IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

C/00237/2011

[arising out of Order-in-Original No.15597/2011, dated 12.04.2011 passed by the Commissioner of Customs, Chennai.]

M/s.SUTURES INDIA P. LTD. APPELLANT

Versus

COMMISSIONER OF CENTRAL CUSTOMS, CHENNAI RESPONDENT

Appearance:

For the Appellant S/Shri S. Jayakumar and M. Karthikeyan, Adv/s.
For the Respondent Shri K. Veerabhadra Reddy, JC (AR)

CORAM:

Hon'be Smt. Archana Wadhwa, Member (Judicial)
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of hearing **16.03.2018**
Date of pronouncement 05.4.2019.

INTERIM ORDER NO.23/2018

Per Archana Wadhwa: FINAL ORDER No. 40652/2019

As per facts on record, the importer is engaged in the import and trading of various surgical products, including surgical tapes from China/Taiwan and Thailand. In respect of imports, so made by them, they were claiming the benefit of concessional rate of duty in terms of notification No.21/2002, dt.01.03.2002. The dispute in the present appeal relates to the applicability of the said notification.

2. The 'Micropore Surgical Tapes' being imported by the appellant are classifiable under the Customs Tariff Heading 3005 90 60

of the Customs Act. Sl.No.22 of the list 37 covered by Sl.No.363A of the Notification which is being claimed by the appellant, reads as follows :

S.No.363A	90 or any Chapter	The following goods namely : (A) Medical equipment (excluding Foley Balloon Catheters) and other goods, specified in List 37.
List 37	S.No.22	Ostomy products (Appliances) for managing Colostomy, Illcostomy, Ureterostomy, Ileal Conduit Urostomy Stoma cases such as bags, belts, adhesives seals or discs or rolls adhesive remover, **'Skin Barriers ' MicroporeSurgical Tapes"**, bag closing clamps karaya seals paste or powder, irrigation sets, plastic or rubber faceplates, flanges, male or female urinary incontinence sets, skin gels, in parts or sets

3. As per the information received by DRI, Ahmedabad, Revenue entertained a view that concessional rate of 5% BCD and 'nil' CVD in terms of the said notification is being wrongly claimed by the importer, inasmuch as, the same is available only for 'Skin Barriers ' Micropore Surgical Tapes" which are used as Ostomy products for managing Colostomy, Illcostomy, Ureterostomy, Ileal Conduit Urostomy Stoma and the appellants products did not fall under the said category, inasmuch as, the same are general purpose surgical tapes and not being exclusively used as Ostomy products.

4. Accordingly, investigations were conducted against the importers and the goods imported by them were seized under a Panchanama, dated 11.11.2008. Statements of the Managing Director of the company as also their Production Manager were recorded on various dates. As regards the tapes, it was informed that the same were imported under two brand names 'Hipore', and 'Trupore'.

Whereas, Hipore brand surgical tape was paper adhesive tapes, Trupore surgical tapes were Poly adhesive tapes.

He further deposed about the end use of the above imported surgical tapes was as an adhesive tape to hold the intravenous needles in its place after insertion into the veins, also used for holding the cloth bandage applied on wound or surgical dressing. ' Hipore' brand surgical tapes were microporous in nature and as could be seen the same was printed on the packing box as "Surgical microporous tapes" and also permeable to air and water vapour and 'Trupore' brand surgical tapes were not microporous but only permeable to air and water vapour. Regarding the usage of the surgical tapes for Ostomy purposes such as managing Colostomy, Illcostomy, Ureterostomy, Illeal Conduit Urostomy Stoma cases, etc. Production Manager stated that he was not aware of it.

As had been mentioned on the packing of the surgical tapes these adhesives tapes were surgical tapes that was to state that they were of less allergenic when used on human body parts. These surgical tapes could be used as an aid after applying medicines on the surgical cuts or wounds.

As per packing list, 'Hipore' is suitable for long term guage and dressing fixation and for securing intravenous needles, medical devices, electrodes and tubing on skin'. In case of 'Trupore' surgical tape, the applications mentioned were—'Trupore is suitable for securing bulky dressing, catheters, tubing and other devices even on areas of human body subjected to movement' which were self-explanatory.

Shri L.G. Chandrasekhar, Managing Director of the appellant, in his statement recorded on 11.11.2008, in answer to a specific question, stated that the surgical tapes imported and sold by them were primarily intended for use in Ostomy care. On being asked to elaborate Ostomy care, it was deposed that Ostomy care was a wound drainage mechanism, wherein, during and post drainage, the wound had to breathe, exudates excess fluid and did not allow foreign particles to get into the wound and provided excellent skin barrier. At the same time, the tape should not be allergenic. He further deposed that the tapes imported by them had the following characteristics (i) they were microporous allowing the wound to heal, breathe and exudates; (ii) they were least allergenic and provided excellent skin barrier and allowed constant and quick permeation of air and water vapour. These surgical tapes were tested for these very qualities for strict compliance. All these properties were also mentioned in 'Hipore' brand surgical, however, in the 'Trupore' brand surgical tapes the word 'microporous' was not mentioned. He also deposed that the lead brands of surgical tapes as the Micropore and Transpore were manufactured by M/s. 3M and these products were promoted as Ostomy care products and the tapes imported by them were considered as alternative and economical substitute for the above brands respectively.

