

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI**

Appeal No. C/174/2011

Arising out of Order-in-Original CAO No. CC/MJ/26/2010

ADJ ACC, Dated 24.12.2010

**Passed by Commissioner of Customs (Export), ACC,
Mumbai**

Date of Hearing: 18.12.2018

Date of Decision: 12.04.2019

**COMMISSIONER OF CUSTOMS (ACC & IMPORT)
AIR CARGO COMPLEX, SAHAR ANDHERI (EAST)
MUMBAI-400099**

Vs

**SAMSUNG INDIA ELECTRONICS PVT LTD
101-103, 1ST FLOOR, COPIA CORPORATE SUITES
PLOT NO.9, JASOLA DISTRICT CENTRE
NEW DELHI**

**Appellant Rep by: Ms Vinita Sekhar, Authorised
Representative**

Respondent Rep by: Shri Tushar Jarwal, Adv.

CORAM: S K Mohanty, Member (J)

Sanjiv Srivastava, Member (T)

Cus - The assessee had filed B/E for clearance of goods declared as "Samsung GSM Mobile Phone GT-P1000, Chic White IRSP ITMNU GT-P1000 CWA INU" - The goods were examined on 2nd Check basis and on examination the goods appeared to be personal computers rather than mobile phones - The goods were liable for classification under CTH 8471 as Automatic Data Processing Machine as against classification under 85171290 as claimed by

assessee - It is also well known that the "Tablet" is sold in the market for its capability to perform functions which are normally performed on Automatic Data Processing machine classifiable under heading 8471 - From the reading of Chapter Note 5(A) to Chapter 84, it is quite evident that the goods in question are nothing but an Automatic Data Processing Machine - Even Commissioner has recorded a finding that the imported item is an Automatic Data Processing Machine - The assessee asserted that by applying note 5(E), the imported item needs to be classified under heading 8517 - The said submission of respondents cannot be sustained because from plain reading of said Chapter Note, it is quite evident that it is in respect of machine which are capable of performing a specific function needs to be classified in heading appropriate to their respective function - If the item under importation was capable only for permitting the specific function of "mobile telephony", then in that case the same would have been classified under heading 8528 - But here the case even as per Commissioner is not of specific function but of predominant function - Telephony itself requires that instrument should have earpiece and mouthpiece for voice communication - The item imported do not have any mouth piece or earpiece - From the reviews of the product available on the net with respect to use of this item for telephony, court do not agree with the finding of Commissioner that pre-dominant function of the item imported is mobile telephony - Matter is remanded back to the adjudicating authority for fresh consideration of issue of classification - Since the matter is quite old, Commissioner should re-adjudicate the matter following the principles of natural justice within three months: CESTAT

Matter remanded

Case laws cited:

***Kantilal Nanchand & Co [2000 (123) ELT 311 (Bom)]...
Para 3.1***

Surcoat Paints (P) Ltd - 2008-TIOL-223-SC-CX... Para 4.3

***Priyanka Refineries Ltd - 2009-TIOL-2576-CESTAT-
BANG... Para 4.3***

***Ligare Aviation Ltd - 2018-TIOL-376-CESTAT-CHD... Para
4.3***

Paper Products Ltd - 2002-TIOL-84-SC-CX... Para 4.3

***Nakamichi Techo Pvt Ltd [2017 (333) ELT 216 (TDel)]...
Para 4.3***

***A B Mauri India Pvt Ltd [2010 (260) ELT424 (T-Mad)]...
Para 4.4***

Swaraj Mazda :td. {1995 (77) ELT 505 (SC)]... Para 4.4

***Ratan Melting & Wire Industries - 2008-TIOL-194-SC-CX-
CB... Para 5.15***

J K Laxmi Cements - 2016-TIOL-160-SC-CT... Para 5.16

FINAL ORDER NO. A/85727/2019

Per: Sanjiv Srivastava:

This appeal by revenue is directed against order in original CAO No CC/MJ/26/2010/ADJ/ACC dated 24.12.2010 of the Commissioner Customs (Import) Air Cargo Complex Mumbai. By the said order Commissioner held as follows:

'(a) The impugned device is not classifiable as an ADP machine and is to be classified as a mobile telephone under CTH 85171290. In the circumstances the proposal to confiscate the goods under section 111(m) of the Customs Act and imposing penalty under Section 112(a) are not sustainable.

(b) The labels required for complying with Notification No 44 (RE-2000)/1997=2002 dated the 24th November, 2000 issued by DGFT the importer has to affix it using labels which cannot be easily removed."

2.1 Respondent (Importer) had filed B/E No 838746 dated 29/11/2010 for clearance of the goods declared as "Samsung GSM Mobile Phone GT-P1000, Chic White IRSP ITMNU GT-P1000 CWA INU."

