

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL No. C/157/2010

(Arising out of Order-in-Appeal No. 679(GR.VB)/2009 (JNCH)/IMP-294 dated 18.11.2009 passed by Commissioner of Customs (Appeals), Mumbai-II, JNCH, Nhava Sheva)

Tata Toyo Radiators Ltd.

Appellant

Vs.

Commissioner of Customs (Import), Nhava Sheva Respondent

Appearance:

Shri S. Narayanan, Advocate, for appellant

Shri S.R. Nair, E.O. (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 27.6.2018

Date of Decision: 29.10.2018

ORDER No. A/87778/2018

Per: Sanjiv Srivastava

This appeal is directed against the Order in Appeal dated 18.11.2009 of Commissioner of Customs (Appeal) Mumbai II, Jawaharlal Nehru Custom House, Nhava Sheva, rejecting the appeal filed by the Appellant holding as follows:

"I have carefully gone through the submissions made before me and the records, I find that the goods in

question are in the category of a machine and the spectrometer is only a part of that. Since the machine in its complete form is not a simple handy instrument to measure the flow, level, pressure or other variable of liquids or gases but ascertains leakage through a different system of ions dispersion through a spectrometer, forming part of whole machine, It is not a simple measuring instrument. It is something different as evident from the picture of machine and its diagrams. It has thus necessarily to go under the category of not elsewhere specified under 9031. The lower authority viz the AC has therefore rightly concluded that the machine in question is classifiable under CTH 9031."

2.1 Appellants filed a Bill of entry No 677731 dated 21.01.2008 for clearance of "*Helium Leak Testing Machine Twin Chamber with Recovery System*" claiming classification under CTH 90268090 and exemption under Notification No 24/2005-Cus (S No 31). On the basis of objection raised by CRA, the classification of the said machine was amended to 9031 with basic custom duty @ 7.5%. The matter was adjudicated by the Assistant Commissioner after following due process of law and demand of differential duty to tune of Rs 16,05,177/- along with applicable interest was confirmed by the Assistant Commissioner.

2.2 Aggrieved by the order of Assistant Commissioner, appellants filed the appeal to Commissioner (Appeal), who dismissed the appeal holding as stated in para 1 supra.

2.3 Against the said order of Commissioner (Appeal) appellants are in appeal before us.

3.1 In their appeal, appellants have challenged the orders of Commissioner (Appeal) on following ground;

- i. Both the authorities have failed to appreciate, the technical features of the said machine and have also not appreciated the technical reasoning given by the Chartered Engineer Certificate to support the classification under Custom Tariff Heading 9026.
- ii. They have not been put on notice on technical aspects as to why department intend to amend the classification, to defend the case.
- iii. Both the authorities below have failed to appreciate that the machine can be a checking/ measuring instrument. Machine in its complete form is not a simple handy instrument to measure the flow, level, pressure or other variable of liquid or gases cannot be a reason for holding the same to be not classifiable under heading 9026 and classifiable under 9031.

- iv. The imported goods in question are in fact measuring or checking instrument, and hence classifiable under heading 9026. Since the imported item measures the flow the flow of gas viz Helium and records such flow which is means to check as to whether there is any leakage in the radiator, it essentially is an instrument classifiable under heading 9026.
- v. To get classified under CTH 9026, the imported goods has to carry out the functions of measuring or checking the flow level, pressure or other variables of liquid or gases.
- vi. The spectrometer housed in the said instrument enables the gasses to get disbursed due to which helium gas which is separated when passes through helium detector in the said instrument could ascertain the flow and measure of such helium gas in the chamber and if such measure of helium gas presence is beyond the particular reading, it gives result that water / coolant content in the Radiator would leak.
- vii. Also as per the certificate given by the independent Chartered Engineer, the machine system in general and its mass spectrometer in particular quantifies the rate of flow of helium leak through the defective parts, in short it quantifies flow rate of leaked gas in the environment.

- viii. Chartered Engineer has stated that machine which carry out function of measuring and checking are nothing but measuring instruments and such instruments which does the function of measuring and checking are also referred to as machines.
- ix. As per McGraw Hill Dictionary of Scientific and Technical Terms, in relation to Engineering Industry, the word instrument is defined as “*A device for measuring and sometimes also recording and controlling the value of quantity under observation.*”
- x. They also rely on the following authorities in their support:
 - a. Commissioner of Customs Bangalore vs SPM India Ltd [2007 (211) ELT 573 (T-Bang)];
 - b. Hindustan Machine Tools Ltd vs Collector of Customs Madras [1987 (28) ELT 151 (T)];
 - c. Bajaj Tempo Ltd vs Collector of Customs, Bombay [1997 (910) ELT 111 (T)];
 - d. Kinetic Engineering Ltd vs Collector of Customs [1988 (37) ELT 61 (T)];
 - e. Collector of Customs vs Escorts Limited [1990 (49) ELT 223 (T)];
 - f. Collector of Customs vs Technological Centre [1989 (44) ELT 116 (T)];

g. Bajaj Auto Ltd vs Collector of Customs,
Mumbai [2000 (125) ELT 821 9T)];

4.1 We have heard Shri S Narayanan Advocate for the Appellant and Shri S R Nair, Authorized Representative for the revenue.

4.2 Arguing for the appellants learned counsel submitted that

a. the item under import is "*Double Chamber Helium Leak Detector System*" and since it functions specifically to measure the flow of gas viz helium and record such flow, which is the means to check as to whether there is leakage in radiator, it is essentially an instrument classifiable under heading 9026.

b. He heavily relied upon the opinion rendered by the Chartered Engineer and also the technical literature to support his case for classification under 9026.

c. He relied on the meaning of word instrument as given in McGraw Hill Dictionary of Scientific and Technical Terms to argue that item under importation is nothing but an instrument.

d. he relied on the case laws mentioned in his appeal to submit, that as per the law settled by these authorities, the correct classification of

items imported by them will be 9026 as claimed by them.

e. Since the item under import is correctly classifiable under heading 9026, the demand for differential duty cannot be sustained against them.

4.3 Arguing for the revenue, learned Authorized representative submitted-

a. Item imported is a machine and not a standalone instrument or apparatus. It is used for checking evaporators, condensers, compressors, radiators etc used in refrigeration and air conditioning industry.

b. The automotive industry part to be tested is connected by quick coupling and is placed in a test chamber and closed by the mobile cover. When cover is in position the entire chamber is completely sealed. The sealed assembly is then connected to a vacuum pump unit and helium leak detector. If the part leaks then helium escapes into the chamber and from there into the pump unit and is detected by the analysis cell and leak detector. As per Chapter Note 3 to Chapter 90, read with Notes 3 & 4 to section XVI, since the principle function of the machine is to test leakage in automotive parts, the same will get classified under CTH 9031.

c. CTH 9026 does not refer to any machine whereas CTH 9031 refers to Machine. Since the item under importation is machine in the first place, the same is more appropriately classifiable under 9031.

d. As per Oxford Dictionary-

Machine : An apparatus using mechanical power and having several parts, each with an definite function and together performing a particular task “a fax machine.”

Instrument: a tool or implement, especially one for precision work, “a surgical instrument”; a measuring device used to gauge the level, position, speed, etc of something, especially a motor vehicle or aircraft.

e. Since the item imported is correctly classifiable under heading 9031, the appeal needs to be dismissed.

