OFFICE OF THE COMMISSIONER OF CUSTOMS
CUSTOM HOUSE KANDLA
NEAR BALAJI TEMPLE, NEW KANDLA

Phone : 02836-271468/469 Fax: 02836-271467

A	File No.	S/10-23/ADJ/COMMR/Blow Kings/2017-18
B	Order-in-Original No.	KDL/COMMR/SKA/02/2018-19
C	Passed by	Shri Sanjay Kumar Agarwal Commissioner, Custom House, Kandla.
D	Date of order	31.05.2018
E	Date of issue	31.05.2018
F	Show Cause Notice No. & Date	S/10-23/ADJ/COMMR/ Blow Kings/2017-18 dated 07.09.2017
G	Noticee(s)/Co-Noticee(s)	**1.** M/s. Blow Kings, Shed No. 170-173, Sector-1, KASEZ, Gandhidham. **2.** ADG (Stores), GMSD, 37, Naval Hospital Road, Post Box No. 524, Chennai - 600003. **3.** The Assistant Director, Animal Husbandry, (Medical Store), Jalandhar, Punjab -144001. **4.** M/s Bharat Biotech International Ltd., Genome Valley, Turkapally Shameerpet, Hyderabad, Telangana - 500078. **5.** M/s Blow Kings, J 25, GIDC, Vapi. **6.** The DADG (MS) – GMSD, Mumbai Central, Mumbai, Maharashtra - 400006. **7.** The Dy. Director, Animal Husbandry, District Panchayat Anand. Sardar Patel Bhavan, Amul Dairy Road, Anand, Gujarat - 388001. **8.** M/s Fleischhacker Manufacturing Co. India Pvt. Ltd. – 10/119, 1st Floor, Main 80 ft. Road, Shankar Gali, Vishwas Nagar, Shahdara, Delhi - 110032. **9.** M/s Plastipack G-17, Omnibus Industrial Estate, Ringanwada, Daman, Daman & Diu - 396210. **10.** Sr. CMO (SAG), - GMSD, Opp. Telephone Exchange, Karnal, Haryana, India – 132001.

1. This Order - in - Original is granted to the concerned free of charge.
2. Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

Customs Excise & Service Tax Appellate Tribunal,
West Zonal Bench,
2nd Floor, Bahumali Bhavan Asarwa,
Nr. Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad - 380004

3. Appeal shall be filed within three months from the date of communication of this order.
4. Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs. 10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.
5. The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.
6. Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
7. While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.

BRIEF FACT OF THE CASE

M/s. Blow Kings, a unit in Kandla Special Economic Zone, situated at 173, Kandla Special Economic Zone, Gandhidham, Kutch (hereinafter also referred to as '*noticee No. 1*') have been granted Letter of Approval (LOA) for manufacturing Vaccine Carriers, Vaccine Cold Box, Blood Transport Boxes, Ice Packs etc. The said LOA was extended from time to time.

1.2. The noticee No. 1 cleared/ removed Vaccine Carrier, Blood Transport Box, Ice Pack etc., totally valued at Rs. 8,25,64,584/-, to various customers in Domestic Tariff Area (DTA) by mis-classifying the same under Customs Tariff Item 90189099 of the Customs Tariff Act, 1975 (hereinafter also referred to as '*CTA, 1975*') and paid Basic Customs Duty @ 7.5% and CVD @ 6%. The Vaccine Carriers were meant for packing, storing and carrying vaccines. The subject goods appeared to be classifiable under Tariff Item 39231030 of CTA, 1975.

1.3. The Customs Tarff Item 90189099 covers "*others*" of "*Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scientigraphic apparatus, other electro-medical apparatus and sight testing instruments*" attracting Basic Customs Duty @ 7.5% and CVD @ 6%. Whereas the Customs Tariff Item 39231030 covers "*insulated ware of heading 3923 under the broad heading articles for conveyance or packing of goods of plastics viz: Stoppers, Lids, Caps and other closure of plastics*" which attracted Basic Customs Duty @ 10% and CVD @ 12.5% during the relevant period.

1.4. Vaccine Carriers are manufactured by using the materials of High Density Polyethylene. The same are insulated with Polyurethane Foam (PUF). The Vaccine Carriers and other goods did not appear to be medical instruments as listed in CTH 9018 of CTA, 1975. It appeared that the Tariff Item 90189099 did not cover Vaccine Carrier and similar goods and thus the classification declared by the noticee under Tariff Item 90189099 of CTA, 1975 in the Bills of Entry appeared to be incorrect.

1.5. Customs Tariff Heading 3923 of CTA, 1975 covers "*Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures of plastics*". The Customs Tariff Sub-heading 392310 of CTA, 1975 covers "*Boxes, cases, crates and similar articles*". Further, the Customs Tariff Item 39231030 of CTA, 1975 covers "*Insulated ware*". The subject goods are made of materials obtained from HDPE/ Polyethylene and are used as

packing and carrying vaccines. Therefore, the impugned goods appeared to be appropriately classifiable under Customs Tariff Item 39231030 of CTA, 1975. Further, it appeared that the mis-classification of subject goods under Customs Tariff Item 90189099 of CTA, 1975, instead of correct Customs Tariff Item 39231030 of CTA, 1975, resulted in evasion of Customs Duty totally amounting to Rs. 82,57,256/-.

