

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 50851 of 2021

[Arising out of Order-in-Original No. 01/2021/MKS/Pr. Commissioner./ICD-Import/TKD dated 08.01.2021 passed by the Principal Commissioner of Customs (Import), New Delhi]

M/s. SPML Infra Limited

F-27/2, Okhla Industrial Area,
Phase-II, New Delhi - 110020

...Appellant

VERSUS

**Principal Commissioner of Customs
(Import) – New Delhi (ICD TKD)**

Inland Container Depot,
Tughlakabad, New Delhi - 110020

...Respondent

WITH

Customs Appeal No. 50852 of 2021

[Arising out of Order-in-Original No. 01/2021/MKS/Pr. Commissioner./ICD-Import/TKD dated 08.01.2021 passed by the Principal Commissioner of Customs (Import), New Delhi]

Shri Sushil Sethi

Managing Director, SPML Infra Ltd.,
F-27/2, Okhla Industrial Area,
Phase-II, New Delhi - 110020

...Appellant

VERSUS

**Principal Commissioner of Customs
(Import) – New Delhi (ICD TKD)**

Inland Container Depot,
Tughlakabad, New Delhi - 110020

...Respondent

APPEARANCE:

Shri Bhaskar Thakkar, Chartered Accountant for the Appellant
Shri S.K. Rahman, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 19.12.2024
DATE OF DECISION: **02.05.2025**

FINAL ORDER No. 50584-50585/2025

DR. RACHNA GUPTA

This order disposes of two appeals arising out of common order in original bearing no. 01/2021 dated 08.1.2021¹ passed by the Principal Commissioner of Customs, Inland Container Depot²Tughlakabad deciding the proposals made in the Show Cause Notice dated 12.3.2020³ issued by the Directorate General of Revenue Intelligence⁴ which was made answerable to the Principal Commissioner of Customs, Tughlakabad, Joint Commissioner of Customs, Air cargo complex Delhi and Assistant Commissioner of Customs, Nhava Sheva in respect of goods imported through the respective ports/air cargo complexes. The Central Board of Indirect Taxes and Customs appointed the Principal Commissioner as the common adjudicating authority to decide the proposals in the SCN and accordingly, he passed the impugned order.

1.1 Appeal no. 50851 of 2021 is filed by M/s. SMPL Infra Ltd.⁵, the company / importer challenging the change of classification of the imported goods, demand of differential customs duty under section 28(4) of the Customs Act, 1962⁶ invoking extended period of limitation, confiscating the imported goods/ holding the imported goods liable for confiscation under section 111(m) of the Act on the allegation of wrong classification and imposing penalties under section 114A and 114AA of the Act. **Appeal no. 50852 of 2021 is filed by Shri Sushil Sethi, Managing Director of M/s. SMPL Infra Ltd.**to challenge the order of imposition of penalties upon him under section 112(a) (ii),

1 Impugned order

2 ICD

3 SCN

4 DRI

5 Importer

6 Act

114AA and 117 of the Act. The facts which culminated into the impugned order are as follows: -

1.2 M/s SPML Infra Ltd. is engaged in execution of water supply projects. For this purpose, it imported AMR/Non-AMR (automated meter reading apparatus) water meters from M/s Arad Technologies Ltd., Israel and China through ICD Tughlakabad, Air Cargo Complex, New Delhi and JNCH Nhava Sheva Port. DRI received intelligence that the importer had imported domestic water supply meters for volumetric measurement and revenue billing but wrongly classified them under **Customs Tariff Item⁷90261010** with a view to evade duty. The details of the bills of entry filed at the three ports are as follows: -

ICD Tughlakabad

BOE Number	BOE date	Country of origin	CTH	QTY
8533350	09.03.2015	CN	90261010	9000
9642507	22.06.2015	CN	90261010	11000
4602709	16.03.2016	CN	90261010	3200
4809105	06.04.2016	CN	90261010	10000
5227966	11.05.2016	CN	90261010	6800

Air Cargo Complex, New Delhi

BOE Number	BOE date	Country of origin	CTH	QTY
9279660	19.05.2015	CN	90261010	6000
8635614	18.03.2015	CN	90261010	4000
2138408	04.08.2015	IL	90261010	1
2138408	04.08.2015	IL	90261010	1
2138408	04.08.2015	IL	90261010	1

Nhava Sheva Port

BOE Number	BOE date	Country of origin	CTH	QTY
6284178	08.08.2016	IL	90261010	46
6284178	08.08.2016	IL	90261010	16
6284178	08.08.2016	IL	90261010	5

⁷ CTI

6284178	08.08.2016	IL	90261010	9
6284178	08.08.2016	IL	90261010	1
6284178	08.08.2016	IL	90261010	7

1.3 Based on the said intelligence searches were conducted at the business as well as the residential addresses of the appellants. Certain documents were recovered under Panchnamas including a copy of the contract / agreement dated 27.05.2013 executed between the appellant company and Delhi Jal Board (DJB). This contract / agreement was for the supply, installation and maintenance of AMR / Non-AMR (automatic meter reading /non-automaticmeter reading) water meters of size 15mm. The document also contained the specifications which the water meters had to meet asIS:779:1994 OR ISO:4064:1993. The matter was investigated further, statements were recorded and DRI formed an opinion that the water meters of such specifications are multi jet water meter for measurement of domestic consumption of water and that they were correctly classifiable under **CTI 90282000** and that the importer had misclassified them under **CTI 90261010** with an intent to evade duty.

1.4 Shri Deepak Jain,General Manager (Projects) of SMPL, in his statement dated 31.01.2020 made under section 108 of the Act admitted that they imported water meters meant for measuring the domestic consumption of water, which are classifiable under **CTI90282000**.