5.1 We have considered the submissions made in appeal and also during the course of arguments. Since the issue for determination is with regards the classification of an item under importation, before proceeding further to have better and complete understanding of the item it is necessary to refer to the technical literature available in respect of the item, which was produced during the course of arguments and has been reproduced below:

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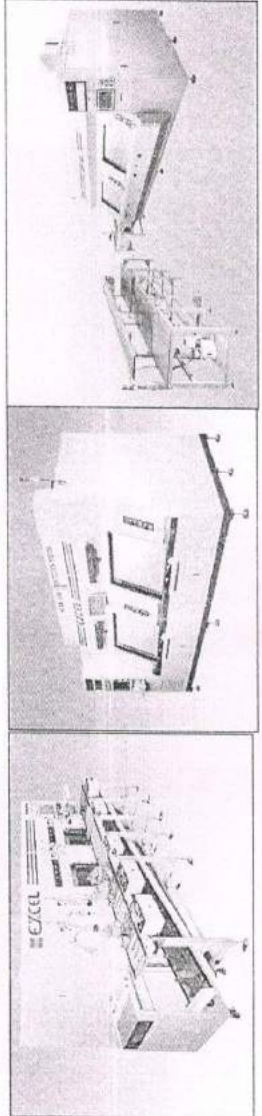
1



Products

Leak Detector System

Chart 18
23/01/2007
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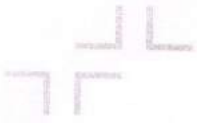


**DOUBLE CHAMBER HELIUM LEAK DETECTOR
SYSTEM**

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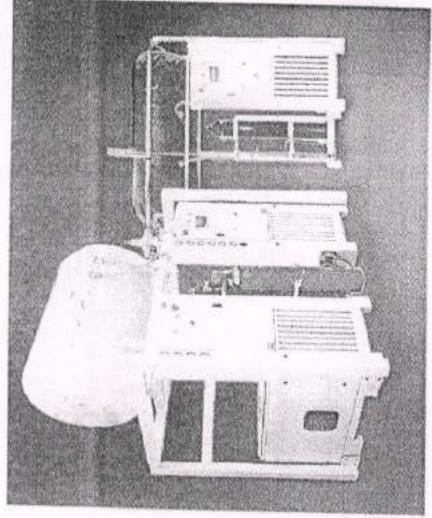
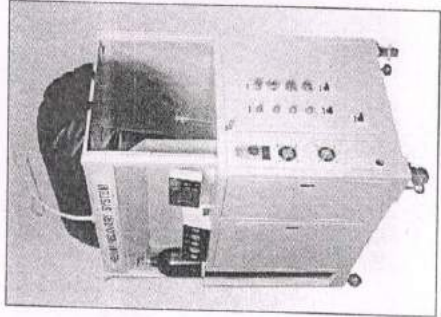
2



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Products

Leak Detector System



GAS RECOVERY SYSTEM

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Chart 20
23/01/2007
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3

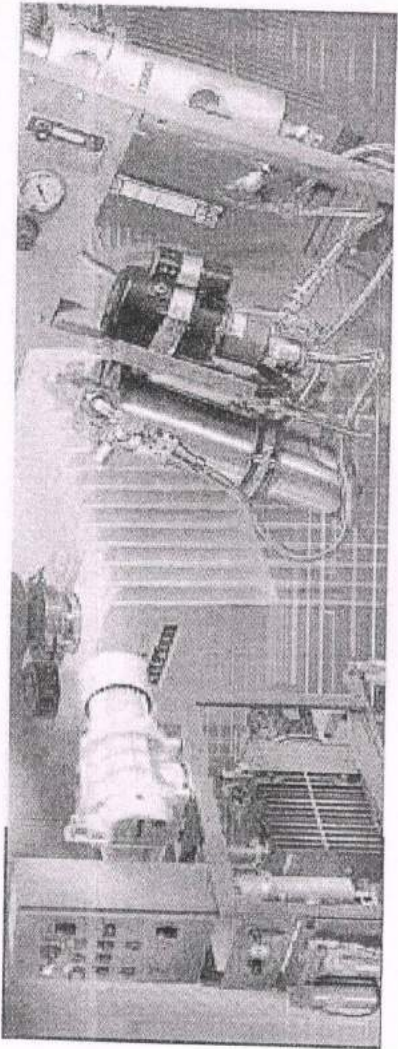


EXCEL
PRECISION

Basic Features

Chart 21
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Chart 22
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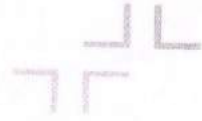
Selling the Standard for Assembly, Test and Production

S.A. - 4000

Basic Features - Performance

- ❖ Production rate up to 120 tests/hour
- ❖ Possibility to boost production with a second operator for dual chamber system.
- ❖ Sensitivity up to the 10⁻⁶ mbar.l/s range (Helium)
- ❖ Combined Test :
 - ❖ proof test with dry air / N₂
 - ❖ gross leak helium test
 - ❖ fine leak helium test

5



EXCELTM
PRECISION

Basic Features - Flexibility

- ❖ Compact shape for minimized footprint
- ❖ Single main frame for easy relocation
- ❖ All interfaced utilities on the top of the system

Chart 23

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Basic Features - Up Time & Reliability

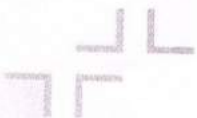
- ❖ Test chamber with full opening on the top
- ❖ Auto-calibration with a certified calibrated leak
- ❖ Auto-depollution with N2 when the helium background getting too high

Chart 25
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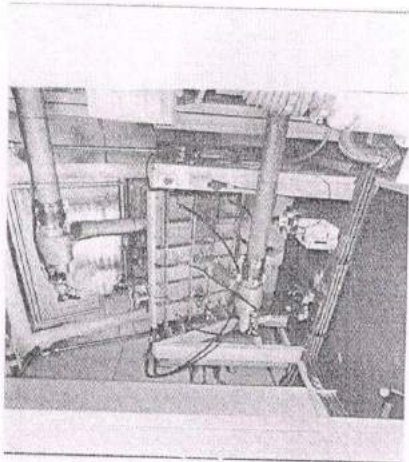
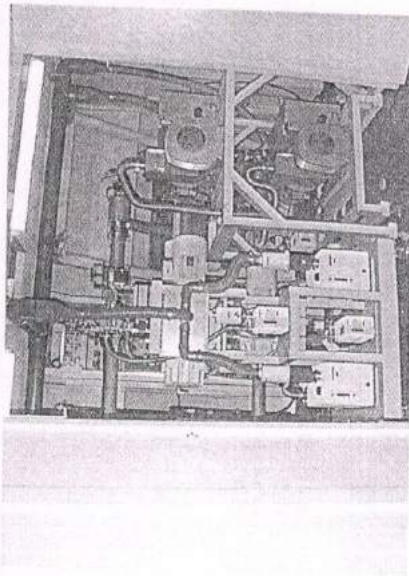
Basic Features - Up Time & Reliability

- ❖ Special device to prevent humidity from affecting cycle time
- ❖ Double sealing with intermediate pumping
- ❖ Dual pumping line

Chart 26

23/01/2007

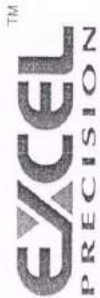
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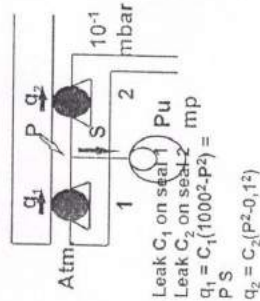
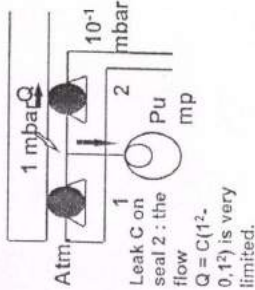
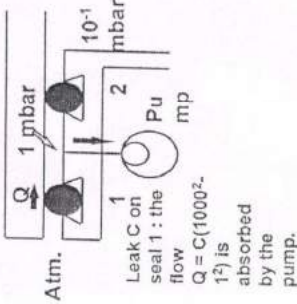
9



DOUBLE SEAL & INTERMEDIATE PUMPING

PURPOSE To ensure the tightness integrity of the vacuum chamber or a connection

PRINCIPLE A double seal is equipped with an intermediate pumping. In case of a leak on the external seal, no effect on the background of the internal side. In case of a leak on the internal seal, the air flow is limited thanks to the poor pressure difference on each side of the leak. In case of a leak on both seals, the same.