2.2 In the-

i. B/E in column relating to retail sale price details the description given is "Single Sim SAMSUNG GSM Mobile Phone" with retail sale price of Rs 38,000/- per piece.

ii. Commercial Invoice No 9002186815 dated 25/11/2010 description is given as "Mobile-GTP1000, Chic White, INU GT-P1000 CWA INU." Quantity declare is 400 pieces with unit price of Rs 18,551/- per piece.

iii. Airway Bill No KCT0640623 dated 26/11/2010 declares goods as "400 pcs of GT-P1000 CWA INU Mobile, GT-P1000, CHIC White, INU). Declared value of 400 pcs is Rs 74,20,400/-

2.3 The goods were examined on 2nd Check basis and on examination *"the goods appeared to be personal computers rather than mobile phones. The product has a 7" display screen. It can be used for communication, via email, voice and video etc. and can also be used for watching films, viewing pictures, e-reading, video conferencing, video telephony over 3G Tech etc. It appeared to function as personal computer as well as mobile phone."*

2.4 The goods were liable for classification under CTH 8471 as Automatic Data Processing Machine and liable to duty of 10% CVD+(2%+1%) Cess as against classification under 85171290 as claimed by the importers leviable to (2%+1%) Cess.

2.5 The imported device had dimensions of 19.01 cm X 12.04 cm X 1.12 cms (thickness) and has weight of 385 gms. It has got a CPU, Keyboard (touch screen) and display unit as well as size of screen to ensure comfortable reading.

2.6 The advertisements of the product also highlight the computer based functions of the device rather than voice telephony functions. For other applications where visual comfort is important viz reading newspaper, books, HD Video, magazine, stocks etc., a bigger screen is provided which has made it a heavier and bigger instrument.

2.7 Thus device was more appropriately described as Tablet PC rather than mobile telephone and it was brought and sold in trade both in domestic and international market as tablet PC rather than mobile phone. Hence in terms of Rule 4 of general Rules of Interpretation of Customs Tariff the imported device was more appropriately classifiable under heading No 8471 of Customs Tariff.

2.8 Commissioner gave an oral show cause notice to the importers asking them to show cause as to why-

(i) The 400 pcs of Samsung Galaxy Tab valued at Rs 74,94,604/- should not be held liable for confiscation in terms of Section 111(m) of the Customs Act, 1962.

(ii) Why the device should not be treated as a Tablet PC classifiable under CTH 84713090 and appropriate CVD of 10%, 1% and 2% C. Ex Cess should not be levied and collected on the impugned device covered under B/E No 838346 dated 29.11.2010.

(iii) Why penalty should not be imposed on M/s Samsung India Electronics Pvt Ltd under Section 112(a) and Section 114(AA) of the Customs Act, 1962.

2.9 after taking into account the contentions raised by the respondent, in their letter dated 08/12/2010 and during personal hearing on 20/12/2010, Commissioner adjudicated the matter as per order referred in para 1, supra.

2.10 On examination of the order Committee of Chief Commissioners for legality and propriety, Committee directed for filing the appeal before Tribunal. Thus this appeal.

3.1 In the appeal the order of Commissioner has been challenged on following ground-

i. Commissioner has in his order observed that the device was capable of performing functions like word processing, calculations using Excel Worksheet, Editing of Power Point Presentations etc., which are the functions normally executed on a personal Computer. Having so observed the Commissioner should have held the classified the device under heading no 8471 as the device fell within ambit of Chapter Note 5A(1) to Chapter 84.

ii. The device was not freely programmable as a new code could not be written by the user and executed on it. However it was noted by the adjudicating authority that using the operating system which was loaded on the device user could input his requirement from the various choices provided by the operating system. The tablet PC refers to any tablet size personal computer regardless of Operating System. Hence the device was freely programmable device as envisaged in Chapter Note 5A(ii) and hence merited classification under CTH 8471.

iii. The principal function of the imported device was not telephony. The item is designed and marketed and understood in trade as a Tablet Personal Computer only. It has CPU, Keyboard (Touch Screen) and Display Unit. The device has features for media consumption. The

advertisement, websites and reviews by experts all describe the imported item as Tablet Personal Computer and it is understood so in the trade parlance. Thus 84713090 was more appropriate classification for the said product.

iv. In terms of para 2 of the Board Circular **17/2007-Cus** "mobile, cellular handset / telephone has the essential characteristic of transmission and reception apparatus, such as aerial, display screen, keypad and that the same should be of small size so that it can be handheld and is of lightweight for use as telephone instrument. The other functions such as radio receivers, music players, e-mail, net browsers, calculators, stopwatch, alarm, computing on software platform are subsidiary to the main function of transceiver." The main point underscored in this para is that the Mobile Phone is a light weight device for easy handling and devices such as PDA are bulky devices suitable for the functions of a Personal Computer. The imported item is bulky device and not sleek or light weight as a Mobile Phone ought to be. The device cannot be held against the ear for attending the call as there is no provision for earpiece in the device. The Board Circular referred to by the Commissioner is in relation to smart phones which have advance features of a Personal Computer, GPS device etc. Imported devices are not smart phones and it falls under the generic category of tablet computers primarily designed for media consumption. Thus reliance placed by the Commissioner on the said Bora Circular is totally unfounded.

v. The main function of mobile phone is to make calls comfortably by holding the phone in palm and to receive calls by placing it near ear. In a bulky instrument like the imported one it is almost impossible to receive the calls by placing it close to ears. The instrument do not have a earpiece (essential part of any mobile phone). The only

way in which the call can be received is through hands free by placing the instrument on table or a similar support.

vi. When the trend in mobile phones is towards sleekness the claim of importer that imported goods are mobile phones is unacceptable.

vii. Bombay High Court has in case of *Kantilal Nanchand & Co [2000 (123) ELT 311 (Bom)]* held "It is now wellsettled by judicial decisions that when an expression is not defined in a Statute, the meaning to be given to it is the one which it has in popular or trade parlance." By application of trade parlance test the goods cannot be said to be mobile phone.

viii. Thus correct classification of the imported devices should be under heading 84713090 and not under 85171290 as held by the Commissioner.