1.5 Investigations revealed that the importer had previously (during 2012) imported the same goods, i.e. AMR water meters as samples for testingfrom the same foreign supplier, M/s Arad Technologies Ltd.classifying them under **CTI 90282000**. Those

consignments were cleared through their Customs Broker M/s. Shailendra Jain C&F Pvt. Ltd., New Delhi.

1.6. Thereafter, the importer changed its Customs Broker to M/s. P.S. Bedi &Co. Pvt. Ltd., New Delhi through whom it cleared the goods imported through the disputed Bills of Entry by classifying them under **CTI 9026 1010**. Shri Deepak Kumar Jain admitted in his statement that the goods imported through the disputed Bills of Entry and the goods which they had previously imported were identical.

1.7 The invoices issued by the supplier M/s. Arad Technologies Ltd. indicated four-digit HSN code of **9026** but the Certificates of Country of Origin issued by the authorities in exporting country clearly indicated **HSN** code **9028**. Further investigation showed that the invoices issued for the past consignments by the same supplier indicated **HSN code 9028**.

1.8. Statement of Shri Rajesh Kumar Singhal, G-Card holder of the previous Customs Broker M/s. Shailendra Jain C&F was recorded on 4.2.2020 who confirmed that they had cleared the past consignments of the importer classifying the meters under **CTI 9028 2000** and that the import documents including the invoice of the supplier showed **HSN code 9028**.

1.9. Statement of Shri Satendra Singh Chauhan, authorized signatory of the new Customs Broker M/s. P S Bedi was recorded who stated that the importer contacted them to clear the water meters imported by them. He also said that the importer had given written instructions that they should be classified under **CTI 9026 1010** and that they filed the Bills of Entry accordingly.

1.10. In short, the imported goods were classified under **HSN 9028** in the past invoices. They were also classified accordingly in the Bills of Entry and the goods were cleared. Thereafter, the appellant changed its Customs Broker and directed them in writing to file Bills of Entry under **CTI 9026 1010**. The invoices from the overseas supplier also changed the HSN and indicated **9026** (as opposed to **9028** indicated in the past invoices). However, the Country of Origin certificates issued by the authorities of the exporting country mentioned the **HSN 9028**. It is also an admitted fact that there was no difference between the goods imported in the past and the goods imported through the disputed Bills of Entry.

1.11 Considering all the above, the department formed an opinion that there has been a deliberate attempt on part of the appellants to mis-declare the imported item i.e. water meters falling under **CTI 90282000** as flow meters falling under **CTI 90261010** with the intention to wrongly avail exemption from the whole duty of custom leviable thereon, under notification no. 24/2005-Cus dated 01.03.2005 thus have evaded custom duty causing loss to the government exchequer.

1.12 Accordingly, Show Cause Notice bearing no. 856/2020/851-53 dated 12.03.2020 was served upon M/s SPML Infra Ltd., the importer, Sh. Sushil Sethi, the Managing Director of M/s SPML Infra Ltd. and on M/s PS Bedi & Company Pvt. Ltd., the customs broker of the appellants. It was proposed to reassess duty classifying the imported goods under **CTI 90282000** instead of **CTI 90261010**. The goods were also proposed to be confiscated due to mis-declaration and the differential customs duty was proposed to be recovered under section 28 of the Act invoking extended period of

limitation along with the interest under section 28AA of the Act. Penalties were proposed to be imposed on the importer company under section 114A, 114AA of the Act. Penalty was proposed to be imposed on Shri Sushil Sethi was proposed under Sections 112, 114AA and 117 of the Act. Penalty against custom broker was also proposed under section 112 and section 114AA of Custom Act 1962. The proposals in the SCN were confirmed by the impugned order dated 08.01.2021. We have before us, only appeals of M/s. SMPL Infra Ltd and of Shri Sushil Sethi. There is no appeal by the Customs Broker M/s. P.S. Bedi & Co.

2. We have heard Shri Bhaskar Thakkar, learned Chartered Accountant representing the appellants and Sh. SK Rahman, learned authorized representative of the department and perused the records.

Submissions on behalf of the appellants

3. Learned Chartered Accountant appearing on behalf of the appellants submitted as follows:

3.1 The Appellant importer had purchased and imported water meters under various Bills of Entry imported during the period FY 2015-16 for execution of contract awarded by the Delhi Jal Board. As per the said contract/agreement the supply of water meters confirming to IS 779:1994 or ISO 4064:1993. ISO 4064:1993 which deals with measurement of water flow in fully charged cold conduit were to be supplied. Some of the important definitions as referred in the International Organisation for Standardization (ISO) were referred impress upon that flow rate (Q) – Quotient of the actual volume of water passing through the water meter and the

time taken for this volume to pass through the water meter. The catalogue/brochure of Model Q water meter given by M/s. Arad Technologies Limited, overseas supplier in the impugned case clearly specifies values of Q3, Q2/Q1, Q2/Q1. As per HSN explanatory note flow meter which measures rate of flow are covered under CTH 90261010 and liquid meters such as household supply meters, which measures total volume of liquid delivered over a period are covered under CTH 9028 2000. Appellant, product fall under 1st category hence the imported goods are rightly classified under CTH 90261010.

3.2 In a similar matter involving classification dispute, the Hon'ble CESTAT, Kolkata recently held that imported water meters having specification to ISO 4064:1993 and product specification as expressed in the overseas supplier catalogue, should be classified under **CTI90261010**.

