# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

## Customs Appeal No. 592 of 2010

(Arising out of Order-in-Appeal No. 26-misc-569/08-09Gr.IIA DRI/AZU/INV-28/BSN/2008 dated 30.04.2010 passed by the Commissioner of Customs (Import), (Appeals) Mumbai)

**BSN Medical Pvt. Ltd.** **.... Appellant**
1106-1108, Regent Chambers,
Nariman Point, Mumbai-400 021.

Versus

**Commissioner of Customs (Import), Mumbai** **..Respondent**
New Custom House, Ballard Estate, Mumbai-400001.

Appearance:

Shri T. Vishwanathan, Advocate for the Appellant
Shri R. K. Dwivedy, Authorized Representative for the Respondent

**WITH**

## Customs Appeal No. 779 of 2010

(Arising out of Order-in-Appeal No. 58/2010/CAC/CC-I-/SHH dated 13.07.2010 passed by the Commissioner of Customs (Import), (Appeals) Mumbai)

**Beierdorf India Pvt. Ltd.** **.... Appellant**
Curti, Ponda, Goa-403215

Versus

**Commissioner of Customs (Import), Mumbai** **...Respondent**
New Custom House, Ballard Estate, Mumbai-400001.

Appearance:

Shri R. V. Shetty, Advocate for the Appellant
Shri R. K. Dwivedy, Authorized Representative for the Respondent

**AND**

## Customs Appeal No. 866 of 2010

(Arising out of Order-in- Appeal No.58/2010/CAC/CC-I-/SHH dated 13.07.2010 passed by the Commissioner of Customs (Import), (Appeals) Mumbai)

**Commissioner of Customs (Import), Mumbai** **... Appellant**
New Custom House, Ballard Estate, Mumbai-400001.

Versus

**Beierdorf India Pvt. Ltd.** **.... Respondent**
Curti, Ponda, Goa-403215

Appearance:

Shri R. K. Dwivedy, Authorized Representative for the Appellant
Shri R. V. Shetty, Advocate for the Respondent

**AND**

**Customs Appeal No. 35 of 2011**

(Arising out of Order-in-Original No.89/2010/CAC/CC/BKS dated 27.10.2010 passed by the Commissioner of Customs (Adj.), Mumbai)

**Hemant Surgical Industries Ltd.** **.... Appellant**
647, Girgaum Road, Near Dhobi Talao,
Avijah Building, Gr. Floor, NO.6 & 7, Mumbai

Versus

**Commissioner of Central (Adj.), Mumbai** **.... Respondent**
New Custom House, Ballard Estate, Mumbai-400001.

Appearance:

Shri Vikram Naik, Advocate for the Appellant
Shri R. K. Dwivedy, Authorized Representative for the Respondent

**AND**

**Customs Appeal No. 109 of 2011**

(Arising out of Order-in-Original No.89/2010/CAC/CC/BKS dated 27.10.2010 passed by the Commissioner of Customs (Import), Mumbai)

**Commissioner of Customs (Import), Mumbai** **... Appellant**
New Custom House, Ballard Estate,
Mumbai-400001.

Versus

**Hemant Surgical Industries Ltd.** **.... Respondent**
647, Girgaum Road, Near Dhobi Talao,
Avijah Building, Gr. Floor, NO.6 & 7, Mumbai

Appearance:

Shri R. K. Dwivedy, Authorized Representative for the Appellant
Shri Vikram Naik, Advocate for the Respondent

**AND**

**Customs Appeal No. 87358 of 2013**

(Arising out of Order-in-Appeal No.302/MCH/AC/CRARS/2013 dated 06.03.2013 passed by the Commissioner of Customs (Import), (Appeals) Mumbai)

**BSN Medical Pvt. Ltd.** **.... Appellant**
1106-1108, Regent Chambers,
Nariman Point, Mumbai-400 021.

Versus

**Commissioner of Customs (Import), Mumbai** ..**Respondent**
New Custom House, Ballard Estate, Mumbai-400001.

Appearance:

Shri R. V. Shetty, Advocate for the Appellant
Shri R. K. Dwivedy, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)**
**HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER NO. A/85440-85445/2022**

Date of Hearing: 15.03.2022
Date of Decision: 28.04.2022

***Per: P. Anjani Kumar***

BSN Medicals Pvt. Ltd. and others appellants have filed these appeals against the impugned orders dated 30.04.2009, 13.07.2010, 27.10.2010 and 06.03.2013.

