CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO. 85635 OF 2022

(Arising out of Order-in-Appeal No: 1013 to 1124 (Gr.VA)/2021(JNCH)/ Appeals dated 30th November 2021 passed by the Commissioner of Customs (Appeals), Mumbai – II)

Imagine Marketing Private Limited .....**Appellant**
501-B Shri Guru Har Krishan Bhavan
Charat Singh Colony Road, Chakala, Andheri (E)
Mumbai - 400093

Versus

Commissioner of Customs (NS-V) .....**Respondent**
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad – 400707

WITH

C/85636/2022	**C/85637/2022**	**C/85638/2022**	**C/85639/2022**
C/85640/2022	**C/85641/2022**	**C/85642/2022**	**C/85643/2022**
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C/85660/2022	**C/85661/2022**	**C/85662/2022**	**C/85663/2022**
C/85664/2022	**C/85665/2022**	**C/85666/2022**	**C/85667/2022**
C/85668/2022	**C/85669/2022**	**C/85670/2022**	**C/85671/2022**
C/85672/2022	**C/85673/2022**	**C/85674/2022**	**C/85675/2022**
C/85676/2022	**C/85677/2022**	**C/85678/2022**	**C/85679/2022**
C/85680/2022	**C/85681/2022**	**C/85682/2022**	**C/85683/2022**
C/85684/2022	**C/85685/2022**	**C/85686/2022**	**C/85687/2022**
C/85688/2022	**C/85689/2022**	**C/85690/2022**	**C/85691/2022**
C/85692/2022	**C/85693/2022**	**C/85694/2022**	**C/85695/2022**
C/85696/2022	**C/85697/2022**	**C/85698/2022**	**C/85699/2022**
C/85700/2022	**C/85701/2022**	**C/85702/2022**	**C/85703/2022**
C/85704/2022	**C/85705/2022**	**C/85706/2022**	**C/85707/2022**
C/85708/2022	**C/85709/2022**	**C/85710/2022**	**C/85711/2022**
C/85712/2022	**C/85713/2022**	**C/85714/2022**	**C/85715/2022**
C/85716/2022	**C/85717/2022**	**C/85718/2022**	**C/85719/2022**
C/85720/2022	**C/85721/2022**	**C/85722/2022**	**C/85723/2022**
C/85724/2022	**C/85725/2022**	**C/85726/2022**	**C/85727/2022**
C/85728/2022	**C/85729/2022**	**C/85730/2022**	**C/85731/2022**
C/85732/2022	**C/85733/2022**	**C/85734/2022**	**C/85735/2022**
C/85736/2022	**C/85737/2022**	**C/85738/2022**	**C/85740/2022**
C/85741/2022	**C/85742/2022**	**C/85743/2022**	**C/85744/2022**
C/85745/2022	**AND**	**C/86433/2022**	

<u>APPEARANCE</u>:

Shri T Vishwanthan, Shri Akhilesh Kangsia, Ms Madhura Khandekar and Shri Siddharth Sen, Advocates for the Appellants
Shri Jitesh Kumar Jain, Joint Commissioner (AR) for the respondent

<u>CORAM:</u> HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR C.J. MATHEW, MEMBER (TECHNICAL)

DATE OF HEARING: 25.10.2024
DATE OF DECISION: 28.11.2024

<u>FINAL ORDER NO's: 86885-86995/2024</u>

<u>PER: C.J. MATHEW:</u>

By these 111 appeals, M/s Imagine Marketing Private Limited[1] assails assessment of a variety of models of 'bluetooth enabled earphones/headsets', imported by them between 7th April 2020 and 2nd June 2021, wherein their claim to be covered by tariff item 8517 6290 of First Schedule to Customs Tariff Act, 1975[2] with benefit of exemption (at serial no. 20) in notification[3] was rejected in favour of the rate of duty corresponding to tariff item 8518 3000 of First Schedule to the Customs Tariff Act as determined by customs authorities. The impugned order found that the original authority was justified in revising the classification besides recording that, with bills of entry, filed under section 46 of Customs Act, 1962[4], having adopted classification proposed by customs authorities, no interference was called for.