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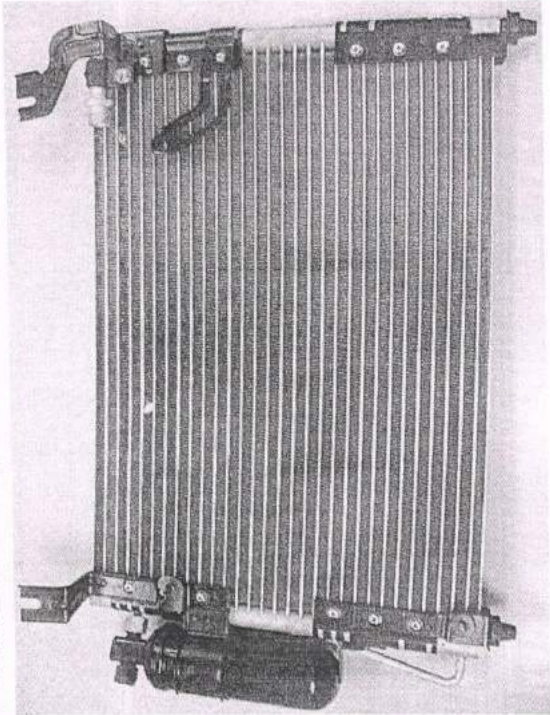
Basic Operation

- 1. Connect the coupler to the test part.

Chart 35

2340/12007

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Basic Operation

- 2. Loading the test part into the chamber



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Chart 37
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Basic Operation

- 3. Connect the test part to the high pressure hose



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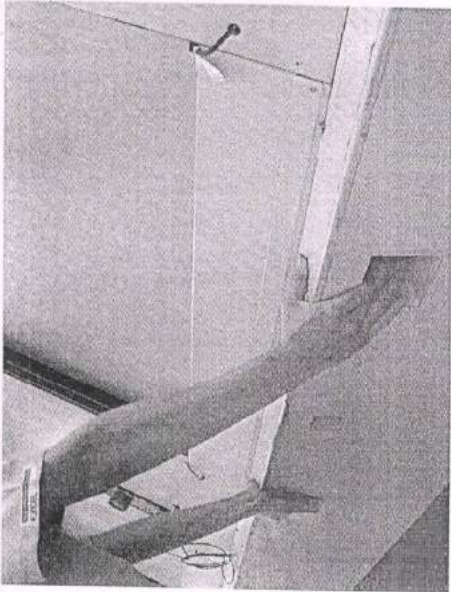


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Basic Operation

- 4. Press the two synchronized button to close the chamber door and start cycle.



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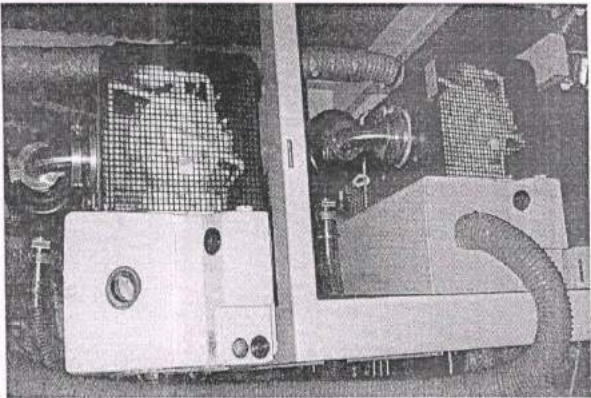


EXCELTM
PRECISION

Basic Operation

5. The roughing pump will pump down the chamber to 20 mbar and continue by high vacuum pump to pump the chamber to 1x10⁻¹ mbar.

Chart 33
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Automation

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Basic Operation

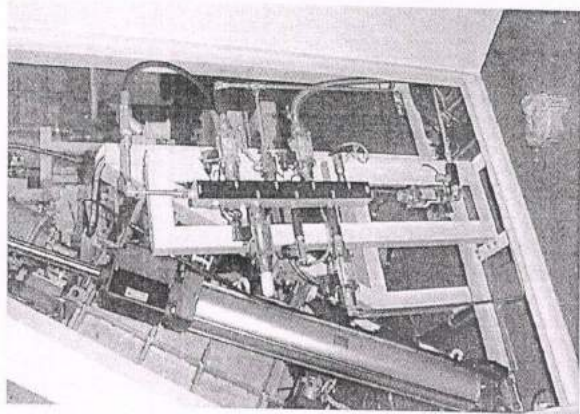
6. Meanwhile, the test part will go through 3 test process:

- Proof Test
- Gross Leak Test
- Fine Leak Test

Chart 40

23/01/2007

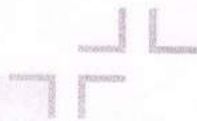
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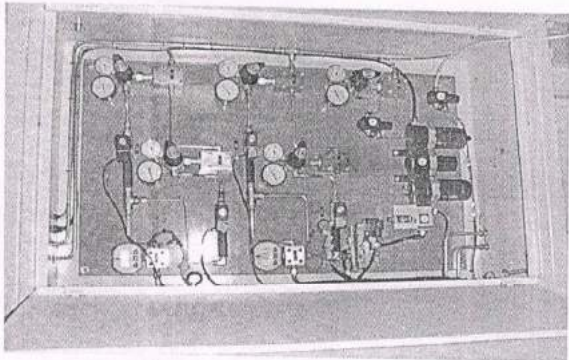


