facts and provide completeness.

21. This leaves us with the interpretation of the Customs Tariff by the DRI and by Videocon.

22. The specific questions to be decided by us are:

a. Are the imported viewing cards/smart cards classifiable under **CTI 8523 52 90** as was done in the Bills of Entry or under **CTI 8529 90 90** as held in the impugned order?

- b. Can the demand of duty invoking extended period of limitation under section 28(4) be sustained?
- c. Can the demand of interest under section 28AA be sustained?
- d. Can the confiscation of the goods under section 111 or holding the goods liable to confiscation be sustained?
- e. Can the penalty under section 114A imposed on Videocon be sustained?
- f. Can the penalty under section 112 imposed on Dhoot, Kanthalia and Mathur be sustained?
- g. Did the ADG (Adj), DRI err in not imposing penalties on Videocon, Dhoot, Kanthalia and Mathur under section 114AA?
- h. Did the ADG (Adj.) DRI err in not imposing redemption fine under section 125 of the Act?

23. Before examining these questions, it would be relevant to discuss how imported goods are cleared through Customs to put the entire case in perspective.

24. To clear the imported goods the importer or his customs broker files a Bill of Entry online in the ICES giving details of the goods, description, value, classification and exemption notifications, etc. The importer has to self-assess duty as per section 17(1) of the Act and the proper officer can re-assess the duty. If the proper officer re-assesses duty different from self-assessment, he has to pass a speaking order unless the importer accepts the re-assessment in writing.

25. Once the Bill of Entry is filed in the ICES, it goes through the customs Risk Management System²⁵ which decides if the Bill of Entry should be cleared based on self-assessment itself or it should be sent for re-assessment by the proper officer (which can be the same as self-assessment or different from it) or examination of the goods or both and the Bill of Entry in the ICES then moves accordingly to the queue of the appraiser or to the shed examiner or to the out of charge officer. Both the self-assessment by the importer and the re-assessment by the proper officer are forms of assessment.

26. After the assessment is completed and the duty is paid by the importer, the proper officer issues an order clearing the goods for home consumption (under section 47 of the Act) and thereafter, the goods cease to be imported goods. There cannot be any further assessment of duty on the goods.

27. The relevant provisions of the Act are reproduced below:

2. Definitions.—In this Act, unless the context otherwise requires,—

(2) **‘assessment’ means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable**, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to—

(a) **the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;**

(b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;

(c) **exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;**

(d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;

(e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;

(f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods, and **includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;**

(4) 'bill of entry' means a bill of entry referred to in section 46;

(14) 'dutiable goods' means any goods which are chargeable to duty and on which duty has not been paid;

(15) 'duty' means a duty of customs leviable under this Act;

(17) 'examination', in relation to any goods, includes measurement and weighment thereof;

(23) 'import', with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

(25) '**imported goods**' means any goods brought into India from a place outside India but **does not include goods which have been cleared for home consumption;**

(26) '**importer**', in relation to any goods **at any time between their importation and the time when they are cleared for home consumption, includes any**

owner, beneficial owner or any person holding himself out to be the importer;

Section 17. Assessment of duty. -

(1) An importer entering any imported goods under section 46 , or an exporter entering any export goods under section 50 , shall, save as otherwise provided in section 85 , self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the entries made under section 46 or section 50 and the self assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

(3) For the purposes of verification under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

Explanation. - For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent

of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.

Section 46. Entry of goods on importation. - (1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting electronically on the customs automated system to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed:

Section 47. Clearance of goods for home consumption. -

(1) **Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty,** if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer **may make an order permitting clearance of the goods for home consumption:**

28. Once the goods are cleared for home consumption, the process of assessment comes to an end because the goods cease to be imported goods and there cannot be any further assessment.

29. However, the assessment already made in the Bill of Entry, can be modified through one of the five ways provided in the Act. Each of these methods has its own limitations:

- a) An appeal before Commissioner (Appeals) under section 128 of the Act by either the department or the importer within the time limit prescribed therein;
- b) An SCN issued under section 28 of the Act by the proper officer- this is subject to three limitations- WHO (only the proper officer), WHY(to recover duties not

levied, not paid, short levied, short paid or erroneously refunded) and WHEN (within the normal or extended period of limitation as the case may be);

c) By finalising provisional assessment under section 18 of the Act;

d) By amending the documents under section 149 by the importer if the proper officer permits the amendment; and

e) By the officer under section 154 to correct clerical or arithmetical errors.