2. Learned Counsel for the appellant submitted that they had been compelled to agree with the 'proper officer' for change of classification stemming from refusal to accept any other rate of duty as applicable and they had, thereupon, discharged basic customs duty @ 15% ad valorem instead of 10% that they were not only entitled to but also had been clearing so since 2015-16, as the only option to secure the assessed bills of entry for

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1. the appellant
2. the Customs Tariff Act
3. no. 57/2017-Cus dated 30th June 2017
4. the Customs Act

clearance of goods under section 47 of the Customs Act. It was further submitted that, as evidenced by the sample of sets of checklists and corresponding bills of entry as well as from letter of protest lodging their claim for classification under the more beneficial heading, they had not ever voluntarily accepted the classification insisted upon by customs authorities.

3. It is their grievance that despite these facts, including that of consultative letters dated 4th November 2016 and 30th March 2021 indicating the intention of customs authorities to alter the classification as well as the protest letters filed by them before clearance of the goods on payment of the higher rate of duty, being brought on record, the first appellate authority, of his own accord and in the absence of any justification offered by the proper officer under section 17 of the Customs Act for altering the rate of duty, proceeded to adjudge the classification.

4. Learned Counsel contended that, in the absence of a 'speaking order', as prescribed under section 17(5) of the Customs Act, for each such revision, the assessment claimed by them should prevail for which reliance was placed on the decisions of the Tribunal in **Commissioner of Customs (Preventive), Jodhpur** vs. **Shiv Ganesh Exim Pvt Ltd**[5] and in **Commissioner of Customs (Appeals), Kolkata** vs. **Enterprise International Ltd**[6] disposing off appeals[7] against order[8] of Commissioner of Customs (Appeals), Kolkata. It was further argued that the finding on merit was flawed inasmuch as the technical aspects of the goods conformed to the description in the First Schedule to the Customs Tariff Act claimed by them and for which reliance was placed upon the decision of the Hon'ble

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5. 2024-TIOL-854-CESTAT-DEL
6. final order 77130-77131/ 2024 dated 7th October 2023
7. Customs Appeal No. 75159 and 75170 of 2019
8. Order-in-appeal no. KOL/CUS(Port)/AA/1835-1836/2018 dated 01.10.2018

High Court of Delhi in **Amazon Wholesale India Private Limited**[9] vs. **Customs Authority of Advance Ruling, New Delhi** and on circular[10] of Central Board of Excise & Customs (CBEC – as it then was). According to Learned Counsel, self-assessed bill is an appealable order as held by the Hon'ble Supreme Court, in **ITC Ltd**[11] vs. **Commissioner of Central Excise, Kolkata – IV** and by the Hon'ble High Court of Bombay in **Maharashtra Cylinders Pvt. Ltd**[12] vs. **CESTAT, Mumbai**, and that filing of appeal was, of itself, payment under protest for which reliance was placed on the decision of the Hon'ble Supreme Court in **Mafatlal Industries Ltd**[13] **vs. Union of India** as well as that of the Tribunal in **Hemant Surgical Industries Ltd**[14] vs. **Commissioner of Customs (Import), Nhava Sheva** and that similar decision of the Tribunal was upheld by the Hon'ble Supreme Court in **Principal Commissioner of Customs (Import and General) vs. CISCO Systems India Pvt. Ltd**[15]. He further submitted that protest itself is tantamount to disputing the assessment and that should necessarily have been followed by 'speaking order', envisaged under section 17(5) of Customs Act for which reliance was placed on the decision of the Hon'ble High Court of Madras in **Ingram Micro India Pvt. Ltd**[16] vs. **Principal Commissioner of Customs, Chennai** and Hon'ble High Court of Calcutta in **Kothari Metals Ltd**[17] vs. **Union of India** and of the Tribunal in **Commissioner of Customs, Tuticorin** vs. **Sakthi Sugars Ltd**[18] and in

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9. 2023 (12) TMI 757 – DELHI HIGH COURT
10. No. 36/2013-Cus dated 5th September 2013
11. 2019 (368) ELT 216 (SC)
12. 2010 (259) ELT 369 (Bom)
13. 1997 (89) ELT 247 (SC)
14. 2019 (370) ELT 610 (Tri.-Mumbai)
15. 2024 (387) ELT 517 (SC)
16. 2017 (358) ELT 125 (Mad)
17. 2011 (274) ELT 488 (Cal)
18. 2020 (373) ELT 577 (Tri.-Chennai)

Kerala Feeds Ltd[19] vs. **Commissioner of Customs, Cochin.**

5. Above all, according to Learned Counsel, issue of 'speaking order' is mandated by section 17(5) of Customs Act in the event of re-assessment even if not sought for by the importer as held by the Tribunal in **Commissioner of Customs, ICD, New Delhi vs. VSM Impex Pvt Ltd**[20].