EXCELTM
PRECISION

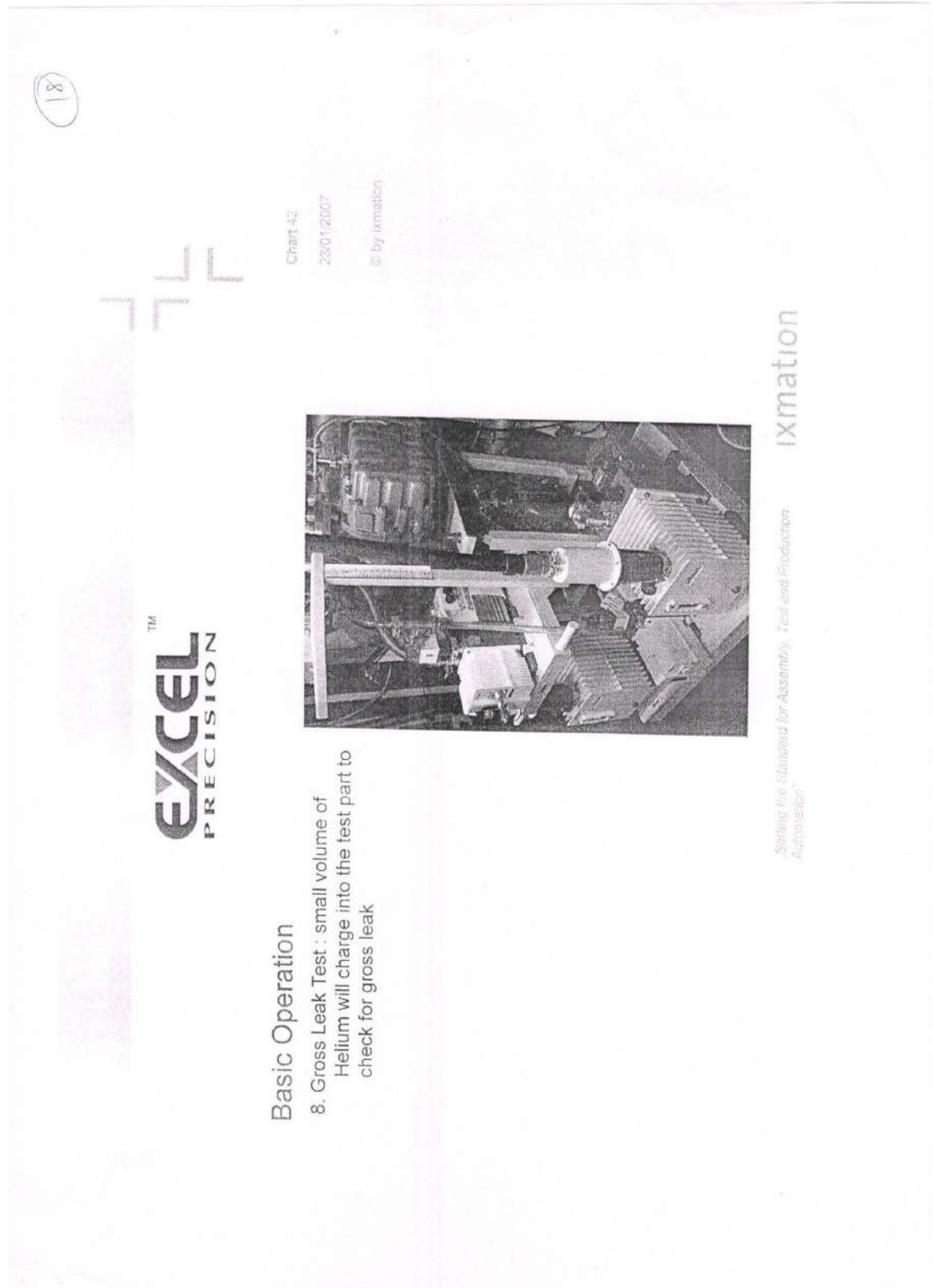
Basic Operation

- 7. Proof Test : 1 - 40 bar of nitrogen/dry air will charge into the test part. Hold for 2 second and check for pressure drop.

Chart 41
23/01/2007
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Basic Operation

8. Gross Leak Test : small volume of Helium will charge into the test part to check for gross leak

5.2 From the perusal of the complete technical literature it is quite evident, that item under importation, cannot be called an instrument or apparatus as understood in common parlance. Even going by the definition of the term instrument as

referred to by the appellants in their submissions i.e.

“A device for measuring and sometimes also recording and controlling the value of quantity under observation.”

The item imported fails to qualify as an instrument because the item is itself not a device, but a combination of various instruments, apparatus and devices, and referred to by term “system” in the technical literature. As per note 3 and 4 to Section XVI made applicable to chapter 90 by virtue of chapter Note 3 to said chapter, the item will qualify only as machine. For ease of reference the said chapter note and section notes are reproduced below:

Note 3 to Chapter 90:

3. The provisions of Notes 3 and 4 to Section XVI apply also to this Chapter.

Notes 3 and 4 to Section XVI

3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complimentary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

4. Where a machine (including a combination of machines) consist of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or 85, then the

whole falls to be classified in the heading appropriate to that function.”

5.3 Even as per the opinion of the chartered engineer submitted by the appellant, reproduced below, the item under importation is nothing but a machine. He has throughout the opinion given by him referred the item imported as machine only. Further chartered engineer, has categorically opined “The qualification of machine and instrument is more with reference to its use, in present case said machine is used as device for measuring & checking leakage hence it can be referred either as a machine or instrument.

A. D. Joshi & Associates

Chartered Engineers, Surveyors &
Loss Assessors, Process Consultants,
Govt. Registered Valuers
Competent Persons
(As per Factory Act, 1948)

Shop No. 7, "Sai Leela Apartment",
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Mobile No. : 98220-78982,
Telefax : (020) 27452996,
E-mail : abhayd_joshi@rediffmail.com

REF: CEC/TTR/2008/01

DATE: 28.09.2008

TO WHOM SO EVER IT MAY CONCERN

Subject: Chartered Engineers Certificate to confirm the technical and core function of 'Helium Leak test Machine Twin Chamber with recovery system,' imported by M/S Tata Toyo Radiator Ltd, Survey no 235-245 Hinjewadi, Pune 27 from M/S Excel Precision SDN Bhd, Malaysia vide Invoice No.0008 dt 05/01/2008 and also to confirm the nomenclature of the machine as "general purpose machine or instrument"

On request of M/S Tata Toyo Radiator Ltd (TTR), I visited their factory on 27/09/2008, to ascertain the technical and core function of the machine

On scrutiny of the specifications of the said the 'Helium Leak test Machine Twin Chamber with recovery system' imported by TTR, physical examination of the working operations of the said machine my observations are as follows.

- 1- The said machine uses tracer gas technique for detection of leakage of any mechanical equipment through its welding or mechanical joints. Helium is use as a tracer gas.
- 2- The part that is to be checked is installed in a sealed chamber, which is then placed under vacuumed by means of pump unit. The helium is then injected in the part to be checked.
- 3- If the part is leaking, the helium will escape in to the chamber which is in direct communication with leak detector via the vacuum circuit.
- 4- The core or the heart of detector is an analysis cell which comprises of high intensity, high performance Mass Spectrometer.
- 5- The concentration of leak helium gas in the vacuum circuit is quantified by the Mass Spectrometer. The concentration, of helium gas, it self depends on rate of leakage from defective part. Thus the leak detection machine having Mass Spectrometer as its integral part and the vacuum circuit in which helium from defective part acts as a reservoir for the Mass Spectrometer.

The machine in general and its Mass Spectrometer in particular quantifies the rate of flow of helium leak through the defective parts, in short it is quantification of flow rate of leaked gas in the environment of defective part

- 3 Further review of the specification indicates that the machine detects the Leakage of helium by quantifying the partial pressure of helium and its incremental rise in the environment of defective parts. Thus its principle is quite different from instruments which depends on mechanical or optical principles applicable for machine for balancing mechanical parts, test benches, inspection of semi conductors, wafers or devices for inspecting photo masks or reticles used in manufacture of semi conductive devices.



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In consideration of above facts, I conclude that the said 'Helium Leak test Machine Twin Chamber with recovery system' is meant to carry out specific technical function, for which it has been built and it is not a general purpose machine or instrument. In the present case, the machine measures/checks the flow of leaked helium using the Mass Spectrometer and thus in nutshell it is a machine meant for carrying out the function of measurement, through which it gives desired result of detecting leakage.

