

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEAL NOS: C/86815, 86819 to 86823//2017

[Arising out of Order-in- Appeal No: MUM-CUSTOM-AMP-APP-706 to 711/16-17 dated 14th March 2017 passed by the Commissioner of Customs (Appeals), Mumbai– III.]

For approval and signature:

Hon'ble Shri S K Mohanty, Member (Judicial)

Hon'ble Shri C J Mathew, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : Yes
 2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
 3. Whether Their Lordships wish to see the fair copy of the Order? : Seen
 4. Whether Order is to be circulated to the Departmental authorities? : Yes
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Shivani Scientific Industries (P) Ltd

... *Appellant*

versus

Commissioner of Customs (Import)
ACC, Mumbai

... *Respondent*

Appearance:

Shri NK Gupta, Advocate with Shri Kashish Gupta, Chartered Accountant for appellant

Shri R Kumar, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri S K Mohanty, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 08/08/2018
Date of decision: 14/12/2018

ORDER NO: A/88111-88116/2018

Per: C J Mathew

Appellant, M/s Shivani Scientific Instruments Pvt Ltd, claims to have imported goods that are classifiable under heading no. 90189099 of the First Schedule to Customs Tariff Act, 1975 as 'instruments and appliances used in medical, surgical, dental or veterinary sciences, including scientigraphic apparatus, other electro medical apparatus and site testing instruments'; *per contra*, it was the contention of customs authorities that the goods are 'microscopes classifiable under heading no 90118000 of the First Schedule to Customs Tariff Act, 1975 in the residual sub-heading within the heading 'compound optical microscopes, including those for photo microgravity, cinephotomicrography or micro projection.'

2. In this context, while putting forth the case of Revenue, Learned Authorised Representative places his arguments on the foundation of the decision of the Hon'ble Supreme Court in *Mehra Bros v. Joint Commercial Officer [1991 (51) ELT 173 (SC)]* that dealt

with the scope of inclusion of an ‘accessory’ with the ‘main article’. We are unable to persuade ourselves of the relevance of this judgement to the present dispute pertaining to an exhaustive inventory for classification and with statutorily adopted rules for interpretation thereof; the dispute before the Hon’ble Supreme Court concerned levy of sales tax which operated on entirely different foundation of tax policy, formulated independently for each constituent state in the Union, with the legislative organ identifying the object of taxation as well as the rate of tax. The tax policy for levy of duties of customs, since the notification of Customs Tariff Act, 1975, was restricted to rates to be placed alongside the headings in the comprehensive tariff, and in rare circumstances, inserting new sub-headings. The rules of interpretation appurtenant to the Tariff are logical and sufficiently structured to deal with most situations. Consequently, any interpretation of the scope, and relevance, of a heading, or sub-heading, would necessarily have to be made within the context of those Rules.

3. It is also pertinent to note that the dispute itself is rooted in a partial exemption available for goods under the heading claimed by the appellant. With that origin, the submissions made by both sides may not be of assistance in clarifying the distinction between the two rival headings which, according to us, is our task. We are similarly conscious of the lack of consistency of position, so critical for

identifying the appropriate heading, across time and place as these could well be reversed should the rates of duty also be. In such a dispute over the applicability of an exemption, the pursuit of maximising by Revenue and of minimising on the part of assessee lends an inherent bias which is best neutralised, on either side, by focusing on the resolution of the dispute in terms of the heading alone.

4. Complicating the contours of the dispute are the rival claim for determination under the residual entry in the two headings. The frail foundation of such an undertaking, as pointed out by the Hon'ble Supreme Court in *Dunlop India Ltd & Madras Rubber Factory Ltd v Union of India and Others* [1983 (13) ELT 1566 (SC)]

'36. We are, however, unable to accept the submission. It is clear that meanings given to articles in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in the usual course. But once an article is classified and put under a distinct entry, the basis of the classification is not open to question. Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance, we then see no difficulty for statutory classification under a particular entry.

37. It is good fiscal policy not to put people in doubt and quandary about their liability to duty, it would have been better if the article is eo nomine, put under a proper classification to avoid controversy over the residuary clause. When an article has, by all standards, a reasonable claim to be classified under an

enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. The question of competition between two rival classifications will, however, stand on a different footing.

38. It is not for the Court to determine for itself under Article 136 of the Constitution under which item a particular article falls. It is best left to the authorities entrusted with the subject. But where the very basis of the reason for including the article under a residuary head in order to charge higher duty is foreign to a proper determination of this kind, this Court will be loath to say that it will not interfere.'

is not conducive to an easy resolution of the present dilemma. We, therefore, have to resolve the classification in terms of the heading itself.

5. The dispute does not travel beyond classification within chapter 90 of First Schedule to the Customs Tariff Act, 1975 which is that of 'optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof' and to be resolved is whether the impugned goods are 'compound optical microscopes' and, if they are not, the claim of the appellant would succeed.