The statement of the Managing Director was again recorded on 12.11.2008, wherein, he disclosed about the fact of import of fabric, which was being further converted by them into surgical tapes. In respect of the demand on the fabrics, he admitted that there was a mistake on their part, inasmuch as, fabrics were also declared as tapes and he is ready to pay duty on the same. As the said part of the impugned order confirming demands in respect of the fabrics is not being challenged by the appellant in the present appeal, we are not adverting to the same.

In the said statement, he again reiterated his stand that even though the said surgical tapes can be used in the cases other than Ostomy care and are not primarily meant for exclusive use for Ostomy care purpose but they satisfied the condition of the exemption notification No.21/2002, inasmuch as, the intended purpose was procurement and sale of their products for Ostomy care purposes.

During the investigation period, Revenue downloaded the relevant information from the website of the Wikipedia, wherein,

a) Colostomy had been defined as a surgical procedure that involved connecting a part of the colon onto the anterior abdominal wall, leaving the patient with an opening on the abdomen called a stoma.

b) Illeostomy had been defined as a stoma that was constructed by bringing the end or loop of small intestine (the ileum) out onto the surface of the skin. Intestinal wastes pass out of the illeostomy and get collected in an external pouching system stuck to the skin.

c) An ileal conduit urinary diversion had been defined as a surgical technique usually referred to as the Bricker ileal conduit after its inventor, Eugene M. Bricker. To create an ileal conduit, the ureters were surgically unattached from the bladder and an ureteroenteric anastomosis was made in order to drain the urine into a detached section of ileum (a part of small intestine). The end of ileum was then brought out through an opening (stoma) in the abdominal wall. The urine was collected through a bag that was attached on the outside of the body over the stoma.

d) And Ureterostomy was defined as the creation of a stoma (a new artificial outlet) for a ureter or kidney.

e) By reading the web page, it was found that the following types of Ostomy surgeries were also possible :

Dacryocystorhinostomy, Enterestomy, Cecostomy, Colostomy, Duodenostomy, Ileostomy, Jejunostomy, Appendicostomy, Esophagostomy, Gastrostomy, Cholecystostomy, Choledochostomy, Sclerostomy, Thoracostomy, Trachestomy, Urostomy, Nephrostomy, Ureterostomy, & Vesicostomy.

The Revenue also took printouts of the web page of M/s. SGV Medical, wherein in the Resources Section an article on "Life after Ostomy" had been presented and in the said article ostomy surgery viz. Colostomy, Ileostomy and Urostomy had been explained. The explanation of the surgeries was the same as described under the web page of Wikipedia reiterated above. Further it was explained in the article that learning about the products available in order to choose the right system for use was important. It had been elaborated that:-

> *"Stomas require little care. The skin surrounding the stoma, called peristomal skin, must be protected from direct contact with discharge. This discharge is potentially irritating. The peristomal skin should be gently cleansed with plain soap (without moisturizer) that leaves no residue, and then rinsed with water after each change of your Ostomy pouching system. Water cannot enter the stoma because of its outward shape, so you won't need to cover it during bathing showering.*
> *Pouches come in different sizes and shapes to serve different functions. Today's pouches are light, odour-proof, leak proof and undetectable under clothing. Many pouches have clear or opaque options. Pouches also can come with a filter if your output is solid, as the filter allows gas to escape-but not odour. Filters also prevent gas from building up so the pouch does not inflate like a balloon.*

There are basically two types of pouches :

Single Use – a closed end pouch that you remove and dispose of one to three times a day. These closed end pouches are a practical choice to use while traveling or for convenience at any time. These are used if you want greater freedom of movement or discretion.

Drainable - a pouch you empty from an opening on the bottom of the pouch. These pouches are best if you have discharge frequently throughout the day. Ostomy systems are made up of a wafer (which attaches to your body) and a pouch (which attaches to the wafer). Because discharge from the stoma can irritate the skin around it, you need an Ostomy system that fits correctly so that it provides skin protection. There are two Ostomy system options:

Two-piece - the pouch is separate from the skin barrier wafer and the pieces snap together with a flange. The flange is connected to the wafer and looks like a plastic ring. It is easy to unsnap the pouch and discard the pouch as often as you like. The flange 'clicks' into place similar to how a plastic ware top 'clicks' into place on a plastic ware container. With a two-piece system you can use a stationary flange or a floating flange. A stationary flange is very flat, so you may want to try it if you want your pouching system flat against your skin. With a floating flange, you can put your fingertips under the flange for support while you attach the pouch to the barrier, which is great for people with weaker dexterity.