It is further opined that, The qualification of machine and instrument is more with reference to its use, in present case the said machine is used as a device for measuring & checking leakage hence it can be referred as either Machine or instrument.,,

If it is meant to bring out any change in the materials by certain process or it has something to do with the product either involving mechanical electrical or civil process, then it is essentially regarded as Machine. In the present case, as the Machine under reference do not carry out any process to bring out any material change in the object i.e radiator placed in the Chamber, the said machine by its function explained above, should be called as "Measuring Instrument."

Above information is true & correct to the best of my knowledge & belief

Signature & Seal of Chartered Engineer

Registration Number

Official Address

Official Telephone

Residential Address

Name & Address of the
Institution with which
Registered

Mr. Abhay D. Joshi

F- 100548-7, Dt. 13/12/90

07, Sai Leela Apartments, Chinchwad, Pune-33
(020) 27352996

F/1, Gokhale Vrindavan, Chinchwad, Pune-33
Institution of Engineers (India)
8, Gokhale Road, Calcutta (India)

Place: Pune

Date: 28/09/2008

A. D. Joshi & Associates

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REF: CEC/TTR/2008/01/ Rev

DATE: 05/10/2008

TO WHOM SO EVER IT MAY CONCERN

Subject- Chartered Engineers Certificate to confirm the technical and core function of 'Helium Leak test Machine Twin Chamber with recovery system,' imported by M/S Tata Toyo Radiator Ltd, Survey no 235-245 Hinjewadi, Pune 27 from M/S Excel Precision SDN Bhd, Malaysia vide Invoice No.0008 dt 05/01/2008 and also to confirm its technical aspects more so with reference to the details as presented in CH 9026 / CH 9027 and CH 9031 of Customs Tariff

This has a reference to certificate No CEC/TTR/2008/01 issued on 28/ 09/2008

To elaborate above said certificate, I further reviewed the relevant Custom Tariff and HSN so also the manual/SOP of the said Helium Leak Testing Machine and my observations are as follows-

It may be repetition of definition of Custom Tariff which is well understood by learned officer's but for my understanding I am re-producing the description printed under relevant Tariff Entry 9026, 9027 & 9031 as follows which I am using as a basis for my revised certificate-

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.

The above classification covers -

Instruments and apparatus,
For Measuring or checking

- The flow,
- level,
- pressure or
- other variables

Of liquids or gases

Measuring or Checking the flow or level of liquids is covered by 9026 10

Which covers- 9026 10 10 - Flow Meters
9026 10 20 - Level Gauges
9026 10 90 - Other

Instruments and apparatus for measuring or checking pressure is covered
By 9026 20 00

Other instruments or apparatus for Measuring or Checking Other variables of liquids or gases are covered by 9026 80-

- Heat Meters is covered by 9026 80 10
- Others are covered by 9026 80 90



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9027 : INSTRUMENTS AND APPARATUS FOR PHYSICAL OR CHEMICAL ANALYSIS (for example, Polar meters, refract meters, spectrometers, gas or smoke analysis apparatus); INSTRUMENTS AND APPARATUS FOR MEASURING OR CHECKING VISCOSITY, POROSITY, EXPANSION, SURFACE TENSION OR THE LIKE; INSTRUMENTS AND APPARATUS FOR MEASURING OR CHECKING QUANTITIES OF HEAT, SOUND, LIGHT (including exposure meters); MICROTOMES

The above, amongst others, covers as under -
9027 10 00 - Gas or Smoke Analysis apparatus.
9027 30 10 - Spectrometers
9027 30 20 - Spectrophotometers

9031: MEASURING OR CHECKING INSTRUMENTS, APPLIANCES AND MACHINES, NOT SPECIFIED OR INCLUDED ELSEWHERE IN THIS CHAPTER; PROFILE PROJECTORS

After reviewing and understanding, the intended technical meaning of Items covered in the scope of said Tariff Items in the Customs Tariff, I have tried to dissect various operations of the said Helium Leak Test Machine Twin chamber with recovery system & my views are rendered below in the form of question and answer form :

- 1 Whether the said Helium Leak Test Machine Twin Chamber with Recovery System is basically a Measuring Instrument / Device ? (considering its functions and technical reasons for the same)

YES, it is measuring instrument because it detects the rate of leaked GAS (Helium) Through the cracked/damaged part of equipment under test, in terms of flow of helium in the flow unit's i.e cubic centimeters/min as appearing on the read out LCD screen of machine & same has been specified in the GA drawing of the machine

- 2 Does it measure the flow of gas?:

YES, It does measure the flow of gas for the reasons that the Helium gas which keeps leaking in the Chamber environment through the defective part of equipment under test and then leakage rate i.e. its flow rate is measured to ascertain the extent of leaking area

- 3 If so, then which is the instrument which actually carries out such measurement?

The flow of gas is measured by Mass Spectrometer through its Helium Detector. The process of measurement of leakage rate in terms of cubic centimeters/min of helium by the mass spectrometer can be described as follows

The equipment to be tested for determining extent of leakage of helium through defective part of equipment is first kept in a chamber and then the equipment as well as the chamber environment is subjected to vacuum system to remove maximum. Volume of air /gases in the confined space. Further specific quantity of helium (tracer gas) is pumped in to the confined space of equipment, subjected to leak detection and then the helium supply to the equipment is cut off. Due to the crack/defect of equipment being tested, the helium leaks out from the crack and it is spread in the environment surrounding the equipment but in the confined space of chamber only.



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The rate of leakage of helium from the crack is directly proportional to the area of the crack. This rate of leakage of helium from the crack is quantified by automatically incitu withdrawing a sample of mixture of gases inside the chamber and fed to the analysis cell of mass spectrometer.

The spectrometer cannot analyze concentration of helium alone from mixture hence the mixture of gases are disassociated/distributed in to its constituents by applying magnetic field. to the sampled mixture of gases where in the individual gases gets distributed on the basis if its wave length and they are detected by specific gas detector. In the present case the leakage rate of helium, through the leaking equipment is quantified by using helium detector. If some body is using hydrogen as a tracer gas then the rate of leakage of hydrogen through the cracked portion of defective equipment will have to be detected using Hydrogen detector

The instrument which is checking the leakage rate of helium through the leaking equipment is called spectrometer. For detecting the rate of leakage of tracer gas ,the mixture containing the tracer gas has to be, distinctly divided/separated in to its constituents, it is analogues to separation of the ray of light in to its constituents i.e spectrum by prism in optical instruments. In the present case the instrument has been given the name as spectrometer only because it's analysis cell divided the mixture of gases in to its constituents and its concentration i.e leakage rate of tracer gas in the mixture is quantified or measured by specific detector i.e helium detector.

- 4 Whether the mass spectrometer measure extent of leakage & its rate in measurable Units or it carries out physical analysis of gas only

The said Helium Leak Test Machine Twin Chamber with Recovery System is a Measuring Instrument/ device, and it carries out the function of measuring the leaked helium flow rate in the Chamber/environment of defective equipment in terms of cubic centimeters/min of helium, and thus it indicates / helps to conclude whether the equipment subjected to testing is defective or not and if defective, what is extent of leakage?