30. In this case, the assessment was modified by an SCN issued by the DRI under section 28(4) of the Act invoking extended period of limitation. The SCN states that 'receiving intelligence that Videocon was mis-classifying the goods' DRI investigated the matter. However, as discussed above, all Bills of Entry are filed by almost all importers across the country in the ICES of the Customs which are accessible by the Customs officers and presumably by DRI. DRI can check in a few minutes on the ICES as to which importer had imported what goods and classifying under which **CTI**, etc. We find it surprising that this information which is so easily accessible by DRI is said in the SCN to be 'intelligence received' by DRI. It is somewhat like a stockbroker with access to the stock exchange website saying that he had gathered intelligence that a particular stock was being sold on a day at a particular price; he can simply check the price on the website.

31. We next need to examine as to what is 'classification of the goods' and who can do it. Section 2(2)(a) of the Act shows that classification of goods is an important part of the assessment. Therefore, those mandated or empowered to assess the duty (such as the importer or the proper officer) or to modify the assessment (such as the proper officer to issue notices or pass orders under sections 18, 28, 128, 149 and 153) can do the classification.

32. In this case, **Videocon**, the importer, classified the goods under **CTI 8523 52 90** as part its self-assessment (under section 17) and the goods were examined (in many Bills of Entry) and cleared by the proper officer of customs for home consumption. The ADG, DRI who issued the SCN and the ADG(Adj), DRI who passed the impugned order, classified the goods under **CTI 8529 90 90** (under section 28). Thus, there are two different views regarding classification of the imported goods - one of Videocon (which has not been changed or modified by the proper officer under section 17) and another of the ADG DRI who issued the SCN and the ADG(Adj.) who passed the impugned order. This is not a case where the classification of the goods was already decided in previous Bills of Entry under one CTI by the proper officer re-assessing duty or in an appeal by the Commissioner (Appeals) or this Tribunal or by any Court and thereafter, Videocon filed Bills of Entry with another CTI thereafter to evade duty.

33. Therefore, the 'mis-classification of the goods to evade' by the Videocon alleged in the SCN and affirmed in the impugned order is not correct. Videocon classified the goods in the Bills of Entry as per its understanding and view and the proper officer also cleared the goods accordingly and in many cases after the goods were examined. The details of all Bills of Entry including the classification were in the Customs ICES and presumably DRI had full access to them. After examining these Bills of Entry, DRI felt that they should have been classified under a different CTI.

34. All that can be said of Videocon is that it did not anticipate that DRI would later examine the Bills of Entry filed by it and take a view that the goods must be classified under a different CTI and then file Bills of Entry conforming to the likely future views of DRI. The question is if there is an obligation to anticipate the future views of DRI or an obligation to file Bills of Entry to conform to such future views.

35. Classification is a part of assessment or its subsequent modification. It should be done applying one's mind and not anticipating future views of someone else and conforming to such views. Of course, if the classification has already been settled with respect to previous imports by an order of the proper officer, Commissioner (Appeals), this Tribunal or any Court and thereafter, the importer files the Bill of Entry with a contrary classification, it can be held against him. Judicial

discipline requires the classification decided by the Court, Tribunal, Commissioner (Appeals) or even by the proper officer contrary to the self-assessment must be followed by those lower in the judicial hierarchy.

36. The ADG (Adj.) DRI who passed the impugned order classified the goods as per his understanding and interpretation of the tariff; he could not have predicted if his order would be assailed by Videocon and if so, what classification this Tribunal would find correct and certainly had no obligation to pass the impugned order conforming to the future order of this Tribunal. Likewise, Videocon, the importer, could neither predict the future views of DRI nor had any obligation to conform to such future views.

37. In short, this is simply a case of two conflicting views about classification of the imported goods. We now proceed to decide the questions formulated by us in paragraph 22 above.

Are the imported viewing cards/smart cards classifiable under CTI 8523 52 90 as was done in the Bills of Entry or under CTI 8529 90 90 as held in the impugned order?