1.6. Goods cleared from SEZ Unit to DTA are subjected to levy of Customs Duty under Section 30 of Special Economic Zone Act, 2005. The Bills of Entry covered in this case were filed by the noticee No. 1 on self-assessment basis for the clearance of subject goods to DTA. The noticee No. 1 filed Bills of Entry on the basis of authorizations given by the following DTA buyers, as provided under Rule 48(1) of the Special Economic Zone Rules, 2006:

(i) ADG (Stores), GMSD, 37, Naval Hospital Road, Post Box No. 524, Chennai (hereinafter also referred to as '*noticee No. 2*'),

(ii) The Assistant Director, Animal Husbandry, (Medical Store), Jalandhar (hereinafter also referred to as '*noticee No. 3*'),

(iii) M/s. Bharat Biotech International Ltd., Genome Valley, Turkapally Shameerpet, Hyderabad (hereinafter also referred to as '*noticee No. 4*')

(iv) M/s. Blow Kings, J 25, GIDC, Vapi (hereinafter also referred to as '*noticee No. 5*')

(v) The DADG (MS) – GMSD, Mumbai Central, Mumbai (hereinafter also referred to as '*noticee No. 6* ')

(vi) The Dy. Director, Animal Husbandry, District Panchayat Anand, Sardar Patel Bhavan, Amul Dairy Road, Anand, Gujarat (hereinafter also referred to as '*noticee No. 7*')

(vii) M/s. Fleischhacker Manufacturing Co. India Pvt. Ltd. – 10/119, 1st Floor, Main 80 ft. Road, Shankar Gali, Vishwas Nagar, Shahdara, Delhi (hereinafter also referred to as '*noticee No. 8*')

(viii) M/s. Plastipack G-17, Omnibus Industrial Estate, Ringanwada, Daman, Daman & Diu (hereinafter also referred to as '*noticee No. 9*')

(ix) Sr. CMO (SAG), - GMSD, Opp. Telephone Exchange, Karnal, Haryana (hereinafter also referred to as '*noticee No. 10*')

1.7. The subject Bills of Entry were filed by the noticee No. 1 on self-assessment basis for the clearance of impugned goods to Domestic Tariff Area on the basis of authorizations from respective DTA buyers. It appeared that while clearing the goods to Domestic Tariff Area, the noticee No. 1

deliberately suppressed specifications and uses of the goods and mis-classified the same under Customs Tariff Item 90189099 of CTA, 1975 with an intention to evade Customs Duty. They were aware of the fact that the subject goods were not medical instruments as listed in the Customs Tariff Heading 9018 of the CTA, 1975 but were meant for using in packing and carrying and were appropriately classifiable under Customs Tariff Item 39231030 of CTA, 1975. At the relevant time, the goods covered under Customs Tariff Item 39231030 of CTA, 1975 attracted BCD @ 10% and CVD @ 12.5%. The goods covered under Customs Tariff Item 90189099 of CTA, 1975 attracted BCD @ 7.5% and CVD @ 6%. In view of above observations, it appeared that by suppressing the material facts of specifications and uses of the subject goods, the noticee No. 1 mis-classified impugned goods and evaded duty totally amounting to Rs. 82,57,256/-. Since the duty was evaded by suppression of material facts and mis-declaration of the goods, it appeared to be a fit case for invoking extended period for demand of duty as provided under Section 28(4) of the Customs Act, 1962.

1.8. In view of the above discussed facts, it appeared that while clearing the subject goods to DTA, on behalf of the above named importers, the noticee No. 1 mis-declared the subject goods, totally valued at Rs. 8,25,64,584/- by deliberately suppressing the material facts relating to specifications and uses of the same. They also mis-classified the subject goods and evaded payment of appropriate duty on the same during clearance to DTA. For the said act of suppression of material facts and mis-declaration of description, the goods totally valued at Rs. 8,25,64,584/- appeared to be liable to confiscation under Section 111(m) of the Customs Act, 1962, though the same were not physically available. Further, it appeared that for the act of suppression of material facts and mis-declaration, the noticee No. 1 to 10 have rendered themselves liable to penalty under Section 112(a) of the Customs Act, 1962. All of them also rendered themselves liable to penalty under Section 114A of the Customs Act, 1962 for the act of evading duty by suppressing the material facts and mis-declaration of the subject goods. Since the noticee No. 1 prepared and used invoices and packing lists showing false information about the subject goods, it appeared that the noticee No. 1 rendered themselves liable to penalty under Section 114AA of the Customs Act, 1962.

1.9.1 In view of above, Show Cause Notice F. No. S/10-23/ADJ/COMMR/ Blow Kings/2017-18 dated 07.09.2017 was issued to the above named ten noticees, calling upon them to show cause to the Principal Commissioner of Customs, Custom House, Kandla, as to why:-

(a) the classification declared as Customs Tariff Item 90189099 of Customs Tariff Act, 1975 in the Bills of Entry should not be rejected and the goods should not be classified under the Customs Tariff Item 39231030 of Customs Tariff Act, 1975 and the respective Bills of Entry be assessed accordingly;

(b) the differential Customs duty totally amounting to **Rs. 82,57,256**/- on the goods should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962 along with interest under Section 28AA ibid;

(c) the goods totally valued at Rs. 8,25,64,584/- should not be held liable to confiscation under Section 111(m) of the Customs Act, 1962, though the same are not physically available.

(d) penalty under Section 112(a)/ 114A of the Customs Act, 1962 should not be imposed on each of them for willfully mis-stating and suppressing the facts as discussed above.

1.9.2 Further, vide the said Show Cause Notice M/s. Blow Kings, Kandla Special Economic Zone, Gandhidham were called upon to show cause to the Principal Commissioner of Customs, Custom House, Kandla, as to why penalty under Section 114AA of the Customs Act, 1962 should not be imposed upon them.

DEFENCE

2.1. The noticee No. 1 have filed their written defence reply vide their letter dated 27.11.2017, wherein they have submitted as under:

2.1.1 They are engaged in manufacturing a wide range of cold chain equipment which are used in vaccination/ immunization programs for transporting vaccines, specimens, blood samples, etc., specifically for organizations like World Health Organization (WHO), Unite Nations Children's Fund ('UNICEF') and Ministry of Health & Family Welfare. Vide Performance Quality Safety (PQS) Devices Catalogue, the Department of Immunization, Vaccines and Biological – Quality, Standards and Safety of the World Health Organization has laid down its requirements for the pre-qualifying such equipment. They are manufacturing the said goods confirming to the standards prescribed for various models of insulated containers, vaccine carriers, water/ coolant packs, etc. Purchase orders placed by the WHO/ UNICEF require strict adherence to the PQS standards.