4.1 We have heard Ms P Vinitha Sekhar Joint Commissioner Authorized Representative for the revenue (appellant) and Shri Tushar Jarwal, Advocate for the respondent.

4.2 Arguing for the revenue learned Authorized Representative reiterated the submissions made in the appeal memo, She also produced a cut out made of cardboard to emphasise on the size of the device imported and to demonstrate that the said device could not be held in hand conveniently for purpose of placing and receiving telephone calls. She submitted that i. The classification of any goods under the customs Tariff as per Rules of Interpretation of Tariff, need to be determined as per the terms of heading, relevant section and chapter notes.

ii. Relying on the Note 3 to Section XVI and Chapter Note 5(A) to Chapter 84, the imported item should be classified under CTH 84713090 as the devices satisfies all the four conditions laid down by the said chapter note.

iii. The main/ primary function of the device is the determinant of the classification. Since in the present case the primary function of the device is akin to that of Personal Computer the same will merit classification under the heading provided for the same. Also the device is understood and brought/ sold in market as PC Tablet and not as mobile phone.

iv. The issue with regards to classification of imported devices under consideration has been dealt in CBEC Circular No **20/2013-Cus**. The said Circular makes the distinction between the tablet computers a smart phones, and clarifies that tablet computers will be classified under heading 847130.

v. WCO HSC decisions on the subject also hold that these devices will merit classification under heading 847130.

4.3 Arguing for the respondents learned counsel submitted

i. Issue estoppel. The same very issue has been considered by the Commissioner Customs (Appeal) Delhi and he has vide his order in appeal dated 31.10.2011 adjudged the classification of the very same product as has been claimed by them. Revenue has not filed any appeal against the said order and the proceedings in respect of the case in Delhi have acquired finality. Since the issue has not been challenged in the case in Delhi, the revenue is barred to take contrary stand. {*Surcoat Paints (P) Ltd [2000 (232) ELT 4 (SC)*}, *Priyanka Refineries Ltd. [2010 (249) ELT 70 (T-Bang)]*, *Ligare Aviation Ltd [Final Order No A/62117/2017-CU(DB) dated 5.12.2017]*

ii. The classification claimed by the respondents is in accordance with the Board Circular No **17/2007-Cus** dated 19.04.2007. Said Circular is binding on the revenue as per the decision in case of *Paper Products Ltd [1999 (112) ELT 765 (SC)]*

iii. Chapter Note 5E to chapter Chapter 84 specifically provides that the Automatic Data Processing Machine and performing a specific function other than data processing (which is telephony) are to be classified in headings appropriate to respective function.

iv. Note 3 to Section XVI provides that machines of such nature are to be classified as per their principle function.

v. As per Note 5D(ii) to Chapter 84, since the product is for transmission and reception of voice, images, data etc., it would not be classifiable under heading 8471.

vi. Issue has been decided holding PC Tablets to be classifiable under heading 8517 in case of *Nakamichi Techo Pvt Ltd [2017 (333) ELT 216 (TDel)]*

4.4 In rejoinder learned Authorized Representative submitted

i. The argument advanced by the counsel for respondent that issue is now settled by the decision of Commissioner (Appeal) Delhi (OIA dated 4.11.2011) in their favour, and now revenue is estopped from taking challenging the said view in the present appeal as no appeal has been filed against the said order is not correct in view of various decisions holding that there is no estoppel in tax matter. {*A B Mauri India Pvt Ltd [2010 (260) ELT424 (T-Mad)] upheld by Apex Court at [2011 (271) ELT A35 (SC)], Swaraj Mazda :td. [1995 (77) ELT 505 (SC)]*.

ii. Commissioner (Appeal) was wrong in placing reliance on this order while passing his order as this order has not been accepted and is under challenge.

iii. Reliance placed by the counsel on circular No **17/2007-Cus** is not correct.

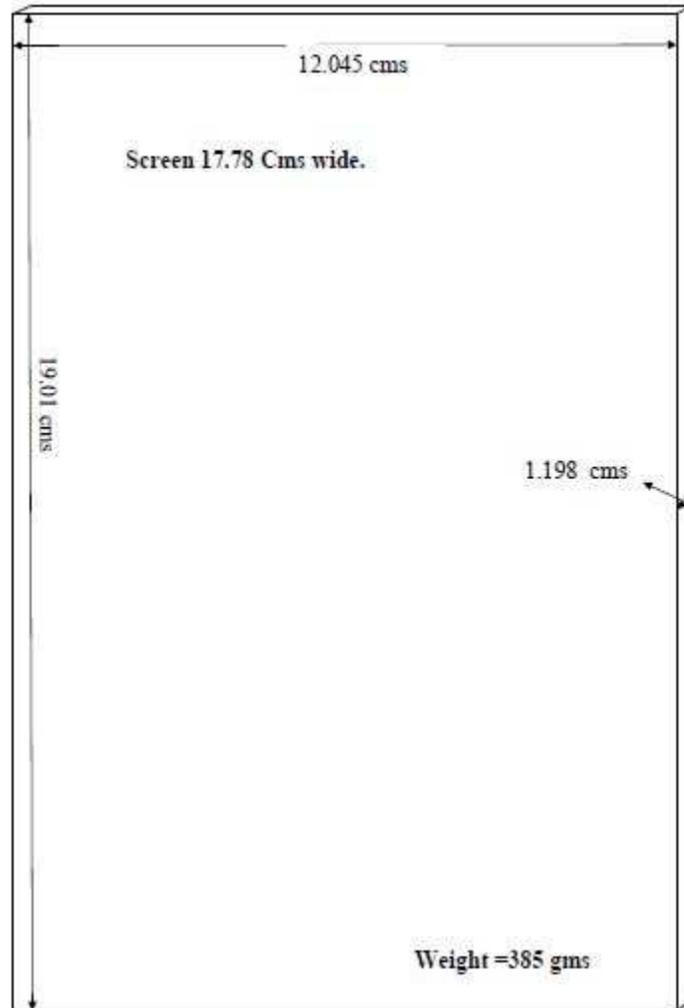
iv. Counsel has argues and admitted that they are now classifying the Samsung Galaxy Tab under 8471.