3.3 Since the year 2000, all importers are required to self- assess duty and self-assessment is also an order of assessment. Thus, without challenging the final assessment order through an appeal under Section 128 of the Act the department issued the SCN which is bad in law. Reliance is placed on **ITC Ltd. Vs. Commissioner of Central Excise, Kolkata-IV 2019 (368) ELT 216 (SC)** where at Para 43 is observed as follows:

"As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment"

3.4 The disputed bills of entry were filed in the FY-2015-16 and the SCN has been issued on 12.03.2020 invoking extended period on the ground of suppression of facts. The question arises that when the Bills of entry were finally assessed from three different location i.e. ICD Tughlakabad, Air Cargo Complex, New Delhi, Nhava Sheva Port. Thus, three different officers having rank of Assistant Commissioner or above have dealt with such classification issue and accepted the same, then just because DRI have different interpretation it does not tantamount to "Suppression" Reliance is placed on **Incredible unique Buildcon Pvt. Ltd. versus Commissioner of C. Ex. & S.T., Alwar 2022 (65) G.S.T.L. 377 (Tri. – Del.)**.

3.5 The impugned order may be set aside and both the appeals may be allowed.

Submissions of Revenue

4. Rebutting these submissions, Ld. Authorised Representative (AR) for the department submitted as follows.

4.1 The appellant imported disputed goods by declaring them as "AMR or non-AMR water flow meters" at various ports namely ICD Tughlakabad, ACC Delhi & Nhava Sheva Port. The appellant has declared **CTI90261010** and claimed benefit of notification S.No. 31 of notification No. 24/2005-Cus dated 01.03.2005 as amended and paid basic customs duty ⁸ of 0%. The correct **CTI** is **90282000** chargeable to BCD of 7.5%.

4.12 The heading **CTH9026** covers flow meters, which measure the rate of flow. The HSN Explanatory notes given for **9026** says

8 BCD

that the heading excludes apparatus which merely indicate the total amount of liquid delivered during the period, which are classifiable as 'supply meters' in heading **9028**. Thus, it is very clear that the water meters installed at homes which measure the quantum of water consumed over a period, say in a month, are to be classified under **CTI 90282000**.

4.3 The appellant had entered into a contract dated 27.05.2013 with Delhi Jal Board for supply, installation and maintenance of AMR non-AMR water meters. The imported goods were supplied to the Delhi Jal Board as per this contract. One of the clauses of this contract clarifies that these meters were "application is for domestic consumption".

4.4 The catalogue with the said contract produced shows the model as "domestic model Q, multi jet magnetic water meter" and its application as 'for domestic consumption'. The words 'flow meter' are nowhere mentioned in the contract. Thus, it is clear that under the contract, the appellant agreed to supply water meters and not flow meters and for this purpose it imported the meters. Reliance is placed on the decision in the case of **Liquid Controls India Pvt. Ltd. Versus Commissioner of Cus., Acc, Mumbai reported as 2017 (356) E.L.T. 278 (Tri. – Mumbai)**.

4.5 Shri Deepak Kumar Jain General Manager Projects of the appellant admitted that the imported goods are domestic water meters required for revenue billing. The description in the contract is also water meter of make ARAD, which are multi jet magnetic water meter.

4.6 The importer had earlier imported samples during the year 2012 and CTH was declared as 9028 in Bills of Entry and the invoices of the supplier also mentioned HSN CTH 9028. Thereafter, when bulk quantities were imported in year 2015 and 2016 the appellant changed the CTH from 9028 to 9026 and the invoices of the overseas supplier also changed accordingly. The Certificates of origin issued by the authorities of the exporting country still indicate HSN 9028.

4.7 Shri Rupendra Singh Bedi, Director of PS Bedi & Co., the Customs broker, in his statement dated 02.03.2020, said that he had seen the contract agreement for supply and installation and maintenance of water meters between appellant-importer and Delhi Jal Board and the word "flow meter" was not mentioned in the said contract.

4.8 The CTH 9028 talks of 'liquid meters'. Water is a liquid. Hence, 9028 heading is appropriate for water meters. Reliance is placed on the case law of the case of **Dunlop India Ltd. & Madras Rubber Factory Ltd. Versus Union of India and Others reported as 1983 (13) E.L.T. 1566 (S.C.)**

4.9 Goods must be classified as understood by the people in trade and commerce in the usual course. In the instant case, the imported goods are used to measure volume of water flowing. It is immaterial even if they can, in addition, also measure the rate of flow. Hence, the imported goods were correctly classifiable under **CTI 9028 2000** and there is no infirmity in the impugned order which may be upheld and the appeals may be dismissed.

5. We heard the submissions advanced by both sides and perused the records. The issues to be decided in this appeal are:

- (i) Which is the correct classification of the disputed goods- **CTI 9026 1010** (as claimed by the appellants) or **CTI 9028 2000** (as held in the impugned order)?
- (ii) If the classification in the impugned order is correct, has the demand been correctly raised invoking extended period of limitation under section 28 (4)?
- (iii) Has the demand of interest under section 28AA been correctly invoked?
- (iv) Were the imported goods correctly confiscated or have been held liable to confiscation under section 111(m)?
- (v) Have the penalties under section 112, 114A, 114AA and 117 been correctly imposed on the appellants herein?

Classification of the goods

5.1 We proceed to examine the classification first. The two rival **CTIs are 9028 2000 and 9026 1010**. The relevant entries are as follows:

Chapter 90: Optical, Photographic, Cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof

9026 Instruments and Apparatus for Measuring or Checking the Flow, Level, Pressure or Other Variables of Liquids or Gases (for Example, Flow Meters, Level Gauges, Manometers, Heat Meters), Excluding Instruments and Apparatus of Heading 9014, 9015, 9028 Or 9032

902610 For measuring or checking the flow or level of liquids

9026 10 10 For measuring or checking the flow or level of liquids: Flow meters

.....