One piece – the pouch and the skin barrier wafer are directly connected as a single unit. This means the one-piece is easy to apply, you just peel off the backing on the wafer and stock to your abdomen. It stays on as long as it remains comfortable and secure.

Your pouching system should be secure, odor free and comfortable, no matter what type you select. The skin barrier should be changed regularly, once or twice a week."

From the above, Revenue entertained a view that skin surrounding the stoma called peristomal skin must be protected from the direct contact with discharge. This discharge was potentially irritating. To prevent the discharges from coming into contact with the peristomal skin, a skin barrier referred to as a wafer in a one piece or two piece systems was used for sticking the pouch to the abdomen. In a two-piece system, a plastic ring called flange was attached to the wafer, which fits to the pouch. In one-piece systems, the backing of the wafer was to be peeled off and was to be stuck to the abdomen and wear it as long as it remained secure and comfortable.

5. The printout of web page of M/s. HMP Communications titled as "Ostomy Wound Management' was also downloaded, as also, the web page of website of M/s. Convatec, USA. Further, the web page of web site of M/s. Medex Supply, wherein the product pouch for Ostomy Skin barriers was downloaded. From a conjoint reading of the information received from the websites, a view was entertained that the adhesive Skin Barrier Micropores Tapes/Wafers attached to the pouches used in the wounds are the Ostomy products and adhesive skin barrier Micropores tapes cannot be considered as Ostomy appliances specifically.

6. In view of the above background, investigations were also made at other ends i.e., the distributors, sellers etc., wherein they clarified that such surgical tapes are sold over the counter as "sales products" and without the prescription of the doctor. It also came on record that orders for surgical tapes were also being procured from the hospitals. Revenue also downloaded the web pages of overseas manufacturers of the imported surgical adhesive tapes and found that the same are used for fixing the dressing at the skin or for fixing the syringe needle of the intravenous drip and is a common job for medical treatment. Inasmuch as, in the above web site of the manufacturer, there is no mention of the use of the surgical tape in any Ostomy case as a Ostomy appliance, the same cannot be granted the benefit of the notification in question. The website of the appellant was also scrutinized and it was found that the product description nowhere specified that the said tapes are for use in Ostomy products.

7. Based upon the result of the investigations, proceedings were initiated against the appellant by issuance of a show-cause notice proposing to deny the benefit of the notification in the current imports as also in respect of the previous imports and to confiscate the seized goods as also for imposition of penalties. The said show-cause notice culminated into the present impugned order passed by the Commissioner confirming the demand of around Rs.2.53 crores (approx.) along with confirmation of interest and imposition of penalty of identical amount under section 114A of the Customs Act, 1962. He also confiscated the seized goods, which were already released under a bank guarantee of Rs.15,64,000/- and imposed redemption fine of the said amount. Further, he confiscated the imported surgical tapes with redemption fine of Rs.50,00,000/-.

The said order of the Commissioner is impugned before us.

8. We have heard S/Shri S. Jayakumar and M. Karthikeyan, learned advocate/s for the appellants and Shri K. Veerabhadra Reddy JC (AR) for the Revenue.

9. The short question required to be decided in the present appeal is as to whether the surgical tapes imported by the appellant and declared as skin barrier 'Micropore Surgical Tapes' would be entitled to the benefit of the notification in question. Sl.No.22 of List 37 under Sl.No.363A of Notification No.21/2002, dated 01.03.2002 already stands reproduced by us. The said Sl.No grants exemption to Ostomy products **such as** packs, poles, adhesive seals or discs or rolls, adhesive remover, skin barrier 'Micropore Surgical Tapes'.

The crux of the Revenue objections for denial of the said benefit is that the surgical tapes imported by the appellant are general purpose tapes and can be used for the procedures other than Ostomy. The entire evidences produced in the impugned order by the Commissioner, which is primarily based upon the information downloaded from the web sites, relates to the Ostomy procedure and various Ostomy products, which in our view is not of much importance, inasmuch as, it is the assessee's own case that such surgical tapes can be used in other procedures also. Learned advocate has rested his case on the simple reading of the said notification and the interpretation of the same and has impressed upon the point that the goods in question being admittedly skin barrier 'Micropore Surgical Tapes' are entitled to the exemption even though the same were capable of being used, apart from Ostomy products, in other procedures also. The notification nowhere insists on the end-use of the products and, inasmuch as, the product in question is capable of being used as Ostomy products, the same would attract the exemption. The Revenue has also referred to various printouts of web sites and certain documents from US patent and European patent to arrive at the conclusion that 'Micropore Surgical Tapes' as mentioned in the notification refers to the product 'wafers' sold world over under the description of skin barrier 'Micropore Surgical Tapes'/Wafers.