38. According to Videocon, the viewing cards/smart cards are goods in themselves and they are not part of the Set Top Boxes into which they are inserted. They were imported separately and not along with the STB. The mere fact that they are used with the STBs and have no other use will not, according to Videocon, make them parts of the STBs. Even the

fact that the viewing cards/smart cards are customized to Videocon and that they cannot be used with the STBs of other D2H service providers, will not, according to Videocon, make them parts of the STBs.

39. According to the Revenue, as held in the impugned order, the viewing cards/smart cards are parts of the STBs and should be classified accordingly as held in the impugned order.

40. According to Videocon, even if the smart cards/ viewing cards are treated as parts of STBs, their classification would not change.

41. We now proceed to examine the relevant entries in the Customs Tariff and the relevant Chapter/Section Notes.

SECTION XVI

MACHINERY AND MECHANICAL APPLIANCES; ELECTRICAL EQUIPMENT; PARTS THEREOF; SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND PARTS AND ACCESSORIES OF SUCH ARTICLES

Section Note:

1. This Section does not cover :

- (a) transmission or conveyor belts or belting, of plastics of Chapter 39, or of vulcanised rubber (heading 4010); or other articles of a kind used in machinery or mechanical or electrical appliances or for other technical uses, of vulcanised rubber other than hard rubber (heading 4016);
- (b) articles of leather or of composition leather (heading 4205) or of furskin (heading 4303), of a kind used in machinery or mechanical appliances or for other technical uses;

- (c) bobbins, spools, cops, cones, cores, reels or similar supports, of any material (for example, Chapter 39, 40, 44 or 48 or Section XV);
- (d) perforated cards for Jacquard or similar machines (for example, Chapter 39 or 48 or Section XV);
- (e) transmission or conveyor belts or belting of textile material (heading 5910) or other articles of textile material for technical uses (heading 5911);
- (f) precious or semi-precious stones (natural, synthetic or reconstructed) of headings 7102 to 7104, or articles wholly of such stones of heading 7116 except unmounted worked sapphires and diamonds for styli (heading 8522);
- (g) parts of general use, as defined in Note 2 to Section XV, of base metal (Section XV), or similar goods of plastics (Chapter 39);
- (h) drill pipe (heading 7304);
- (i) endless belts of metal wire or strip (Section XV);
- (j) articles of Chapter 82 or 83;
- (k) articles of Section XVII;
- (l) articles of Chapter 90;
- (m) clocks, watches or other articles of Chapter 91;
- (n) interchangeable tools of heading 8207 or brushes of a kind used as parts of machines (heading 9603); similar interchangeable tools are to be classified according to the constituent material of their working part (for example, in Chapter 40, 42, 43, 45 or 59 or heading 6804 or 6909);
- (o) articles of Chapter 95; or
- (p) typewriter or similar ribbons, whether or not on spools or in cartridges (classified according to their constituent material, or in heading 9612 if inked or otherwise prepared for giving impressions).

2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules :

(a) parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;

(b) other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that

kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517;

(c) all other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate or, failing that, in heading 8487 or 8548.

CHAPTER 85

Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles

NOTES :

1. This Chapter does not cover :

- (a) electrically warmed blankets, bed pads, foot-muffs or the like; electrically warmed clothing, footwear or ear pads or other electrically warmed articles worn on or about the person;
- (b) articles of glass of heading 7011;
- (c) machines and apparatus of heading 8486;
- (d) vacuum apparatus of a kind used in medical, surgical, dental or veterinary purposes (Chapter 90); or
- (e) electrically heated furniture of Chapter 94.

5. For the purposes of heading 8523 :

- (a) Solid-state non-volatile storage devices" (for example, "flash memory cards" or "flash electronic storage cards") are storage devices with a connecting socket, comprising in the same housing one or more flash memories (for example, "FLASH E2PROM") in the form of integrated circuits mounted on a printed circuit board. They may include a controller in the form of an integrated circuit and discrete passive components, such as capacitors and resistors;
- (b) The term "smart cards" means cards which have embedded in them one or more electronic integrated circuits (a microprocessor, random access memory (RAM) or read only memory (ROM)) in the form of chips. These cards may contain contacts, a magnetic stripe or an embedded antenna**

but do not contain any other active or passive circuit elements.

