

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
REGIONAL BENCH, ALLAHABAD
COURT NO. I**

**Misc Application No. C/MISC/70452 & 70453/2018
In Appeal No. C/71241/2018-CU[DB]**

**Arising out of Order-in-Original
No.16/COMMR./NOIDA/CUS/2018, Dated: 23.07.2018
Passed by Commissioner, Customs, Noida**

**Date of Hearing: 17.01.2019
Date of Decision: 17.01.2019**

M/s MITSUI CHEMICALS INDIA PVT LTD

Vs

**COMMISSIONER, CUSTOMS
NOIDA**

**Appellant Rep by: Shri Suyash Agarwal & Shri Darpan
Agarwal, Advs.**

**Respondent Rep by: Shri Shiv Pratap Singh, Deputy
Commissioner AR**

**CORAM: Archana Wadhwa, Member (J)
Anil G Shakkarwar, Member (T)**

**Cus - The proceedings were initiated against them by way
of SCN alleging that as the assessee had imported
'Homeopathic Medicines' falling under Customs Tariff Act,
30064000 and the same being drugs are not permitted to
be imported at ICD Dadri, and consequently proposing
confiscation of goods as also imposition of penalty on the
assessee - The assessee have declared their imported
goods as 'Dental Care Products' in Bill of Entry filed by
them - The SCN alleges that the goods falling under
Heading 30064000 is 'Homeopathic Medicine' and as such**

being drugs are not permissible to be imported at ICD Dadri - Said Tariff Heading which covers Dental Cement and other dental filling bone reconstruction cements - As explained, said dental cement is used for creating artificial tooth which are to be further implanted in humans - Tribunal fail to understand as to how the SCN mentioned the goods to be classifiable as "Homeopathic Medicines" - The notice has not proposed to change the classification but simplicitorly alleges that the goods falling under Tariff Heading No.30064000 are Homeopathic Medicine - The notice proposed confiscation of goods on the basis of same being Homeopathic Medicines whereas the Adjudicating Authority has travelled beyond the SCN and has confiscated the goods by holding the same as Medical devices covered by the definition of Drugs - It is well settled law that SCN is the basis for initiation of proceedings and it is not proper for any Adjudicating Authority to travel beyond the allegations made in the notice - Having accepted that such goods are not Homeopathic Medicines which was the basic charge against the notice, Adjudicating Authority should have vacated the proceedings instead of moving ahead for confiscation of goods on an altogether different ground - The allegations in the notice were only in respect of Dental Cement whereas there is no dispute for the other items imported by assessee - As such the confiscation of all the items cannot be justified - In any case and in any view of the matter, other items are neither drugs nor Medical Devices specified in terms of Rule 3(b)(iv) of Drugs and Cosmetics Act - The denial of import of the same at ICD Dadri is not in accordance with provisions of Rule 43A, Drugs and Cosmetics Rule, 1945 - The impugned order is set aside: CESTAT

Appeal allowed

FINAL ORDER NO. 70197/2019

Per: Archana Wadhwa:

After hearing both the sides, we find that the appellant filed a Bill of Entry on 26.05.2018 for clearances of the various products detailed below which were imported by them.

a) 30064000 (Dental cements)

b) 34070010 (Modelling Pastes)

c) 38249990 (Prepared binders for foundry moulds, Case hardening compound)

d) 37011010 (Photographic plates or films)

e) 75051210 (Nickel Bars)

2. The said Bill of Entry was filed at ICD Dadri, Gautam Budh Nagar, Greater Noida. The said goods were examined by the Revenue officers in respect of their description, grade and quantity and were found to be correct. However, as the provisions of the Drugs and Cosmetics Act, 1940 prohibited import of drugs at ICD Dadri, Revenue entertained a view that the items in question being 'Homeopathic Medicines' are not permitted to be imported at Dadri.

3. In view of the above belief, proceedings were initiated against them by way of Show Cause Notice dated 26.06.2018 alleging that as the appellant had imported 'Homeopathic Medicines' falling under Customs Tariff Act, 30064000 and the same being drugs are not permitted to be imported at ICD Dadri, and consequently proposing confiscation of goods as also imposition of penalty on the appellant.

The said show cause notice stand adjudicated by the learned Commissioner of Customs, Noida Vide his impugned order vide which he has absolutely confiscated all the items imported by the appellant on the ground that

the same are 'Medical Devices' and hence are covered by Section 3(b)(iv) of the Drugs and Cosmetics Act, 1940. Inasmuch as Rule 43A of the Drugs and Cosmetics Rules, 1945 allows the import of Drugs only through specified ports and ICD Dadri not being specified port there is violation of the said Rule, thus rendering the imported goods liable for confiscation in terms of Section 111(d) of the Customs Act, 1962. Accordingly, he confiscated the entire goods worth Rs.1.76 crores absolutely along with imposition of penalty equivalent to the value of goods in terms of Section 112(a)(iv) of the Customs Act, 1962. The said order of the Commissioner is impugned before us.