We find no merit in the reasoning of the Revenue. The expression used in the notification is skin barrier 'Micropore Surgical Tapes' and there is no justification in interpreting the said expression as "wafers". As such, the Revenue's stand that such expression only refers to the product Ostomy Wafers cannot be appreciated. According to us as long as the appellant's product satisfy the definition of the skin barrier 'Micropore Surgical Tapes', exemption would be available to them. Though the appellant in their memo of appeal have given long write-up on what Ostomy Wafers are, we do not feel the need of referring to the same. According to the appellant, the earlier identical notification referred to the two products, skin barrier and ' Micropore Surgical Tapes' as two different products by putting a comma in between the two. The issue came to be discussed by the Tribunal in the case of *M/s. Equipment Sales Corporation* reported in *1989 (39) E.L.T. 431,* wherein the benefit of the earlier Notification No.208/81-Cus., dated 22.09.2001 was extended to the 'Micropore Surgical Tapes'. Learned advocate submits that though the said comma is not present in the present notification but the fact that the plural term stands used in the "skin barriers" will show that skin barriers and 'Micropore Surgical Tapes' are two different products. 'Micropore Surgical Tapes' is used for supporting the pouches as can be seen from the web page of M/s. 3M, the manufacturer, who owns the brand name Micropore.

The duty stand mainly demanded on the ground that surgical tapes imported by the appellant are general purpose surgical tapes and the said tapes are not exclusively for Ostomy use. On a reading of the notification, we note that the same does not refer to the end-use of the surgical tapes. As long as the same are capable of being used in as Ostomy products, the same would earn the notification benefit without establishing the fact that the same are actually being used as Ostomy product. Further reading of the list also establishes that both the types of products i.e., the one which are exclusively used for Ostomy, and second the general purpose products are also included. The fact of extending the exemption notification to adhesive removal skin, gels by mentioning the same in the notification, leads us to believe that even the general use items would get covered by the notification, even if a part of the same is actually used for general applications. As long as it is established that the 'Micropore Surgical Tapes' can also be used for Ostomy purposes, the same would get coverage under the said notification. It has to be observed here that the notification in question does not provide any end-use verification so as to hold that the items which are actually being used is Ostomy products, would get the exemption.

10. Our attention also stands brought to the product under reference i.e., Micropore being manufactured by M/s. 3M. The word Micropore has originated from the word "microporous", which according to Wikipedia refers to a material containing pores with diameter 2nm. Microporous materials, apart from other use are used in the first aid to fix dressings to wounds and hold pouches in place. If necessary, it may be used to cover small wounds with gauge padding. The printout of web pages of the manufacturer of the ' Micropore Surgical Tapes' M/s. 3M has specifically shown the surgical tapes as a support to Ostomy pouches. Similarly, it is further shown that cloth surgical tapes and surgical paper tapes are being used as accessories in Ostomy management. The expression skin barrier is generally used for the products which protects the skin and does not allow any foreign material to seep in.

11. We also note that the Revenue had not produced any evidence on record to show that there are any specific surgical tapes manufactured by any manufacturer for exclusive use in the Ostomy applications. The various web site material downloaded by the

Revenue has nowhere advanced their case that the general purpose skin barrier 'Micropore Surgical Tapes' cannot be used in Ostomy applications. The wordings of the notification are very wide and include the skin barrier 'Micropore Surgical Tapes', without any further condition attached to the same. The use of the expression **such as** is inclusive and not exhaustive. Even in this inclusive portion 'Skin Barriers 'Micropore Surgical Tapes" are included. The Revenue's contention that the same are not meant exclusively as for Ostomy applications cannot be appreciated, inasmuch as, the said inclusive definition also refers to the other general purpose products like skin gels etc., which may not have an exclusive Ostomy application. Merely because the surgical tapes imported by the appellant can be used for other purposes, by itself cannot be a ground for denial of the exemption unless the Revenue succeeds in convincing that the same can never be used as Ostomy products. No expert opinion stand taken by the Revenue to show that the goods were not capable of being used as Ostomy products. As such, we are of the view that a simple and plain reading of the notification would lead us to a conclusion that the imported 'Micropore Surgical Tapes' are exempt in terms of the said notification.

12. We can also draw support to our above conclusion from the clarification issued by CBEC, when similar exemption was introduced to certain medical equipments. The relevant paragraph is reproduced below:-

> "The scope of customs duty exemption available to specified medical equipments [see S.Nos.351 and 352 of Notification No.17/2001-Customs], is restricted to their specific use in ophthalmic and ENT applications respectively. It is clarified that if the specified equipments are used in multiple applications in addition to their use in Ophthalmic and ENT

applications respectively, the benefit of the exemption to such equipment is not to be denied."