CTI 8523 52 90 (as asserted by Videocon)

8523 DISCS, TAPES, SOLID-STATE NON-VOLATILE STORAGE DEVICES, "SMART CARDS" AND OTHER MEDIA FOR THE RECORDING OF SOUND OR OF OTHER PHENOMENA, WHETHER OR NOT RECORDED, INCLUDING MATRICES AND MASTERS FOR THE PRODUCTION OF DISCS, BUT EXCLUDING PRODUCTS OF CHAPTER 37

-Magnetic media

- Semiconductor media:

8523 52 -- Smart cards

8523 52 10 --- SIM cards

8523 52 20 --- Memory Cards

8523 52 90 --- Other

CTI 8529 90 90 (as held in the impugned order)

8529 PARTS SUITABLE FOR USE SOLELY OR PRINCIPALLY WITH THE APPARATUS OF HEADINGS 8525 TO 8528

852910 - Aerials and aerial reflectors of all kinds; parts suitable for use therewith:

852990 -Other :

85299010 ---For communication jamming equipment

85291020 ---For amateur radio communication equipment

852890 30 --- Open cell for television set

85299090 ---Other

42. Goods must be classified as per the chapter headings and sub-headings read with the relevant Section Notes and Chapter Notes. The Customs Tariff is divided into sections and each section is further divided into Chapters. Some sections have only one chapter and some have more.

43. Section XVI under Chapter 85 is relevant for the purpose. Section Note 2 to this section explains how parts of the goods should be classified. This Section Note, however, is subject to Section Note 1 and Chapter Note 1 to Chapter 85.

Section Note 1 and Chapter Note 1 to Chapter 85 exclude certain types of goods from the scope of the section and chapter respectively which are not relevant for this case because it is nobody's case that the goods are not covered by this section or chapter.

44. Learned counsel for Videocon relied on Chapter Note 5(b) to Chapter 85 to assert that the imported cards were 'smart cards'. According to this Chapter Note, the term "smart cards" means cards which have embedded in them one or more electronic integrated circuits (a microprocessor, random access memory (RAM) or read only memory (ROM)) in the form of chips. These cards may contain contacts, a magnetic strip or an embedded antenna but do not contain any other active or passive circuit elements.

45. According to Videocon, the cards imported by it squarely meet the parameters laid down in Chapter Note 5(b) to Chapter 85 and therefore, are 'smart cards' other than SIM Cards and memory cards and hence they are squarely classifiable under **CTI 8523 52 90**.

46. In the impugned order the ADG (Adj.) rejected this classification on the ground that the imported cards do not meet the parameters laid down under Chapter Note 5(b) to Chapter 85 and therefore, they do not qualify as smart cards at all. Specifically, it is stated that the cards contained passive and active electrical circuits for connection with the Set Top

Box along with a few algorithms and personalized information. Reliance for this assertion is placed on the statement of Shri Vikash Wadhera, Associate Vice President of Videocon recorded under section 108 of the Act which is enclosed as RUD 11 to the SCN. Videocon submitted an expert report from Shri Vinay J Riberio, Associate Professor of IIT Delhi stating that the cards had no active or passive circuits other than the chip. The ADG (Adj.) refused to consider this expert opinion stating that they should have presented it at the time of investigation.

47. As we have already observed that none of the statements recorded under section 108 of the Act were put through the process under section 138B and admitted as evidence by the ADG (Adj.), to render them relevant to prove truth of the contents of the statements and hence this statement of Shri Vikash Wadhera cannot be used to prove the case of the department. In **Its My Name Pvt. Ltd.**, Delhi High Court held that the statements which have not gone through the procedure under section 138B cannot be relied upon. The relevant portion of the judgment is as follows:

76. We are not persuaded to change our view, on the basis of the various statements, recorded under Section 108 of the Act, on which the Learned ASG sought to rely. Statements, under Section 108 of the Act, we may note, though admissible in evidence, acquire relevance only when they are, in fact, admitted in evidence, by the adjudicating authority and, if the affected assessee so chooses, tested by cross-examination. We may, in this context, reproduce, for ready reference, Section 138B of the Act, thus :

“138B. Relevancy of statements under certain circumstances. — (1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

- (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
- (b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court.”