4. After carefully considering the submissions made by both the sides and after going through the impugned order passed by the learned Commissioner of Customs, we find that the appellants have declared their imported goods as 'Dental Care Products' in the Bill of Entry filed by them. We have already detailed the various items imported by them along with Tariff Headings. The show cause notice alleges that the goods falling under Heading 30064000 is 'Homeopathic Medicine' and as such being drugs are not permissible to be imported at ICD Dadri. We have seen the said Tariff Heading which covers Dental Cement and other dental filling bone reconstruction cements. As explained to us the said dental cement is used for creating artificial tooth which are to be further implanted in humans. We, really fail to understand as to how the show cause notice mentioned the goods to be classifiable as "Homeopathic Medicines." The notice has not proposed to change the classification but simplicitorly alleges that the goods falling under Tariff Heading No.30064000 are Homeopathic Medicine.

Having seen the Tariff Heading which covers 'Dental Cement', we find no merits in the above allegation of the Revenue in holding Dental Cement as Homeopathic

Medicines. In any case and in any view of the matter, we note that the notice raised dispute only in respect of the goods falling under said Tariff Item i.e. Dental Cement. There was no allegation in respect of the other items so imported by the appellant. In spite of that, the Adjudicating Authority has ordered absolute confiscation of all the items.

5. In any case, we note that during adjudication the Adjudicating Authority dropped the charge of the said goods being Homeopathic Medicines but proposed to hold that the same are 'Medical Devices' which are covered by the definition of "Drugs" under Section 3(b)(iv) of the Drugs & Cosmetic Act, 1940 and as such the same has to be held as falling within the ambit of definition of Drugs. Inasmuch as Rule 43A of the Drugs Rule prohibits drugs at ICD Dadri and the goods in question falling under the definition of drugs, the same could not be imported at ICD Dadri.

6. For better appreciation of the provision of Section 3(b)(iv) of the Drugs and Cosmetic Act, 1940, which stands adopted by learned Commissioner, we would like to reproduce the same:-

"(iv) Such devices* intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board:"

As is seen from above all the medical devices are not covered by the definition of drugs. It is only those devices which stand specified by the Central Government by a Notification in the Official Gazette, which stand covered by the definition. The Central Government has specified vide S.O. 1468(E) dated 6th October, 2005, the following

devices intended for external or internal use in human being or drugs with immediate effect, namely:-

(i) Cardiac Stents

(ii) Drug Eluding Stents

(iii) Catheters

(iv) Intra Ocular Lenses

(v) I.V. Cannulac

(vi) Bone Cements

(vii) Heart Valves

(viii) Scalp Vein Set

(ix) Orthopaedic Implants

(x) Internal Prosthetic Replacements.

It is not the Revenue's case that the goods imported by the appellant fall under in the above specified 10 items.

Surprisingly the learned Commissioner has stopped after looking at the definition of drugs in Section 3(b)(iv) and has held as if all the medical devices are covered by the definition of drugs without appreciating the fact that only such devices which stand specified by the Central Government gets covered by the definition of drugs in terms of the said provisions of Drugs and Cosmetics Act, 1940. He has not further bothered to look at such specification by the Central Government by way of Notification dated 6 October, 2005. As such, we hold that the confiscation of the goods on the above reason by the Adjudicating Authority is not justified.

7. In any case, we note that the notice proposed confiscation of the goods on the basis of the same being Homeopathic Medicines whereas the Adjudicating Authority has travelled beyond the show cause notice and

has confiscated the goods by holding the same as Medical devices covered by the definition of Drugs. It is well settled law that show cause notice is the basis for initiation of proceedings and it is not proper for any Adjudicating Authority to travel beyond the allegations made in the notice. Having accepted that such goods are not Homeopathic Medicines which was the basic charge against the notice, the Adjudicating Authority should have vacated the proceedings instead of moving ahead for confiscation of goods on an altogether different ground. We also note that the allegations in the notice were only in respect of Dental Cement whereas there is no dispute for the other items imported by the appellant. As such the confiscation of all the items cannot be justified. In any case and in any view of the matter, we find that other items are neither drugs nor Medical Devices specified in terms of Rule 3(b)(iv) of the Drugs and Cosmetics Act. The denial of import of the same at ICD Dadri is not in accordance with provisions of Rule 43A, Drugs and Cosmetics Rule, 1945.

8. In view of the forgoing, we set aside the impugned order and allow the appeal with immediate relief to the appellant. All Miscellaneous stands disposed.