

**AUTHORITY FOR ADVANCE RULINGS**  
**(Central Excise, Customs and Service Tax)**  
**Hotel Samrat, 4<sup>th</sup> Floor, Kautilya Marg, Chanakyapuri**  
**New Delhi**

**Present:**  
**Justice V.S. Sirpurkar (Chairman)**  
**Shri S.S.Rana (Member)**  
**Shri R.S.Shukla (Member)**

The 15th day of July, 2016

Ruling No. AAR/44/CE/ 18 /2016  
In  
Application No. AAR/44/CE/24/2015

Name & address of the applicant	:	M/s. Nucleus Software Exports Ltd, New Delhi
Commissioner concerned	:	Commissioner of Central Excise Noida-1,C-56/42, Renu Tower, Sector-62 Noida-201307
Present for the applicant	:	Shri B.L.Narasimhan, Advocate
Present for the Department	:	Shri Amresh Jain, Authorised Representative (AR)

**RULING**

M/s Nucleus Software Exports Limited (hereinafter also referred to as applicant) is a Public Limited Company resident in India. Applicant proposes to import a hardware product called the Nucleus Device manufactured by a Chinese entity. Applicant proposes to undertake the activity of loading of business software on said Nucleus Device. Nucleus Device is classifiable under Tariff Entry 85176290 of the First Schedule to the Central Excise Tariff Act, 1985 as *Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: other*. The Nucleus Device would serve as a cashless currency transmitting apparatus.

2. These Nucleus Devices would be imported into India from a vendor in China. Prior to import of the Nucleus Devices, the Chinese entity would embed the basic input output system onto the Nucleus Devices enabling it to perform primary functions such as processing of input commands and display of data. The purpose of the basic input output system includes the following:-

- a) Enable processing of input commands;
- b) Display the output on the LCD and
- c) Download the business software on the Nucleus Device.

Upon import into India, the Nucleus Devices would be loaded with the business software developed by the applicant before they are sold in the domestic market. The Nucleus Device has connector pins that can be used for downloading software and charging the battery. The business software and data would be loaded into the device using the Software Download, Battery Charger Adapter. Under this procedure, the business software and data would be downloaded into the Flash memory of the Nucleus Device. The Personal Computer (PC) sends the commands to download the software to the Nucleus Device via the USB cable. Before the downloading process, the Nucleus Device needs to be connected to the PC via the Software Download, Battery Charger Adapter.

3. The steps involved in the downloading process are as given below:

Step 1: The download process starts once the personal computer sends the “Initialize Command” to the Nucleus Device on the USB interface. The Nucleus Device responds with the “OK Response”.

Step 2: The personal computer sends the “Start Download” command to the Nucleus Device. This indicates to the Nucleus Device that the software download is about to begin and the Nucleus Device prepares itself for the software download by entering the Programming mode. It sends an “OK Response” once it is ready to receive the software.

Step 3: The personal computer starts sending the Business Software and Data. The Nucleus Device receives the Business Software and Data and programs it into the Flash memory present in the Nucleus Device. Once the complete Business Software and Data is downloaded, the Nucleus Device sends the “Ok Response”.

Step 4: This is the last step that indicates to the Nucleus Device that it can exit the programme mode. This is done by sending the “End Download Command”. The Nucleus Device responds by sending the “Ok Response”.

4. Applicant has sought ruling on the following question:

*Whether the activity of loading of business software in the Nucleus Device by the applicant constitutes manufacture under the Central Excise Law?*

5. Revenue inter-alia submits that software would provide the most essential and basic characteristics of the Nucleus Device and form its integral part, without which device would not function as a cashless currency transmitting apparatus and loading of

software involve process of manufacture; that Nucleus Device and software are different and distinct goods under the Central Excise Act having been classified differently; that loading of software converts the hardware manufactured into functioning Nucleus Device and this process amounts to manufacture. Revenue relying on the order of Tribunal in case of NCR Corporation India Pvt. Ltd. vs. Commissioner of Central Excise, Pondicherry 2010 (251) ELT 380 (Tri-Chennai) submits that loading of software on the Nucleus Device would amount to manufacture since the device could not function without it and cost of software would be part of the final cost of the Nucleus Device.

6. It is noticed that said Tribunal order relied upon by the Revenue is an interim order and is regarding pre-deposit of dues ordered by the Adjudicating Authority. Further, as rightly pointed out by applicant, submission of Revenue that loading of software on the Nucleus Device would amount to manufacture since device would not function without it, is factually not correct. Applicant has clearly mentioned in the application that the Nucleus Device, prior to import would be embedded with basic input output system, enabling it to perform primary functions, such as processing of input commands and display of data. Further, it is Bluetooth enabled whereby it can connect with other authorized devices and the NFC (Near Field Communication) – for providing security and proximity functionality, can store information and transfer the information to another device. Thus, we agree with the applicant that the Nucleus Devices, as imported, are not incomplete or unfinished articles.

