CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85813 OF 2018

[Arising out of Order-in-Appeal No: MUM-CUSTM-AMP-APP-879/17-18 dated 14th December 2017 passed by the Commissioner of Customs (Appeals), Mumbai-III.]

Emerson Process Management (India) Pvt Ltd
Delphi, B-Wing, 6th Floor, Central Avenue,
Hiranandani Business Park, Powai, Mumbai 400 093 … ***Appellant***

Versus

Commissioner of Customs (ACC)
Air Cargo Complex, Sahar, Andheri (E), Mumbai. ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86169 OF 2019

[Arising out of Order-in-Appeal No: NGP/EXCUS/000/APPL/452-53/18-19 dated 23rd January 2019 passed by the Commissioner of Customs, Central Excise & GST (Appeals), Nagpur.]

Endress + Hauser Flowtec (India) Pvt Ltd
Plot No. M 171-176, MIDC Industrial Area, Waluj
Aurangabad – 431136 … ***Appellant***

Versus

Commissioner of Customs & GST
Civil Lines, Telangkhedi Road, Nagpur - 440001 ***…Respondent***

AND

CUSTOMS APPEAL NO: 86172 OF 2019

[Arising out of Order-in-Appeal No: NGP/EXCUS/000/APPL/454-55/18-19 dated 23rd January 2019 passed by the Commissioner of Customs, Central Excise & GST (Appeals), Nagpur.]

Endress+Hauser (India) Automation Instrumentation Pvt Ltd
Plot No. M 192, MIDC Industrial Area, Waluj
Aurangabad – 431136 … ***Appellant***

Versus

Commissioner of Customs & GST
Civil Lines, Telangkhedi Road, Nagpur - 440001 ***…Respondent***

AND

CUSTOMS APPEAL NO: 86684 OF 2019
WITH
CROSS-OBJECTION NO. 85828 OF 2019

[Arising out of Order-in-Appeal No: NGP/EXCUS/000/APPL/454-55/18-19 dated 23rd January 2019 passed by the Commissioner of Customs, Central Excise & GST (Appeals), Nagpur.]

Commissioner of Customs & GST
Civil Lines, Telangkhedi Road, Nagpur - 440001 … ***Appellant***

Versus

Endress+Hauser (India) Automation Instrumentation Pvt Ltd
Plot No. M 192, MIDC Industrial Area, Waluj
Aurangabad – 431136 ***…Respondent***

AND

CUSTOMS APPEAL NO: 86688 OF 2019
WITH
CROSS-OBJECTION NO. 86687 OF 2019

[Arising out of Order-in-Appeal No: NGP/EXCUS/000/APPL/452-53/18-19 dated 23rd January 2019 passed by the Commissioner of Customs, Central Excise & GST (Appeals), Nagpur.]

Commissioner of Customs & GST
Civil Lines, Telangkhedi Road, Nagpur - 440001 … ***Appellant***

Versus

Endress + Hauser Flowtec (India) Pvt Ltd
Plot No. M 171-176, MIDC Industrial Area, Waluj
Aurangabad – 431136 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 87948 OF 2019

[Arising out of Order-in-Appeal No: NGP/EXCUS/000/APPL/256/19-20 dated 28th June 2019 passed by the Commissioner of Customs (Appeals), Mumbai.]

Endress + Hauser (India) Pvt Ltd
7B 7th Floor, Godrej One Building, Pirosjishanagar,
Eastern Express Highway, Vikhroli (E),
Mumbai-400079 … ***Appellant***

Versus

Commissioner of Customs (Import)
Air Cargo Complex, Sahar, Andheri (E), Mumbai. ***…Respondent***

AND

CUSTOMS APPEAL NO: 88205 OF 2019

[Arising out of Order-in-Appeal No: NGP/EXCUS/000/APPL/255/19-20 dated 28th June 2019 passed by the Commissioner of Customs (Appeals), Mumbai.]

