CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH,

COURT NO. 4

CUSTOMS APPEAL NO. 51045 OF 2020

[Arising out of Order-in-Original No. VIII(HQ)10/Imp/ adj/VivoMobile/71/19-20/7141 dated 16.06.2020 passed by the Commissioner of Customs (Appeals) New Delhi.]

VIVO MOBILE INDIA PVT LTD **APPELLANT**

Vs.

COMMISSIONER, CUSTOMS –
Air Cargo, Export,
New Delhi. **RESPONDENT**

Appearance:
Present for the Appellant : S/Shri Kishore Kunal, Manish Rastogi and Ms Kanak Grover, Advocates

Present for the Respondent: Shri Nagender Yadav, Authorised Representative

CORAM:

HON'BLE P. VENKATA SUBBA RAO, MEMBER(TECHNICAL)
HON'BLE DR. RACHNA GUPTA, MEMBER(JUDICIAL)

Date of Hearing : **20/07/2022**
Date of Decision : **04.10.2022**

FINAL ORDER No. 50955 /2022

PER DR. RACHNA GUPTA

In the present appeal, the appellant M/s. Vivo Mobile India Pvt. Ltd. (VMIPL) are engaged in the imports of various items through Air Cargo Complex, Delhi with assistance of their CHA M/s. R G Cargo Services Pvt Ltd. During the post clearance audit of some of the Bills of Entry for import of items by the appellants, the Department observed that the appellants have paid Basic Customs duty (BCD) @ 10% on Microphone for Cellular Mobile Phone classifying the same under CTH 85181000. Simultaneously, the benefit of entry at S.No. 18 of Notification No. 57/2017 dated 30.6.2017 was claimed by M/s. VMIPL, the appellants. Department formed an opinion that as per Customs Tariff Act, 1975, 'Microphone for Cellular Mobile Phone' attract Basic Customs duty @ 15% SWS @10% and IGST @18%, totaling of 37.470% duty. It was accordingly alleged that appellants have short paid duty. Differential duty was demanded vide letter bearing No. DLCUSADT /35/Circle-I/2019 dated 01.02.2019 for the period 2.2.2018 to 20.12.2018. The appellants have deposited the same but under protest and continued contesting that 'Microphone for Cellular Mobile Phone' are the part of Printed Circuit Board Assembly (PCBA) and as such was exempted from BCD levy in terms of S.No. 6A of the Notification No. 57/2017 dated 30.6.2017 as amended by Notification No. 37/2018-Cus dated 02.04.2018. The product was also impressed upon to be exempted from the Customs duty by virtue of Entry of S.No. 427 of Notification No. 50/2017 dated 30.6.2017.

2. Denying the claim of payment / nil rate of BCD as claimed under 6A and 18A of Notification No.57A/2017 and as claimed under Entry No. 427 of Notification No. 50/2017 dated 30.6.2017 the show cause notice bearing No.8097 dated 23.10.19 was served upon the appellant proposing the duty demand of Rs.1,26,09,230/- along with the interest amounting to Rs.7,22,406/-. The amount which was deposited by the appellant vide Challan No. 1894 dated 02.03.2019 was proposed to be appropriated against the total demand amount. Penalty was also proposed. The proposal, as such, has been confirmed vide the Order-in-Original bearing No. 71/19-20 dated 16.06.2020. Being aggrieved, the appellant is before this Tribunal.

3. We have heard learned Counsels Shri Kishore Kunal, Manish Rastogi and Ms Kanak Grover appearing for the appellants and Shri Nagender Yadav, learned Authorised Representative appearing for the department.