v. In case of Nakamichi relied by the counsel the main issue was on limitation and not classification.

vi. The facts of case of Hewlett Packard India relied upon by the Counsel are clearly distinguishable from the facts in this case and said decisions is not applicable.

5.1 We have considered the submissions made in the appeal and during the course of arguments.

5.2 The issue in the present case makes us reproduce the actual size picture of the item under importation, indicating the length, width and thickness of the same along with its weight. Just comparing the length and width with that of A4 size paper having standard dimension [27.94 cms X 21.59 cms] will give the idea of the size. On an A4 paper after leaving standard margins of 2.54 cms on each side normally the space available is about [22.86 cms X 16.51 cms]. Thus on the length the size is about 83% and on width about 75% of the working area of the A4 sized paper. The above comparison has been done to understand the size of the device under importation. Above comparison also shows that the size of the items is convenient for the purpose of reading as it compare quite well with normal reading paper size of A4. In fact most of the novels would be smaller in length and width then the size of imported item.



5.3 The comparison made above shows that the item imported, is more suited for the purpose of working/ reading rather than for the purpose of telephony, specifically as a mobile device. I am unable to make out how convenient it would be to use the device while holding the same against ear as a mobile telephone. Further the imported item admittedly is without an earpiece, which would make it impossible to use the same for conversation. Commissioner has in his order while discussing the features of the item under importation in para 17, 18, 19, 20 21 categorically recorded the findings as follows:

"17. This device does functions of a mobile telephone both of ordinary audio telephone and of video telephone. It also does functions of tablet Personal Computer similar to that of i-pad. The main functions of this product as seen in product literature are,-

(a) Video conferencing

(b) Navigation

(c) E-reading

(d) Browser

(e) Augmented reality

(f) Other

- On the Go

- In a meeting

- At home

- Working Remotely

Each of the above functions are primarily dependent on the service rendered through mobile network. Of course functions like e-reading can be done even when there is no connectivity if the books in the required format are downloaded on the device much the same way music is downloaded and stored in some of the mobile phones presently available in the market. It is also noted that the device does not have USB ports though it can take matter recorded in appropriate software on SD Micro cards.

18. The main reasons for suggesting classification of this product as an Automatic Data Processing Machine are the following:

(a) It does all functions of a Tablet Personal Computer

(b) It has a size of 19cm x 12.5cm and this is bigger than that of ordinary mobile telephone so far being used.

(c) The manufacturer is not advertising the product as a mobile phone but as a "Tab". The product literature nowhere mentions it to be a mobile phone.

19. The Wikipedia gives the following write up on Android software which is the Operating System for this device.

"Android is a mobile operating system initially developed by Android Inc. Android was purchased by Google in 2015. Android is based upon a modified version of the Linux Kernel. Google and other members of the Open Handset Alliance collaborated to develop and release Android to the world. The Android Open Source Project (AOSP) is tasked with the maintenance and further development of Android. Unit sales for Android OS smartphones ranked first among all smartphone OS handsets sold in the U.S. in the second and third quarters of 2010, with a third quarter market share of 43.6%." So the argument of the importer that Android software is used primarily in mobile telephony is found to be incorrect.

20. One main objection raised by the importer against classification under CTH 8471 is that it is not a freely programmable device as envisaged in Chapter note 5A(ii) of Chapter 84. I am not able to accept this argument. This device is not freely programmable in the sense that a new code cannot be written by the user and executed on it. However already Operating System which is a program is loaded on the device. Now using this Operating System the user can input his requirements from the various choices provided by the operating system and get the results that he desires. Android is an Open Source Program, that is to say the codes constituting the software is open to all to be modified, though such

modification cannot be done by a user who does not have knowledge of Linux codes. With the advent of more and more GUI based applications, computers are used with programs loaded on it for varying purposes not by executing codes on a command line. For example a computer may be used for editing of photos or simulating a surgery. For the functions for which the machine is prepared by the operating system and the application software loaded on it, the machine gives outputs based in input received. The era of each user writing codes on computer as in first or second generation computers no longer exists. I-Pad which are recognized as personal computer also is not programmable by an ordinary user to alter the functions offered by the built in Operating System.