9028 Gas, liquid or electricity supply or production meters including calibrating meters therefor

9028 1000 Gas meters

9028 20 00 Liquid meters

6. As per the Rule 1 of the General Rules of Interpretation, goods should be classified as per the chapter headings read with the relevant chapter notes and section notes. It is evident from the description of the two entries of the Customs Tariff that **CTI 9026 1010** would apply to flow meters, i.e., those which measure the rate of flow of the liquids through them while **CTI 9028 2000** would apply to those meters which measure the volume of the liquid flowing through them.

7. Since the Customs Tariff is based on the Harmonised System of Nomenclature (HSN), the Explanatory Notes to HSN merit consideration in classifying goods. We draw our support from the case law of the case of **Collector of Customs, Bombay Versus Business Forms Ltd. reported as 2002 (142) E.L.T. 18 (S.C.)**. The Hon'ble Supreme Court in another matter titled as **Collector of Central Excise, Shillong Vs. Wood Craft Products Limited reported as 1995 (77) ELT 23 SC** has held that the tariff entry is patterned on HSN explanatory notes which are preferable even to ISI glossary in case of Conflict. The Hon'ble Supreme Court in this case has perused the statements of objects and reasons of Central Excise Tariff Bill, 1985 which led to the enactment of Central Excise Tariff Act, 1985 and held that the Central Excise Tariff is based on HSN, the internationally accepted nomenclature which has been taken into account in the said statement of objects and reasons so

as to reduce disputes on account of tariff classification. Accordingly, the Hon'ble Court held that for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN.

8. The relevant HSN notes to the two entries are as follows.

CTH 9026: Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquid or gases (for example, flowmeters, level gauges, mano-meters, heat meters), excluding instruments and apparatus of heading 90.14, 90.15, 90.28 or 90.32.

9026.10 - For measuring or checking the flow or level of liquids

9026 10 10 For measuring or checking the flow or level of liquids:
Flow meters

9026.20 - For measuring or checking pressure

9026.80 - Other instruments or apparatus

9026.90 - Parts and accessories

Apart from instruments or apparatus more specifically covered by other headings of the Nomenclature, such as:

- (a) Pressure reducing valves and thermostatically controlled valves (heading 84.81);
- (b) Anemometers (wind gauges) and hydrological level gauges (heading 90.15);
- (c) Thermometers, pyrometers, barometers, hygrometers and psychrometers (heading 90.25);
- (d) Instruments and apparatus for physical or chemical analysis, etc. (heading 90.27),

This heading covers instruments and apparatus for measuring or checking the flow, level, pressure, kinetic energy or other process variables of liquids or gases.

The instruments and apparatus of this heading may be fitted with recording, signaling or optical scale, reading devices or transmitters with an electrical, pneumatic or hydraulic output.

Measuring or checking apparatus generally incorporates an element sensitive to variations in the quantity to be measured (e.g. Bourdon tube, diaphragm, bellows, semiconductors) moving a

needle or a pointer. In some devices the variations are converted into electrical signals.

Measuring or checking instruments or apparatus of this heading combined with taps, valves, etc., are to be classified as indicated in the Explanatory Note to heading 84.81.

- (I) Apparatus for Measuring or Checking the Flow or Rate of Flow of Liquids or Gases Flowmeters. These indicate the rate of flow (in volume or weight per unit of time) and are used for measurement of flow both through open channels (rivers, waterways, etc.) and through closed conduits (piping, etc.)

Some flowmeters use the principle of the fluid meters of heading 90.28 (turbine- type, piston-type, etc.) but the majority are based on the principle of differential pressure.

Flowmeters which operate by using magnetic fields, ultrasound or heat.

This heading excludes:

- (a) Hydrometric paddle – wheels for measuring the rate of flow in rivers, canals, etc. which fall in heading 90.15 as hydrological instruments.
- (b) **Apparatus which merely indicate the total amount of liquid delivered over a period, which are classified as supply meters in heading 90.28.**

Anemometers of the special types used for recording the rate of flow of air currents in mines, tunnels, chimneys, furnaces and conduits in general, and consisting essentially of a bladed fan and a calibrated dial. In some devices the measured values are converted into electrical signals.

CTH 9028: Gas, liquid or electricity supply or production meters, including calibrating meters thereof

9028.10	-	Gas meters
9028.20	-	Liquid meters
9028.30	-	Electricity meters
9028.90	-	Parts and accessories

These meters are generally fitted with a device driven at a speed proportional to the rate of fluid flow or to the electrical quantity being measured. They are often fitted in a bypass or shunt off the

main or connected to measuring transformers, so that only part of the flow passes through them, but are calibrated so as to indicate the total quantity passing through the service pipes or through the main.

Gas, liquid or electricity supply or production meters fall in this heading whether or not fitted with a clockwise recording device or with a simple mechanical or electrical device for bringing controlling, signaling, etc., appliances into action.

(I) Gas or Liquid Supply or Production Meters

These meters are used to measure in volumetric units the amount of fluid passing through a pipe. Flowmeters, which measure rate of flow are excluded (heading 90.26).

The heading includes household supply meters, plant production or supply meters, and standard meters (for checking the accuracy of ordinary meters). In addition to simple meters, the heading also includes special meters such as maximum, prepayment, price-calculating, etc., meters.

Supply or production meters consist essentially of the measuring device (turbine, piston, diaphragm, etc.), the mechanism for regulating the admission of fluid (generally slide valves), the transmission (endless screw, camshaft, gears or other system), and a recorder or an indicator (pointer or drum type) or both.

8. We find that the HSN Explanatory note to 9028 clearly states that household water supply meters measuring volumetric units are covered under CTH 9028. HSN Explanatory note to 9026 says that the heading excludes apparatus which merely indicate the total amount of liquid delivered by the period, which is classified as 'supply meters' in heading CTH 9028.