2. Brief issue involved in these cases is whether the imported goods "Skin Barriers Micropore Surgical Tapes" are eligible for exemption contained under Notification No. 21/2002-Cus dated 1.3.2002 at Sr. No. 363 (A) and as to whether extended period of limitation can be invoked. As the issue is common, all these appeals have been taken up together for decision.

3. Learned Counsels appearing for the appellants submit that they have been importing "Skin Barriers Micropore Surgical Tapes - Leukopor" falling under Customs Tariff Heading 30059060 and have been availing the exemption under Notification No. 21/2002-Cus dated 1.3.2002. The Department has been allowing the imports and exemption thereof without raising any objection. However, in the year 2011, DRI conducted investigation and show-cause notices were issued seeking to

deny exemption notification and seeking to recover the differential duty. The same was confirmed by the impugned orders. Hence, these appeals.

4. Learned Counsel appearing for the appellants though raised issue of jurisdiction of ADG, DRI to issue show-cause notice during the course of arguments but they submit that they are not pressing for the issue.

5. Learned Counsels submit that the issue is squarely covered in their favour by a decision of Chennai Bench of the Tribunal in the case of Sutures India Pvt. Ltd. Vs. Commissioner of Customs – 2019 (370) ELT 1257 (Tri-Chennai). Learned Counsels also fairly submit that there is a decision against the appellants in the case of *3M India Ltd. vs. Commissioner of Customs, Bangalore-I – 2020 (373) ELT 385 (Tri-Bang)*, which has distinguished the ratio of the judgment in the case of Sutures India Pvt. Ltd. (supra). This decision of Bangalore Bench of the Tribunal has been upheld by the Hon'ble Supreme Court reported at 2021-VIL-28-SC-CU.

6. Learned Counsels for the appellants submit that the adjudicating authority solely relied on incorrect understanding of the product name "Wafer" and held that they are not "Skin Barriers Micropore Surgical Tapes"; the adjudicating authority held that impugned goods is for general use and is not specific for "Ostomy". The Department, however, does not dispute the classification claimed by the appellants. There is no product called "Skin Barriers Micropore Surgical Tapes" ; in fact "Skin Barriers Micropore Surgical Tapes" are two distinct products.

There is a punctuation error in the notification as can be traced by the history of the notification issued from time to time since 1981. The decision of Bangalore Bench of the Tribunal is not applicable in the present case on merit as the same is dissented with the decision of Sutures India Pvt. Ltd. (supra) on an incorrect understanding of the facts that specific product for Ostomy purpose having dual purport was not considered. However, the same was considered in the case of Sutures India (supra).

7. Learned Counsels submit that the goods have been imported since 1993 and Department has been allowing the examination contained under Notifications No. 29/94-Cus dated 1.3.1994, 36/96-Cus dated 23.07.1996 and 21/2002-Cus dated 1.3.2002; the goods were same and were also described in the same manner. Department has drawn samples from time to time and was convinced that the impugned orders are eligible for exemption; the goods have also been examined at the time of assessment or while giving out of charge. Therefore, extended period cannot be invoked. Further, this is only the case of *bona fide* belief by the appellants that the goods were eligible for exemption notification as they were allowed the same in the past. It has been consistent practice of giving the same description of the goods in the Bill of Entry over the years and therefore, no mis-declaration/suppression can be attributed to them. He relied on the following judgments: -

*(a) Sirthai Superware India Ltd. Vs. Commissioner of Customs – 2020 (371) ELT 324 (Tri)*

*(b) Vesuvius India Ltd. Vs. Commissioner of Customs – 2019 (370) ELT 1134 (Tri)*

*(c) Northern Plastics – 1998 (101) ELT 549 (SC)*

(d) *Commissioner of Customs Vs. Jyoti Industries Ltd. – 2005 (188) ELT 88 (Tri)*

8. He further submits that as the Tribunal itself expressed two different opinions on the eligibility of the notification benefit; the appellants cannot be alleged to have been mis-represented or suppressed the facts. He relies upon the following judgments–

(a) *Star Entertainment Pvt. Ltd. Vs. Commissioner of Customs – 2015 (327) ELT 238 (Tri)*

(b) *Commissioner of Customs Vs. Star Entertainment Pvt. Ltd.- 2015 (329) ELT 50 (Bom)*

(c) *Continental foundation Jt. Venture Vs. Commissioner of Central Excise – 2007 (216) ELT 177 (SC)*

(d) *Jayaswal Neco Industries Ltd. Vs. Commissioner of Central Excise – 2016 (344) ELT 578 (Tri)*

9. Learned Authorized Representative for the Department reiterates the findings of the impugned order and relied upon the order of 3M India Ltd. decided by the Bangalore Bench.