- 5 What is the function of Spectrometers, which has reference in the said Leak testing Machine (as Mass spectrometer)

The same has been explained at para 3 above. Further, the Spectrometer in the present case, do not carry out any function of physical or chemical Analysis as is required under Customs Tariff 9027.

- 6 Can the said item "Helium Leak Test Machine Twin Chamber with Recovery System is a Measuring Instrument/ device can be called as "Gas Analyzer" meant for physical or chemical analysis.

"Helium Leak Test Machine Twin Chamber with Recovery System" do not carry out any function of physical or chemical Analysis as is required under Customs Tariff 9027.

- 7 Can the said machine classified under chapter 90.31: of custom tariff This defines the instrument to be covered as

"MEASURING OR CHECKING INSTRUMENTS, APPLIANCES AND MACHINES, NOT SPECIFIED OR INCLUDED ELSEWHERE IN THIS CHAPTER; PROFILE PROJECTORS."



The said machine neither operates on principle of balancing mechanical parts as envisaged in 9031 20 00 nor optical principles as applicable while checking / inspecting semi conductors wafers or devices as envisaged in 9031 41 00 but it works on principle Of detection of flow rate of tracer gas through leaking portion of test equipment hence it may be beyond the preview of chapter 9031 of custom tariff.

Since the said Helium Leak Test Machine Twin Chamber with Recovery System does specific function of Measuring the flow rate of gas and the variables as per CH 9026, only such Machines/ instruments which are not covered specifically are included in CH 9031 of Customs Tariff.

In consideration of above technical aspects, it is opined that "Helium Leak Test Machine Twin Chamber with Recovery System" which quantifies the rate of leakage i.e. flow of gas through leaking portion of defective equipment in terms of flow unit i.e. cubic centimeter/min, conforms to the definition spelt out under custom tariff 9026 80 90 as - Other Instruments or apparatus.

Above information is true & correct to the best of my knowledge & belief

Signature & Seal of Chartered Engineer

Registration Number

Official Address

Official Telephone

Residential Address

Name & Address of the
Institution with which
Registered

Place: Pune

Date: 05/10/2008

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5.4 From the opinion of Chartered Engineer and also the technical literature, it is evident, that the said machine is used for detecting leakage and not for the purpose of measuring or checking the flow, level, pressure or other variables of liquids or gases.

5.6 For an item to be classified under heading 9026, reproduced below, it essentially has to be an instrument or apparatus used for measuring or checking the variables in respect of liquid or gases.

“9026 Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquid or gases (for example flow meters, level gauges, manometers, heat meters)’ excluding instruments and apparatus of heading 9014, 9015, 9028 or 9032.”

5.7 Counsel for appellants have during the course of arguments, tried to persuade us to accept that the imported item was used to determine the helium in the chamber for ascertaining leakage, and hence should qualify to be an item classifiable under heading 9026. The argument of counsel did not appealed to us for the reason that detection of leak was not on the account of any measurement of helium gas flowing in the radiator, but was by way of determining the traces of helium in the chamber in the which radiator, being tested was placed, by using high intensity, high performance Mass Spectrometer.

5.8 Heading 9031 reads *“Measuring or Checking Instruments, Appliances and Machine, not specified or included elsewhere in this chapter; Profile Projectors”*. In fact as per the chartered engineer certificate, and technical literature produced, the item imported, is Machine or Instrument, for checking or measuring

leakage and hence is more appropriately classifiable under this heading.

5.9 There are two Chartered Engineers Certificate produced one is dated 28.09.2008 and second dated 5.10.2008. While that dated 28.09.2008 is in respect of the item under consideration, the second one is determining the classification of the item. It is well settled law that determination of classification is the function of assessing authority { J M Baxi & Co [2015 (318) ELT 688 (T)]} and the Chartered Engineer has no jurisdiction to determine the same. Hence the second opinion has to be ignore and classification determined on the basis features of machine along with the first opinion of Chartered Engineer.

5.10 Reference is also made to the HSN Explanatory Notes (reproduced below) for the said headings.

90.26

90.26 - Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flowmeters, level gauges, manometers, 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

9026.20 - 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, signalling 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

- (A) **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. These include:

- (1) **Differential pressure (fixed aperture) flowmeters.** These comprise essentially:
 - (i) a primary device (e.g., Pitot or Venturi tube, simple diaphragm, orifice plates, shaped nozzle) to set up a differential pressure, and
 - (ii) a differential pressure gauge (float, diaphragm, differential pressure, oscillating ring balance or flow transmitters, etc., type).

90.26

(2) **Variable area (variable aperture) flowmeters.** These usually consist of a graduated cone-shaped tube containing a heavy float which is carried along by the current until the flow of the liquid between the float and the wall reaches equilibrium. For high pressure liquids, use is made either of magnetic flowmeters (the position of an iron float in a non-magnetic tube being shown externally by a magnet), or of valve flowmeters (an iris diaphragm fitted inside the tube being connected in parallel with a small flowmeter).

(3) **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.

(B) **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.

(II) INSTRUMENTS AND APPARATUS FOR MEASURING OR CHECKING THE LEVEL OF LIQUIDS OR GASES

Level indicators for liquids and indicators for the content of gasometers.

Level indicators for liquids include :

(1) **Float-type.** These may give a direct reading on a graduated column mounted on the float, or the effect may be transmitted to a dial needle by means of a cable and drum or be converted into an electrical signal.

(2) **Pneumatic and hydrostatic type.** These are used to measure the level in pressure tanks, by means of a differential pressure gauge.

(3) **Two-colour light type, for boilers.** These are based on the difference in the refractive indices of water and steam. They consist of a set of lamps, coloured screens, an optical system and a level which indicates in different colours the respective heights of the water and the steam.

(4) **Electrical-type,** based, for example, on the variations of resistance, capacitance, ultrasound, etc.

This heading covers not only level indicators for closed reservoirs or tanks, but also those for open basins and canals (hydroelectric works, irrigation systems, etc.).

To ascertain the content of a gasometer, the level of the "bell" is measured, either directly or from a dial needle to which the bell is connected by means of a cable and drum.

Instruments for measuring or checking the level of solid materials are excluded (heading 90.22 or 90.31, as the case may be).

(III) INSTRUMENTS AND APPARATUS FOR MEASURING OR CHECKING THE PRESSURE OF LIQUIDS OR GASES

Pressure gauges (e.g., manometers), apparatus for measuring the pressure of a liquid or gas. These differ from barometers in that the latter measure atmospheric pressure while pressure gauges indicate the pressure of a liquid or gas in a closed space. The main types of pressure gauges are as follows :

(1) **Liquid-type pressure gauges** (mercury, water or other liquids, or two non-miscible liquids). The liquid is contained in a glass or metal tube; these gauges may be of the single column type, U-tube type, inclined tube or multitube type, or be in the form of an oscillating ring balance.

90.26

- (2) **Metallic pressure gauges.** Like aneroid barometers, these may have a single or multiple diaphragm, a capsule, Bourdon tube or spiral metal tube or some other pressure sensitive element which directly moves a pointer or varies an electrical signal.
- (3) **Piston-type pressure gauges.** In these, the pressure is applied either directly or via a diaphragm on to a piston which is weighted or held by a spring.
- (4) **Electrical pressure gauges** based on variations of an electrical phenomenon (e.g., resistance, capacitance) or using ultrasound.

Vacuum gauges for measuring very low pressures, including ionisation gauges using thermionic vacuum tubes (triodes). In these, positive ions produced by collision of the electrons with the molecules of the residual gas are attracted towards a negative plate. Thermionic vacuum tubes (triodes) presented separately are **excluded (heading 85.40)**.