9. Thus, both from the entries in the Customs Tariff and the corresponding explanatory notes of HSN, it is evident that meters which are primarily designed to measure the rate of flow of the liquids are classifiable under **CTI 9026 1010** while those which measure the volume of flow are classifiable under **CTI 9028 2000**.

10. The question which arises was what is the nature of the meters which were imported. The undisputed facts are that the imported meters were supplied by the importer to Delhi Jal Board under a contract to supply, install and maintain meters to be installed at homes.

11. The contract dated 27.05.2013 was executed between the appellants and Delhi Jal Board pursuant where to the appellant has imported the impugned meters. The name of the work in the said contract is "supply of installation and seven-year maintenance of 15 mm size AMR/non-AMR water meters confirming to IS 779; 1994 or ISO 4064; 1993". The description given in the contract in addition to the above is that the water meters were required to be marked to read in metric system along with the manufactures test and guarantee certificate, including cost of all material, GI fittings including supplying at store and transporting from store to consumer connections in municipal area straight reading supply of AMR water meters. Thus, it becomes clear that the contract itself is simply talking about the requirement of meters meant for measuring the volume of water supplied to the household in the municipal area over a period of time. It is nowhere talks about the flow meters. Jal Board is otherwise not suppose to measure the speed of the water. It required meters to be installed domestically for revenue billing, it otherwise coming out of the contract itself.

12. As already observed above that water meters measuring volume per duration of time are simply water meters and the water meters measuring speed of the liquid per unit of time are the flow meters. **It has also been observed that all water meters are flow meters but not vice versa.** Thus, the imported goods were

the one to be supplied to Delhi Jal Board for measuring the volume of domestic supply of water and thus the product is water meter clearly covered under CTH 9028.

13. We have also seen the scope of ISO 4064 specification which was brought on record by the appellant itself, the international standards thereof. We observe that ISO 4064 applies to water meters based on electrical or electronic principles and to water meters which based on mechanical principles incorporating electronic devices are used to measure the actual volume flow of cold portable water and hot water. **Thus, the imported goods merit classification under CTI 9028 2000.**

Confirmation of demand under section 28(4) of the Act invoking extended period of limitation

14. The next question is of confirmation of demand invoking extended period of limitation. Learned Chartered Accountant made two submissions on this issue. Firstly, he submitted that the Bills of Entry were self-assessed and the goods were cleared and self-assessment is also a form of assessment as per the judgment of the Supreme Court in **ITC Ltd vs Commissioner of Central Excise, Kolkata IV**⁹ and the self-assessed Bills of Entry could have been assailed by the department before Commissioner (Appeals) under section 128 of the Act. According to the learned chartered accountant, since the demand has been raised in the SCN and confirmed in the impugned order under section 28 without first assailing the self-assessment in appeal, it is not sustainable. He placed reliance on the order of the Kolkata bench of this Tribunal in

⁹ 2019 (368) ELT 216 (SC)

Shri Rajib Saha vs Commissioner of Customs (Preventive), Shillong¹⁰ in support of this submission.

15. The second submission of the learned chartered accountant is that classification is a matter of opinion of the importer according to which it self-assessed the Bill of Entry and no malafide can be attributed to it even if the classification is decided against it. Therefore, demand invoking extended period of limitation cannot be sustained.

16. Learned authorized representative for the Revenue supports the confirmation of demand invoking extended period of limitation.

17. We have considered the submissions on this question. The reliance placed by the learned Chartered Accountant on **ITC Ltd.** is highly misplaced as this is a case of demand under section 28 and the question before Supreme Court in **ITC Ltd.** was whether refund of duty under section 27 can be sanctioned if the goods were cleared on the basis of self-assessment without filing an appeal before Commissioner (Appeals) and not if a demand could be raised under section 28. Supreme Court held that all assessments including self-assessments can be appealed against before the Commissioner (Appeals) and no refund can be sanctioned unless the assessment is modified.

18. Assessments can be modified either through an appeal to the Commissioner (Appeals) under section 128 or modified under section 28. The submission of the learned counsel, if accepted, will result in absurd consequences. If a notice under section 28 is issued, after considering the reply and hearing the

¹⁰Final Order no. 76465-76466/2023 dated 24 August 2023 passed by CESTAT Kolkata in Appeals C75278 and 75279 of 2016

noticee, the proper officer (commissioner or additional commissioner or joint commissioner or deputy commissioner or assistant commissioner) has to adjudicate the matter and pass an order. If the assessment is already appealed against before Commissioner (Appeals) under section 128 and is either affirmed or annulled or modified, the assessment order merges with the order of the Commissioner (Appeals) which must be honoured. The question of the proper officer again issuing a notice under section 28 on the same issue after the Commissioner (Appeals) had decided the matter does not arise because the proper officer cannot sit in judgment over the order of the Commissioner (Appeals).

19. We now consider the order of a bench of this Tribunal passed in **Rajib Saha** relied upon by the learned Counsel. The relevant portion of this order is reproduced below:

7. The Appellant cited the decision of the Hon'ble Supreme Court in the case of I.T.C. Vs. Commissioner of Central Excise, New Delhi [2019(368) ELT 216 (SC)] wherein it has been held that the department cannot demand differential duty without challenging the self-assessment made by the importer. Accordingly, they contended that the impugned order is not sustainable.

.....

10. We observe that the self-assessment of the Bills of Entry by the importer was not challenged by the department. The Hon'ble Supreme Court in the case of ITC Ltd, has held as under:

When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and **it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified**

under Section 128 or under other relevant provisions of the Act.

