

**CUSTOMS EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 3**

CUSTOMS APPEAL NO. 50008 OF 2020

[Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/PPG/620/2019-20 dated 24.09.2019 passed by the Commissioner of Customs(Appeals) New Delhi]

M/S MEHAR HEALTHCARE CORPORATION,

Appellant

16/89, Lane No. 4, Faiz Road,
Karol Bagh,
New Delhi-110005

Vs.

**COMMISSIONER, CUSTOMS-NEW DELHI
(IMPORT)**

Respondent

ICD, Patparganj,
Delhi-110096

Appearance:

Present for the Appellant : Shri Vaibhav Singh, Advocate

Present for the Respondent: Shri Rakesh Kumar, Authorised Representative

CORAM:

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

HON'BLE MS. BINU TAMTA, MEMBER(JUDICIAL)

FINAL ORDER NO. 50391 /2023

Date of Hearing : 17/02/2023

Date of Decision: 24/03/2023

BINU TAMTA

1. The present appeal filed by M/s Meher Healthcare Corporation for assailing the Order-in-Appeal dated 24.09.2019 passed by the Commissioner of Customs (Appeals) New Delhi.

2. The issue in the present case relates to the classification of the product, 'Manual Breast Pump' which according to appellant is classifiable under CTH 9018 whereas the revenue classified it under CTH 3926. The authorities below have confirmed the classification

of the product under CTH 3926. The appellant has filed the present appeal challenging the said order before this Tribunal.

3. Briefly stated, the appellant filed Bill of Entry No. 8243789 dated 19.1.2017 for import of 3040 pieces of "Manual Breast Pump, Electric Breast Pump and Conduit Connector Cover for medical use". During the assessment, catalogue was called for and as the goods were found to be Manual Breast Pump, the department felt that the goods were appropriately classifiable under CTH 3926 instead of 9018.

4. The contention of the appellant has been that the electric breast pump has been classified by the department under Heading 90181990 under the category of instruments and appliances used in medical, surgical, dental, veterinary sciences, but the product manual breast pump has been classified under Chapter 39269099 in the category of other articles of plastics though the same ought to have been classified under 9018. To justify the classification under 9018, he referred to the actual utility, purposes and various benefits for using the Manual Breast Pump. He further laid emphasis that the Government of India runs special programs so as to promote breast feeding (mothers absolute affection) MAA and also that United States FDA and several other countries describe the breast pump as a medical device. The appellant also claimed that they have registered manual breast pump as a medical device

under Central Drug Standard Control Organization governed by the Ministry of Health, Government of India.

5. The Authorised Representative of the revenue has submitted that the goods are merely devices for convenience of lactating women and is not an instrument to be used in medical science. According to the revenue, neither any medical prescription is required nor has the appellant obtained any NOC from the Drugs Controller under the Drugs and Cosmetic Act. He also referred to the HSN Notes, the Chapter Note 1 (b) and (g) of CTH 90 which expressly excludes similar medical apparatus.

6. We have heard the learned Counsel for the appellant as also the revenue and have perused the records.

7. Before proceeding to consider the matter on merits, it is necessary to set out the two entries CTH 3926 and 9018 under which the product is alleged to fall:

**3926 -OTHER ARTICLES OF PLASTICS AND
ARTICLES OF OTHER MATERIALS OF HEADINGS
3901 TO 3914.**

39269099 -Other KG. -10%

90.18- Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments (+).

-Electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters):

9018.11--Electro-cardiographs

9018.12--Ultrasonic scanning apparatus

9018.13--Magnetic resonance imaging apparatus

9018.14--Scintigraphic apparatus

9018.19-- Other

9018.20--Ultra-violet or infra-red ray apparatus

-Syringes, needles, catheters, cannulae and the like:

9018.31--Syringes, with or without needles

9018.32--Tubular metal needles and needles for sutures

9018.39--Other

- Other instruments and appliances, used in dental sciences:

9018.41--Dental drill engines, whether or not combined on a single base dental equipment

9018.49-- Other

9018.50--Other ophthalmic instruments and appliances

9018.90--Other instruments and appliances

8. In order to resolve the controversy, it is necessary to refer to the case law whereby the test for ascertaining the classification has been laid down. The Apex Court in the case of **CCEx Vs. Shree Baidyanath Ayurved Bhawan Ltd, 2009 (237)ELT 225** dealt with the issue as to whether the product 'Dant Manjan Lal' could be treated as an Ayurvedic medicine to qualify for exemption under

the notification. The Court referring to the decision in **Puma Ayurvedic Herbal Vs. Commissioner of Central Excise, Nagpur** applied the common parlance test and held that DML is routinely used for dental hygiene and is known as a tooth powder.

9. In view of the principles of classification we do not agree with the appellant that the utility of the breast pump to achieve the benefits of breast feeding is a valid test to classify the breast pump as a medical device under CTH 9018. We find that the adjudicating authority had rightly dealt with the Annexure B and C submitted by the appellant/ importer regarding short and long term use of breast feeding as sponsored by WHO, by holding that these do not have any relevance in ascertaining the classification of a product in view of the principle of law laid down in **ESPI Vs. CCE, 1996 (82) ELT 444**, that product literature cannot be the sole basis for classification.