A Division Bench of this Court has, speaking through A.K. Sikri, J. (as he then was) held, in *J & K Cigarettes Ltd. v. Collector of Central Excise* [2009 (242) E.L.T. 189 (Del.)] that, by virtue of sub-section (2), Section 138B(1) of the Act would apply, with as much force, to adjudication proceedings, as to criminal proceedings. Following this, it has been held, by the High Court of Punjab and Haryana, in *Jindal Drugs Pvt. Ltd. v. U.O.I.* [2016 (340) E.L.T. 67 (P & H)] that, unless and until one of the circumstances contemplated by clause (a) of Section 138B(1)(a) applies, the adjudicating authority is bound to follow, strictly, the procedure outlined in clause (b), before treating a statement, recorded under Section 108 of the Act, as relevant. (We may note, here, that *Jindal Drugs* [2016 (340) E.L.T. 67 (P & H)] was rendered in the context of Section 9D of the Central Excise Act, 1944 which is, however, *in parimateria*, and *in haec verba*, with Section 138B(1)(b) of the Act.) Paras 19 to 21 of the

judgment in *Jindal Drugs* (supra) may, for ready reference, be reproduced thus :

"19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

20. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

21. It is only, therefore, -

- (i) after the person whose statement has already been recorded before a Gazetted Central Excise Officer is examined as a witness before the adjudicating authority, and
- (ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence, that the question of offering the witness to the assessee, for cross-examination, can arise."

(Emphasis Supplied)

We express our respectful concurrence with the above elucidation of the law which, in our view, directly flows from Section 138B(1) of the Act - or, for that matter, Section 9D of the Central Excise Act, 1944.

77. The framers of the law having, thus, subjected statements, recorded under Section 108 of the Act, to such a searching and detailed procedure, before they are treated as relevant in adjudication proceedings, we are of the firm view that such statements, which are yet to suffer such processual filtering, cannot be used, straightaway, to oppose a request for provisional release of seized goods. The reliance, in the appeal before us, on various statements recorded during the course of investigation in the present case cannot, therefore, in our view, invalidate the decision, of the Learned Tribunal, to allow provisional release of the seized 25400.06 grams of gold jewellery, covered by Bill of Entry No. 107190, dated 20th April, 2019.

48. Similarly, in **Jindal Drugs Pvt. Ltd.**, Punjab and Haryana High Court dealt with the admissibility of the statements made under the Central Excise Act, 1944 without following the procedure prescribed under Section 9D of the Central Excise Act which is *pari materia* with section 138B of the Customs Act and held as follows:

25. In the light of the above, respondent no. 2 is directed to adjudicate the show cause notice issued to the writ petitioners by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial authorities in this regard, including the principles of natural justice, in the following manner :

- (i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements,

so that the Revenue would examine them in chief, before the adjudicating authority, i.e., before Respondent No. 2.

- (ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.
- (iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examined-in-chief before the adjudicating authority, i.e., before Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No. 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.
- (iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in *Arya AbhushanBhandar v. U.O.I.*, 2002 (143) E.L.T. 25 (S.C.) and *Swadeshi Polytex v. Collector*, 2000 (122) E.L.T. 641 (S.C.).

26. With the above directions, the writ petition stands disposed of.

49. It is now a settled legal position that the statements made under section 108 of the Customs Act cannot be relied upon unless the procedure prescribed under section 138B was followed and they are admitted as evidence and this has not been done with respect to any of the statements in this case.

50. As far as the expert opinion of Shri Ribeiro is concerned, the ADG (Adj.) clearly erred in refusing to consider it. The defence of the noticee starts after the investigation has been completed and the SCN is issued. If the adjudication order is to be passed only based on the investigation and the contents of the SCN, no scope for defence will be left. The Adjudicating authority has to not only consider the SCN but also the submissions in defence. The ADG (Adj.) clearly erred in refusing to consider the report altogether. If he had any doubts about the report, he could have summoned Shri Ribeiro, examined him and then decided whether his report should be accepted or rejected. However, refusing to even consider an opinion given in defence is a serious illegality by the ADG (Adj.). We are conscious that classification could only be done by the adjudicating authority in the case and not by any expert but the expert opinion of the Mr. Ribeiro is regarding the nature of the goods and if there were any other circuits. Such expert opinion is relevant to this case especially since the case of the DRI is built on the premise that there were additional circuits.

51. Since the ADG (Adj.) found that the cards do not fall under **CTI 8523 52 90**, and that they are not goods in themselves but are parts of Set Top Boxes, he held that the parts should be classified as per Section Note 2(b) to Section

XVI. This Note, as can be seen says that parts should be classified as follows:

(a) If the parts are goods included in any of the headings of Chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) they are in all cases to be classified in their respective headings;

(b) other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517;

(c) all other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate or, failing that, in heading 8487 or 8548.