11. We observe that the ratio of the above said decision is squarely applicable in this case. We find that the impugned order passed demanding differential duty without challenging the original assessment of the Bill of entry is not sustainable. Hence, the demand is not sustainable on this count also.

(emphasis supplied)

20. It is evident from the above text of the order that while the judgment of the Supreme Court in **ITC Ltd.** was with respect to sanction of refunds under section 27, in **Rajib Saha**, the bench had instead, applied it to the demands under section 28 and held that a notice under section 28 cannot be issued without first filing an appeal before the Commissioner (Appeals). This, being contrary to the explicit legal position and also the law laid down by the Supreme Court in **ITC Limited**, is, in our opinion, *per incuriam*, and hence cannot be a binding precedent on us in this case.

21. **Thus, there is no force in the submission of the learned Chartered Accountant that a notice demanding duty under section 28 cannot be issued without first assailing the self-assessment before Commissioner (Appeals) under section 128. It needs to be rejected and is rejected.**

22. The other submission of the learned Chartered Accountant is that classification of imported goods is a matter of opinion which, even if it is wrong, cannot result in a presumption of malafide and invocation of extended period of limitation under section 28. As per section 28, a demand can be raised only within the normal period of limitation and demand for extended period of limitation can be raised only if the short payment of duty is due to

(a) collusion; or

- (b) any wilful mis-statement; or
- (c) suppression of facts

23. This submission of the appellant looks attractive on a first look but a deeper examination of the facts would show otherwise. Generally speaking, merely assessing the duty by claiming an incorrect classification of the goods in the Bill of Entry does not mean that the importer had any intention to evade payment of duty. However, the facts of a case may prove such an intention.

24. In this case, the appellant was fully aware of the nature and function of the meters which it had imported. It imported them and supplied to Delhi Jal Board to install in homes to measure the water consumption. For this purpose, it had entered into a detailed contract with Delhi Jal Board. Therefore, the appellant was fully aware that the meters which it had imported were meant to measure the volume of water consumption by individual homes based on which Delhi Jal Board charges for the water.

25. Well before these imports under the disputed Bills of Entry, the appellant had imported samples of the meters from the same supplier and cleared them through Customs Broker M/s. Shailendra Jain C&F Pvt. Ltd., New Delhi classifying them under **CTI 9028 2000** which is the same **CTI** under which Revenue wants to classify them in this case. The invoices from the overseas supplier for these Bills of Entry also mentioned **HSN 9028**.

26. Thereafter, the appellant imported these meters in larger quantity for supply to Delhi Jal Board. It changed its Customs Broker to M/s. P.S. Bedi & Co. Pvt. Ltd. and changed the classification to **CTI 9026 1010**; this Customs Broker indicated in

his statement that the appellant had given written instructions to classify the meters under **CTI 9026 1010**. The same overseas supplier supplied these meters also, but in the invoices, **HSN 9026** was now mentioned. The Country of Origin certificates issued by the authorities in the exporting country, however, clearly mentioned **HSN 9028**.

27. These facts show that the appellant indicating **CTI 9026 1010** in the Bills of Entry was not on any honest belief but it was clearly a strategy to evade paying duty adopted by changing the classification from **CTI 9028 2000** under which it was filing the Bills of Entry. It obtained invoices from the supplier indicating **HSN 9026** (as opposed to **HSN 9028** indicated in the previous invoices), it changed its customs broker, gave the broker written instructions to file Bills of Entry classifying them under **CTI 9026 1010**. The Country of Origin certificates issued by the authorities in the export countries continued to indicate **HSN 9028**.

28. The question which may arise is if the importer deliberately changes the classification and it results in short payment of duty if extended period of limitation could be invoked. In our considered view, given the peculiar facts of this case, where the classification of the goods was deliberately changed by the appellant importer, its intention to evade duty by mis-classifying the goods is evident. We draw support from the judgment of the Supreme Court in **Commissioner of Central Excise, Ahmedabad vs Urmin Products Pvt. Ltd and others**¹¹. In that case, Revenue assailed the orders passed by the CESTAT deciding the classification of the goods in favour of the assessee respondents. After detailed

¹¹**2023 (10) TMI 1112 - SUPREME COURT**

examination, the Supreme Court held the classification in favour of the Revenue. On the question as to whether extended period of limitation could be invoked for issuing a demand under section 11A of the Central Excise Act, 1944, the Supreme Court found that the respondents had changed the classification of the manufactured goods consequent upon the budgetary changes in order to take ineligible benefit and under those circumstances, and held that extended period of limitation could be invoked. Relevant paragraphs of this judgment are reproduced below:

42. It is an admitted fact that till the filing of this letter, the Assessee continued to classify the product as 'zarda/jarda scented tobacco' falling under CET SH 2403 9930. It is for this precise reason, that the adjudicating authority has observed, and rightly so that the letter dated 30.03.2006 had been cleverly drafted and it does not mention in detail the product which they were manufacturing at that material time namely 'zarda/jarda scented tobacco'. Though the classification in the letter shows entry CET SH 2403 9910 ('chewing tobacco'), it would depict a picture as though it is a new product. A plain reading of the letter would not indicate that the author of the said letter intended to reveal any details about the product that is being manufactured. However, the Assessee cannot feign ignorance as to the necessity of furnishing such relevant details necessary for determination of payment of duty. The Assessee having been in this industry for a long period was well aware of this statutory requirement. Upon a deeper examination of the said letter, the suppression becomes more apparent, namely the non-mentioning of change of the name and classification of the goods which they were currently manufacturing and which they ought to have disclosed. It would be apposite to note the judgment of this Court in *Continental Foundation Jt. Venture v. Commissioner of Central Excise* (2007) 10 SCC 337 that suppression means failure to disclose full information with intent to evade payment of duty. It has been further held:

"12. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the revenue invokes the extended period of limitation Under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

14. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful', preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Misstatement of fact must be wilful."