4. It is submitted by the appellant that they are a manufacturing company in the business of manufacture of mobile phones in India with latest and advanced technology including the PCBA and has been granted the Import Export Code. They are also registered under CGST regime. It is submitted that they also import various electronic and mechanical items and components for the manufacture of such mobile phones and PCBA at their factory. The mobile phones as imported by the appellants are impressed upon to be eligible to exemption from BCD as per entry at S.No. 7 of Exemption Notification No. 50 read with Entry No. 4 / List 20 which unconditionally exempts all kinds of microphones falling under Chapter 84 and 85. It is alternatively submitted that the microphones imported by the appellants are undisputedly pasted and soldered on the PCBA and as such are the parts of such PCBA, hence are eligible to exemption under entry at S.No. 6A of Exemption Notification No. 57 which exempts 'parts' required for manufacturing PCBA.

5. It is further submitted that during the course of investigation, the department itself has taken opinion from Indian Institute of Technology, Delhi (IIT) vide their letter No. 2108 dated 4.02.2020 (as annexed on the record of the appeal.) The opinion by IIT Delhi dated 18.3.2019 specifically concluded that components that require soldering are PCBA components and all other components that are only mechanically attached to the PCB without soldering are cell phone parts. The appellant also submitted that vide their reply to Show Cause Notice dated 22.01.2020 and the additional submissions dated 04.02.2020, it was conveyed to the Department that microphones which have

been imported by the appellant are to be soldered and pasted on PCBA. It was also explained in those replies and was also been demonstrated before the Investigating Authorities that without the impugned microphones being soldered to the PCBA, the later fails the sensitivity test. Further the department did not mention about the said report in the show cause notice. The copy thereof was also not given to the appellant. The suppression of such a vital opinion obtained by the Department itself reflects clear premeditated mind against the appellant. The Original Adjudicating Authority has totally disregarded the said opinion of a Competent authority holding the same to be irregular instead, has relied upon the some information collected from the internet. Confirmation of demand is therefore, alleged to be based on extraneous consideration and is beyond the scope of allegations raised in the show cause notice.

6. Learned Counsel has relied upon the decision in the case of **CC, Mumbai vs. Toyo Engineering,** reported as **[2006 (201) ELT 513 (SC)**] wherein it was held that Show Cause Notice is foundation of the case of Revenue Authorities and any adjudication order which confirms demand beyond allegations raised in Show Cause Notice, is unsustainable. The rejection on the ground that the availment of exemption notification at an belated stage is also not good in the eyes of law. It is submitted that substantial benefit of exemption Notification can be availed by the assessee at any stage of proceeding. Decision in the case of **Share Medical Care vs. Union of India,** reported as **[2007 (209) ELT 321 (SC)]** has been relied upon. It is submitted that otherwise also at the time of import of the impugned microphones, the entry No. 427 was very much in existence, clearly exempting all kinds of micro phones from payment of Customs duty. There is otherwise no dispute in the show cause notice as to the eligibility of benefit of exemption to the appellant under Notification No. 50/2017. Learned Counsel further

submitted that the General Rule of Interpretation has not reasonably been the examined by the Adjudicating Authority with the submission that where more than one benefit is available to the importer at the stage of import and even at the subsequent stage of adjudication, it is completely at the option of the importer to claim a more beneficial entry of exemption. The conduct of the department is alleged to be against the principles laid down by the Hon'ble Supreme Court in **Unichem Laboratories Ltd. vs CCE, Bombay** reported as [**2002 (145) ELT 502 (SC)].** Impressing upon that the exemption under entry at S.No. 6A of exemption notification No. 57 has rightly been availed by the appellant that the order under challenge is prayed to be set aside.

7. To rebut the submissions, learned Departmental Representative has mentioned that the appellant had short paid the duty while wrongly claiming the benefit of entry No. 6A of Notification No. 57/2017 and another Notification No. 50/2017 dated 30.6.2017. The imported microphone have intentionally been claimed to be the parts of the PCBA as are the subject matter of said entry No. 6A to avail wrong exemption. The explanation B of Notification No. 57/2017 defining the PCBA is impressed upon. It is mentioned that as per the said explanation, PCBA means printed circuit board assembled with electronic components such as resistors, capacitors, diodes, inductors, ICs and mechanical components such as contact springs or connectors or chargers or adapter of cellular mobile phones. Learned Departmental Representative impressed that the mobile phones are not mentioned to be part of the PCBA in the said definition. Hence, the benefit of entry No. 6A has wrongly been availed by the appellant.