52. According to Videocon, the cards imported by it are goods falling under **CTI 8523 52 90**. Therefore, even if they are considered as parts of STB, as per (a) above, they deserve to be classified under this CTI.

53. The ADG (Adj.), on the other hand, held that they are not goods falling under **CTI 8523 52 90** and therefore, classified them as per Section Note 2(b) as parts of Set top boxes under **CTI 8529 90 90**.

54. We find that since the DRI proposed to change the classification of the goods in the SCN and changed the classification in the impugned order, it is for the DRI to establish the change in the classification. This, as discussed,

was done in the impugned order, by relying on the statement of Shri Vikash Wadhera (RUD-11) but it has to be ignored because it was not admitted as per section 138B. The classification by Videocon under **CTI 8523 52 90**, therefore, needs to be accepted on this ground alone.

55. Further, even if the statement of Shri Wadhera, succinctly summarized in paragraphs 5.4.3 (a) and (b) of the impugned order is considered, it only says that the cards have both ROM and RAM and also some passive and active electrical circuits for connection with the Set top box and some algorithms and personalized software. As per Chapter Note 5(b) smart cards can have RAM or Rom in one or more electronic integrated circuits in the form of chips, a magnetic strip or an embedded antenna but not any other active or passive circuit elements. It does not say that it cannot have both ROM and RAM in the chip. It is only other active or passive circuit elements which take the cards out of the purview of Chapter Note 5(b). It must be remembered that a chip itself is a very large scale integrated circuit after containing millions of transistors. If the circuits are only in the form of one or more chips, the cards will fall within Chapter Note 5(b). It is only when there are any circuits other than the chips and the magnetic strip and embedded antenna, will the card go out of the purview of Chapter Note 5(b). The statement of Shri Wadhera, as summarized in the impugned order, does not say that there are any circuits other than in

the chips, magnetic strips or embedded antenna. If the mere presence of any circuit removes it from the definition of smart cards as per Chapter Note 5(b), no card can ever be a smart card because every chip in the card, is, in itself a circuit.

56. Had the ADG(Adj.) examined Shri Wadhera during adjudication as per section 138B and also allowed cross examination by Videocon, this confusion would not have arisen. Had the ADG(Adj.) considered the report of Shri Ribeiro and if considered necessary, summoned and examined him also, this confusion would have not arisen.

57. We also find that a good will not become part of another good simply because it is used in conjunction with such good or because it is customized to work with that good. ATM cards are designed to work with ATM machines only but they do not become their parts for that reason. Likewise, a credit card is not a part of the Point of Sale Machine in which it is swiped. A audio cassette is not a part of the cassette player nor is a DVD part of the DVD player.

58. The fact that a card has been customized to work with only machines of the importer will make no difference and such customization does not make the card a part of the machine. The cards imported by the appellant are goods in themselves, and have been bought as such by Videocon. Customisation of the cards will make no difference. Now-a-

days every debit card and credit card is customized but it does not make the debit card a part of the ATM.

59. It is also immaterial as to how much data is stored in the card. In some goods, such as DVDs and CDs the entire information is on the disc itself. In smart cards such as Metro cards, debit cards, credit cards, etc. some of which come with only a magnetic strip while others come with a chip, the card only contains the basic information about the holder and his account details. Further details, such as credit or debit balance, etc. are dynamically retrieved from the server once the card is inserted into the machine or swiped. These will not make the cards part of some other machine.

60. Clearly, the viewing card/smart card inserted into the set top box of DTH service provider is a good in itself and is not a part of the set top box.

61. The re-classification of the goods in the impugned order from **CTI 8523 52 90** to **CTI85299090** cannot be sustained and deserves to be set aside.

Can the demand of duty invoking extended period of limitation under section 28(4) be sustained?

62. Since we have found that the re-classification of the goods under CTI 8529 90 90 cannot be sustained, neither can the consequential demand of duty be sustained.