It is this hiding of the fact and not specifying the details in their letter that led to the issuance of the show cause notice and invocation of Section 11A and Section 11 AC of the CE Act, by the Department. It cannot be ignored that till filing of the letter dated 30.03.2006, the Assessee itself was classifying the product as 'zarda/jarda scented tobacco' falling under CET SH 2403 9930 and being a large-scale manufacturer and paying large sums of amount as duty, to contend that it was unaware of the difference between these two products, or to contend that it had classified the product as 'zarda/jarda scented tobacco' by ignorance, is not a plausible justification on part of the Assessee. However, on the issuance of Notification No. 2 of 2006 dated 01.03.2006 under which 'zarda/jarda scented tobacco' was excluded or in other words not included in the said notification, the Assessee changed the description of its product from 'zarda/jarda scented tobacco' to 'chewing tobacco'. The date of communication of the letter dated 30.03.2006 by the Assessee also acquires significance in as much as the Notification No. 2 of 2006 dated 01.03.2006 were to take effect from 01.04.2006 and just two days before the date of the said Notification No. 2 of 2006 coming into effect, this communication dated 30.03.2006 has been forwarded to the Department by the Assessee. **The intention of springing up such a letter is evident from the fact that intention was to evade payment of duty payable Under Section 4 of CE Act; despite knowing the fact that its product was not covered under relevant notification which provides for valuation Under Section 4A, yet the Assessee did so, only to pay duty on lower value as per Section 4A of CE Act, by claiming the product manufactured by it as 'chewing tobacco' rather than 'zarda/jarda scented tobacco' to avail benefit of MRP-based assessment which was lower than the value as prescribed Under Section 4 of the CE Act.**

43. Yet another factor which cannot go unnoticed is the statement of the production manager and factory in-charge and manager recorded at the time of the inspection of the units/factory of the Assessee, whereunder they have clearly admitted in their statement dated 21.06.2007 recorded Under Section 14 of the CE Act, wherein they confirmed that in the E.R. 1 returns filed for the month of April 2006 onwards, they have revised the classification of their final product from CET SH 2403 9930 to CET SH 2403 9910 and started describing their product as 'chewing tobacco' instead of 'zarda/jarda scented tobacco' and by virtue of such declaration they continued to pay duty as per MRP-based assessment under the relevant Notification No. 2 of 2006 dated 01.03.2006 though 'zarda/jarda scented tobacco' was not covered under MRP-based assessment during the period 01.03.2006 to 10.07.2006 till the tariff entry i.e., CET SH 2403 9930 being brought within the ambit of Section 4A of CE Act by issuance of Notification 16 of 2006 dated 11.07.2006. **It is for this precise**

reason that the act of the Assessee was held to be a deliberate and accordingly wilful misstatement was alleged on part of the Assessee, with an intention to evade duty payable Under Section 4 of the CE Act, which would attract the extended period of limitation, namely proviso to Section 11A (1) being invoked. The adjudicating authority has examined the issue of invoking an extended period of limitation, in the background of the communication dated 30.03.2006 which has been very heavily relied upon by the Assessee to stave off the allegation of misrepresentation or wilful misstatement of facts and the adjudicating authority opined as under:

"It can be seen that the Assessee had very cleverly drafted the letter and did not mention any details of the product which they were manufacturing at that material time i.e., 'Jarda scented tobacco'. On reading this letter, any person could conclude that they have started a new product 'Chewing tobacco' which they have classified in 2403 9910 as it is the, correct subheading of Chewing tobacco. On a plain reading of the letter, at the first instance, no one will be able to understand the real motive. The Assessee did not mention in the letter that they are changing the name and classification of the goods which are currently being manufactured by them which they were supposed to do. Had they mentioned this fact at that time, the issue would not have arisen at all. Intentionally, they have hidden the facts and did not elaborate in the letter. The Assessee, on the contrary preferred to show the reasons in the statement recorded Under Section 4 on 26-6-2006 when the department caught him for evading the duty. Further, the Assessee has mentioned that as per the practice followed by their industry, they classify their product Chewing tobacco into 2403 9910. The classification of the goods manufactured by an Assessee is based on many factors including the raw material used, manufacturing process and the end use. If any of the deciding factors is changed then the classification may change and therefore the industry cannot decide the classification in such type of goods. The Assessee intentionally hid the fact that they have changed the classification of their product viz. 'Jarda scented tobacco'. It is an established fact that when there is no dispute on classification and the Assessee suddenly submits a very carefully drafted letter of such type, a general inference will be drawn that a new product has been introduced in place of earlier one. The Assessee, with intent to evade the Central Excise duty, deliberately resorted to mis-statement and willfully suppressed the vital facts. The Assessee had changed and misclassified the product from 'Jarda scented tobacco' to 'Chewing tobacco' with an intention to evade payment of duty payable Under Section 4 of the Central Excise Act, 1944, despite knowing the fact that their product was not covered under the relevant Notification which provides for valuation Under Section 4A. The Assessee did so to enable them to pay duty on low value [as the value as per Section 4A of Central Excise Act, 1944 (MRP based assessment) was lower than the value as per Section 4 of Central Excise Act, 1944. Thus, there was a deliberate intention to evade payment of duty by the Assessee, by misclassification and willful mis-statement of their product and due to this act, the department is entitled to invoke the extended period as provided in the proviso to Section 11A (1) of the Central Excise Act, 1944 to recover the differential duty along with interest Under Section 11 AB for the larger period upto 5 years and has also rendered themselves liable to penalty Under Section 11AC of the Central Excise Act 1944. I, accordingly hold that the Assessee is liable to penalty Under Section 11AC of the Central Excise Act, 1944."