21. This device can do functions like word processing, calculations using Excel worksheet, editing of power point presentation etc which is normally done on a personal computer. So it does some functions of a personal computer and functions of a mobile phone. So the issue of classification can be decided based only on the finding as to which is the predominant function."

5.4 Once having recorded so Commissioner relies on the Board Circular No **17/2007-Cus** and states that since the predominant function of the said item is that of mobile telephony this item is classifiable as Mobile Telephone under CTH 8517.

5.5 Para 2 of the said Circular reads as follows:

"2 It is represented that mobile, cellular, handset/ telephone has essential characteristic of transmission and reception apparatus, such as aerial, display screen, keyboard and that they should be of small size so that it can be hand held and light weight for use as telephone instrument. The other functions such as radio receivers, music players, e-mail, net browsers, calculators, stop

watch, alarm computing on software are subsidiary to the main function of transceiver."

5.6 Para 9 of the Circular reads as follows:

"9 In trade parlance too it is noticed that the goods are sold as cellular or mobile phones with various additional facilities the use of which is dependent on the cellular services provided. Further consumers purchase such cellular phones mainly because of their ability to transmit data in all situation and locations and at all times, not just in specified place that offer Wireless Wi-Fi access. In short, it is found that the goods are marketed and consumers purchase a smart phone or other similar cellular/ mobile phone because of the phone function with additional facilities and not for their PDA or GSM capabilities alone, as such these additional facilities will not become operational without subscribing to a cellular phone service plan. Hence it is clarified that these instruments are to be categorized as mobile/ cellular phones from the point of trade parlance."

5.7 Commissioner has in para 26 and 27 of his order after examination of the size of the imported item and the product literature recorded as follows:

"26 I note that though the size of the device is bigger than that of common mobile phones, the device is suitable for being held in one palm and operated upon by the other hand. The size is not critical enough to decide the classification of the product.

27. It is seen that the product literature or advertisements for the product do not describe the product as a mobile phone. Neither do these documents describe it as personal computer. They use the term "Tab". They call the use of device as "Tabbing". The term "Tab" is nearer to Tablet Personal Computer, commonly referred as "Tab", already known in the market than to mobile phone. At the same time their advertisement talks of their partnership with

Aircel, Docomo, Reliance Mobile and Vodafone in the matter of giving promotional offers. The tribunal in its decisions Blue Star Ltd vs UOI 1980 (6) ELT 280 and Hindustan Lever Ltd Vs CCE 2001 (121) ELT 451 (T) has observed that a way product is advertized should not be reason for deciding its classification but the functions of the product should be reason for its classification. On the other hand there are decisions like:-

(i) M B Impex Vs CC 1990 (49) ELT 213

(ii) United Copiex (India) Pvt Ltd Vs CC 1997 (14) ELT 28 which emphasize on trade parlance in the matter of deciding classification. But trade parlance can be relied upon only when other means for resolving the dispute in meaning of tariff Entries do not succeed. In this case the matter can be decided by the fact the predominant use of this device is as a mobile phone."

5.8 The findings recorded in para 26 of the impugned order are contrary to the circular 17/2007-Cus relied upon by the Commissioner for determining the classification. If the Commissioner has concluded that the size of the item imported was bigger than the instruments used for mobile telephony, then he should have in view of para 2.0 of the aid Circular, not apply the same for determination of classification. Para 2 of the said circular makes it very clear that the items under consideration in that Circular were of small size and were used for mobile telephony.

5.9 The findings recorded in para 27 are contradictory to para 9 of the said Circular. Further the findings recorded are also not in consonance with the decisions relied upon by the him to state that the trade parlance should not be basis for determination of classification. In the case of Hindustan Lever, Member Technical has in his consenting order considered the scope of advertisement/ trade parlance meaning etc and recorded as follows:

"23. The Supreme Court in laying down the law as to classification of goods under the Tariff has consistently held that the commercial nomenclature or trade understanding should be the basis of classification except when the statutory content, in the Tariff Entries requires a departure. In paragraph 53 of the judgment in the case of Akbar Badruddin Jiwani v. CC [1990 (47) E.L.T. 161 (S.C.)] the Court held "it is well settled that in Taxing Statute the words used are to be understood in the common parlance or commercial parlance where the word in the Tariff Entry has not been used in a scientific or technical sense....." In their judgment in the case of Metagraphs Pvt. Ltd. [1996 (88) E.L.T. 630 (S.C.)] the Supreme Court held that trade parlance/common parlance of a particular product was the material factor in arriving at the classification. The same view was held by the Supreme Court in their judgment in the case of Chemical and Fibres of India Ltd v. UOI [1997 (89) E.L.T. 633 (S.C.)].

24. The word "soap" as is commercially understood or is appreciated by an individual means a product which lathers, in the process cleansing the body of a person (or a fabric in the case of laundry cloth) of grime and dirt. This was the appreciation of the people used as samples in the test conducted referred to above. In a departmental store like Apna Bazaar, Dove is found nestling on the same shelf with other soaps."

5.10 Thus in our view the findings recorded by the Commissioner for ignoring the size of the item imported and trade parlance/ understanding of the same cannot be sustained. The applicability of the circular relied upon by the Commissioner has to be determined after taking into account the size/ dimensions of the imported item and also the trade/ parlance understanding of the same.

