CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Customs Appeal No. C/199/2009

(Arising out of Order-in-Appeal No. 247 & 248/Mumbai-III/2008 (S/49-142 & 143/Misc ACC/CUS/Mumbai-III/2008) dated 23-12-2008 (issued on 26-12-2008) passed by the Commissioner of Customs (appeals), Mumbai-400059.

M/s. Advanced Micronic Devices Ltd., ...Appellant
13, Swastik Chambers, Sion-Trombay Road,
Chembur,
Mumbai – 400071.

VERSUS

Commissioner of Customs (Import) ....Respondent
ACC, Sahar, Andheri (East),
Mumbai-400099.

<u>APPERANCE:</u>
Shri J.H. Motwani, Advocate for the Appellant
Shri Shri Atul Sharma, Asst. Commissioner- Authorised Representatives for the Respondent.

WITH

Customs Appeal No. C/248/2009

(Arising out of Order-in-Appeal No. 247 & 248/Mumbai-III/2008 (S/49-142 & 143/Misc ACC/CUS/Mumbai-III/2008) dated 23-12-2008 (issued on 26-12-2008) passed by the Commissioner of Customs (appeals), Mumbai-400059.

Commissioner of Customs (Import) ....Appellant
ACC, Sahar, Andheri (East),
Mumbai-400099.

VERSUS

M/s. Advanced Micronic Devices Ltd., ...Repondent
13, Swastik Chambers, Sion-Trombay Road,
Chembur,
Mumbai – 400071.

APPERANCE:
Shri Shri Atul Sharma, Asst. Commissioner, Authorised Representative for Appellant.
Shri J.H. Motwani, Advocate for the Respondent

**CORAM: HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)**

FINAL ORDER NO. A/86058-86059/2019

Date of Hearing: 23-01-2019
Date of Decision: 23-01-2019

PER: DR. SUVENDU KUMAR PATI

1. Denial of benefits of concessional rate of duty under notification No. 21/2002-Cus dated 1-3-2002 along with imposition of consequential interest and penalty much after clearance of goods by invoking extended period is assailed by the importer in appeal no. 199/09 while setting aside of redemption fine imposed in Order-In-Original by the Commissioner of Customs (appeal), Mumbai-III is challenged by the Revenue Department in appeal no. 248/09.

2. Factual backdrop of the case is that appellant importer M/s. Advanced Micronic devises Ltd had imported 4 consignments of D.C. Defibrillators between 30-03-2002 and 1-04-2003 through 4 Bills of Entry. The goods were cleared with the benefit of exemption notification no. 21/2002 as D.C. Defibrillators supplied by one M/s. Zoll Medical Corporation, were stated to be meant for internal use with pace makers, for which notification was applicable. During October 2006,

special investigation and intelligence branch started investigation in respect of such importation, before whom appellant appeared in response to summons, and made deposit of differential duty amount of ₹ 5,12,811/- under covering letter dated 17-11-2006 but had received show cause notice dated 31-3-2007 proposing differential duty amount of ₹ 6,39,490/- in terms of sub section (1) of section 28 of the Custom Act, 1962 along with interest at appropriate rate under section 28AB as well as proposal for confiscation under section 111 (m) and penalty under section 114A and or 112(a) of the said Act. Matter was adjudicated upon and the duty demand, interest, penalty as well as confiscation of the goods were confirmed. Importer appellant preferred appeal before the Commissioner of Customs (Appeals) Mumbai-III who also confirmed duty demand, interest etc. but set aside redemption fine and set aside fine imposed against vice President of the importer company Mr. Badrinath Sirsi. Importer is before us challenging the confirmation order and Department is before us challenging chopping of redemption fine only against the importer.

3. We have heard submissions of Learned Counsel and learned DR in respect of their appeals and objections to the appeals. We have also perused the case record and the judgement of the Hon'ble Suprreme Court of India passed in the case of BPL v. Commissioner of Central Excise, Cochin-II report in 2015 (319) E.L.T. 556 (S.C.), placing reliance on which revenue has challenged the appeal filed by the importer.