However, the tribunal has proceeded to hold that limitation would apply and show cause notice should not have been

issued beyond one year in view of the fact that the Assessee intimated their intention to change - vide Paragraph 22 of the impugned order, without addressing the aforesaid issues which has been dealt in detail hereinabove. In other words, the tribunal by cryptic order has negated the contentions of the Revenue and held that the invocation of the extended period of limitation was not warranted. This finding, not being in consonance with the facts obtained on the hand, we are unable to subscribe our views to the judgment of the tribunal. In that view of the matter, we are of the considered view that Question No. 1 is to be answered against the Assessee and in favour of the Revenue and affirm the finding of the adjudicating authority and reverse and/or set aside the finding recorded by the tribunal which has been observed at the initial stage herein given that it is not only contrary to the facts but also contrary to law as noticed hereinabove. **It is for these precise reasons the Adjudicating Authority was of the clear view that there has been a deliberate intention to avoid payment of duty by the Assessee by misclassification and willful misstatement of its product and hence it was justified in invoking the extended period as provided in the proviso to Section 11A(1) of CE Act, 1944.**

(emphasis supplied)

29. Respectfully following the ratio of the judgment of Supreme Court in **Urmin Products**, we hold that considering the facts of the case, the intention of the importer to evade paying duty by deliberate mis-classification of the goods is evident and therefore extended period of limitation was correctly invoked in this case. **We, therefore, hold that confirmation of demand invoking extended period of limitation with interest was correct.**

Confiscation of imported goods under section 111(m)

30. Section 111(m) reads as follows:

Section 111. Confiscation of improperly imported goods, etc. -

The following goods brought from a place outside India shall be liable to confiscation:

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under trans-shipment, with the declaration for trans-shipment referred to in the proviso to sub-section (1) of section 54;

31. The imported goods were classifiable under **CTI 9028 2000** and they were instead classified under **CTI 9026 1010** in the Bills of Entry (which is an entry made under the Act). Such incorrect classification is,

usually considered as a matter of opinion and goods are not held liable to confiscation for mis-classification. However, in the peculiar facts of the case, where the importer had, deliberately changed the classification of the goods and engaged a new Customs Broker and gave written instructions to classify the goods under **CTI 9026 1010**, we find that Section 111(m) squarely applies to the imported goods and they were liable confiscation. In the impugned order, the imported goods were correctly confiscated under section 111(m) wherever they were available. Where they were not available, the goods were held to be liable to confiscation but were not actually confiscated. We uphold these decisions in the impugned order.

Penalties under section 112, 114A, 114AA and 117

32. These sections read as follows:

SECTION 112. Penalty for improper importation of goods, etc.-

Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher:

Section 114A. Penalty for short-levy or non-levy of duty in certain cases. -

Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined

under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:

Section 114AA. Penalty for use of false and incorrect material. -

If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

Section 117. Penalties for contravention, etc., not expressly mentioned. -

Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, **where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding ^{four} lakh rupees.**

Penalty under section 112 can be imposed for acts which render the goods liable to confiscation. Since we have upheld the confiscation of the goods/holding that the goods were liable to confiscation, section 112 squarely applies. Penalty under section 114A can be imposed if the duty was not paid or short paid by reason of collusion or any wilful mis-statement or suppression of facts. These factors are the same as those required to invoke extended period of limitation under section 28. Since we have, considering the peculiar facts of this case, upheld the invocation of extended period of limitation, we also uphold the penalties imposed under section 114A.

33. Penalty under section 114AA can be imposed for knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material. In this case, the appellant deliberately caused incorrect **CTI** to be indicated in the Bills of Entry and hired a new Customs Broker and instructed him to indicate wrong **CTI** in the Bills of Entry. Therefore, section 114AA squarely applies to this case. As far as penalty under section 117 is concerned, it is a

residual penalty imposable where there is no other provision. Since penalties were found to be imposable and were imposed under other sections, penalty imposed under section 117 cannot be sustained.

34. In the light of entire above discussion, **we hold as follows:**

- (i) The goods imported under the disputed Bills of Entry at three of the ports were the water meters and NOT flow meters.
- (ii) The correct classification of these meters is **CTI 9028 2000**.
- (iii) The benefit of nil rate of BCD in terms of Notification No. 24/2005 dated 01.03.2005, entry at Sr. No. 31 was available only to the flow meters under CTH 9026. The rate of duty for water meters under CTH 9028 is @ of 7.5%.
- (iv) The submission of the learned Chartered Accountant that unless the self-assessed Bills of Entry are assailed before Commissioner (Appeals) under section 128, no SCN demanding duty under section 28 can be issued is not correct and the reliance placed by him on **ITC Ltd.** is misplaced. **ITC Ltd.** held that refund under section 27 cannot be sanctioned unless the assessment (including self-assessment) is assailed before Commissioner (Appeals) and it does not say that demand under section 28 can be issued only after an appeal.
- (v) The appellant had deliberately changed the classification of the goods from **CTI 9028 2000** to **CTI 9026 1010** and hired a new Customs Broker and gave him instructions accordingly in order to evade duty; therefore, extended period of limitation under section 28 was correctly invoked.

(vi) Considering the peculiar facts of this case, we find that the goods were correctly confiscated/held liable to confiscation under section 111(m).

(vii) All penalties except penalty under section 117 were correctly imposed and are upheld. Penalties imposed under section 117 are set aside.

35. Both appeals are partly allowed by setting aside the penalty imposed in the impugned order under section 117. The rest of the impugned order is upheld.

[Order pronounced in the open court on **02.05.2025**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

HK