5.11 Interestingly Commissioner has in para 22 reproduced the para 7 of the Circular and has in para 23 observed, "23 The impugned device satisfies all the conditions specified in this paragraph. The main feature of this device which is not mentioned in the circular is video telephony. This function is more akin to telephony than to that of personal computer. Other features like e-reading is nothing very new because word processing capability is already discussed in the circular. The facility of Navigation is already dealt with as GPS. It is to be noted that most of these functions are delivered through reception of radio signals reserved for mobile telephony. The device is hardly of any use without receiving such signals. So in fact this device is hardly anything more than a smart phone. It is just that it is called by a different name namely "Tab". " This paragraph records the entire finding of Commissioner for holding that mobile telephony is predominant function of the imported item, in para 25. Para 25 of Commissioner's order is reproduced below:

"25 This is composite machine consisting of ADP and mobile phone. So one has to decide whether mobile telephony is principal function or ADP function. This machine will be bought by anybody primarily for communication needs, for the services the device can provide using the radio signals it receives. With the advent of 3G services in the country the range of such services is bound to increase, it is this new market need for such services based on 3G transmission that this device is designed to serve. So I conclude that the principal function of this device is that of mobile telephony."

5.12 In our view the order of Commissioner has been passed without application of mind. In the entire order he goes on rejecting the contentions raised by the respondents for claiming classification under CTH 8517 but finally decides the classification as claimed by them.

He has failed to consider the manner in which the respondents have positioned themselves in the market vis a vis the imported item. In their own literature, they describe the products stating "Tablet with support for GSM voice communication, SMS and MMS". Thus respondents have entered the market describing the product as Tablet with support for GSM voice Communication. In our view this is enough to hold that voice communication is secondary function to the Tablet functions. When the respondents themselves hold that Tablet function is predominant, any finding rendered by the Commissioner to the contrary cannot survive.

5.13. It is also well known that the "Tablet" is sold in the market for its capability to perform functions which are normally performed on Automatic Data Processing machine classifiable under heading 8471. Before we proceed further it is necessary to reproduce the description of two headings in dispute:

8471 Automatic Data Processing Machines and Units Thereof; Magnetic or Optical Reader, Machines for transcribing Data on to Data Media in Coded Form and Machines for processing such data, not elsewhere specified or included.

8517 Telephone Sets, Including telephones for Cellular Networks or for other Wireless Network other Apparatus for the Transmission or Reception of Voice, Images or Other Data, Including Apparatus for Communication in Wired Or Wireless Network (such as local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528.

Chapter Note 5 to Chapter 84, reads as follows:

"5.(A) For the purposes of heading 8471, the expression "automatic data processing machine" means machine capable of:

(i) storing the processing programme or programmes and at least the data immediately necessary for the execution of the programme;

(ii) being freely programmed in accordance with the requirements of the user;

(iii) performing arithmetical computations specified by the user;

(iv) executing, without human intervention, a processing programme which requires them to modify their execution, by logical decision during the processing run.

(B) Automatic data processing machines may be in the form of systems consisting of a variable number of separate units.

(C)

(D)

(E) Machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function other than data processing are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings"

From the reading of Chapter Note 5(A) to Chapter 84, it is quite evident that the goods in question are nothing but an Automatic Data Processing Machine. Even Commissioner has recorded a finding that the imported item is an Automatic Data Processing Machine. Respondents have in their submissions asserted that by applying note 5(E), the imported item needs to be classified under heading 8517. The said submission of the respondents cannot be sustained because from plain reading of the aid Chapter Note, it is quite evident that it is in respect of machine which are capable of performing a specific function needs to be classified in the heading appropriate to their respective function. If the item under importation was

capable only for permitting the specific function of "mobile telephony", then in that case the same would have been classified under heading 8528. But here the case even as per Commissioner is not of specific function but of predominant function. Telephony itself requires that instrument should have earpiece and mouthpiece for voice communication. The item imported do not have any mouth piece or earpiece. From the reviews of the product available on the net [https://www.gsmarena.com/samsung_p1000_galaxy_tab-review-527p4.php] with respect to use of this item for telephony, reproduced below, we do not agree with the finding of the Commissioner that pre-dominant function of the item imported is mobile telephony.

"Introduction

Not so long ago the tablet was a futureless species, stuck in an evolutionary dead-end. The technology and the operating systems didn't offer the right balance of portability and usability to suit its needs. But just look at it now...

It was the Apple iPad that made the first splash and many other tablets are on their way on following its steps. We guess Samsung's had an easier job than Apple bringing it to market. They already had the Samsung Galaxy S in the works and just had to make it bigger. Plus, they didn't need to go to great lengths explaining what a tablet is and what it does.

If nothing else, the Galaxy Tab makes the S in Galaxy S meaningful. But the Tab itself is not size XL. In a nutshell, the new Samsung tablet is a Galaxy S with 3 inches added to the screen and 2 megapixels taken away from the camera. The Tab is equipped with the same 1GHz Hummingbird processor and PowerVR SGX540 graphics accelerator, 512MB RAM, a complete connectivity set and

16GB internal storage. The whole thing's running on Android's latest – v2.2 Froyo.

Telephony is all there

And here we come to one of the more interesting aspects of the Samsung Galaxy Tab. With the handset supporting voice and video-calling, it could in theory replace your phone all together. Now we don't know how practical it is to have a 7" device as your primary phone but if you decide to go for it, the software is all there to support you.