As per requirement of WHO, they submit complete dossiers of the aforesaid PQS prequalified products for annual review and revalidation. Following that procedure, they have got various models of subject goods reviewed and revalidated annually by the WHO. On satisfaction of the WHO, the said goods are published under '*Revalidated devices*' on the PQS WHO web page and they are notified accordingly. They are providing the said goods to the Government of India also which are used in immunization programs. Since the said goods are manufactured as per the requirements of WHO and used specifically for vaccination programs, they have been classifying the same under CTH 90189099.

2.1.2 The aforesaid classification reads as under:

> *"9018 – Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scientigraphic apparatus, other electromedical apparatus and sight-testing instruments ...*
> *9018 – Other instruments and apparatus ...*
> *90189099 – Other"*

2.1.3 The SCN has been issued without considering their letter dated 01.08.2017. The Department is under the erroneous assumption that the subject goods were cleared by them on self-assessment basis. They cleared the goods to the DTA only after assessment by the authorized officer.

2.1.4 CTH 90189099 of the CTA, 1975 covers 'instruments, appliances and apparatus' used for medical purpose. The term 'instruments' has not been defined under the CTA, 1975 or the Customs Act, 1962. It is settled law that if a term is not defined under legislation, the dictionary meaning of the same is to be referred. They placed reliance on judgments in the matters of **(i)** Star Paper Mills *Vs.* Collector of Central Excise [1989 (43) ELT 178 (SC)] wherein term 'instruments' has been defined, **(ii)** Kerala Electric Lamp Works *Vs.* Collector of C. Excise, Cochin [1996 (83) ELT 209 (Tribunal)] wherein the term 'apparatus' has been defined, **(iii)** I.C.B. (P) Ltd. *Vs.* Collector of Central Excise, Baroda [1997 (95) ELT 239 (Tribunal)] wherein the term 'appliance' has been defined and **(iv)** Star Radio Electric Co. *Vs.* Commissioner of Sales Tax [1971 (27) STC 367] wherein it was observed that appliance is a mechanical thing, an apparatus or device.

2.1.5 Further, relying on the judgment in Damodar J. Malpani *Vs.* Collector of Central Excise [2002 (146) ELT 483 (SC)] they have contended that subject goods are classifiable under Chapter 90. They have also relied on judgments/ orders in the matters of Commissioner of Central Excise *Vs.* Connaught Plaza Restaurant (P) Ltd. [2012 (268) ELT 321 (SC)], Commissioner of Central Excise, Goa *Vs.* Waterways Shipyard [2013 (297)

ELT 77 (Tri.-Mumbai)] and Fenner (India) Ltd. *Vs.* Collector of Central Excise, Madurai [1995 (77) ELT 9 (SC)] and Sun Export Corporation *Vs.* Collector of Customs, Bombay [1997 (93) ELT 641 (SC)]. They have contended that if an item is prima facie classifiable under two or more headings, the same shall be classified under the heading which occurs last in numerical order and when two views are possible, the one favorable to the assesse has to be adopted.

2.1.6 They received declarations from the WHO and M/s. HLL Lifecare Limited (*a GOI Enterprise which procured the subject goods from them for and on behalf of Ministry of Health and family Welfare*) to the effect that the impugned goods adhere to the standards laid down by the WHO and are used exclusively in immunization programs. They are in receipt of a declaration dated 16.11.2017 issued by the UNICEF certifying that the subject goods are vital to the UNICEF assisted immunization programs and that UNICEF invests in the development of the goods. It has been contended that international expert bodies like WHO and UNICEF have classified the said goods to be instruments used for medical purpose.

2.1.7 The said goods have been regularly classified under Chapter 90 while exporting from major ports by other exporters. They been manufacturing the said goods since 1985 and have been classifying the same under Chapter 90 of the CTA, 1975. Prior to the present investigation, the Department never challenged the classification adopted by them. There is no change in law and the Department has not provided any reasons for rejecting the long standing classification practice adopted by them and accepted by the Department.

2.1.8 The Department has sought to re-classify the said goods under Chapter 39 on the grounds that the same are manufactured using 'High Density Polyethylene'. CTH 3923 covers *'articles for the conveyance or packing of goods'*, i.e. goods having been manufactured out of plastic and generally used for conveyance or packing of goods. However, the impugned goods are manufactured with strict adherence to WHO specifications, and are provided exclusively to WHO, UNICEF and the Government of India for the sole purpose of use in immunization programs. The said good are used exclusively by medical professionals and therefore cannot be classified under Customs Tariff Item 39231030.

2.1.9 As per Chapter Note 2(u) of Chapter 39 of the CTA, 1975, the Chapter 39 does not cover articles classifiable under Chapter 90. Thus, even if any goods are capable of being classified under Chapter 39, the same have

to be classified under Chapter 90 if they satisfy the criteria laid therein. The goods classifiable under Chapter 39 are goods of general use.

2.1.10 Rule 3(a) of the Interpretative Rules states, *'heading which provides the most specific description shall be preferred to headings providing a more general description'*. The said good are correctly classifiable under Chapter 90 of the CTA as the same are differentiable from the general term of insulated wear for the following reasons:

- The said goods are specifically designed to protect vaccines from variation in weather and temperature.
- The said goods are used exclusively in hospitals and medical centers.
- The goods are manufacture with strict conformation to the WHO PQS specifications.
- The said goods are supplied to the WHO, UNICEF and Ministry of Health, exclusively for medical use.

2.1.11 The subject goods fulfill stringent criteria with norms meant for medical purposes and cannot be used otherwise. The said goods are totally different from ordinary insulation boxes as they are meant only for medical use. The said goods are used during the actual immunization and not just for the purpose of transporting the vaccines. The said goods are manufactured keeping in mind that vaccines are required to be kept at a particular temperature and therefore are designed and manufactured accordingly. Both, the 'Vaccine Carrier' and the 'Coolant Packs' are specifically designed in way so that the temperature of vials can be maintained during the actual immunization. Therefore, it cannot be said that the subject goods are used merely for the purpose of transportation of goods. This fact is also supported by the declaration of UNICEF dated 16.11.2017 wherein it is clearly stated that *"Unicef procures WHO approved Vaccine Carriers, Cold Boxes and Ice Packs (Cold Chain Equipment) to support Unicef assisted programs for immunization in various countries"*.