Endress + Hauser (India) Pvt Ltd
7B 7th Floor, Godrej One Building, Pirosjishanagar,
Eastern Express Highway, Vikhroli (E),
Mumbai-400079 … ***Appellant***

Versus

Commissioner of Customs (Import)
Air Cargo Complex, Sahar, Andheri (E), Mumbai. ***…Respondent***

APPEARANCE:

Shri V Lakshmikumaran, Advocate, Shri Sriram Sridharan, Advocate and Shri D Gopalan, Advocate for the assesse-appellants

Shri D S Mann, Deputy Commissioner (AR) for Revenue

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85762-85768/2024

DATE OF HEARING: 08/02/2024
DATE OF DECISION: 07/08/2024

PER: C J MATHEW

The common thread running through these several disputes of four appellant-companies of the Endress+Hauser group, a global leader in 'measurement instrumentation services and solutions for industrial process engineering', is their cavil at the substitution of classification of both their 'traded' imports and manufactured goods owing to which benefit of exemption from duties of customs on all of their imports were denied. The assessees claim to deal in 'simple meters' which are privileged with the exemption as well as to be benefitting similarly from such privilege on inputs imported for manufacture of these as set out in notification no. 24/05 dated 1st March 2005 which they were deprived of by customs authorities after October 2013 and by central excise authorities on imports of 'parts and accessories' by two of the assessees for the earlier period – all by holding that, in the respective jurisdictions, the 'measuring instruments' do not fit the description corresponding to heading 9026 of First Schedule to Customs Tariff Act, 1975 as well as of Schedule to Central Excise Tariff Act, 1985 but to tariff item 9032 8990 of First Schedule to Customs Tariff Act, 1975 and of Schedule to Central Excise Tariff Act, 1985. The adjudicating authority in the central excise jurisdiction had also imposed penalties on the assessees concerned as well as on one individual in each of the two proceedings which came to be dropped by first appellate authority and Commissioner of Customs, Nagpur has filed appeals challenging the escapement of M/s Endress + Hauser Flowtec (India) Pvt Ltd and M/s Endress + Hauser (India) Automation Instrumentation Pvt Ltd from penal consequences.

2. The appeal of M/s Emerson Process Management India Pvt Ltd concerns imports of ‘flow meters’, ‘pressure transmitters’ and ‘level transmitters’, as well as ‘parts and accessories’ imported for manufacture of like goods, against 1361 bills of entry between November 2013 and August 2014 that were ordered to be re-classified as tariff item 9032 8990 and 9032 9000 of First Schedule to Customs Tariff Act, 1975 respectively which deprived them of exemption from duties of customs available to goods classified within heading 9026 of First Schedule to Customs Tariff Act, 1975 by recourse to notification no. 24/2005-Cus dated 1st March 2005 (sl. no. 31 and sl. no. 39 respectively). As this was not found to be acceptable, the re-classification was agreed to ‘under protest’ and the consequential assessment for clearance backed by an order under section 17(5) of Customs Act, 1962 which, upon challenge before the first appellate

authority, was upheld in order[1] of Commissioner of Customs (Appeals), Mumbai-III leading to the appeal before us.

3. M/s Endress + Hauser (India) Pvt Ltd is before us challenging order[2] of Commissioner of Customs (Appeals), Mumbai–III which upheld the revised classification adopted by the assessing officer for clearance of 'measuring instruments', imported *vide* bill of entry no.7880188/ 01.09.2018 and no. 7041231/02.07.2018, with the plea that the clearances of 'flow meters', marketed as 'Promass', had been effected at the rate corresponding tariff item 9032 8990 of First Schedule to Customs Tariff Act, 1975 only at the instance of assessing officer who, disinclined to accept that the description corresponding to heading 9026 of First Schedule to Customs Tariff Act, 1975 was more apt, disentitled availment of notification no. 24/2005-Cus dated 1st March 2005 (sl. no. 31) on the goods .