63. We also find that extended period of limitation can be invoked under section 28(4) if duty is not paid, short paid or erroneously refunded by reason of any (a) collusion; or (b) any wilful mis-statement; or (c) suppression of facts, by the importer. In this case all Bills of Entry were filed on the ICES. The goods were declared as per the documents and they were classified by the importer as per its understanding. They were cleared by the proper officer in 144 Bills of Entry, of which in 63 Bills of Entry the goods were examined. The entire basis for the demand is only a different view of DRI about the classification. Merely because DRI has a view different from the view of the importer and the proper officers who cleared the Bills of Entry, extended period of limitation under section 28(4) cannot be invoked. It is neither possible nor does the importer has a obligation to anticipate the future views of DRI about classification in any investigation and file Bills of Entry accordingly. Therefore, the invocation of extended period of limitation in the SCN and in the impugned order is misconceived and it cannot be sustained.

Can the demand of interest under section 28AA be sustained?

64. Since the demand of duty itself cannot be sustained both on merits and on limitation, the demand of interest also cannot be sustained.

Can holding the imported goods liable to confiscation under section 111(m) be sustained?

65. In the impugned order, the imported goods have been held liable to confiscation but were not confiscated since they were not available. Since we have held in favour of the importer on the question of classification and consequential demand, the order holding the goods were liable to confiscation under section 111(m) cannot be sustained.

66. We also find that section 111(m) of the Act reads as follows:

Section 111. Confiscation of improperly imported goods, etc. -

The following goods brought from a place outside India shall be liable to confiscation: -

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under trans-shipment, with the declaration for trans-shipment referred to in the proviso to sub-section (1) of section 54;

67. Section 111(m) refers to the entry made under the Act. The expression 'making an entry' in Customs Act means filing some papers to get the goods cleared by the Customs. In case of imports, the entry is made by filing a Bill of Entry. If the goods do not correspond in respect of value or in any other particular the entry made, i.e., the Bill of Entry, they will be liable to confiscation under section 111(m). However, it must be remembered that the importer also has an obligation to self-assess duty under section 17(1) of the Act. There is no

separate mechanism to self-assess duty. When filing the Bill of Entry, the importer has to enter not only the description of the goods, quantity, etc. but also the classification, exemption notifications, value, etc. Thus, there are elements in the Bill of Entry which are matters of fact-nature of goods, quantity, etc. and there are matters of opinion such as the classification, exemption notification, etc. While matters of fact can be determined conclusively as correct or not, the classification, exemption notification, etc. are matters of opinion. Videocon classified the goods as per its understanding. Merely because the classification in the Bill of Entry does not conform to the view of DRI in hindsight, the goods will not be liable to confiscation, even if the DRI's classification is correct.

68. It has also been stated that the actual dimensions of the cards were somewhat different from what was mentioned in the Bill of Entry. We find it not of any significance in the facts of the case to determine the classification.

69. The order holding that the goods were liable to confiscation under section 111(m) cannot be sustained for all the above reasons.

Can the penalty under section 114A imposed on Videocon be sustained?

70. This section reads as follows:

Section 114A. Penalty for short-levy or non-levy of duty in certain cases. -

Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:

71. Since we have found in favour of Videocon on the question of classification on merits as well as on the question if there were elements of 'collusion, wilful misstatement or suppression of facts', the penalty imposed under section 114A cannot be sustained.

Can the penalty under section 112 imposed on Dhoot, Kanthalia and Mathur be sustained?

72. Penalties under section 112 can be imposed for acts or omissions which render the goods liable to confiscation under section 111. Since we have found in favour of Videocon on the question of holding the goods liable to confiscation under section 111, the penalties under section 112 imposed on Dhoot, Kanthalia and Mathur also cannot be sustained and need to be set aside.

Did the ADG (Adj), DRI err in not imposing penalties on Videocon, Dhoot, Kanthalia and Mathur under section 114AA?

73. The appeal of the Revenue is on the ground that in the impugned order, the ADG (Adj.) erred in not imposing

penalties under section 114AA on Videocon, Dhoot, Kanthalia and Mathur.

74. This section provides for penalties for wilful mis-declaration and it reads as follows:

Section 114AA. Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

75. Since we have found that there were no mis-declaration or mis-classification of goods in the impugned order, we cannot impose any penalties under section 114AA. The submission of the Revenue that this section would apply not only to exports but also to imports is correct as is evident from the text of the section itself and also from the decisions in **Ilishan Biotech (P.) Ltd, CELEBI Delhi Cargo Terminal Management India Pvt. Ltd. and Sunil Aidasani**. However, this legal position will make no difference in the facts of the case because we have found against the Revenue on the questions of demand of duty on merits as well as limitation and also against the Revenue on the question of holding the goods liable to confiscation under section 111.