7. It is observed that as per Section 2(f) of the Central Excise Act, 1944, the term 'manufacture' is defined as under;

## *2. Definitions*

*In this Act, unless there is anything repugnant in the subject or context:-*

*(f) "manufacture" includes any process, -*

- i. incidental or ancillary to the completion of a manufactured product; and*
- ii. Which is specified in relation to any goods in the Section or Chapter Notes of the Schedule I to the Central Excise Tariff Act, 1985 as amounting to manufacture; or*
- iii. Which in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labeling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer.*

8. Applicant submits that Nucleus Device is a complete manufactured product, when imported. Loading of software only enhances the utility of Nucleus Device, hence, loading of software cannot be said to be incidental or ancillary to completion of

manufactured product as envisaged under Section 2 (f) (i) of the Central Excise Act, 1944. Further, under Section 2 (f) (ii) *ibid*, if any of the section or chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 specify certain processes as amounting to manufacture, then also, those processes would be treated as manufacture. No section or chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 treat process of recording of sound or data or other phenomena of product of heading 8517 as amounting to manufacture. Furthermore, Section 2 (f) (iii) *ibid* is applicable only in respect of goods which fall under Third Schedule to the Central Excise Tariff Act, 1985. Nucleus Device classifiable under heading 8517 does not fall under said Schedule. It is observed from the submissions made by the Revenue that they have claimed that subject activity of loading of software into the Nucleus Device is manufacture but for this assertion, they have not invoked sub-clause (i), (ii) and (iii) of Section 2 (f) of Central Excise Act, 1944. However, said definition of manufacture is an inclusive definition and covers the processes which are commonly understood manufacture, as interpreted by the Courts.

9. Applicant submits that the Nucleus Device in the form in which it is imported and post uploading of software has essentially the same name, character and use. The character, usage and identity of the Nucleus Device on loading of software remain the same. Therefore, loading of business software would not *ipso facto* amount to manufacture in the scope of its natural meaning as interpreted by the Courts. In this regards, applicant relied upon the decision of the Hon'ble Supreme Court in the case, *Union of India vs. Delhi Cloth and General Mills Co. Ltd.* reported in 1977 (I) ELT (J199) wherein it was held that manufacture implies a change or transformation resulting in emergence of a new and different article having a distinctive name, character or use. Further, the Hon'ble Supreme Court in the case, *Union of India vs. J.G. Glass Industries* reported at 1998 (97) ELT 5 (SC) has evolved a two-fold test to determine manufacture. The first is whether by the said process, a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist. The second is whether the commodity already in existence will serve no purpose but for the said process. We are in agreement with the applicant that up-loading of software into the Nucleus Device, which is already embedded with the basic input output system to perform primary functions will not result in new and different article having a distinct name, character or use. Further, the original commodity i e, Nucleus Device proposed to be imported, will not cease to exist on up-loading of software into the Nucleus Device and would also continue to serve its functions.

10. Applicant submits that Chapter Note 7 to Chapter 85 was inserted in 1997 subsequent to the Hon'ble Supreme Court decision in the case of *Prabhat Sound Studios Vs. Additional Collector of Central Excise* reported at 1996 (88) ELIT 635 (S.C.) decided on 07.11.1996, which held recording of sound on magnetic cassette tapes or

spool magnetic tapes as not amounting to manufacture; that it appears that since the Hon'ble Supreme Court had held the activity of recording on magnetic cassette tapes or spool magnetic tapes as not amounting to manufacture, the Chapter Note was inserted to deem the activity of recording of phenomena (including sound) on specific goods under the erstwhile heading 8524 (present heading 8523 and Chapter Note 10) as manufacture. Applicant further submits that the insertion of a Chapter Note deeming the activity of recording as manufacture further substantiates the stand that recording per se does not amount to manufacture under the natural meaning. Similarly, the loading of business software being an activity comparable to recording of sound does not amount to manufacture within the natural meaning of the term. Applicant also submits that Note 10 of Chapter 85 states that *for the purposes of heading 8523 recording of sound or other phenomena shall amount to manufacture*. It is admitted fact that subject item is classifiable under heading 8517; that said Chapter Note is only applicable to goods covered under heading 8523; that Nucleus Device does not fall under 8523; that Chapter Notes to Chapter 85 do not provide embedding of software into a device classifiable under CTH 8517, to be read as manufacture. We are in agreement with the applicant that Chapter Note 10 or any other Note to Chapter 85 is not applicable in the present case to consider the activity of up-loading of business software in the Nucleus Device as deemed manufacture. If the intention of the legislature was to treat up-loading of software into devices like Nucleus Device, as manufacture, Note(s) to Chapter 85 would have included goods of heading 8517, deeming such activity to be manufacture.

12. In view of the above, we rule as under;

*The activity of loading of business software in the Nucleus Device by the applicant will not constitute manufacture under the Central Excise Law.*

**Sd/-**  
**(S.S. Rana)**  
**Member(R)**

**Sd/-**  
**(V.S. Sirpurkar)**  
**Chairman**

**Sd/-**  
**(R.S.Shukla)**  
**Member (L)**