2.1.12 In accordance with Rule 3(c) of Interpretative Rules also the subject goods are classifiable under Chapter 90. The said Rule provides that if an item is prima facie classifiable under two or more headings, they shall be classified under the heading which occurs last in numerical order. They have relied on judicial pronouncements in the matters of Commissioner of Central Excise, Goa *Vs.* Waterways Shipyard [2013 (297) ELT 77 (Tri.-Mumbai)] and Fenner (India) Ltd. *Vs.* Collector of Central Excise, Madurai [1995 (77) ELT 9 (SC)].

2.1.13 As the goods are correctly classifiable under Customs Tariff Item

90189099 and there is no suppression of fact the goods are not liable to confiscation.

2.1.14 They have produced copies of various literatures including:

- Extract of Performance Quality Safety Catalogue issued by WHO;
- Purchase orders placed by UNICEF/ WHO;
- Notices of revalidation issued by WHO for the period 2014 to 2017, classifying goods as 'devices';
- National e-tender enquiry document bearing No. HLL/PCD/IMMU-06/15-16;
- Declarations from M/s. HLL Lifecare Ltd. declaring adherence of goods to WHO standards;
- Declarations from WHO declaring adherence of goods to WHO standards.

2.1.15 Further, vide letter dated 21.05.2018, the noticee No. 1 have submitted a catalogue containing photographs of vaccine carrier.

2.2 The Assistant Director, Animal Husbandry, Veterinary Medical Store, Jalandhar (noticee No. 3) has filed their written submissions vide their letter dated 09.10.2017, wherein they have submitted that they have not evaded any custom duty. They had floated an e-tender for the purchase of certain material and equipment, which also included 300 large vaccine carriers 20+/-2ltrs. The noticee No. 1 also applied and got the tender for supply of 300 large vaccine carriers 20+/-2ltrs for rates quoted by them which were inclusive of taxes. Accordingly they issued purchase order at the quoted rates. These large vaccine carriers were supplied at Veterinary Medical Store Jalandhar after inspection and verification. They did not evade any custom duty as the noticee No. 1 gave rates for each Vaccine Carrier including all Tax and the forwarding amount. The Custom duty part was only with the noticee No. 1 as they were the importers of Vaccine Carriers and not the department. They were not part of import or customs duty.

2.3 The Senior Chief Medical Officer (HAG), In-charge Government Medical Store Depot, Mumbai - 8 (noticee No. 6) has submitted their defense reply vide letters dated11.04.2018 wherein they have submitted that the procurement of Cold Box and Vaccine Carriers was made by M/s. HLL Lifecare Limited, Noida and was supplied to them on behalf of the Ministry for distribution to the end user as per Ministry's directions; that they were not involved in the matter and did not play any role in mis-classification; that the said error and omission has been made by the noticee No. 1; that the charges against them may be dropped and the SCN may be withdrawn.

2.4 The Assistant Director, In-charge GMSD, Chennai-3 (noticee No. 2) has submitted their defense reply vide letters dated 25.09.2017 and 10.05.2018 wherein they have submitted that they did not place any purchase order to the noticee No. 1; that the procurement action was done by M/s. HLL Lifecare; that the subject two items does not fully pertain to them; that the supply was meant for Universal Immunization Program of Government of India and they received material only for the packing purpose of Vaccines; that they did not issue any Authorization to the noticee No. 1 to clear the material; that the matter has been taken with the Procurement Division of Ministry of Health & Family Welfare for giving appropriate direction to M/s.HLL Lifecare; that they may be exempted to attend the personal hearing and M/s. HLL Lifecare may be called to resolve the matter as they are only storage and distribution center as per the directions of Ministry of Health & Family Welfare and HLL Life care is the procurement agency.

2.5 The noticee No. 4, 5, 7, 8, 9 and 10 did not submit any defense reply.

PERSONAL HEARING

2.6.1 Personal Hearing to the noticees were fixed on 17.04.2018 and 19.04.2018. Dr. Iqbal Singh, Asst. Director, Animal Husbandry (Medical Store), Jalandhar, Punjab (noticee No. 3) appeared for personal hearing on 19.04.2018. He reiterated his submission made in written reply. He mentioned that they purchased the goods from M/s. Blow Kings as they were the lowest bidder in the invited tender. The rates were inclusive of taxes and they are not aware whether there is any short levy of duty. He requested to drop the proceedings.

2.6.2 Next date of personal hearing for noticee No. 1 and 5 were fixed as 03.05.2018. Shri Munjal Kothari (partner in noticee No. 1), Shri Sarkar (officer-in-charge KASEZ unit of noticee No. 1) and Ms. Priyanka Kothari, Executive Sales Assistant in noticee No. 1) appeared on behalf of the noticee No. 1, 5 and 9. They reiterated the submissions made in written reply and stated that the insulated vaccine box manufactured by them is for transportation of vaccines and it is not a mere picnic box. They have to maintain the WHO specifications and their product is tested and certified in WHO labs and published in PQS (Performance Quality Safety) Catalogue by WHO. The goods are as per Ministry of Health & Family Welfare protocol which is similar to WHO protocol. They further stated that issue was raised on CRA objection which is now dropped and requested to drop the proceedings.

2.6.3 The noticee No. 2, 4, 6, 7, 8 and 10 did not appear for personal hearing.

DISCUSSION AND FINDINGS

3.1 I have carefully gone through the Show Cause Notice dated 07.09.2017, relied upon documents to the show cause notice, defence replies filed by the noticees, literature produced by them and the oral submissions made during the personal hearing.

3.2 The main issue to be decided in the present case is as to whether the Vaccine Carrier, Vaccine Cold Box, Blood Transport Box etc. cleared by the noticees to Domestic Tariff Area are classifiable under Customs Tariff Item 39231030 or 90189099 of the CTA, 1975. Consequently proposals of demand of duty with interest, confiscation and penalty are to be decided.