Did the ADG (Adj.) DRI err in not imposing redemption fine under section 125 of the Act?

76. Revenue has asserted in the appeal filed by it that the ADG(Adj.) erred in holding that the goods seized in Aurangabad at the premises of Videocon were liable to confiscation but not confiscating them as they were not available and that he should have imposed a fine in lieu of confiscation. Learned special Counsel for the Revenue relied on the decisions in **Weston Components Ltd., Madras Petrochem Ltd. and T. Elavarasan.**

77. We agree that if goods are seized and are provisionally released on bond pending adjudication and thereafter have been found liable to confiscation, a redemption fine in lieu of confiscation can be imposed and recovered as decided in a catena of judgments, including the three cited above. However, since we have found in favour of Videocon on the question of holding the goods liable to confiscation under section 111(m), no redemption fine can be imposed in this case.

78. To sum up:

- a) Although the SCN states that DRI started investigation on receiving intelligence that Videocon was mis-classifying the goods, we find that all information regarding every Bill of Entry filed, the details of classification of the goods during self-assessment and examination by the proper officers and the dates of clearance of goods were available on the ICES. It is a simple case where DRI looked at the

Bills of Entry which were already cleared by the proper officer and entertained a belief that the goods deserve to be classified differently.

- b) The assessment of the Bill of Entry comes to an end when an order is issued by the proper officer clearing them for home consumption under section 47. Once it is issued, the goods cease to be imported goods or dutiable goods and there can be no more assessment of duty on the goods.
- c) However, the assessment already done can be modified through one of the five methods, if applicable- (i) an appeal to the Commissioner (Appeals) under section 128; (ii) through an SCN issued under section 28; (iii) when finalising the assessment under section 18 if the goods were released on provisional assessment; (iv) by the importer by amending the documents under section 149; and (v) by the officer under section 154 to correct clerical or arithmetical errors.
- d) Classification of goods is a part of assessment and it can be done by either the importer self-assessing the Bill of Entry or by the proper officer re-assessing it or by anyone modifying the assessment under any of the five methods indicated above.
- e) Classification is a matter of opinion of the person. There is no obligation under the law on the importer to either to anticipate what view DRI or any Customs officer may take in hindsight about the classification of the goods which were already cleared or to file bills of entry conforming to such anticipated classification. However, if the classification was already settled earlier through re-assessment or in any appeal, the importer has to follow judicial discipline and file Bills of Entry accordingly. Likewise, if the classification is decided by the Commissioner (Appeals), this Tribunal

or any court against the Revenue, the proper officer re-assessing the goods or any adjudicating authority or appellate authority passing orders has to follow the decision of the higher judicial authority.

- f) None of the statements recorded under section 108 of the Act and relied upon in the SCN are relevant to this case because the ADG (Adj.) did not admit them as evidence after following the procedure prescribed under section 138B.
- g) The viewing cards/smart cards imported by Videocon deserve to be classified under **CTI 8523 52 90** and not under **CTI85299090** as held in the impugned order.
- h) There were also no grounds to invoke extended period of limitation under section 28(4) in the facts of the case.
- i) The demand, consequently, is set aside, both on merits and on limitation.
- j) Since the demand has been set aside, the order holding the imported goods liable to confiscation under section 111(m) needs to be set aside. Even otherwise, classification of goods during self-assessment of a Bill of Entry without anticipating what classification DRI may find correct in hind sight conforming to such anticipated classification cannot be a ground to hold goods liable to confiscation under section 111(m).
- k) Consequently all penalties on all the appellants need to be set aside.
- l) Revenue's appeal to impose redemption fine and to impose penalties under section 114AA on Videocon, Dhoot, Kanthalia and Mathur deserve to be dismissed.

79. In view of the above, **Customs Appeal No. 50912 of 2020** filed by the Revenue is dismissed. **Customs Appeal No. 51007 of 2020 filed by Videocon, Customs Appeal No. 50915 of 2020 filed by Shri Dhoot, Customs Appeal No. 50914 of 2020 filed by Shri Kanthalia and Customs Appeal No. 50913 of 2020 filed by Shri Mathur** are allowed with consequential relief to these appellants.

(Order pronounced in open court on 23/09/2025.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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