The heading also covers the **maximum and minimum type pressure gauges**. **Differential pressure gauges**, used to measure differences in pressure, include the following types: two-liquid, float, oscillating ring balance, diaphragm, capsule, ball (without liquid), etc.

(IV) HEAT METERS

Heat meters measure the quantities of heat consumed in an installation (e.g., a hot water type heating system). They consist essentially either of a liquid supply meter, two thermometers placed respectively at the intake and outlet of the conduit, and a counting and totalising mechanism. This group also covers thermocouple heat meters.

Small heat meters of the types mounted on radiators in blocks of flats so that central heating costs can be fairly divided resemble thermometers and contain a liquid which evaporates under the effect of heat.

PARTS AND ACCESSORIES

Subject to the provisions of Notes 1 and 2 to this Chapter (see the General Explanatory Note), separately presented parts and accessories of apparatus or appliances of this heading remain classified here. Examples include separate graphical recording devices (including those in which the indications supplied by several measuring or checking instruments are recorded), whether or not fitted with devices for signalling, pre-selection or control.

90.31

90.31 - Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this Chapter; profile projectors (+).

9031.10 - Machines for balancing mechanical parts

9031.20 - Test benches

- Other optical instruments and appliances :

9031.41 -- For inspecting semiconductor wafers or devices or for inspecting photomasks or reticles used in manufacturing semiconductor devices

9031.49 -- Other

9031.80 - Other instruments, appliances and machines

9031.90 - Parts and accessories

In addition to **profile projectors**, this heading covers **measuring or checking instruments, appliances and machines, whether or not optical**. It should, however, be noted that this group **does not include** any instruments, apparatus, etc., falling in headings 90.01 to 90.12 or 90.15 to 90.30; in particular, the following are therefore **excluded** :

- (a) Astronomical instruments of heading 90.05.
- (b) Microscopes (heading 90.11 or 90.12).
- (c) Surveying, etc., instruments and appliances of heading 90.15.
- (d) Instruments for measuring length, for use in the hand (heading 90.17).
- (e) Medical, surgical, etc., instruments and appliances of heading 90.18.
- (f) Machines or appliances for testing the mechanical properties of materials (heading 90.24).
- (g) Flowmeters, etc., of heading 90.26.
- (h) Instruments and apparatus for measuring and checking electrical quantities and instruments and apparatus for measuring or detecting ionising radiations of heading 90.30.
- (ij) Automatic regulating or controlling instruments and apparatus (heading 90.32).

**(I) MEASURING OR CHECKING INSTRUMENTS,
APPLIANCES AND MACHINES
(A)**

These include :

- (1) **Machines for balancing mechanical parts (dynamic, static or with an electronic balancing device)** e.g., armatures, rotors, crank shafts, connecting rods, propeller shafts, wheels, flywheels.

In dynamic machines, the parts are rotated on two bearing blocks or between centres, the out-of-balance being measured mechanically (tracing of diagrams on a recording plate, spring balance principle, etc.).

Static balancing machines operate on the tilting principle, the out-of-balance being measured on scales or dials. They differ from dynamic machines in that the part to be balanced does not rotate.

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Out-of-balances are compensated either by counterweights or removal of material.

On machines fitted with an electronic balancing device, the vibrations due to unbalance are detected by a special sensitive element and are then amplified.

This heading also covers balancing machines fitted with a machine-tool (drilling-machine, for example) and used exclusively for rectifying out-of-balances.

- (2) **Test benches** for engines and motors, electrical generators, pumps, speed indicators or tachometers, etc., consisting of a frame and a measuring or calibrating instrument.
- (3) **Laboratory appliances** of a kind used for testing fuels and in particular for measuring the octane index of petroleum or the cetane index of diesel engine oils. This apparatus usually consists of an internal combustion engine, a dynamo, an ignition generator, heating resistors, measuring instruments (thermometers, pressure gauges, voltmeters, ammeters, etc.).
- (4) **Apparatus for testing and regulating vehicle motors**, for checking all parts of the ignition system (coils, sparking plugs, condensers, batteries, etc.), for ascertaining the best carburettor setting (by analysing exhaust gases), or for measuring the compression in the cylinders.

- (5) **Planimeters**, for measuring plane areas (e.g., on plans, diagrams, skins or hides). A tracing point combined with a measuring device follows the outline of the area to be measured.

Integrators, harmonic analysers and other instruments are based on the planimetric principle and capable of measuring other factors (e.g., volume, moments of inertia).

- (6) **Head contour measurers**, used by hatters, which operate by perforating a sheet of paper.
- (7) Dial indicating **comparators**, micrometric devices, electronic, opto-electronic and pneumatic sensors, whether or not automatic, as well as all devices or instruments for measuring length, angles or other geometrical quantities using such sensors. The heading also includes recording comparators, and comparators fitted with a mechanical device which conveys mass produced parts to the comparator and eliminates defective parts.

However, this heading **does not include** the dial type comparators for use in the hand described in Item (4) of Part (D) of the Explanatory Note to heading 90.17 (see exclusion (d) above).

- (8) **Column-type gauges** for checking precision set squares, for checking heights or for other checks during manufacturing processes.
- (9) **Sine bars and adjustable table sine bars** for checking angles.
- (10) **Bubble levels**, used in numerous trades, including **micrometric adjustable levels** (bubble level with built-in micrometer), **block levels** (metal frame with two levels) used in engineering, and **liquid levels** based on the communicating vessels principle.

It should be noted that the heading **excludes** levels specialised for surveying purposes (heading 90.15).

90.31

- (11) **Clinometers** (pointer or graticule types, clinometer-rules, clinometer-protractors) to check a level as compared with a horizontal plane, or to measure surface inclination.

However, the instruments, also called clinometers, used in surveying to gauge the height of land, are **excluded** (heading 90.15).

- (12) **Plumb-lines.**

- (13) **Spherometers** to measure the curvature of spherical surfaces (lenses, mirrors, spectacle lenses, etc.). These consist essentially of a base with three pins (at the angles of an equilateral triangle), a divided rule and a micrometric screw with feeler. Other types (opticians' lens measurers) may be fitted with a dial to indicate the curvature directly.

- (14) **Checking standards.**

- (15) **Multidimensional measuring equipment**, including **Co-ordinate Measuring Machines** (CMMs) used to perform dimensional checks, either manually or mechanically, on various components or parts of machines.

- (16) **Opticians' centring machines** for determining and marking the axis and centre of a lens.

- (17) **Micrometric standard measuring machines**, based on the micrometer principle. These consist of a fixed tailstock (with a contact indicator) and an adjustable headstock with micrometer screw.

- (18) **Apparatus for measuring or detecting vibrations, expansion, shock or jarring**, used on machines, bridges, dams, etc.

- (19) **Apparatus for checking textile materials**, for example, **yarn grading winding reels (warp reels)**, for obtaining a determined length of yarn or slivers, (with or without tension regulator, counter and bell); **torsiometers and torsiographs** for determining torsion of yarn; **tensiometers** for measuring tension of yarn on textile machines (warping, spool winding, spinning, etc.); **instruments for checking the regularity of yarn** by winding on a drum or board, usually comprising a device for checking the interval between windings.

- (20) **Surface-finish testing instruments** and machines for gauging the condition of surface.