3.3 The noticee No. 2 has submitted that they did not place any purchase order to the noticee No. 1 as the procurement action was done by M/s. HLL Lifecare. They have contended that the supply was meant for Universal Immunization Program of Government of India and they received material only for the packing purpose of Vaccines. They did not issue any Authorization to the noticee No. 1. I find that though they have not addressed the issue of classification but as per their reply, the goods supplied to them were meant for immunization program of Government of India.

3.4 The noticee No. 3 have submitted that they had floated e-tender for purchase of certain material and equipment including Vaccine Carriers for Veterinary Medical Store Jalandhar and the noticee No. 1 quoted rate including all the taxes. Thus, they have contended that the Custom duty part was to be looked after by the noticee No. 1. In their defense reply, they have not stated anything about classification of impugned goods.

3.5 The noticee No. 6 has submitted that the procurement of Cold Box and Vaccine Carriers was made by M/s. HLL Lifecare Limited, Noida and was supplied to them on behalf of the Ministry. They have contended that they were not involved in the matter and they have not played any role in mis-classification and the said error and omission has been made by the noticee No. 1. I find that in their defense reply, they have also not stated anything about classification of impugned goods.

3.6 I find that the noticee No. 2, 3 and 6 are Departments of Government of India. All these departments are Medical Stores. I find that in their defense replies they have not touched technical aspects of the alleged mis-classification. However, from the fact that the impugned goods were supplied to these Government Medical Stores, I infer that of use of the impugned goods was in the medical field. It has been contended that M/s. HLL Lifecare Limited was also in picture for supply of impugned goods to the noticee No. 2 and 6 but it is a fact that it is a Government of India Enterprise in the medical field.

3.7 The noticee No. 1 has submitted their defence on various counts. They have submitted that the SCN has been issued without considering their letter dated 01.08.2017. I have gone through the said letter. The issue involved in this case has arisen from an audit objection. I find that the said letter of the noticee No. 1 was submitted consequent to the audit objection. Submissions of the noticee No. 1 in that letter are similar to contentions raised during the impugned defence submissions. I find that even if SCN is issued without considering their submissions, it neither render the same illegal not adversely affect their interests as after issuance of SCN they are granted opportunity of their defence. It does not take away their right to defense. Therefore, I do not find force in this contention.

3.8 Next contention of the noticee No. 1 is that the Department is under the erroneous assumption that the subject goods were cleared by them on self-assessment basis. They have argued that they cleared the goods to DTA only after assessment by the authorized officer. I find that as per Section 17 of the Customs Act, 1962, after introduction of system of self-assessment, the importer has to self-assess the goods. Law provides that in appropriate cases, customs officer may re-assess the same. In any case, demand of duty under sub-section (1) or (4) of Section 28 of the Customs Act, 1962 can be demanded after clearance of the goods, irrespective of the fact that assessment was done by the importer or by customs officer. Therefore, I find that this contention is not tenable.

3.9 The noticees have classified the impugned goods under Customs Tariff Item 90189099 of the CTA, 1975. Vide the impugned Show Cause Notice it has been proposed to reject the said declared classification and to classify the impugned goods under Customs Tariff Item 39231030 which covers "*Insulated ware of heading 3923 under the broad heading Articles for conveyance or packing of goods, of plastics; Stoppers, Lids, Caps and other closures, of plastics*". Before determining correct classification of Vaccine

Carrier, Cold Boxes etc., from these two contending classifications, I find it necessary to ascertain nature and uses of impugned goods. The Show Cause Notice contains brief details of the same. The noticee No. 1 has also produced literature relating to the same.

3.10 As per the Show Cause Notice, the subject Vaccine Carriers etc. are manufactured by using the materials of High Density Polyethylene. The same are insulated with Polyurethane Foam (PUF). It has been alleged that the subject goods are not medical instruments as listed in the Customs Tariff Heading 9018 of the CTA, 1975 but are meant for use as packing and carrying. The noticee No. 1 has argued that the subject goods fulfill stringent criteria of Govt. of India with norms meant for medical purpose and cannot be used otherwise as the same are totally different than ordinary insulation boxes. The noticee has submitted literature relating to impugned goods.

3.10.1 I have gone through the literature submitted by the noticee No. 1 with their defense reply and also during the personal hearing. They have submitted a photocopy of extracts of the Performance Quality Safety (PQS) Catalogue issued by the World Health Organization. Section E004 of the said Catalogue covers Cold Boxes, Vaccine Carriers and other insulated containers used for the transportation of vaccines. I find that the said Catalogue, issued by the World Health Organization, stipulates various conditions for use of the Cold Boxes and Vaccine Carriers. It covers various Cold Boxes, Vaccine Carriers, Cool Water Packs etc. manufactured by the noticee No. 1. It also contains PQS Independent Type Testing Protocol. Various products manufactured by the noticee and involved in this case appear in the said Catalogue which contain references of test reports also. In respect of Vaccine Carriers, there are references of quality standard [ISO 9001:2008] also. The said ISO specifications specifies requirements for a quality management system where an organization needs to demonstrate its ability to consistently provide product that meets customer and applicable statutory and regulatory requirements. It is generic and is applicable to all organizations.

3.10.2 The noticee No. 1 has also submitted various purchase orders issued to them by UNICEF and WHO for supply of Vaccine Carriers, Vaccine Cold Boxes with Icepacks for specified cold lives. They have also submitted copies of letters issued by the Scientist, Prequalification Team, WHO, Geneva. I find that vide the said letters, various, Water-packs, Cold Boxes and Vaccine Carriers manufactured by the noticee No. 1 were revalidated by WHO. Though the case in hand does not contain any supply to UNICEF and

WHO but as the description appearing in submitted purchase orders are also appearing in the Bills of Entry covered in this case, I find it relevant to consider these documents. From these purchase orders, I find that the noticee received purchase orders for such goods from UNICEF and WHO, wherein the goods have been described as "Cold Boxes", "Vaccine Carriers" etc. From these facts I find force in the contention of the noticee that the Vaccine Carriers are manufactured for specific use in storing or carrying vaccines.

