CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 86838 Of 2019

(Arising out of Order-in-Original No. CC/VB/01/2019-20/Adj (i)/ACC dated 18.04.2019 passed by Commissioner of Customs (Import), ACC, Mumbai)

M/s Intermedics .....**Appellant**
H-130, Rajlaxmi Commercial Complex,
1st Floor, Thane Bhiwandi Road, Kalher,
Bhiwandi-421302.

VERSUS

Commissioner of Customs-(Import), ACC, Mumbai .....**Respondent**
Air Cargo Complex, Navpada, Sahar Village,
Andheri East, Mumbai-400099.

Appearance:

Shri V. M Doiphode, Advocate for the Appellant
Shri Manoj Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86327/2022

Date of Hearing: 21.11.2022
Date of Decision: 21.11.2022

PER : S.K. MOHANTY

Briefly stated, the facts of the case are that the appellant herein M/s. Intermedics had imported "Surgical Operating Microscope" and accessories thereof, classifying the same under Customs Tariff Heading (CTH) 9018 14 00. In the Bills of Entry (B/Es) filed before the customs authorities, the appellant had claimed the benefit of Customs Notification No. 12/2012-Cus. dated 17.03.2012 [Sr.No.473/474(ii)] and Central Excise Notification No. 12/2012-C.E. dated 17.03.2012 [Sr. No. 310/309(i)]. The classification of product under CTH 9018 14 00 is "instruments and appliances used in medical, surgical, dental, veterinary science and scientigraphic apparatus". However, the classification claimed by the appellant was objected to by the Customs Revenue Audit (CRA), contending that the appropriate classification would be under CTH 9018 90 99, which describes the product as "other instruments and appliances used in medical, surgical, dental or veterinary science". With regard to the "accessories of surgical microscopes", the audit wing had opined the same should be classifiable under CTH 9011. Since, the disputed B/Es were self-assessed by the appellant, on the basis of the audit report, the customs department had issued the Less Charge-cum-Demand Notices dated 13.12.2013 and 02.12.2014 under Section 28 of the Customs Act, 1962 for recovery of the differential duty amount along with interest. Subsequently, the department issued the show cause notice dated 16.11.2016 in respect of the disputed B/Es, proposing classification of the disputed goods under CTH 90118000/90119000 and for denial of the benefit of exemption notifications dated 17.03.2012 (supra). The said show cause notice was issued under sub-section (4) of Section 28 *ibid*. Matter arising out of the said SCN was adjudicated by learned Commissioner of Customs (Import) vide the impugned order dated 18.04.2019. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. Learned Advocate appearing for the appellant submitted that since Less Charge-cum-Demand Notices dated 13.12.2013 and 02.04.2014 was issued by the department, the *modus operandi* connected to importation of the disputed goods were within the knowledge of the department and thus, the extended period of limitation cannot be invoked subsequently, for issuance of the SCN under Section 28 (4) *ibid.* Therefore, learned Advocate submitted that the SCN dated 16.11.2016 issued for the period 25.11.2011 to 27.09.2014 is clearly barred by limitation of time. He further submitted that since there is no element of suppression, fraud and mis-declaration on the part of the appellant, the penal provisions under Section 114 AA *ibid* cannot also be invoked for imposition of

penalty. On merits, learned Advocate has justified the case of the appellant that the product in question should appropriately be classifiable under CTH 90181400 inasmuch as the same were used to perform Intra Cytoplasmic Sperm Injection (ICSI) procedure in Vitro Fertilization for the treatment of infertile couples.

3. On the other hand, learned AR appearing for the Revenue reiterated the findings recorded in the impugned order to substantiate the claim that confirmation of the adjudged demands on the appellant is in conformity with statutory provisions.

4. Heard both sides and perused the records.

5. We find that in this case, pursuant to the audit objection raised by the audit officer of CRA, the Dy. Commissioner of Customs (I), Appraising Group-VB, ACC, Mumbai vide Less Charge-cum-Demand Notices dated 13.12.2013 (3 in Nos.) had intimated the appellant that it had short-paid customs duty and the same is recoverable along with interest for mis-classification of CTH 9018, instead of the proper classification under CTH 9011. With regard to issuance of the said notices and also the SCN dated 16.11.2016, a query was raised by the Bench as to how parallel proceedings were initiated against the appellant for recovery of the dues. Pursuant to the query, the learned Authorized Representative appearing for Revenue has placed on record the letter dated 18.11.2022 addressed by the Commissioner of Customs (Import), Air Cargo Complex. Sahar, Mumbai clarifying the position regarding issuance of the notices. The relevant paragraph in the said letter is extracted herein below :

> *"3. In this regard, it is humbly submitted that there is no file available in the records for earlier two less charges issued vide F. No. S/3-Misc-93/13-14/Gr. VB/ACC dtd.13.12.2013. Probably and presumably that could be the compelling reason that the SCN vide F. No. S/3-Misc-92/2013-14/Gr. VB/ACC dtd. 16.11.2016 was issued covering earlier Bills of Entry also. However, it is stated that earlier two less charge have not been adjudicated. SCN mentioned supra has only*

been adjudicated by competent authority. Inadvertent and compelling error in this regard is regrated. "

6. On examination of the case records, more particularly the letter dated 18.11.2022 (supra), we find that the alleged mis-classification of the subject goods were within the knowledge of the department way back in the year 2013. In the present case, though for issuance of the less charge-cum-demand notice, the department had invoked the provisions of Section 28 *ibid,* but for confirmation of the adjudged demands, they have invoked the provisions of sub-section (4) of Section 28 *ibid*. The said statutory provision has the applicability, in the eventuality, where any duty has not been levied or not paid or has been short-levied or short-paid, owing to the reason of collusion; or any wilful mis-statement; or suppression of facts. It has been mandated that in such cases, the person chargeable with duty shall be issued with a show cause notice within a period of five years. Insofar as the normal period of issuance of show cause notice is concerned, sub-section (1) Section 28 *ibid* has provided that the same has to be issued within a period of one year from the relevant date. In the present case, since the period of dispute is from 25.11.2011 to 27.09.2014, the SCN ought to have been issued within a period of one year, which admittedly has not been issued in this case. The letter dated 18.11.2022 (supra) on the contrary has made the position clear that since no file is available with the department in regard to two less charge demand notice, the SCN dated 16.11.2016 was issued for confirmation of the adjudged demands with respect to the disputed B/Es filed by the appellant. Since, the entire facts regarding importation of the disputed goods and their classification claimed by the appellant was within the knowledge of the department, we are of the view that the extended period of limitation cannot be invoked for confirmation of the adjudged demands. Therefore, we are of the considered opinion that the impugned order should be set aside on the ground of limitation alone.

7. In view of the foregoing discussions, we do not find any merits in the impugned order passed by the learned Adjudicating Authority. Therefore, by setting aside the impugned order, appeal filed by the appellant is allowed.

(Operative part of the order pronounced in the open court)

(C J Mathew)
Member (Technical)

(S.K.Mohanty)
Member (Judicial)

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