In mechanical or pneumatic types the gauging is done by means of a hard contact point or air jets.

In electrical types a sapphire or diamond pick-up moves across the surface to be tested and converts any irregularities of that surface into an electric potential. The vertical movements of the pick-up are converted into the electric potential by means of a piezo-electric crystal or, indirectly, by being made to vary the value of a capacitor or inductor. The electric potential is then amplified and measured. Comparison of the measurement with the readings obtained by use of selected surface roughness standards (small metal plates supplied for that purpose) give a measure of the state of the surface being tested.

- (21) **Gear testing machines** using, for example, a lever amplifying system, for testing profile forms, pitch diameters, tooth spacing and rolling contact, etc. (on spur and bevel gears), lead, etc. (on helical and worm gears).

90.31

- (22) **Instruments for measuring the contracting of a clay, etc., test piece** taken from a ceramic furnace during firing to determine the course of the firing (pyrosopes). These instruments are often similar to callipers but are calibrated in arbitrary units.
- (23) **Instruments for measuring irregular surfaces** (such as skins and hides) by the photoelectric process. (The differences in the current from a photoelectric cell depend on how much of a uniformly lit glass sheet is covered by the opaque surface under measure.)
- (24) **Instruments for measuring the diameter of yarns** by the photoelectric process as described in Item (23) above.
- (25) **Instruments for continuous measurement and checking of the thickness** of metal sheets or strip in rolling mills, etc.
- (26) **Ultrasonic thickness measuring instruments** which enable thickness to be ascertained by observations made from one side of the material only.
- (27) **Instruments for detecting faults, fissures, cracks or other defects in materials** (bars, tubes, profiles, machined articles, such as screws, needles, etc.). These operate either by observing the cathode-ray screen diagram resulting from magnetic variations, or by direct reading of variations in magnetic permeability as indicated on a graduated scale or by the use of ultrasonic waves. The latter group includes **ultrasonic instruments for checking soldered or welded joints**, which operate on the principle that any lack of continuity in the medium through which the ultrasonic waves pass deflects the beam. Defects may be measured by either observing the attenuation of the beam or by echo methods. The observation may be made on a cathode-ray tube screen.
- (28) **Special instruments for checking watches or watch parts.** These include :
 - (i) **Instruments for checking hairsprings.**
 - (ii) **Amplitude meters** for checking the amplitude of the oscillations of the balance wheel. A light beam, which is interrupted by the movement of the balance wheel, is projected on to a photoelectric cell which thus gives a measure of the amplitude.
 - (iii) **Oscillometers** for testing and checking complete watch movements. The watch movement is placed on a microphone, and each tick of the watch produces a potential which is amplified and applied to two electrodes. One of the electrodes is fitted with points which thus perforate a record on a paper strip.
 - (iv) **Instruments for the final check of the watch.** These operate on the same principle as oscillometers (recording the ticking of the watch placed on a microphone) but may also be fitted with a cathode-ray oscilloscope.
- (29) **Special electrical instruments for measuring stress and strain.** They are based, for example, on the following principles :
 - (i) Variations in the resistance of a wire when subjected to stress (strain gauges). However, electrical resistors known as "strain gauges" fall in heading 85.33.

90.31

- (ii) Variations of capacity between specially constructed electrodes.
- (iii) Electric potentials produced by quartz or similar crystals when subjected to pressure.

This group also includes **dynamometers**, used to measure the compression or tractive force of hydraulic presses, rolling mills, material testing machines, etc., and also for load tests (aircraft). They usually consist of a metal body (cylinder, ring, etc.) to which stress is applied, and of a measuring apparatus, graduated in units of weight, which records any change in the shape of the metal body.

However, dynamometers for testing the properties of materials are **excluded** (heading 90.24).

- (30) **Load cells** which convert changes in applied force (including weight) into proportional changes in voltage. These changes in voltage are generally detected by instruments for measuring, controlling, weighing, etc., and are expressed in the desired units.
- (31) **Electronic chronographs and chronoscopes** for measuring the duration of an electric contact. These consist of a capacitor which is charged through a high resistance whilst the contact is closed; the measurement is made on a valve voltmeter calibrated in time units.

(B)

This heading also covers **optical** type measuring and checking appliances and instruments, such as :

- (1) **Optical or graduated scale comparators**, for checking the dimensions of a part being manufactured against a standard piece; the movement of the feeler is magnified by an optical device (revolving mirror principle).
- (2) **Comparator benches** for checking elongation, lengths, surfaces, etc. These incorporate table and frame, sliding carriage and two mounted micrometric microscopes.
- (3) **Measuring benches** for large parts, thread gauges, gear cutters, threaded shafts for lathes, cross members, etc. These incorporate frame and table, viewing microscope, two micrometric microscopes and projection apparatus.
- (4) **Interferometers**, for checking plane surfaces. These are based on the principle of light interference, and comprise a standard optical flat and lenses with micrometric cross wires for measuring the interference bands. But the heading **excludes** standard optical flats (heading 90.01), and interferometers for measuring refractive indices (heading 90.27).
- (5) **Optical surface testers**, for gauging the condition of surfaces by means of a combination of a prism and a lens.
- (6) **Apparatus equipped with rapid impulse differential feeler and optical viewer**, for photographically recording and measuring profiles and conditions of surfaces.
- (7) **Alignment telescopes**, for checking straightness of benches or machine slides and measuring metallic constructions. They are operated by collimation or auto-collimation and comprise a telescope and a collimator or mirror.

Simple reading of the said explanatory note makes it clear that miscellaneous measuring and checking devices are classified under heading 9031, whereas only those with specific functions as specified by terms of heading of 9026 have been classified in that heading.

Since the item in question is not used for measuring any parameters in relation to liquid or gasses the same is more appropriately classifiable under heading 9031.

5.11 In view of our holding the item "*Helium Leak Testing Machine Twin Chamber with Recovery System*" appropriately classifiable under heading 9031 49 00, the benefit under Notification Number 24/2005-Cus (S No 31) is not admissible to them.

6.1 In case of Commissioner of Customs Bangalore vs SPM India Ltd {2007 (211) ELT 573 (T-Bang)}, as per para 6 of the order, "*Air leak tester is a high precision measuring and checking instrument incorporating different pressure sensor which measures and checks the volume or pressure of air/ gas and determines the existence of leakage of air/ gas and rate of leak*", since tribunal found that item was measuring and checking the pressure or volume of gas it determined the classification under 9026. This being not the case here, the decision is not applicable.

6.2 In case of Bajaj Tempo Ltd, Escorts Limited and Technological Centre referred by the Counsel, the issue was in relation to admissibility of exemption under Notification No 49/78-Cus in respect of accessories to Universal Measuring Machine and hence is distinguishable

6.3 In case of Bajaj Auto Ltd, the issue was primarily in relation to the subdivision of machinery into components and accessory for denying the benefit of exemption under notification No 23/91-Cus. Hon'ble tribunal decided by holding that such subdivision cannot be allowed and equipment considered as whole to be classified under heading 9027 and benefit of exemption allowed. This case is too distinguishable as in the present case there is no subdivision of the machine into components and accessories, the assessment of the item being done as whole.

6.4 Hence we find all the decisions referred to by Counsel are distinguishable and do not impact the classification or admissibility of exemption in the present case.

7.0 In result, we uphold the order of Commissioner (Appeal) and dismiss the appeal filed by the appellants.

(Pronounced in court on 29.10.2018)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)