By relying upon the said circular Tribunal in the case of *M/s. Wipro GE Medical Systems* reported as *2005 (185) E.L.T. 321 [CESTAT-Bang.]* has held as under:-

> "The fact that the Government wants the exemption to be extended, even when the Notification restricts the same to Ophthalmic applications, to other applications strengthens the case of the appellant as during the relevant period, there were no restriction in the notification to non-ophthalmic applications. Summing up, we hold that there is enough evidence to show that the impugned items are having A-scan facility and fall under Sl.No.351 of the Notification No.17/2001. We also hold that the exemption Notification No.16/2000-Cus. dated 1-3-2000 is not restricted to the equipments used in Ophthamology. If these items satisfy the conditions of Notification, the Probes, which are very necessary to use this scanner, would also be entitled for the exemption in terms of the Notification. Hence the charge of mis-declaration, cannot be sustained. Hence we set aside the duty demand. Consequently, the penalties are not-leviable. Therefore, we allow the appeals with consequential relief".

At this stage, we may also note the decision of the Tribunal in the case of *M/s. Lifeline Systems P. Ltd., Vs Collector of Customs, New Delhi* reported in *1988 (33) E.L.T.699 (Tribunal)* wherein the benefit of exemption Notification No.208/81-Cus., was considered in respect of 'Skin Barriers 'Micropore Surgical Tapes", while dealing with Revenue's stand those tapes have to be of particular width. The Tribunal observed that — "to restrict the term 'tape' to a particular width, when the notification itself does not specify any particular width of the product, would be reading into the notification more than what it specifies." Similarly, in the present case also, Revenue is seeking to restrict the wordings of the notification by adopting the interpretation that the exemption would apply only to those surgical tapes which are either actually used as Ostomy products or meant to be exclusively used as Ostomy products. It is well settled law that no alien words or expressions can be introduced in the notification so as to give it a different meaning than the one for which the notification is meant for.

13. As regards the interpretation of the notification, we can have guidance from the Hon'ble Supreme Court's decision in the case of *M/s. Mahavir Industries Ltd.* reported in *2009 (236) E.L.T.214 (S.C.)* as also from the Hon'ble apex court decision in the case of *Commissioner of Central Excise, Gujarat Vs M/s. Reliance Petroleum Ltd.* reported in *2008 (227) E.L.T.3 (S.C.)* wherein it was observed that an exemption notification has to be considered liberally and the benefit thereof should not be denied by taking recourse to doctrine of narrow interpretation. It was further observed in the case of *M/s. Reliance Petroleum Ltd.*, that the terminology used in the notification would have an important role to play and where exemption notifications *ex facie* applies, there is no reason as to why purport thereof would be limited by giving a strict construction thereto. The court also observed that the object for grant of exemption would be considered in a broad based manner and the wordings used have to be given their meaning and purpose may be allowed to be achieved.

In the present case, we agree with the learned advocate that the entire purpose of the notification is to grant exemption to the products which are used for management of specified Ostomy procedures. The notification apart from covering the specific Ostomy products, also covers the general purpose products as already observed by us. Hence, benefit cannot be disallowed on the sole ground that the product in question is not being used exclusively as Ostomy product. Merely because the tapes in question are being used as multiple use items, the same would not be a reason to deny the benefit of the notification. The Revenue cannot introduce the word 'solely' or 'exclusively' in the notification so as to hold that only those tapes which are exclusively used in Ostomy procedures would get the benefit. Revenue further failed to establish that there are specific surgical tapes which are meant for exclusive use as Ostomy product. According to the Revenue, the benefit is not required to be extended to the surgical tapes which can be used apart from Ostomy products, as general purpose products also. If that be so, we really fail to understand as to what type of surgical tapes would get covered by the notification, inasmuch as, there are no specific or specially made surgical tapes meant to be used only as Ostomy products.

In view of the foregoing discussion and analysis, we conclude in favour of the appellant and hold that the tapes in question would be entitled to the notification benefit. Accordingly, we set aside the impugned order and allow the appeal. Inasmuch as, we have allowed the appeal on merit, we are not diverting to the other issue of the demand being time-bar etc.

14. As regards the duty on non-woven surgical fabrics, which are further used by the appellant in the manufacture of the surgical tapes in their factory, learned advocate is not contesting the demand on the same, except the quantification portion, which may be done by the adjudicating authority afresh, after allowing the appellant an opportunity to putforth their case. Inasmuch as, we have held that the appellant is entitled to the benefit of the notification, we set aside the demand along with interest and penalty imposed upon the appellant relatable to the said part of the applicability of the notification. Confiscation of the goods is also set aside. Appeal to this

extent, except the duty liability which stands not contested by the appellant on merit on woven surgical fabrics, is allowed.

Appeal is disposed of in the above terms.

(Pronounced in open court on)

19/4/18

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

Separate order recorded.

25/4/18

ksr
19-04-2018

Per: V. Padmanabhan:

I have carefully gone through the order prepared by ld. Member (Judicial). But, I am unable to persuade myself to agree with the same and hence I record my observations in the following paragraphs.