10. Heard both sides and perused the records of the case.

11. As submitted by the Counsels, the issue is no longer *res integra* as being decided by the Bangalore Bench in the case of 3M India Ltd. (supra). It has also been brought to our notice that the same has been upheld by the Apex Court. Therefore, the decision of the Bangalore Bench has attained finality and further process by the decision of Tribunal in the case of Sutures India Pvt. Ltd. (supra) cannot be relied upon.

12. We find that the appellants have submitted that there has been a punctuation error in the notification giving rise to an interpretation that the exemption is not applicable in the impugned goods. We find that any such error in the notification,

if any, should have been brought to the notice of the concerned authorities and got corrected. This Tribunal being a creature of statute cannot sit in judgment on interpretation of a notification or the purport of the notification. However, the Bench is not Writ Court to decide the property of the notification being creature of the statute. This Bench has no jurisdiction to interpret the intention of the notification. Moreover, we find that in the case of 3M India (supra), Tribunal has discussed the issue at length and observed that the product named "Skin Barriers Micropore Surgical Tapes" exists and to that extent the arguments of the appellants are not acceptable. We find that this Bench in the case of 3M India (supra) has observed as follows: -

> **21.** We find that the department has established that a product named and known as "Skin Barriers Micropore Surgical Tapes" exists. We find that evidence of the same has been supplied as RUD to the appellants. Under such circumstances, we find that the appellants contention that no product known as "Skin Barriers Micropore Surgical Tapes" exists and there should have been a comma (,) in between doesn't hold water. When such products are sold and used as such, it cannot be inferred that the notification was wrongly worded and therefore, it is to be interpreted to mean Skin Barriers, Micropore Surgical Tapes is not acceptable.
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> **22.** We find that the impugned order has discussed the issue. Learned Commissioner observes that :
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> 29. I find that even if there were to be a comma missing in the description "Skin Barriers Micropore Surgical Tapes", it is not open to me to supply the same. In the case of The *Commissioner of Sales Tax, Uttar Pradesh* v. *M/s. Parson Tools and Plants, Kanpur* [(1975) 4 SCC 22], the Hon'ble Supreme Court has held as under :
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> "Even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it..."
>
> In this regard, the judgment of Hon'ble High Court of Guwahati in the case of *Sankar Tea Co. Ltd. and Others* v. *Collector of Central Excise, Shillong and Others* [1985 (21) E.L.T. 679 (Guwahati)] also provides useful guidance. In the said case, the Hon'ble Court was dealing with the issue of rate of Central Excise duty chargeable on the tea produced in District of Dibrugarh in the State of Assam. Briefly stated, the Central Government by a notification dated 1-5-1970 divided the tea growing areas into Zones and fixed the rate of duty on tea produced in the said areas. At the relevant time, Dibrugarh was a sub-division in the District of Lakhimpur in Zone V. As per notification dated 22-9-1971, the Assam Government made the sub-division of Dibrugarh as a separate district with effect from 2-10-1971. Subsequently, the Central Government by superseding the earlier notification of 1970, made several zones in place of 5 Zones by a notification dated 5-11-1981 but the District of Dibrugarh was not shown separately. This was done subsequently by a notification dated 28-1-1982. The issue before the Hon'ble High Court was whether the duty should be charged on the Tea produced in District of Dibrugarh during 5-11-1981 to 28-1-1982, as per rated applicable in the Zone V, viz., District of Lakhimpur or residuary Zone VII. In this contest, the Hon'ble

Court examined the issue whether there was an omission to include the word Dibrugarh in the Central Government notification of 5-11-1981 and whether the omission could be supplied. The Hon'ble High Court held as under :

"The basic rule is that the Court should not take upon itself to supply the omission as this is to assume the function of legislature. This is not a case, where the Court is entitled to rewrite the notification. The language of Notification being plain and unambiguous, it is not open to read into it a word which is not there based on a prior reasoning as to the probable intention of the notification. In a Court of Law, what is unexpressed has the same value as which is unintended. This is a Rule of construction. It is the duty of the Court to give without engrafting, adding or implying anything which is not congenial to or consistent with such express intent of the law giver. More so, it a Statute is a taxing Statute. It must be assumed that the Rule making authorities do no commit mistake or make any omission. (Emphasis supplied). Therefore, the contention of the Respondent to supply the word 'Dibrugarh' in the Notification of 1981 is not permissible."