8. It is further submitted that the benefit of duty exemption was available to the appellant under Notification No. 50/2017

dated 30.6.2017 at entry No. 427. But said benefit was not claimed by the appellant at the time of filing of the Bill of Entry but at a belated stage. The said benefit cannot be extended at a belated stage and hence, there is no infirmity in the order under challenge while arriving at this finding. The appellant has partly availed the benefit of 6A of Notification No. 57 since the microphones are not covered under the definition of PCBA. It is impressed upon that microphones infact are not the part of PCBA and are parts of cellular mobile phones. (A part is an essential component of the whole without which the whole cannot function. The installation of various components on a PCBA depends upon the final product for which said installation is being done, say for instance in the case of a modem, the PCBA does not need to be fitted with any microphone but it requires to be fitted with a communication module as it is an integral component for the functioning of the modem. Therefore, these components are different from the component which are used for the purpose as mentioned in of manufacturing the PCBA as mentioned in the Explanation (6)).

9. It is further impressed upon that From S. No. 18 of the parent notification No. 57/2017-Customs dated 30.06.2017 and S. No.7 & 18 of the further notification Nos. 22/2018 Customs dated 02.02.2018 and 37/2018 Customs dated 02.04.2018, legislature has made it clear that the microphone is part of cellular mobile phone and classifiable under CTH 8518. Also, it is very clear that no exemption is granted to microphone which is part of cellular mobile phone. The reliance of the adjudicating authority upon the General Rules of Interpretation has also been justified by learned Departmental Representative mentioning that as per Note 3 & 4 of the Section XVI, it becomes evident that classification of sub-parts will eventually be dependent upon the machine which performs the principal function. In the present case, microphones are serving the purpose of being put to further

use in those apparatus i.e. cellular mobile phones which have a specific principal function of receiving and transmission of communication.

10. Reliance has also been placed on letter No. 334/04/2018-TRU dated 01.02.2018 and 31.05.2019 vide which the duty on microphone for cellular mobile phone had been enhanced by insertion of notification No. 22/2018-Customs dated 02.02.2018. It is submitted that opinion from IIT dated 18.3.2019 cannot be considered because in the matters relating to classification of goods in Customs, the clarifications / guidelines contained in Section Notes / Chapter notes /explanatory notes have to be strictly abide by. In the light of these notes, there remains no room for any other interpretation than holding that impugned imported goods are Microphone for Cellular Mobile Phone which are not eligible for benefit of duty exemption. The order under challenge is justified by learned Departmental Representative and appeal therefore is prayed to be dismissed.

11. Having heard the rival contentions, perusing the entire record, it is observed and held as follows:

Following are observed to be the admitted facts on record:

1) The appellants have imported Microphone for Cellular Mobile Phone for the period 02.02.2018 to 06.07.2019, while claiming duty exemption benefit in terms of Entry No. 6A of Notification No. 57/2017 dated 30.06.2017 as amended by 06.07.2019;;
2) The benefit of duty exemption was also available to the appellant under Notification No.50/2017 dated 30.06.2017 as amended upto 10.4.2018.;
3) Technical expert opinion was called from Indian Institute of Technology, Delhi (IIT) who vide report dated 18.3.2019 has given the recommendations / the opinion, so as to

treat all components that require soldering on PCBA as PCBA components and all other components that are mechanically attached to PCBA without soldering as the cell phone parts.

12. We further observe that the demand in question has been confirmed on following two counts:-

1) Benefit of Notification No. 50/2017 though available, is not given because it was claimed by the appellant at a belated stage;
2) The microphones imported by the appellant are the Microphone for Cellular Mobile Phone and accordingly, are the goods covered under entry at S.No.18 of Notification No. 57/2017 dated 30.6.2017. As such, these goods are not available to the benefit of duty exemption.