Upon perusal of the appeal record, it is seen that the investigation into the case was carried out by the Directorate of Revenue Intelligence. After completion of investigation, the relevant show cause notice No. DRI/AZU/INV/INV-30/Sutures/2008 dated 07.05.2009 demanding custom duty of Rs. 2,53,16,059/- was issued by the ADG, Zonal Unit, DRI Ahmedabad. The jurisdiction of the DRI to issue show cause notice was the subject matter of various litigations. The Hon'ble Supreme Court in the case of ***Commissioner of Customs vs. Sayed Ali – 2011 (265) 17 (SC)*** held that DRI Officers were not proper officers in terms of Section 2(34) of the Customs Act, 1962. To overcome the situation created by the above decision of the Apex Court, Notification No. 44/2011-Cus. (NT) dated 06.07.2011 was issued by CBEC assigning the functions of the proper officer to various officers including ADG, DRI. Further, sub-section 11 was inserted under Section 28 of the Customs Act vide the Customs (Amendment and Validation) Act, 2011 dated 16.09.2011, assigning the function of proper officers to various DRI officers with retrospective effect. For the period subsequent to the amendment, the matter came up before the Hon'ble Delhi High Court in the case of

Padmanabhan

Mangli Impex vs. Union of India – 2016 (335) ELT 605 (Del.) in which the Hon'ble High Court inter alia held that even the newly inserted Section 28(11) does not empower the officers of DRI to issue the show cause notice or adjudicate for the period prior to 08.04.2011. Revenue challenged the decision of the Hon'ble High Court before the Hon'ble Supreme Court and the Apex Court stayed the judgment in the case of ***Mangli Impex vs. UoI*** reported as ***2016 (339) ELT A49 (SC)***. However, on the same issue, Hon'ble Mumbai High Court as well as the Hon'ble High Court of Telengana & Andhra Pradesh have taken a view contrary to the one taken by Hon'ble Delhi High Court.

In the above scenario, the various Benches of the Tribunal, in cases where the show cause notice has been issued by DRI, have been setting aside the decisions of the adjudicating authority and remanding the matter to the original adjudicating authority to first decide the issue of jurisdiction after the availability of Hon'ble Supreme Court in the case of ***Mangli Impex*** and then decide the matter on merit.

The above consistent view has been taken by the various Benches of the Tribunal in hundreds of appeals including-

i) Escorts Ltd. vs. CC, New Delhi –F.O. No. 56659/2017 dated 08.09.2017.

ii) Sarvatra International vs. CC (IND), New Delhi (A. No. C/352-353/2010) – F. O. No. 57128 – 59129/2017 dated 11.10.2017.

iii) Amit Garg, Prop. Vs. CC, New Delhi (A. No. C/178/2010) – F. O. No. 57127/2017 dated 11.10.2017.

iv) A. T. Bhaskaran vs. CC, Tuticorin & ors. (C/A No. 00035-00036 & 00041/2012) F.O. No. 41163 – 41165 of 2018 dated 14.03.2018 (by the same Bench).

In view of the above, I am of the opinion that in the present appeal also, the matter should be remanded to the adjudicating authority with similar directions. Hence, I am not in agreement with the decision of the ld. Member (Judicial) which has been passed on merits of the case.

In view of above, the following difference of opinion is proposed:-

(i) Whether the appeal is to be decided on merit and allowed as held by the ld. Member (Judicial);

Or

(ii) Whether the impugned order is to be set aside and the matter remanded for decision on merit by the adjudicating authority after the availability of the decision of the Hon'ble Supreme Court in the case of ***Mangli Impex***?

(ARCHANA WADHWA)
Member (Judicial)

(V. Padmanabhan)
Member (Technical)
31/5/2018

Per Ms. Sulekha Beevi C.S

16. The above difference of opinion matter was referred as per the order of the Hon'ble President dated 1.11.2018 for resolving the points of difference which arose between the Members while deciding the above appeal.

17. The matter was heard briefly on 11.12.2018. After hearing briefly and also perusal of the orders referred, I was of the opinion that the matter requires to be relisted. Note order was passed by me seeking directions of the Hon'ble President. The relevant portion of the note order is reproduced as under:-

> *"7. Taking situations discussed above into consideration, I find that there is no difference of opinion between two Members on the issue on the dispute per se. In case, I agree with the Member (Judicial), the issue decided by Member (Technical) would have to be totally left out as untouched and vice versa. A third Member is called upon to agree or disagree with the reason or conclusion made by both Members on a particular point. The point being divergent before me, I am unable to agree or disagree. To me, the right resolution of the present situation would be to relist the matter for rehearing. However, as per Section 129C the third Member does not have power to relist or rehear the appeal but can only agree or disagree. For this reason, I am of the view that the Hon'ble President is to decide whether to relist the matter for hearing of both sides. The ld. counsel for appellant Shri S. Jaikumar has placed before me a decision in Amod Stampings Pvt. Ltd. Vs. Commissioner of Customs – 2013 (289) ELT 421 (Guj.) to argue that when the points of reference framed by the Members is unclear, the matter can be sent back to the same Bench for reformulating the difference. I do not think that the problem is with formulation of the points of difference. In Acmi Industries Vs. Commissioner of Customs, Hyderabad – 2004 (174) ELT 213 (Tri. Bang.) in a similar situation*

when the third Member was finding it difficult to decide when there was not unanimity of opinion with regard to the issues framed, the third Member had directed for relisting the case.