10. The heading of chapter 9018 provides instruments and appliances used in medical, surgical, dental or veterinary sciences including scientigraphic apparatus, other electro medical apparatus and sight testing instruments. The breast pump does not fall in any of the categories under the chapter heading. They are not used to perform any specialized surgical procedure nor is used by any medical practitioner. They are simple devices for self use to facilitate the lactating mother in discharge of breast milk as per their convenience. The goods do not require any medical

supervision and are available in the market without any prescription. The heading covers a very wide range of instruments and appliances which, in the vast majority of cases are used only in professional practice (e.g. by doctors, surgeons, dentist, veterinary surgeons midwives) either to make a diagnosis, to prevent or treat an illness or to operate etc.

Even some of the medical devices have been kept out of the purview of HSN 9018. The relevant part of the HSN is quoted below:

The heading does not cover:

- a) Sterile catgut and other sterile material for surgical sutures, sterile laminaria and sterile laminaria tents (heading 30.06)
- (b) Diagnostic or laboratory reagents of heading 38.22.
- (c) Hygienic or pharmaceutical articles of heading 40.14.
- (d) Laboratory, pharmaceutical or hygienic glassware of heading 70.17.
- (e) Sanitary ware of base metal (in particular, headings 73.24, 74.18 and 76.15).
- (f) Manicure or pedicure sets and instruments (heading 82.14)
- (g) Carriages for disabled persons (heading 87.13)
- (h) Spectacles, goggles and the like, corrective, protective or other (heading 90.04)
- (ij) Photographic cameras (heading 90.06) unless incorporated permanently in the instruments or appliances of this heading.
- (k) Microscopes, etc., of heading 90.11 or 90.12

(l) Disc calculators used for calculating lung function, body mass index, etc., of heading 90.17

(m) Mechano-therapy, oxygen therapy, ozone therapy, artificial respiration, aerosol therapy, massage apparatus, etc., of heading 90.19.

(n) Orthopaedic appliances, artificial parts of the body and fracture appliances, including animals (heading 90.21)

(o) X-ray apparatus, etc., (whether medical or not) of heading 90.22.

(p) Clinical thermometers (heading 90.25)

(q) Instruments and appliances used in laboratories to test blood, tissue fluids, urine, etc., whether or not such tests serve in diagnosis (generally heading 90.27).

(r) Medical or surgical furniture, including that for veterinary use (operating tables, examination tables, hospital beds) dentists' chairs not incorporating dental appliances of this heading, etc. (heading 94.02)

11. The Chapter Note 1 provides certain exclusions:-

Notes

This Chapter does not cover:-

(a)-----

(b) Supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, maternity, belts, thoracic support bandages, abdominal support bandages, supports for joints or muscles) (Section XI),

(c)-----

(d)-----

(e)-----

(f)-----

(g) Pumps incorporating measuring devices, of heading 84.13; weight-operated counting or checking machinery, or separately presented weights for balances (heading 84.23); lifting or handling machinery (heading 84.25 to 84.28); paper or paperboard cutting machines of all kinds (heading 84.41); fitting for adjusting work or tools on machine-tools or water-jet cutting machines, of heading 84.66, including fittings with optical devices for reading the scale (for example, "optical" dividing heads) but not those which are in themselves essentially optical instruments (for example, alignment telescope); calculating machines (heading 84.70); valves or other appliances for heading 84.81;

machines and apparatus (including apparatus for the projection or drawing of circuit patterns on sensitised semiconductor materials) of heading 84.86;

12. The Chapter Heading 3926 on the other hand provides other articles of plastics and articles of other materials. This heading covers articles not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of heading 39.01 to 39.14. It then gives inclusions as:-

They Include:-

(11) Pacifiers (or "baby's dummies"); ice-bags; douche bags, enema bags and fittings therefor; invalid and similar nursing cushions; pessaries; sheath contraceptives (prophylactics); bulbs for syringes."

13. Reference to the catalogue as (Annexure D) by the appellant to say that breast pump is a medical device is also not correct as it itself says that this website provides general information on breast pumps and is not intended to provide medical advice. Further, the appellant has referred to the definitions across the European Union and the USA FDA etc of the term 'medical device' (Annexure E), however on perusal of the same we find that the definition of medical device basically implies to devices used for the purpose of diagnosis, prevention, monitoring, treatment or alleviation of disease, injury or handicap or investigation, replacement, modification or support of the anatomy or of a psychological process. This itself supports the view that the breast pump does not merit classification as a 'medical device' as it has no such use.

14. There is no quarrel with the principle that most specific entry prevails over general entry, however there is no specific entry for manual breast pump. The product is made of plastic and is a common usable item.

15. We, therefore, conclude that the product has nothing to do with any medical or surgical procedures nor is it used by any medical practitioner. It is only a facilitating device for self use by lactating mothers. The impugned order classifying the manual breast pump under CTH 39269090 is upheld.

16. The appeal is, accordingly, dismissed.

[Order pronounced on **24.03.2023**]

(P V SUBBA RAO)
MEMBER (TECHNICAL)

(BINU TAMTA)
MEMBER (JUDICIAL)