13. From the above observations, the moot controversies for adjudication appears to us are as follows:

(i) "Whether the impugned goods imported by the appellants (microphones) are the goods which fall under entry at S.No. 6A or are the goods which fall under entry at S.No. 18 of Notification No. 57/2017 dated 30.6.2017?

(ii) Whether the benefit of entry No. 427 / list 20 in Notification No. 50/2017 dated 30.6.2017 is or is not available to the appellant? "

Issue No. (i)

To adjudicate the issue, it is foremost necessary to have a glance about both the entries.

Entry at S.No. 6A of Notification No. 57 /2017 reads as follows:

S.No.	Chapter or Heading or sub headings or tariff items	Description of goods	Standard rate	Condition No.
1	2	3	4	5
6A	Any Chapter	(a) Inputs or parts for use in manufacture of Printed Circuit Board Assembly (PCBA) of cellular mobile phones (b) Inputs or sub parts for use in manufacture of parts mentioned at (a) above	Nil Nil	1 1

Entry at S.No. 18 of Notification No. 57 /2017 reads as follows:

S.No.	Chapter or Heading or sub headings or tariff items	Description of goods	Standard rate	Condition No.
1	2	3	4	5
18	8518	All goods other than the following parts of cellular mobile phones, namely:- (i) Microphones (ii) Wired Headset (iii) Receiver	10% 10%	- -

These entry No. 6A covers such goods which are the parts of PCBA whereas Entry No. 18 covers those goods which are the parts of cellular mobile phones. No specific part of PCBA is specified in entry No. 6A whereas specific parts of Cellular Mobile Phone are entitled for benefit of exemption are mentioned in Entry No. 18. However, we observe that PCBA is defined under Explanation B of said Notification to mean-

> " printed circuit board assembled with electronic components such as resistors, capacitors, diodes, inductors, ICs and mechanical components such as contact springs or connectors of charger or adapter of cellular mobile phones."

14. Apparently mobile phones are not specifically mentioned as parts / components of PCBA. Without dwelling further into this

controversy of classification, the object of Notification No. 57/2017 is perused. It is observed that Notification was issued to exempt the goods of the description as specified in Column 3 of the table thereunder as are specified in the corresponding entry into column 2 of the said table when imported into India, from so much of duty of Customs leviable thereto in the said first schedule which is in excess of amount collected at the standard rate as specified in the corresponding entry in column 4 of the said table. Subject to any of the conditions as specified in the annexure to the said notification. Condition number 1 which is mentioned in the corresponding entry in column 5 of the said table is:.

> "With respect to the imported goods it is observed that nil rate of duty is applicable to such inputs or parts, as are used in manufacture of PCBA provided the importer follows the procedure set out in Customs Imports of Goods at Concessional Rate of Duty Rules, 2017."

15. As per entry No. 18 of the said Notification, 10% of duty has to be paid with respect to all goods except three parts of cellular mobile phones, viz., microphones of cellular mobile phones, wired Headset, Receiver of cellular mobile phones. The exemption is not subject to any conditions. There is nothing on record to show that what rate of duty shall apply to microphones of cellular mobile phones, wired Headset, Receiver of cellular mobile phones. However, it stands clear that duty at the rate of 10% as mentioned in entry at Sl. number 18 of Notification 57/2017 is not applicable to microphones of cellular mobile phones.

16. After perusing both these entries, in our opinion, the contention of the Department that entry number 18 of the said

Notification applies to the imported goods i.e., microphones is meaningless because even if the microphones are part of cellular mobiles the 10% duty as mentioned in entry No. 18, based whereupon the department has raised demand, is not applicable to microphones of cellular mobiles, these being excluded from duty liability in entry No. 18 itself.