In the present case, as already held, there is no omission in the notification as the products corresponding to generic description "Skin Barriers Micropore Surgical Tapes" exist. Even if it were to be so, such omission could not have been supplied in accordance with the law settled as above".

**23.** We find that in view of the above, there is no ambiguity in the notification and there is no need to interpret the notification by supplying what is assumed to be missing in the notification. We find that Hon'ble Apex Court has held in *Dilip Kumar & Company* - 2018 (361) E.L.T. 577 (S.C.) that :

22. At the outset, we must clarify the position of 'plain meaning rule or clear and unambiguous rule' with respect of tax law. 'The plain meaning rule' suggests that when the language in the statute is plain and unambiguous, the Court has to read and understand the plain language as such and there is no scope for any interpretation. This salutary maxim flows from the phrase "*cum inverbisnullaambiguitasest*, *non debetadmittivoluntatisquaestio*". Following such maxim, the Courts sometimes have made strict interpretation subordinate to the plain meaning rule [Mangalore Chemicals case (Infra para 37).], though strict interpretation is used in the precise sense. To say that strict interpretation involves plain reading of the statute and to say that one has to utilize strict interpretation in the event of ambiguity is self-contradictory.

In view of the above, we find that the impugned order is correct as far as it holds that the items imported by the appellants are not eligible for the exemption contained in the Notification No. 21/2002-Cus., dated 1-3-2002. The appellants argue that another part of the notification mentions 'bag closing clamps karaya seals paste or powder' whereas no such products are available and therefore, it need to be understood that notification misses out on certain symbols like (,). We find that as the items described therein are not under discussion, we need not turn our attention to the same.

**24.** The appellants have argued that alternatively, the impugned items are eligible for exemption as they are covered by the other part of the list under 'Ostomy products (Appliances) for managing Colostomy, Illcostomy, Ureterostomy, Illeal Conduit Urostomy Stoma cases such as bags, belts, adhesives seals or discs or rolls adhesive remover; we find that the impugned goods cannot be called appliances by any stretch of imagination. We will go in to find the meaning of appliance. Merriam Webster dictionary defines appliance as *(https://www.merriam-webster.com/dictionary/appliance).*

1. an act of *applying*

2. a : a piece of equipment for adapting a tool or machine to a special purpose : *attachment*
   b : an instrument or device designed for a particular use or function an orthodontic appliance specifically : a household or office device (such as a stove, fan, or

refrigerator) operated by gas or electric current
c : British : *fire engine*
d : an artificial part or mask that is worn as part of an actor's makeup or costume ... more grown-ups are shelling out for scary facial appliances—wounds, snouts and horns—to create the creepy characters they've dreamed up on their own.—
Dana Coffield
e : computing : *information appliance* A growing number of companies are coming up with ways [in 2000] to turn ordinary phones into Internet appliances.— Sharon Cleary

3. obsolete : *compliance*

Cambridge dictionary defines appliances as follows (https://dictionary.cambridge.org/dictionary/english/appliance) a device, machine, or piece of equipment, especially an electrical one that is used in the house, such as a cooker or washingmachine :

Going by the above definition or any other definition one can find that the meaning attached with an appliance is closer to equipment. Therefore, we are not inclined to accept the contention of the appellants. The impugned goods at best can be held to be disposables used in surgery or other medical procedures.

**25.** Learned Counsel for the appellants also argued that the Notification also provided, at Sl. No. 363A, exemption to Life Saving Equipment subject to production of a certificate from DGHS to the effect that the imported goods are lifesaving medical equipment; he submitted that the appellants have produced such certificates and have a right to claim the same even though the same was not claimed at the time of filing bills of entry. We find that *per contra* the Learned Authorised Representative submits that the certificates from DGHS submitted by the appellant in support of their claim, are certificates which have been issued under Notification 208/81 and would have no relevance to the Notification 21/2002-Cus., Sl. No. 363 A and the claim has to be considered only as per the current notification as the requisite certification by DGHS under the current Notification is not produced. We find that the certificates are issued in 1990s and have no mention of the impugned imports.