8. In the result, I am of the opinion that this order shall be placed before the Hon'ble President for taking suitable steps and to decide as to whether the appeal has to be relisted or not. The appeal stands posted to 12.2.2018 awaiting the reply of Hon'ble President."

18. The Hon'ble President vide direction dated nil has directed that there is no need to relist the matter. The relevant portion is reproduced as under:-

"It is for the learned Member to take a view one way or the other on the difference of opinion expressed by the Division Bench. Of course, if the first difference is decided in the positive, then the question of deciding the second matter would not arise, since the appeal would be allowed in its entirety.

In this view of the matter, there is no need to relist the matter for hearing before the Division Bench. The matter may be placed before Ms. Sulekha Beevi, C.S. Hon'ble Member (Judicial) to resolve the difference of opinion expressed by the Bench."

19. The matter was taken up for hearing on 5.3.2019. the counsel for appellant Shri M. Karthikeyan has filed statement to the effect that the appellant is not pressing the issue of jurisdiction of DRI. Both sides were heard in detail and the matter was adjourned to 7.3.2019 for certain clarification.

20. The ld. AR today has furnished a fresh written submission stating that the Technical Member has observed that after perusal of the order of the Member Judicial, he is not persuaded

to agree with the order and has passed a separate order which is on the issue of jurisdiction of DRI. She therefore prayed that the matter may be referred to the President to nominate a Technical Member and that the matter has to be heard by a Division Bench comprising of Judicial Member as well as Technical Member. She submitted that the appeal on merits has been decided only by a Judicial Member and the same cannot be again decided by a Judicial Member since Technical Member was not persuaded by the order of the Judicial Member.

21. I have taken note of this contention of the ld. AR appearing for the department. However, the Hon'ble President has stated that the matter need not be relisted before a Division Bench. As per the direction of the Hon'ble President I proceed to decide the difference of opinions in this appeal.

22. The points of difference referred are as under:-

(i) Whether the appeal is to be decided on merit and allowed as held by the ld. Member (Judicial)?

Or

(ii) Whether the impugned order is to be set aside and the matter remanded for decision on merit by the adjudicating authority after the availability of the decision of the Hon'ble Supreme Court in the case of Mangli Impex?

23. The issue in the appeal is with regard to the eligibility of concessional rate of duty on the goods imported by the appellant. Though the appellant has imported items such as non-woven fabrics and Skin Barriers Micropore Surgical Tapes, the dispute in this appeal is confined to the concessional rate of duty on Skin Barriers Micropore Surgical Tapes. The liability to pay merit duty on non-woven fabrics has been admitted by the ld. counsel for the appellant. The facts already having been narrated in detail by the Member (Judicial), I do not think it necessary to repeat the same. In para 2 of the order passed by the Member (Judicial), the relevant notification has been already reproduced.

24. The main contention put forward by the appellant is that as per the notification, there is no requirement that the Skin Barriers Micropore Surgical Tapes (impugned goods) are required to be used only for Ostomy procedures. That there are other items mentioned in the Notification under list 37 which are items used for general purpose and not exclusively for Ostomy procedures. The products like adhesives seals or discs or rolls adhesive remover, skin gels etc. are items which are not exclusively used for Ostomy procedures. He submitted that the notification does not impose any condition to produce an end-use certificate so as to establish that the items have been used for Ostomy procedures. The department therefore cannot

contend that the impugned goods have to be exclusively used for Ostomy procedures in order to avail the benefit of notification. Further, that department has not established by sufficient evidence that Skin Barriers Micropore Surgical Tapes are exclusively used in Ostomy procedures. The appellant referred to Note 4(k) of Chapter 30 to argue that 'adhesive wafers' or 'face plates' referred in this Section Note are interchangeably used in common parlance and such items have a central stoma (hole). The skin barrier is around such stoma. There is a specific mention of 'face plates' in the notification. That therefore wafers cannot be misconstrued as Skin Barrier Micropore Surgical Tapes.