17. We further observe that to still prove its stand, appellant has heavily relied upon report of Indian Institute of Technology, Delhi dated 18.03.2019. and the core recommendation therein. As mentioned above, it has been emphasized by the appellant that without the mobile soldered on PCBA, PCBA fails the sensitivity test. Same was demonstrated to investigating authority and was conveyed to the department by 7.1.2019 in reply to show cause notice dated 22.1.2020. Also it was clarified that microphone imported by the appellant since have to be soldered onto PCBA, those are the parts of such PCBA. We find that the expert opinion in this respect was sought by the department itself, it finds no mention in the entire Show Cause Notice.

18. The Adjudicating Authority ignored this technical opinion obtained during the course of investigation. Instead, he has relied on the information collected from the internet. The same definitely amount to extraneous consideration and reliance upon non admissible documents/ data. The expert report being departments' own documents is very much admissible in evidence. Perusal of the report shows that the impugned goods are the parts of PCBA. There is otherwise no evidence to record to prove that imported microphone are not the part of PCBA. No doubt, Explanation B of Notification No. 57/2017 does not specifically list microphones as one of the components of PCBA but PCBA is a printed circuit board which got assembled with electric components and in this case, the imported microphones

have to be soldered as to the PCB. There is sufficient evidence in its sensitivity report that unless microphones is soldered and pasted on the PCBA, the same was not functional. Otherwise also, use of word 'such as' in the Explanation B and use of word 'and mechanical components' while naming few electrical components, it becomes clear that components mentioned in the Explanation are merely indicative instead of being confined to four parts i.e. microphones, wired Headset, Receiver of cellular mobile phones and thus may include microphones also if those make the PCBA functional after being assembled with microphones. Thus, the impugned goods are eligible for duty exemption under entry No. 6A of Notification No. 57/2017.

19. We further observe that another Notification No. 50/2017 dated 30.6.2017, exempts microphones by Entry No. 427. It reads as follows:-

S.No.	Chapter or Heading or sub headings or tariff items	Description of goods	Standard rate	Condition No.
1	2	3	4	5
427	8485 or 90	The goods specified in List 20	Nil	-

"List 20 (See S. No. 427 of the Table)

1. Ferrite parts including memory cores and ferrite magnets
2. Switches with contact rating less than 5 amperes at voltage not exceeding 250 Volts AC or DC
3. Connectors
4. **Microphones /Microphone cartridges**
5. Relays of contact rating upto 7 amperes

6. Microwave passive parts

7. (i) Saw filters (ii) Ceramic filter/trap (iii) Delay lines (iv) CRT socket (v) Spark gap

8. Fibre optics and other optoelectronic parts and devices namely, Couplers, Attenuators, Connectors, Splicers, Multiplexers and Demultiplexers

9. Passive optical parts, namely, Microlens and splitters, Micropositioners, Optical filters and gratings and Phase plates

10. Special purpose optical fibres, namely, polarisation holding fibres, plastic fibres and large core fibres"

20. Thus all kinds of microphones irrespective of being the part of PCBA or being the part of cellular mobile phones, are subject to nil rate of duty. The Notification was applicable during the entire period in question, hence it becomes clear that even without dwelling into controversy about PCBA or cellular mobile phones, we observe that microphones are eligible to 100% exemption from the duty liability. The benefit of said notification in alternative was available to the appellant. No question of confirmation of duty demand otherwise at all arise.

21. The benefit of Entry No. 427 has been denied by the Adjudicating Authority below for the reason that the appellant had not claimed the said benefit and ignorance of law is not a ground to claim the benefit as that of exemption. However, Hon'ble Apex Court in the case of **Share Medical Care vs. Union of India** (supra) has held that where the appellant is entitled to benefit under two different Notifications, he can claim more benefit and it shall be the duty of the authorities to grant such benefit provided. Hon'ble Apex Court also clarifies that even if applicant does not claim benefit under a particular notification at initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage. Hon'ble Apex Court relied upon earlier decision in the case of **Unichem Laboratories Ltd. vs CCE, Bombay** (supra) wherein it has been held that if no time