**26.** The appellants have relied upon the decision of coordinate bench, at Chennai in the case of *Sutures India Pvt. Ltd.* (Supra), stating that the Tribunal has gone into the imports of similar products and decided that the applicability of notification has been decided in appellants favour. *Per contra,* the Learned Authorised Representative submits that the coordinate Bench has arrived at the said decision on the premise that the said goods and other items like adhesive seals, adhesive remover, skin gels are items used for general purposes but find use also in ostomy procedures; there is no end use condition/exclusive use condition that such products need to be used only for ostomy applications; it is enough if the impugned goods are capable of being used in relation to ostomy procedure; department has not been able to show any product which fits into the category of surgical tapes meant for Ostomy only. He further distinguishes the decision of the coordinate Bench stating that the Bench did not consider the fact that the item eligible for the benefit is a combination product of Skin Barrier Micropore Surgical Tape which combines the dual properties of preventing the seepage of the ostomy discharge onto the surrounding skin thus preventing harm to the skin as well as having the microporous breathing characteristics; it was not convincingly demonstrated before the Chennai Bench that a product having dual use and fitting the description as mentioned in the Notification exists and thus, the Bench arrived at the conclusion that such product known as'Skin Barrier Micropore Surgical Tape' do not exist. On the basis of the facts and circumstances of the present case and as demonstrated before us, we find that products known as 'Skin Barrier Micropore Surgical Tape' exist and that the impugned goods do not match the description given in the notification so as to be eligible for the exemption. While we are in agreement with the coordinate Bench that there is no specific mention in the Notification that Skin Barrier Micropore Surgical Tapes have to be exclusively used for ostomy procedures and it is enough if they are capable of being used, we find that to be eligible for exemption the impugned goods need to match the description as given in the notification and only then the question of their actual use or capability of being used would come into play. We also find in the instant case that the department could produce evidence to show that products known as "Skin Barriers Micropore Surgical Tapes" exist. We find in our considered opinion that the real issue is whether the impugned goods can be categorised as "Skin Barriers Micropore Surgical Tapes" to be eligible to the exemption. As per our discussion above, the distinction between the impugned products and the items eligible for exemption has been clearly established. It was also established that products which can be described as "Skin Barriers Micropore Surgical Tapes" exist. Therefore, having considered the facts of the case, we find that the department could satisfactorily demonstrate the twin points that the impugned goods do not satisfy the description given in the Notification and that the products mentioned in the Notification exist in reality. We find that there is no ambiguity as far as the description of the items in the notification and that the impugned goods do not satisfy such description so as to be eligible for exemption. As the wordings of the notification give meaning which is not ambiguous, we find that the Apex Court's judgment in *Dilip Kumar* case (supra) is binding and needs to be followed.

**27.** We also find that Apex Court in the case of *Srikumar Agencies* Civil Appeal Nos. 4872-4892 of 2000, decided on 27-11-2008 [2008 (232) E.L.T. 577 (S.C.) = 2009 (13) S.T.R. 3 (S.C.)] observed that :

5. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus :

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

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"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

**28.** We also find that Hon'ble Apex Court has held, in the case of *Swaraj Mazda Ltd.* - 1995 (77) E.L.T. 505 (S.C.) that the Tribunal is not precluded from deciding the question on merits because of its earlier decision regarding the earlier period. This judgment was followed by coordinate Bench in the case of *A.B. Mauri India Pvt. Ltd.* - 2010 (260) E.L.T. 424 (T).

Therefore, we find that the arguments of the appellants are not acceptable and we hold that the exemption is not available to them.

13. Coming to the issue of limitation, we find that the appellants have successfully demonstrated that the imports have been taken place over the years and Department has been allowing the same after examination atleast in respect of few consignments even after the introduction of self assessment regime. Under these circumstances, it cannot be held that the appellants have suppressed or mis-represented any material fact so as to warrant the invocation of extended period. For this reason, we find that impugned orders are not maintainable as far as the limitation is concerned. Accordingly, we hold that penalty cannot be imposed on the appellants.

14. In view of our discussions above, all the appeals filed by the parties are partly allowed confirming the demand of duty for the normal period and setting aside the penalties imposed on the appellants; and the appeals filed by the Revenue stand disposed of in above terms.

(Pronounced in open court on 28.04.2022)

**(S.K. Mohanty)**
**Member (Judicial)**

**(P. Anjani Kumar)**
**Member (Technical)**

Sinha