4. There is no denying of the fact that concessional rate of duty is applicable to D.C. Defibrillators for internal used and pace makers. Learned Counsel for the appellant importer contended that appellant brought imported D.C. Defibrillators meant for internal use and the assessing Officer, after going through the literature of the exporter Zoll company had assessed the duty liability and allowed concessional rate of duty on the basis of notification no. 21/2004. Order-In-Original at page 6 reveals that catalogue of the D.C. Defibrillators imported by the importer was examined by the adjudicated authority but in para 5 of his order the Commissioner of customs (appeals) had given his finding that appellant could not produce any evidence that catalogue was submitted before the assessing Officer along with Bill of Entries which was submitted in 2006 as stated by Vice President Mr. Badrinath Sirsi in his statement recorded by the Customs Officer. Catalogue Annexed to the appeal memo vide Exhibit-A does not reveal that the said D.C. Defibrillators is meant for external use or internal use but going by the judgement of Hon'ble Supreme Court passed in BPL, if such D.C. Defibrillators is attached with its accessories called paddle, the same can be considered as D.C. Defibrillators meant for internal use. One of the Bills of Entery dated 22-3-2002 contains description of goods as PD1400 D.C. Defibrillators for internal use with pace makers with standard accessories and rest of Bills of Entry indicates those are PD1400 D.C. Defibrillators with std. accessories. Common knowledge obtained from the literature of D.C. Defibrillators indicates that main accessories of such units are paddles. Therefore paddles if used in D.C. Defibrillators which is required to correct irregular heartbeats in more critical and emergency situation had to be regarded

as D.C. Defibrillators for internal use. But on closed scrutiny of the Order-In-Original and Order-In-Appeal, it would reveal that their understanding of the term "internal use" lacks clarity. In the OIA the adjudicating authority had given his observation that even when D.C. Defibrillators for external use which is equipped with internal paddles, the same remains D.C. Defibrillators for external use only. Contrary to such findings the Commissioner of Customs (Appeals) observed in the OIA that the catalogue nowhere speaks about internal use of such D.C. Defibrillators and says that at the best it can be used inside and outside the hospital. Probably to his mind if the instrument or machinery is used outside hospital, it should be regarded as external use of the product which is apparently erroneous understanding in view of the fact that internal use means the use of the machinery in the internal organ of the human body during treatment. Now the question comes if internal use is also to be equated with use in internal organ through implementation process because in the OIO, reference to the weight of the machine i.e. 5.9 kg. was made to justify that it was not implantable. However, going by the decision in BPL, which was based on the opinion of one Mr. Jerry Potts, it can be observed that implantable D.C. Defibrillators are definitely distinct from internal Defibrillator used during surgery to counter-shock the heart. This being so, we are of the firm opinion that though D.C. Defibrillators can be interchangeably used as internal or external D.C. Defibrillators, the very fact that paddles were imported along with it as it is necessary accessory, when put to use, the imported goods can be put in the category of the internal D.C. Defibrillators for which exemption notification is applicable. Learned AR for respondent Department, who is also appellant in the connected appeal placed his reliance in BPL case and argued strenuously that only by using a device during open heart surgery to instil electrical shock are not D.C. Defibrillators of the category of internal use device. In this connection, we are tempted to reproduce para 16 of the said judgment to bring clarity to our finding given above.

> *" It is nto disputed by the appellant that their Defibrillators are primarily meant for external use. It is, however, contended that this can be sed internally as well. It is also admitted case that the defibrillator manufactured by the appellant is not implantable internally in the human body. The only justification given by the appellant is that at the time of carrying out the open heart surgery same device can be used to deliver electrical shock. However, it is accepted that to give the electrical shock paddles are needed, which is sold by the appellant only as an accessory. Not only this, while selling the defibrillators said paddlers are not sold as an integral component/accessory of the main equipment. To the contrary, their purchase is optional, meaning thereby the choice is that the buyer to purchase paddle or not. During the arguments it was conceded that 99 per cent sale of these defibrillators were without paddles which means that predominantly the goods are sold for external use only. We would also like to reproduce, at this stage the description of the goods in question as given by the appellant itself in the operating and service manual of the product in question."*

5. Further in the BPL's case, the goods were cleared as under description "BPL potable D.C. Defibrillators/monitor is designed to provide external counter shock…" . In the instant case not only Bill of entry, accessories attached to D.C. Defibrillators clearly reveal that the said machinery was imported for internal use for which exemption notification is rightly applicable. This being our observation and findings, we refrained ourselves from discussing on the issue pertaining to applicability of extended period on the ground of mis-declaration etc. and legality of order of Commissioner (Appeals) dropping redemption fine. Hence the order.

6. Appeal No. C/199/09 is allowed and order passed by Commissioner (Appeals) is hereby set aside. Department's appeal No. C/248/09 is accordingly dismissed.

(Pronounced in the open Court)

(DR. SUVENDU KUMAR PATI)
MEMBER (JUDICIAL)

(C J MATHEW)
MEMBER (TECHNICAL)

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