is fixed for the purpose of getting benefit under the exemption Notification, it could be claimed at any time. It was impressed upon that if the notification applies, the benefit thereunder must be extended to the assessee. The opinion formed by the Authorities as well as Tribunal (in that case) that the assessee ought to have claimed the benefit of Notification at the time of filing of Classification list and not at a subsequent stage was set aside. The Authorities and Tribunal were held by Hon'ble Apex Court to be wrong while forming such an opinion. In another case of **Kerala State Cooperative Marketing Federation Ltd. & Ors. v. Commissioner of Income Tax,** reported as **[(1998) 5 SCC 48],** the following observations were made by Hon'ble Apex Court :-

> "We may notice that the provision is introduced with a view to encouraging and promoting growth of co-operative sector in *the economic life of the country and in pursuance of the declared policy of the Government. The correct way of reading the different heads of exemption enumerated in the section would be to treat each as a separate and distinct head of exemption. Whenever a question arises as to whether any particular category of an income of a co-operative society is exempt from tax what has to be seen is whether income fell within any of the several heads of exemption. If it fell within any one head of exemption, it would be free from tax notwithstanding that the conditions of another head of exemption are not satisfied and such income is not free from tax under that head of exemption. The expression "marketing" is an expression of wide import. It involves exchange functions such as buying and selling, physical functions such as storage, transportation, processing and other commercial activities such as standardisation, financing, marketing intelligence etc. Such activities can be carried on by an Apex Society rather than a primary society"*.

22. It was held that even the appellant does not claim the benefit under a particular Notification at the initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a

later stage. This Tribunal also at Mumbai Bench in the case of **Commissioner of Customs (ACC & IMPORT), Mumbai vs. Global Vectra Helicorp** reported as **[2013 (297) ELT 250]** has held that when exemption is available under two different headings and all conditions have been fulfilled, the benefit of exemption which are available to the assessee on the date of import, cannot be denied on the ground that the said benefit was not claimed at the appropriate time. In view of the above discussions, we hold that Commissioner (Appeals) has committed an error while declining the exemption benefit to the appellant despite that Notification No. 50/2017 was in existence on the date of impugned period. The benefit of said Notification has to be extended in favour of the appellant. Such benefit has wrongly been denied on the ground it being claimed belatedly. The order under challenge is not sustainable on this count.

23. Coming to the aspect of imposition of penalty, penalties can be imposed only in the case where there had been intentional malafide on the part of the assessee. The entire above discussion is sufficient enough to show that the appellant herein was entitled for duty exemption on imports of microphones under Notification No. 50/2017. The benefit of Notification No. 57/2017 is also held available to the appellant for want of no evidence to falsify the IIT report procured by the department. Notification No. 57 entitles the duty exemption to such microphones. Even entry No. 18 of said Notification prescribe 10% of duty as being imposed upon on such goods which are the part of cellular mobile phones except for microphones/ Wired Headset/ Receiver. That is, under entry No. 18 also, there was no duty liability upon the appellant even if the microphones imported by him are the parts of cellular mobile phones as is alleged by the department. It is not the case of the department that conditions of Notification have not been complied with by the appellant. It rather stands

clear from the notification, that no specific condition was to be complied with to avail the benefit of said Notification.

24. In view of above discussions, that there was no liability upon the appellant to pay any Customs duty while importing microphones during the relevant period. The question of non payment thereof that too with an intent to evade, does not at all arise. Penalties imposed under section 112 (b)(ii) read with section 117 of the Customs Act, 1962 does not at all arises. Thus the order under challenge fails to stand on both the counts. Accordingly, the same is hereby ordered to be set aside. Consequent there to, the appeal is allowed.

(Pronounced in the open court on 04.10.2022)

(P. VENKATA SUBBA RAO)
MEMBER(TECHNICAL)

(DR. RACHNA GUPTA)
MEMBER(JUDICIAL)

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