4. Meanwhile show cause notices were issued to M/s Endress + Hauser Flowtec (India) Pvt Ltd and M/s Endress + Hauser (India) Automation Instrumentation Pvt Ltd for recovery in relation to 'parts and accessories' valued at ₹ 280,52,54,760 imported for manufacture between March 2011 and October 2013 on which duty liability of ₹ 26,07,11,570 had been foregone and valued at ₹ 56,28,55,267 between June 2011 and October 2013 on which duty liability of ₹ 5,51,00,377 had been foregone

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[1] [order-in-appeal no. MUM-CUSTM-AMP-APP-879/17-18 dated 14th December 2017]
[2] [order-in-appeal no: MUM-CUSTM-AMP-APP-255&256/19-20 dated 28th June 2019]

respectively. The confirmation of these amounts, arising from the finding that the goods manufactured by them merited classification against tariff item 9032 9000 of Schedule to Central Excise Tariff Act, 1985, as recoverable under rule 8 of Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996, was challenged before Commissioner of Customs (Appeals), Nagpur who, by order[3] disposing off appeal of M/s Endress+ Hauser Flowtec (India) Pvt Ltd and order[4] disposing off appeal of M/s Endress + Hauser (India) Automation Instrumentation Pvt Ltd, upheld the findings, with relief accorded only to the extent of setting aside penalties imposed on them as well as individual concerned, leading to the present dispute before us.

5. We have heard Learned Counsel for appellants and Learned Authorized Representative at length and the pivot of the rival submissions dwelt on the substantive differences between the rival headings with the other alleged to be an inaccurate portrayal of the functionality of the impugned measuring instruments. We find ourselves unable to appreciate the nuanced perspective and the well-honed approach to the exercise in classification when our immediate concern is, and as it should be, compliance with the rules of engagement. Accordingly, we turn our attention to those aspects in this layered dispute.

6. We cannot but address the glaring misapplication of appellate

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[3] [order-in-appeal no. NGP/EXCUS/000/APPL/452-53/18-19 dated 23rd January 2019]
[4] [order-in-appeal no. NGP/EXCUS/000/APPL/454-55/18-19 dated 23rd January 2019]

jurisdiction insofar as the two bills of entry[5] pertaining to imports are concerned. It is on record that the assessing authority insisted on revising the classification with consequential duty implications and that, admittedly, the reluctant compliance thereto by the importers was momentary with challenge mounted immediately before the first appellate authority. It is also on record in the impugned order that neither was any 'speaking order' issued by the assessing authority nor was advantage taken of the offer from the first appellate authority to obtain a first hand account of the justification for revision. And yet, the impugned order has gone on to offer justifications, in the manner that the original authority should have, for the classification; almost akin to a dual-headed assessment that is not contemplated either in section 17 or section 128 of Customs Act, 1962. The jurisdiction of the first appellate authority is to acknowledge the existence of a dispute over assessment and then to determine the validity of justification offered for any detriment visited on an assessee. By disposing off the appeals, Commissioner of Customs (Appeals), Mumbai – III has concurred with the claim of the importer that grievance did exist and that aspect has passed unchallenged. However, by rendering a finding on merit despite absence of any base to apply the provisions of law, the impugned orders have exceeded appellate framework. The only course of action available in the circumstances was to compel an explanation in the manner contemplated by section 17(5) of

[5] [appeal no. 87948 of 2019 and appeal no. 88205 of 2019]

Customs Act, 1962 and failure to do so invalidates the impugned orders. We, therefore, set aside these two and direct that the deficit be made good by the 'proper officer' under section 17 of Customs Act, 1962.

7. In the matter of 1361 imports effected by M/s Emerson Process Management India Pvt Ltd[6], the statutory obligation to justify revision has been duly complied with. In relation to past imports of 'parts and accessories' for manufacture by two of the appellants[7], it has been held by the lower authorities that, owing to revision of classification of the finished goods to an ineligible category, rule 8 of Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 offered the sole weaponry for restitution of privilege that had been incorrectly availed at the time of import. Though the essence of the dispute is the validity of revision, it must be conceded that, in the event of the revision being upheld, the jurisdiction had been rightly invoked. We are, thus, at the core of the dispute: the correctness of classification adopted by the customs authorities for the finished product and the like adopted by the central excise authorities on manufactured product – the classification of 'parts and accessories' is merely derived inasmuch as such goods are separately enumerated within the rival headings.