You can talk by using the loudspeaker or you can go for a pair of headphones and again use the microphone on the device itself. The more sensible approach will be to use a handsfree (wired or Bluetooth) as you won't need to go shouting at the device from a distance.

The only thing you can't do is pretend you are Gulliver in Brobdingnag and hold the Tab next to your ear. Technically, you can do that too, but there is no earpiece and the loudspeaker might hurt your ears, so it's not generally recommended.

As far as reception is concerned, we experienced no issues or in-call voice quality drops.

On the software side of things the Galaxy Tab starts strong with Smart Dial. As good as on the company's dedicated smartphones it searches both contact numbers and names.

The available options during a call include hold, add another call (create conference call), mute and, of course, end call. The keypad is visible at all times, which is convenient for those interactive call handling systems and in case you need to write down a number.

We also ran our traditional loudspeaker test on the Galaxy Tab. The big guy was rather quiet ending with a

Below Average score. Missed calls are likely in noisier environments with this one. What is more worrying is that you'll probably have hard time using it for consuming multimedia content.

<i>Speakerphone test</i>	<i>Voic e, dB</i>	<i>Pink noise /Music, dB</i>	<i>Ringing phone, dB</i>	<i>Overall score</i>
<i>Samsung I9000 Galaxy S</i>	<i>66.6</i>	<i>65.9</i>	<i>66.6</i>	<i>Below average</i>
<i>Samsung P1000 Galaxy Tab</i>	<i>66.7</i>	<i>64.6</i>	<i>68.6</i>	<i>Below average</i>
<i>Google Nexus One</i>	<i>69.9</i>	<i>66.6</i>	<i>79.1</i>	<i>Good</i>
<i>Apple iPad</i>	<i>66.5</i>	<i>65.8</i>	<i>69.7</i>	<i>Average</i>
<i>HTC Legend</i>	<i>78.0</i>	<i>74.3</i>	<i>79.7</i>	<i>Excellent</i>

5.14 CBEC has vide its circular No **17/2007-Cus para 7 clarified as under:**

"7. Certain cellular/ mobile phones called as 'smart phones' may also have other additional features such as accessing the Internet, sending and receiving E-mails, video recording/camera, word processing, radio or audio capabilities with color screens, QWERTY keyboard, touch screen. It may also run application software and synchronize with PCs, function as Global Positioning System (GPS) receiver. These devices work on operating systems (software) like Symbian OS, Microsoft Windows Mobile OS, Linux OS, which are similar to the software used in desktop PC / laptop. All these functionalities grouped as PDA or pocket PC or camera or GPS receiver, contained in cellular/ mobile phones, though represent as composite machine, for the purpose of classification, it will be governed by the Customs Tariff Act and the General Rules for Interpretation (GRI) as explained in

para 4 above. Accordingly, in terms of Section Note 3 to Section Note XVI when the goods satisfy the following conditions these would be characterized as transmission apparatus in cellular / wireless network rather than as an Automatic Data Processing (ADP) machine or camera or GPS receiver.

(i) use transmission of signals (representing speech, messages, data or pictures) by means of electro-magnetic waves which are transmitted through the ether without any line connection i.e., wireless, in any of the bandwidth allotted to mobile/cellular networks say 850 MHz to 1900 MHz; and

(ii) consist of transmission and reception hardware such as transceivers, antenna, microphone, speaker, battery, radio-frequency chip, basic band chip, power management chip, Subscriber Identity Module (SIM), International Mobile Equipment Identity (IMEI) or other unique identity for cellular/mobile phone as well as radio-frequency transmission software such as GSM, General Packet Radio Service (GPRS) and Enhanced Data rates for GSM Evolution (EDGE) etc.,

Hence, such cellular/ mobile phones remain classified in sub-heading 8517 12, as the principal function of these equipments remain as 'telephony'."

In our view said para of the Circular cannot be read in isolation, ignoring all the paras in the Circular. The applicability of Circular has to be determined taking into account all the paras of the Circular and not by picking and choosing a particular para. Commissioner has sought to ignore the context as stated in para 2 and 8 of the said circular. Further from the reading of para 7, itself it is very clear that this para clarifies with regards to "cellular/mobile phones called as 'smart phones'". This para of Circular, no where clarifies that the product which is positioned in market as "Tab", shall become a smart

phone for the purpose of classification. In our view para 7 needs to be read in conjunction with para 2 and 8 and by doing so we are afraid that the conclusion arrived by the Commissioner cannot be sustained.

5.15 Hon'ble Apex Court has in case of *Ratan Melting & Wire Industries [2008 (231) ELT 22 (SC)]* has stated "6. *Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.*" Thus any interpretation of circular which is contrary to the law as declared by the Supreme Court/ High Court or statutory provisions has really no existence in law. In our view the interpretation made by the Commissioner ignoring the trade parlance etc., and by relying only on para 7 of circular cannot be sustained, as it is contrary to the law stated by the Apex Court, in various decisions referred in para 5.8.

5.16 Respondents have during the course of arguments relied upon the decision of the Commissioner Customs (Appeal) Delhi, [Order in Appeal No CC (A) Cus/I & G/213/2011 dated 31.10.2011, and stated that in their own case Commissioner (Appeal), Delhi has held that the item imported by them is correctly classifiable under CTH 8517.