6. Appellant filed three bills of entry no. 6916956/29.09.2014, 6918337/29.09.2014 and 6883306/25.09.2014 in which the classification was altered by order of assessment no. DC/PW/943/

2014-15 dated 5th November 2014. This, along with the assessment of bill of entry no. 7143487/21.10.2014, 7205902/29.10.2014, 7342178/11.11.2014, 7489779/25.11.2014 and 7490895/25.11.2014, were appealed against before Commissioner of Customs (Appeals), Mumbai Zone III who, *vide* order-in-appeal no. MUM-CUSTOM-AMP-APP-706 to 711/16-17 dated 14th March 2017, upheld the classification determined by the original authority.

7. We have heard Learned Counsel for appellant and Learned Authorised Representative at length as they put forth the respective claims of the importer and of Revenue. As we have identified the mandate to resolve this dispute with reference to the heading in the First Schedule to the Customs Tariff Act, 1975, we may only refer to the submissions, to the extent of pertinence, should those provide necessary assistance.

8. The classification adopted by the lower authorities is that of 'microscope'. There is no doubt that the goods, as presented, includes a microscope. The description of the impugned goods goes beyond to encompass 'micromanipulator' along with 'microscope' and to be deployed in treatment of infertility, an increasingly prevalent problem in the modern world for various reasons, with ever growing demand for medical intervention as an alternative to resigned acceptance of divinely ordained fate. The problem has repercussions that are not

only genealogical but, at a macro level, impacting the productive future strength of the nation. According to Learned Counsel for appellant, the imported goods enable sighting of a single human sperm which is then isolated and subjected to process that makes it amenable to *in vitro* fertilisation and is, therefore, not restricted to enhancement of sense of sight but to act in tandem with the ‘micro-manipulator’ for engineering the human sperm for the desired end. He contends that both functions are so equally important in the process for any one of them to be labelled as primary and that, being utilised by trained medical professionals, should find a place in the claimed classification.

9. It is, thus, abundantly clear that the goods, as presented, consist of a microscope and a micromanipulator. It is the claim of the lower authorities, as articulated by Learned Authorised Representative, that these being two independent components, in which there is no compulsion to attach a Nikon microscope to the micromanipulator manufactured by Narishige Co Ltd, the most specific description that applies is ‘microscope’ thus relegating the ‘micromanipulator’, lacking a specific heading, to that of an adjunct of the microscope and rule 3 (a) of General Interpretative Rules would squarely favour Revenue. We are not inclined to agree with this line of contention. Whether the impugned goods are capable of efficient operation with a microscope of another manufacturer is hardly relevant except for

determination as ‘accessory or parts’ and the present dispute does not foray in that direction. The material fact is that *in vitro* fertilisation cannot be carried out without the presence of both the components. Neither can the function of any one of the two be relegated to that of subordination. There is also no proposal for segregation of the two to be assessed separately.

10. Note 2 of chapter 90 of First Schedule to the Customs Tariff Act, 1975 also provides us with some guiding light to subject the proposition of Revenue to validation. The first rule therein for classification of ‘parts and accessories’, if these be goods under specified chapters, mandates placement in their respective headings which does not arise in the present instance. The third rule is not relevant in the absence of any proposal to classify under the heading referred therein. The second rule is to be resorted to when the goods in question find sole, or principal, use with main goods of the chapter. In the admitted context of ‘microscope’ and ‘micromanipulator’ performing independent functions and the consequent lack of applicability of this rule, the disposition of ‘parts and accessories’ stand exhausted and precludes the impugned goods from being described as such.

11. According to Learned Authorised Representative, lack of coverage under the claimed classification suffices to uphold the re-

determined heading; that would be tantamount to excusing the proper officer from the onus to rationally explain the cause for re-determination which is not acceptable.

12. It is not the case of the customs authorities that the goods, as presented, is only a microscope. Neither is it their case that the microscope can, on its own, perform the tasks necessary for *in vitro* fertilisation. We have rendered the finding *supra* that the ‘micromanipulator’ is an essential implement for *in vitro* fertilisation for which the imported goods are to be utilised. The heading proposed by customs authorities is that of ‘parts and accessories’ under ‘microscope’. In the context of the functions performed by ‘micromanipulator’, it can, by no stretch, be considered to be an accessory of ‘microscope’. No distinction has been carved out between the two articles in the impugned order. In the absence of such distinction, the attempt to classify the goods, as presented, under heading no 90118000 of the First Schedule to Customs Tariff Act, 1975 suffers from inconsistency as ‘microscope’ cannot be an accessory of ‘microscope’. Had it been the intent of the lower authorities to accord a separate and distinct classification to each of the two articles, it was necessary to ascertain the separate assessable values also. No exercise has been undertaken in that direction.

13. From the above, we conclude that the classification of the

impugned goods under heading no 90118000 of First Schedule to the Customs Tariff Act, 1975 fails and, in the face of such failure and want of an alternative classification in the show cause notice, the declared classification must be accepted. We also do not find any reason to discard the declared classification as, contrary to the presumption of customs authorities, the impugned goods are instruments used for surgical therapy to overcome a physiological problem in a human body, viz., inability to conceive. It is not a diagnostic instrument that, in the medical field, a microscope is.

14. Thus, by application of rule 1 and rule 2 of General Interpretative Rules, we set aside the impugned order and allow the appeals.

(Pronounced in Court on 14/12/2018)

(S K Mohanty)
Member (Judicial)

(C J Mathew)
Member (Technical)

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