3.10.3 The noticee No. 1 has also submitted a copy of National e-Tender Enquiry Document. I find that it was issued by M/s. HLL Lifecare Limited (A Govt. of India Enterprise) for purchase of cold chain items under universal immunization program. Vide the said tender Cold Boxes, Vaccine Carriers and Icepacks were sought to be purchased for different Government Medical Store Depots. I find that in that document it has been mentioned that the items are essential for safe transportation of sensitive vaccines. It has also been mentioned that the equipment should conform to WHO specifications and should preferably be listed on the product information sheet of WHO. Use of Icepacks has been described as "*Ice Packs are used with vaccine carrier for transportation of UIP vaccine from PHC to session site*".

3.10.4 Further, the noticee No. 1 has submitted a copy of literature "*Immunization in practice*". It states that the system used for storing vaccines in good condition is called 'the cold chain' and is also referred to as vaccine supply chain or immunization supply chain. It consists of a series of links that are designed to keep vaccines within WHO recommended temperature ranges from the point of manufacture to the point of administration as vaccines are sensitive to heat/ freezing/ light etc. It defines Cold Box as an insulated box which can be lined with water packs to keep vaccines in required temperature range. It gives importance to use correct number and size of water packs. As per this literature Vaccine Carriers are smaller than Cold Boxes and are used to transport or temporarily store vaccines and diluents. These are also lined with water packs which can be used as frozen ice packs/ conditioned ice packs/ cool water packs/ warm water packs, as per requirement of vaccine.

3.10.5 The "*Immunization in practice*" literature thrust on correct packing of cold boxes and vaccines. According to it conditioned ice packs or cool water packs are required to be arranged in cold box or vaccine carriers. Vaccines/ diluents are to be put in plastic bags and then in the middle of the cold box or vaccine carrier. Foam pad has to be placed in the top of the

container and then the lid is to be closed tightly. Thus, this literature stipulates specific manner of use of Vaccine Carriers for safety of vaccines.

3.10.6 .The noticee No. 1 has also submitted a copy of literature "*the blood cold chain*" issued by the Department of Blood Safety and Clinical Technology, WHO, Geneva. Chapter 7 of this literature discuss about blood transport boxes. It provides minimum performance specifications. Blood Cold Boxes produced by the noticee No. 1 have found place in the said literature of the WHO.

3.10.7 The noticee No. 1 has also submitted a copy of Immunization Handbook for Health Workers, issued by the Ministry of Health & Family Welfare, Government of India. Its preface states that it is a culmination of efforts of the Government of India, WHO-NPSP, NIHFW, UNICEF etc. It describes cold chain as "*the cold chain refers to the people, equipment and procedures designed to maintain appropriate temperatures for vaccines from the time they leave the manufacturer through transportation and storage until the point of use*". It states that Vaccine Carriers are used for carrying vaccines to sub-center or to villages. They maintain cold chain during transport from the PHC for one day's use in the field. Vaccine Carriers have thick walls and lids and are made of a special material that prevents heat from passing through and reducing the potency of vaccines. According to the literature, Icepacks are plastic containers filled with water which are kept along the walls of the Vaccine Carriers and the Cold Boxes to keep them and their contents cold. Cold Boxes are used to collect and transport monthly supplies of vaccines from district stores to the health facility. Vaccines should be stores/ transported in Cold Boxes only with a sufficient number of conditioned Icepacks. As many of the buyers of impugned goods are departments working under the Ministry of Health & Family Welfare (and are also noticees in this matter), I find the impugned literature to be relevant.

3.10.8 From the above discussed literature I find that the subject goods are specially designed to protect vaccines from warm/ cold weather conditions. The same are used in medical and veterinary science and manufactured strictly conforming to the WHO specification. The same are subjected to verification protocol and Performance Quality Safety (PQS) specifications for maintenance of particular range of temperature. The products manufactured by the noticee No. 1 are tested and certified by WHO and published in PQS (performance Quality Safety) catalogue by WHO. Further, I have also seen photographs of the products, submitted by the noticee No. 1 vide letter dated 21.05.2018. The Vaccine Carrier appearing in

the photograph contains mother-child logo generally used in the field of vaccination/ immunization. The product Vaccine Carrier also contains labels which are mandatory as a part of WHO protocol. Further, it contains pictorial instructions as per WHO standard and vaccine transport advice. I find that the products have been reviewed and revalidated by WHO. These products have been supplied by the noticee No. 1 to the agencies involved in vaccination including the Departments under Ministry of Health and Family Welfare, Government of India. Even in this case most of the buyers are Departments functioning under the Ministry of Health & Family Welfare. In view of these facts, I hold that the impugned goods are Insulated wares, specifically designed for the purpose of carrying and transporting vaccines.

3.11 After considering nature and use of the impugned goods, as above, I proceed to determine correct classification of impugned goods.

3.11.1 It has been proposed to classify the impugned goods under Customs Tariff Item 39231030 of CTA, 1975. I have sequentially gone through the four digit, six digit and eight digit classification. Description of goods mentioned against CTH 3923 reads "*Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics*". The sub-heading 392310, under the said CTH, covers "*Boxes, cases, crates and similar articles*". The Customs Tariff Item 39231030, under the said sub-heading, covers "*Insulated Ware*". Thus, I find that the insulated wares in the form of boxes, cases, crates and similar articles of plastics for conveyance or packing of goods or stoppers, lids, caps and other closures are classifiable under Customs Tariff Item 39231030.

3.11.2 The noticees have classified the impugned goods under Customs tariff Item 90189099 of CTA, 1975. The chapter 90 of CTA, 1975 covers "*Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof*". Description of goods mentioned against CTH 9018 reads, "*Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scientigraphic apparatus, other electromedical apparatus and sight-testing instruments*". Sub-heading 901890, under the said CTH covers "*Other instruments and appliances*". The Customs Tariff Item 90189099 reads "*Other*". Thus, I find that The Customs Tariff Item 90189099 covers the instruments and appliances used in medical, surgical, dental or veterinary sciences and also covers instruments and apparatus used in measuring, checking etc. in the medical or surgical field.