8. The fundamental obligation of assessing authority in classification disputes has been set out in *Hindustan Ferodo Ltd v. Collector of Central*

[6] [appeal no. 85813 of 2018]
[7] [appeal no. 86169 of 2019 and appeal no. 86172 of 2019]

Excise [1997 (89) ELT 16 (SC)] thus

> *'It is not in dispute before us as it cannot be, that onus of establishing that the said rings fell within Item No. 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.'*

and thus

> *'28. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub- heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue……'*

in *HPL Chemicals Ltd v. Commissioner of Central Excise, Chandigarh [2006 (197) ELT 324 (SC)]* by the Hon'ble Supreme Court. Our primary responsibility is to ascertain compliance thereof in the re-determination of classification by the lower authorities. It is nobody's case that the description corresponding to the revised tariff line matches the impugned goods for, if that were so, neither the impugned order nor Learned Authorized Representative would have had to seek sustenance from the notes to chapter 90, notes 3 and 4 to section XVI as applicable to the chapter or the *Explanatory Notes* to the Harmonized System of

Nomenclature (HSN).

9. The motive for re-classification was, as articulated by Learned Counsel for appellant, intent to deny the benefit of exemption accorded by the notification *supra* to measuring instruments, falling within heading 9026 of First Schedule to Customs Tariff Act, 1975, and, in particular, to goods imported for manufacture of such measuring instruments for which the benefit of

> *'39. All goods for the manufacture of goods covered by S. Nos. 1 to 38 above, provided that the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017'*

in exemption of notification no. 24/2005-Cus dated 1st March 2005 is in addition, at sl no. 31, to

> *'Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 9014, 9015, 9028 or 9032'*

corresponding to heading 9026 of First Schedule to Customs Tariff Act, 1975 besides goods of certain specific descriptions at the tariff item level under heading 9027, 9030 and 9031 of First Schedule to Customs Tariff Act, 1975. It would appear that the privilege of duty free import of the goods enumerated therein at serial no. 1 to 38 was also to be made available to goods manufactured domestically from out of the goods imported for such manufacture. The importers sought coverage within the above heading for the goods to be sold as 'measuring instruments', as well as the 'measuring instruments' to be manufactured by them, for no other would have entitled them to exemption. In doing so, they also endowed themselves with the 'Achilles heel' of exclusions in the description and which, for not finding coverage under the said notification, the lower authorities fastened heading 9032 of First Schedule to Customs Tariff Act, 1975 as the conveniencing option. It is the netting of various threads that casts doubt on the modes adopted for classification.

10. In resorting to residual

'Others'

corresponding to sub-heading 9032 89 of First Schedule to Customs Tariff Act, 1975 below sub-classification describing

'Other instruments and apparatus'

other than 'thermostats' and 'manostats' within

> *'Automatic regulating or controlling instruments and apparatus'*

without any heed to the peculiar structuring of this particular heading, there has been a glaring lapse in the classification exercise.

11. There has been no examination of the effect of the single sub-classification on the subheadings below especially when the heading

itself is restricted to ‘instruments and accessories’ which appears to have been comprehensively covered in the enumerations above the sub-classification. Furthermore, the legislative intent of the scope of ‘automatic regulating or controlling’ does not seem to have been attended upon by the respective assessing authority; more so, as in the normal course, a plain reading of the description corresponding to heading 9026 of First Schedule to Customs Tariff Act, 1975 makes it apparent that, but for the deliberate externment therein, even goods of heading 9032 of First Schedule to Customs Tariff Act, 1975 are describable as such. Therefore, the scope of the description in heading 9032 of First Schedule to Customs Tariff Act, 1975 is not amenable to stretching as a ‘free standing’ description may be. Heading 9032 of First Schedule to Customs Tariff Act, 1975 must, therefore and inclusive of residual entry therein, be read to have been intended for autonomous and self-contained calibrating and regulating equipment. The nature of the impugned goods have not been examined for conformity thereto or otherwise.

12. We, therefore, find that the onus devolving on customs and central excise authorities to comply with the rules for interpretation, as statutorily articulated, and rules of engagement, as judicially determined, has not been discharged. Owing to lack of such determination, we are unable to ascertain the correctness, or otherwise, of classification that falls to the original authority to have established.

13. In view of our findings above, the disputes would have to be adjudicated afresh for proper determination of the proposals in the respective show cause notices. Accordingly, the impugned orders are set aside and the matters remanded back to the original authorities for *de novo* proceedings. Needless to state, principles of natural justice shall be adhered to and the submissions of the appellants herein before the adjudicating authority considered in all earnestness.

(Order pronounced in the open court on 07/08/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*