

## CIRCULAR NO 15/2011 - Customs

Dated : March 18, 2011

Subject: **Applicability of indirect taxes on packaged software** - regarding

Representations have been received from some industry association on behalf of software dealers about difficulties being expressed in the assessment to customs duty of documents of title for IT software or documents that enable the transfer of the right to use such software at the time of its sale. It has been reported that there are frequent imports of such documents without any accompanying software. Such packages do not contain software but consist of paper licenses or PUK (Personal Unlocking Key, usually in the form of a scratch card of paper board or plastic) that are used to convey the right to use such IT software. The software in these cases could be freely downloadable or loaded by the OEM supplier under an arrangement with the software company as pre-loaded trial version of software on the computer system requiring the customer to purchase license or PUK after the trial period. Typically these licenses are used either to authorize additional uses against a sale of IT software that has already taken place in the past or to service transactions where the connected software is downloaded electronically by the customer. It has been pointed out that some of the field formations are insisting on the classification of such documents, even when imported without the packaged software, under CTH 8523 i.e. the heading applicable to IT software. It has also been represented that in certain cases the entire value of the license representing the right to use such IT software is sought to be loaded to the value of past imports of IT software by the importer.

2. The issue has been examined. According to Rule 1 of the Rules for the interpretation of the Tariff Schedule, classification is to be determined according to the terms of the heading and any relative Section or Chapter Notes. Heading No. 85.23 refers to "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." Tariff item 85238020 of this heading covers "Information Technology software." The supplementary note to Chapter 85 defines "Information Technology Software" to mean any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine. It is evident that document conveying the right to use software by themselves do not satisfy this definition and therefore do not qualify for classification under this tariff item because they do not contain any representation of instructions, data, sound or image recorded in a machine readable form, which is capable of being manipulated or providing interactivity to a user. On the other hand, tariff item 49070030 of heading 4907 refers directly to "Documents of title conveying the right to use Information Technology software". Hence as per the said Rule 1 mentioned above, such paper licenses which are essentially documents conveying the right to use such IT software, merit classification under CTH 49070030. PUK cards on the other hand are not documents of title conveying the right to use Information Technology

software per se but are actually printed matter containing numbers which when entered, enable the importer to access right to use such IT software. Hence they are liable to be classified under CTH 4911 as "other printed matter".

3. It is, therefore, clarified that paper licenses or PUKs merit classification as per their individual character under heading 4907 in case of paper license and heading 4911 in case of PUK card, the same being other printed matter.

4. In the context of assessment of pre-packaged software imports, kind attention is also drawn to Notification No 30/2010- Central Excise (N.T.) dated 21st December, 2010 by which all such packaged software or canned software were brought under the purview of assessment based on retail sale price, as also Notification No.25/2011-Cus, dated 01-03-11 and Notification No.14/2011-CE, dated 01-03-11, whereby in case of such packaged software which does not require affixation of Retail Sale Price (RSP), exemption has been provided, from payment of Excise duty/ CVD, on the portion of value representing consideration for transfer of right to use such packaged/ canned software. These exemptions have been issued in order to rule out taxation of this portion of the value twice-once as Excise duty/Additional duty of Customs and another time as Service Tax on the consideration that all package software is not sold as shrink wrapped software and that affixation of retail sale price is not required for certain categories viz. (i) software on optical media supplied free of charge, for which right to use or license is purchased separately; (ii) full pack -packaged software with limited validity, not for resale and generally imported for demonstrations or for OEMs;(iii) up-grade full pack-packaged software- supplied free of charge under annual maintenance/subscription/software assurance contract; and (iv) up-dates for packaged software- supplied free of charge under annual maintenance/subscription/software assurance contract etc.

5. Accordingly, all packaged/ canned software imported in shrink wrapped packages, will attract Excise duty/CVD on such retail sale price declared being the combined value of the software and the licenses (right to use). Such software will, however, be exempt from payment of service tax under the category ITSS (as provided in Notification No. 53/2010-ST dated 21st December 2010). On the other hand, such packaged/ canned software, on which affixation of retail sale price is not required under the relevant provisions for the packaged commodities, and the assessment is based therefore, on the value determined under section 4 of the central excise act, 1944, the excise duty/ CVD will be charged only on the value, excluding the value representing consideration for transfer of right to use such packaged/ canned software. However, service tax under the category ITSS would be levied on such portion subsequently.

6. All pending assessments of software, paper licenses and PUK cards may be finalized accordingly. These instructions may also be brought to the knowledge of the field formations and the trade. Any difficulty faced in implementation of these instructions may be brought to the attention of the Board.

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