3.11.3 As the said the words instruments, appliances and apparatus have been used in chapter 90, the noticee No. 1 has addressed it in their defence reply. They have submitted that in the matter of Star Paper Mills *Vs.* Collector of Central Excise [1989 (43) ELT 178 (SC)] the Hon'ble Supreme Court has laid down that when a term in not defined statute, its dictionary meaning may be referred. The term 'instrument' has been defined in Oxford's dictionary as "a tool or device used for a particular task, especially for delicate or scientific work. They have also relied order of Hon'ble CESTAT in the matter of Kerala Electric Lamp Works *Vs.* Collector of C. Excise, Cochin [1996 (83) ELT 209 (Tribunal)], wherein meanings of the terms apparatus and device has been discussed in detail. Relevant part of the said order reads:

> *3. .... As regards "apparatus" it has been defined in the Concise Oxford Dictionary as equipment for doing something. Webster's Dictionary describes the term as an instrument or appliance designed for a specific operation. Likewise the expression appliance has been defined in the Concise Oxford Dictionary as utensil, device or equipment. ....*
>
> *.... This expression as also the others, appliance and equipment have been treated as interchangeable terms in the Dictionaries. One of the meanings of equipment is apparatus. Conversely, apparatus has been defined, inter alia, as equipment as also appliance. Appliance has also been defined as equipment, utensil or device.*

3.11.4 In view of various judicial pronouncements, some of which are discussed above, it is settled legal position that when a term is not defined in statute, dictionary meaning of such terms has to be applied. The words instruments and appliances appearing in CTH 9018 of the CTA, 1975 have not been defined in the said Act. Therefore, in view of well settled legal position, I find that dictionary meaning of word "appliance" can be applied in this case. Dictionary meaning of the term "appliance" is "*a device or piece of equipment designed to perform a specific task*". Further, I find from the submitted literature that the impugned goods are used to safely store vaccines at desired temperatures. Thus, the impugned goods are used for this particular purpose in hospitals and medical centers to protect vaccine for particular specified time period. Therefore, in view of the above discussed judicial pronouncements, I find that that the impugned goods are covered in the term "appliance" and cannot be debar from classifying the same under CTH 9018 of CTA, 1975 on this count.

3.12 Next contention of the noticee No. 1 is that the subject goods have been regularly classified under Chapter 90 by other exporters and they are also classifying the same under Chapter 90 of the CTA, 1975 and the department has challenged it for the first time that too without any change in law or any other reason. They have relied on the order of Hon'ble Supreme Court in the matter of Damodar J. Malpani *Vs.* Collector of Central Excise [2002 (146) ELT 483 (SC)], wherein it was held that different stands cannot be taken for different parties in similar matters. I have gone through the export data submitted by the noticee and I have also gone through such export data obtained independently to check veracity of this contention. I have found from the data that vaccine carriers and cold boxes are classified at different customs locations under Customs Tariff item 90189099 of CTA, 1975. I find that the noticee No. 1 have been classifying impugned goods under the same tariff item and the department accepted the same. I find that under such circumstances, classification cannot be changed without cogent reasons.

3.12.1 The contending Customs Tariff item is 39231030. The CTH 3923 of CTA, 1975 covers "*Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures of plastics*". The sub-heading 392310 under the said CTH covers "*Boxes, cases, crates and similar articles*". The Customs Tariff Item 39231030 of CTA, 1975 covers "*Insulated ware*". Thus, The Custom Tariff Item 39231030 covers Insulated ware like boxes, cases, crates etc. which are made of plastics and are used as conveyance or packing of goods, stoppers, lids, caps etc. As the subject goods are made-up of materials obtained from HDPE/ Polyethylene and are used as packing and carrying vaccines, it has been proposed to classify the same accordingly. It has been alleged in the SCN that the subject goods were not medical instruments but were meant for use as packing and carrying. However, as discussed above, I find that the impugned goods were manufactured in accordance with WHO specifications and were notified accordingly by WHO. Further, the same were supplied to agencies involved in immunization programs/ medical field. In view of these facts and the facts emerging from the literature produced by the noticee No. 1 and discussed above, I find that the impugned goods are different from ordinary cold boxes or picnic boxes.

3.12.2 Further, I find that the Chapter Notes of Chapter 39 of the CTA, 1975 clearly excludes various items from classifying the same under Chapter 39. The Chapter Note 2(u) therein excludes articles of Chapter 90. Though the impugned goods does not appear in the examples cited in the said Chapter Note which states "*for example Optical elements, spectacle frames,*

drawing instruments", however, I find that the list of those examples is not exhaustive. It shows that any item which is capable of being classified under Chapter 90 is excluded from Chapter 39.

3.13.1 As discussed above, specific classification of the subject goods have not been provided and thus the same are required to be ascertained on the basis of various factors. I find that classification in CTH 9018 has been elaborated in the HSN Explanatory Notes. In Collector of Central Excise, Shillong *Vs.* Wood Crafts Products Ltd. [(1995) 3 SCC 454], it was held by the Hon'ble Supreme Court of India that as expressly stated in the statements of objects and reasons of the Central Excise Tariff Act, 1985, the Central Excise Tariffs are based on the Harmonious System of Nomenclature (HSN) and the internationally accepted nomenclature was taken into account to reduce disputes on account of tariff classification. Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the Harmonious System of Nomenclature (HSN). Further, discussing the above judgment in the matter of L.M.L. Ltd. *Vs.* Commissioner of Customs [2010 (258) E.L.T. 321 (S.C.), the Hon'ble Supreme Court of India has held that although, the decision in the case of Woodcraft Products dealt with the interpretation of the provisions of the Central Excise Tariff there can be no doubt that the HSN Explanatory Notes are a dependable guide even while interpreting the Customs Tariff. Therefore, I find that the details available in the HSN Explanatory Notes can be referred while interpreting the Customs Tariff. I refer to the HSN Explanatory Note relating to CTH 9018 which states, inter alia, as:

> *It should also be noted that a number of instruments used in medicine or surgery (human or veterinary) are, in effect, tools (e.g., hammers, knives, saws, chisels, gouges, forceps, pliers, spatula, etc.). Such articles are classified in this heading only when they are clearly identifiable as being for medical or surgical use by reason of their special shape, the ease with which they are dismantled for sterilization, their better quality manufacture, the nature of the constituent metals or by their get-up (frequently packed in cases or boxes containing a set of instruments for a particular treatment: childbirth, autopsies, gynecology, eye or ear surgery, veterinary cases for parturition, etc.).*

3.13.2 From the above, I find that if an instrument, ordinarily termed as a tool of general purpose, is found clearly identifiable as an instrument for medical or surgical use by reason of its shape, get-up or manufacturing quality, the same is liable to be classified under CTH 9018. As discussed above the subject goods have been manufactured for the purpose of use in storing/ carrying vaccines, blood etc. The impugned goods have been tested

by WHO. The same are supplied to WHO, UNICEF, departments of Ministry of Health & Family Welfare

3.14 Further, I find that the issue of classification has arisen as a result of audit objection. Though the impugned SCN has been issued but the Department has was vehemently contested the audit objection. Considering the replies submitted by the Department, the audit para has been settled. It is a fact that adjudicating authority is not bound to drop the proceedings if audit para is settled. However, from the above discussed facts, I find that the impugned goods were appropriately classified by the noticees and the fact that audit para has been settled also supports my findings in this order.

3.15 The noticee No. 1 has relied on various judgments/ orders to oppose the proposed re-classification. I have gone through the cited judgments/ orders. In the matter of Commissioner of Central Excise *Vs.* Connaught Plaza Restaurant (P) Ltd. [2012 (286) ELT 321 (SC)] it was held that in the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it. In view of the above discussed facts about nature of the impugned goods and, following the above ratio, I find that the subject goods are covered under the terms "instruments and appliances".

3.16 In the matter of **(i)** Commissioner of Central Excise, Goa *Vs.* Waterways Shipyard [2013 (297) ELT 77 (Tri.-Mumbai)], **(ii)** Fenner (India) Ltd. *Vs.* Collector of Central Excise, Madurai [1995 (77) ELT 8 (SC)] and **(iii)** Sun Export Corporation *Vs.* Collector of Customs, Bombay [1997 (93) ELT 641 (SC)] it was held that if an item is prima facie classifiable under two or more headings, they shall be classified under the heading which occurs last in numerical order and when two views are possible, the one favorable to the assessee has to be adopted. I find these judicial pronouncements relevant in the instant case.

3.17 In view of the above discussed facts, I find that the impugned Vaccine Carriers are manufactured specially for the purpose of use in carrying and transporting vaccines at maintaining desired temperature for considerable/ particular time period. The Blood Transport Boxes are designed to transport blood. The other goods involved in this case are part and parcel of the Vaccine Carriers. As discussed above, the impugned goods are different from ordinary ice boxes or picnic boxes. I also find that most of

the consignments of subject goods have been supplied to government departments under the Ministry of Health and Family Welfare. The goods are tested and certified by the World Health Organization. In view of the fats discussed above, I find that the impugned goods are designed for use in vaccination/ medical field. Therefore, the same are not merely plastic articles classifiable under Chapter 39 of the first schedule of the CTA, 1975. In view of these facts, I find that the Chapter Note 2(u) of Chapter 39 is attracted in this case. Accordingly, I hold that the impugned goods are covered under Chapter 90 of the CTA, 1975. Therefore, the noticees have correctly declared and classified the impugned goods. Vide the impugned SCN the differential duty and interest thereon have been demanded on the basis of allegations of mis-declaration and mis-classification, which have been found to be non-sustainable. Therefore, I hold that the demand on such grounds does not sustain. Further, the proposals of confiscation and penalty are also based on mis-declaration and mis-classification of impugned goods. Therefore, I hold that the goods are not liable to confiscation under Section 111(m) of the Customs Act, 1962 and the penalties proposed on the noticees under Section 112(a), 114A and 114AA ibid are also not imposable.

4.0 In view of the above, I pass the following order:

ORDER

I hereby drop the proceeding initiated vide Show Cause Notice F. No. S/10-23/ADJ/COMMR/Blow Kings/2017-18 dated 07.09.2017.

31.8.18

(Sanjay Kumar Agarwal)
Commissioner of Customs
Custom House Kandla

To,

1. M/s. Blow Kings, Shed No. 170-173, Sector-1, KASEZ, Gandhidham.

2. ADG (Stores), GMSD, 37, Naval Hospital Road, Post Box No. 524, Chennai, India – 600003.

3. The Assistant Director, Animal Husbandry, (Medical Store), Jalandhar, Punjab, India -144001.

4. M/s Bharat Biotech International Ltd., Genome Valley, Turkapally Shameerpet, Hyderabad, Telangana, India-500078.

5. M/s Blow Kings, J 25, GIDC, Vapi, India.

6. The DADG (MS) – GMSD, Mumbai Central, Mumbai, Maharashtra, India -400006.

7. The Dy. Director, Animal Husbandry, District Panchayat Anand. Sardar Patel Bhavan, Amul Dairy Road, Anand, Gujarat, India – 388001.

8. M/s Fleischhacker Manufacturing Co. India Pvt. Ltd. – 10/119, 1st Floor, Main 80 ft. Road, Shankar Gali, Vishwas Nagar, Shahdara, Delhi, India – 110032.

9. M/s Plastipack G-17, Omnibus Industrial Estate, Ringanwada, Daman, Daman & Diu, India-396210.

10. Sr. CMO (SAG), - GMSD, Opp. Telephone Exchange, Karnal, Haryana, India – 132001.

Copy to :-

a. The Chief Commissioner, Customs, Gujarat Zone, Ahmedabad

b. The Development Commissioner, Kandla Special Economic Zone, Gandhidham, Kutch.

c. The Deputy/Assistant Commissioner (TRC), CH, Kandla.

d. The Deputy/Assistant Commissioner (Prosecution), CH, Kandla.

e. The Deputy Commissioner of Customs, KASEZ, Gandhidham, Kutch.

f. Guard File