He stressed that in view of the fact that the said order of Commissioner (Appeal) has not be appealed against and has become final. In view of this fact he contends that principle of issue estoppel shall bar revenue from taking a contrary stand in this appeal. For making this preposition he relied upon the decisions in following cases:

i. CCE vs Surcoat Paints (P) Ltd. [2008 (232) ELT 4 (SC)]

ii. CCE vs Priyanka Refineries Ltd. {2010 (249) ELT 70 (T-Bang)}

iii. Ligare Aviation Ltd vs CC Amritsar [Final Order No A/62117/2017-CU[DB]}

The submissions made by the counsel in this regards need to be examined in light of the observations made by the Commissioner (Appeal) Delhi para 14 of his order stating "14. Furthermore, it is seen that identical issue has been addressed and settled in Mumbai Sahara Air Customs vide order No CC/MJ/26/10 issued from S/3-

Gen/933/2010/5AACC dated 24.12.2010." Thus

Commissioner (Appeal) has while passing the order in appeal noticed the impugned order before us but the fact he has failed to take note of was that the impugned order has not been accepted by the revenue and appeal was filed prior to his passing the order. In case of Surcoat Paints Hon'ble Apex Court has held as follows:

"10. The Tribunal has reversed the order passed by the Commissioner of Central Excise, Allahabad, primarily relying upon the earlier decision of the Tribunal in CCE v. Agra Leather Goods Pvt. Ltd. [2000 (39) RLT 674 (T)]. Admittedly, against the aforesaid order no appeal was filed by the Revenue. In Agra Leather Goods case (supra), the Tribunal held as under :-

"....."

11. Since the Revenue has accepted the decision given by the Tribunal in Agra Leather Goods case (supra), the Revenue is precluded from challenging the similar order passed in respect of another Unit. Since the order passed in Agra Leather Goods case (supra) has attained finality, the present appeal deserves to be dismissed on this ground alone and accordingly we dismiss this appeal. No costs."

From the above it is quite evident that in the case before the Apex Court, tribunal has while setting aside the order relied upon its own order passed on the same issue in case of some other assessee. Since the said order was not challenged by the revenue in appeal, Hon'ble Apex Court stated that the said order passed in earlier case was a binding precedent and the appeal filed by revenue subsequent order without challenging the earlier order cannot sustain. As pointed out, the facts in the present case are not identical to the extent that Commissioner Air Cargo Mumbai has not passed order relying on the decision of the Commissioner (Appeal) which has not been appealed against. On the contrary Commissioner (Appeal) has referred to the impugned order which has been appealed against. The appeal against impugned order has been filed when the Commissioner (Appeal) order was not there. Hence we do not find any merits in this submission of the Counsel.

5.17 Hon'ble Apex Court has constantly held that there is no estoppel in the matters of revenue. In case of *J K Laxmi Cements {2018 (14) GSTL 497 (SC)}* "25. *The understanding by the assessee and the Revenue, in the obtaining factual matrix, has its own limitation. It is because the principle of res judicata would have no application in spite of the understanding by the assessee and the Revenue, for the circular dated 15-4-1994, is not to the specific effect as suggested and, further notification dated 7-3-1994 was valid between 1st April, 1994 up to*

31st March, 1997 (upto 31st March, 1997 vide notification dated 12-3-1997) and not thereafter. The Commercial Tax Department, by a circular, could have extended the benefit under a notification and, therefore, principle of estoppel would apply, though there are authorities which opine that a circular could not have altered and restricted the notification to the detriment of the assessee. Circulars issued under tax enactments can tone down the rigour of law, for an authority which wields power for its own advantage is given right to forego advantage when required and considered necessary. This power to issue circulars is for just, proper and efficient management of the work and in public interest. It is a beneficial power for proper administration of fiscal law, so that undue hardship may not be caused. Circulars are binding on the authorities administering the enactment but cannot alter the provision of the enactment, etc. to the detriment of the assessee. Needless to emphasise that a circular should not be adverse and cause prejudice to the assessee. [See : UCO Bank, Calcutta v. Commissioner of Income Tax, West Bengal - (1999) 4 SCC 599 = 1999 (111) E.L.T. 673 (S.C.)].

26. In Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries - (2008) 13 SCC 1 = 2008 (12) S.T.R. 416 (S.C.) = 2008 (231) E.L.T. 22 (S.C.) , it has been held that circulars and instructions issued by the Board are binding on the authorities under respective statute, but when this Court or High Court lays down a principle, it would be appropriate for the Court to direct that the circular should not be given effect to, for the circulars are not binding on the Court. In the case at hand, once circular dated 15-4-1994 stands withdrawn vide circular dated 16-4-2001, the appellant-assessee cannot claim the benefit of the withdrawn circular."

5.18 Thus in light of discussions as above we find ourselves not in agreement with the order of Commissioner and set

aside the same and matter is remanded back to the adjudicating authority for fresh consideration of issue of classification and all the other associated issues in light of the observations made in this order.

6.0 In result the Appeal filed by the revenue is allowed and matter remanded back to the adjudicating authority as stated in para 5.18. Since the matter is quite old Commissioner should re-adjudicate the matter following the principles of natural justice within three months from the date of receipt of this order.

(Order pronounced in the open court on 12.04.2019)