25. Against this, the ld. AR Ms. T. Usha Devi argued that 'wafers' and 'Skin Barrier Micropore Surgical Tapes' are interchangeably used in common parlance. The goods imported by appellants are not the Skin Barrier Micropore Surgical Tapes exclusively used for ostomy procedure purposes. These are used for general purpose. Thus goods which are used for general purposes are not eligible for concessional rate of duty. The statement recorded from the importer as well as the distributors have mentioned that the impugned goods are not exclusively used for ostomy procedures. She contended that the notification implies that only products which are used for Ostomy procedures are eligible for the benefit of concessional rate of

duty. Since the impugned goods are not exclusively used for ostomy procedures, the lower authority has rightly disallowed the eligibility of the notification. She heavily relied upon the medical literature obtained from the website to explain that adhesive Skin Barrier Micropore Surgical Tapes / Wafers which has stoma and can be aligned or attached to pouches alone are the products to which the notification would apply. It is also submitted by her that in the packaging of the impugned goods, it is not mentioned that these are exclusively used for ostomy procedures.

26. Heard both sides.

27. On perusal of the order passed by Ld. Judicial Member, it is seen that all the contentions raised by both sides, as noted above, have been discussed in detail. In page 6 of the said order, the medical literature obtained from website with regard to the Skin Barriers Micropore Surgical Tapes / Wafers used in the ostomy procedures and contentions of Revenue are stated. The ld. AR has emphasized that such products which can protect the skin from direct contact of the discharge from the body would only be covered under the notification. Thus, the main ground on which the benefit of notification is denied by the department is on the view that the Skin Barrier Micropore Surgical Tapes mentioned in the notification are those which are exclusively used in Ostomy procedures.

28. On careful perusal of the notification, I do not find that there is requirement for producing an end-use certificate by the assessee so as to establish that the imported products have been used only for ostomy procedures. Further, a notification has to be literally interpreted. On reading the notification, the language is very clear. I do not find any mention that the products mentioned therein have to be exclusively used for ostomy procedures. Of course, only those items required for ostomy procedures are set out in the list. However, there are other products such as adhesive seals, adhesive remover, skin gels etc. which are items which can be used for ostomy procedures as well as for other general purposes. If such items also fall under the category of Ostomy products, then the impugned goods which can be used for general purpose would also fit into ostomy products when used in relation to ostomy procedure. I have to say that department has not put forward any expert medical evidence to establish that the impugned goods imported by the appellant is not at all necessary in ostomy procedure. The only evidence relied by them is regarding medical literature obtained from website / Wikipedia. This too is with regard to wafer which has a stoma in the centre and a surrounding skin barrier. Although such goods which have a stoma in the centre and surround skin barrier may be

exclusively used for ostomy procedures, the notification does not particularly mention this.

29. The ld. AR has relied upon the decisions in the cases of Eagle Flask Industries Ltd. Vs. Commissioner of Central Excise, Pune – 2004 (171) ELT 296 (SC) and Commissioner of Central Excise, New Delhi Vs. Hari Chand Shri gopal – 2010 (260) ELT 3 (SC) to argue that the notification has to be interpreted strictly. I do not have any quarrel with the proposition of law that conditions in the notifications has to be strictly interpreted. The Hon'be Supreme Court in the case of Commissioner of Customs Vs. Dilip Kumar & Company – 2018 (361) ELT 577 (SC) has held that when words in a statute are clear, plain and unambiguous and when only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. Regard must be given to the clear meaning of words and matter should be governed wholly by the language of notification, equity or intendment having no place interpretation of notification.

30. In List 37, it is not mentioned that the Skin Barrier Micropore Surgical Tapes have to be exclusively used for ostomy procedures. There are other products also which can be used for procedures other than ostomy. None of these products which can be used for general purpose are qualified by stating that the eligibility is available if they are used only for ostomy. At the

cost of repletion, there is no condition attached to the notification to produce end use certificate. Then nothing can be read into the notification to interpret that only goods which are exclusively used for ostomy procedures are eligible for exemption. Although Sl. No. 22 of List 37 in the notification starts with the words "ostomy products (appliances) for managing Colostomy, Illcostomy, Ureterostomy ....", since there are goods such as adhesive remover, skin gel etc. which are not exclusively used for ostomy, the benefit will be eligible to the Skin Barrier Micropore Surgical Tapes imported by the appellants.

31. Therefore, I agree with the ld. Judicial Member in holding that the benefit of notification cannot be denied and the appeal has to be allowed in its entirety.

32. Registry is directed to forward the appeal along with this order to the Regular Bench to formulate the majority order.

(Dictated and pronounced in open Court)

Sulekha Beevi

(**Sulekha Beevi C.S.**)
Member (Judicial)

Rex

FINAL ORDER No. 40652/2019

In view of the majority order, the impugned order is set aside and appeal is allowed with consequential relief to the appellants.

25/3/19
(V. PADMANABHAN)
MEMBER(TECHNICAL)

15/3/19
(ARCHANA WADHWA)
MEMBER (JUDICIAL)

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