6. Learned Authorized Representative submitted that the there was no requirement of 'speaking order' as the observation by the first appellate authority makes it abundantly clear that the appellant had, of their own, been classifying the goods on the lines determined by the customs authorities and that neither correspondence or any other evidence of having sought re-assessment of classification is on record. He relied upon several decisions of the Tribunal and of constitutional courts which drew upon the ruling by the competent authority in the US Customs and Border Protection, Department of Homeland Security, Government of United States on similar dispute of classification.

7. On a perusal of the records, we find that the impugned order has affirmed the classification on merit and at the same time, taking note of certain circumstances, held that 'speaking order' was not required. It is strange that the first appellate authority did not find any necessity for the 'proper officer' to have to justify the classification and, yet, by disposal of the merit of the revision, acknowledged that a dispute did exist. Such finding on merits, in the absence of any articulation on the part of the original authority that the classification so adopted was in conformity with General Rules for Interpretation of the Tariff as appended to the Customs Tariff Act or in terms of decisions as judicially determined, determined solely

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19. 2023 (12) TMI 795-CESTAT BANGALORE
20. 2019 (370) ELT 930 (Tri.-Chan)

on the bills of entry and grounds of appeal preferred by the importer is tantamount to oracular pronouncement on behalf of a silent original authority. It is also surprising that the first appellate authority has proceeded to determine the merits of the classification without any material before it either in terms of a show cause notice or 'order-in-original' and not even the saving grace of notice as contemplated in second proviso of section 128A(3) of the Customs Act.

8. This affirmation of assessment was in the face of having taken notice that

> "10.1 In this regard I find that since the Appellants did not agree to the classification of the impugned goods under CTH85183000. Consultative Letters vide F.No. S/2-PCAO-54/JNCH-16-17 dt. 4.11.2016, by the Asstt. Commissioner/ PCA, JNCH, and further and Consultative Letter no. 536B/2020-21/A2 dt. 30.3.2021 from Audit Commissionerate, JNCH were issued to the Appellant. The Appellant further submitted that in view of the aforesaid Consultative Letters wherein the Bluetooth-enabled earphones were appropriately required to be classified under CTH 85183000 which cover 'Headphones and earphones whether or not combined with microphones' and also due to the fact that the DC/Group VA did not allow the Appellant to clear the impugned goods under CTH 85176290, therefore, the Appellant, on their own have been suo moto classifying the impugned goods under CTH 85183000 and paying BCD @15% under protest. Here, I observe that after the Pre-consultation notice, no show cause notice has been issued to the Appellants which implies that they have accepted the classification under CTH 85183000 suggested by the Department Moreover, the Appellant has also not produced any correspondence/evidence of having made a request to the concerned Group for reassessment under CTH 8517. Hence the assessment does not require any interference"

That a measure of trade facilitation, prescribing 'pre-notice' consultation before issue of show cause notice and for dropping of proceedings at that stage, could be misconstrued as implying acceptance of proposal of customs authorities merely from absence of notice, when the intent of legislation was no less than that of obliging the 'proper officer' to consider the stand of the importer, is also unacceptable. Furthermore, the first appellate authority has also noted the claim of the appellant that the 'proper officer' did not allow clearance with the declared classification but, yet, with emplacement of a combination of those facts on the absence of a show cause notice concluded that the assessment was compliant with section 17 of the Customs Act.

9. From the provisions relating to assessment, particularly after the amendment effected by section 38 of Finance Act, 2011 providing for self-assessment by the importer/exporter in the entry prescribed for section 46 and section 50 of the Customs Act, as the case may be, we find that the 'proper officer' was vested with option to verify the self-assessment before, or to audit it after, clearance to enable re-assessment of duty liability in accordance with section 17(4) of the Customs Act upon which

> "xxxxxx
> (5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be."

in section 17 of the Customs Act was required to be complied with.

10. It is common ground that no 'speaking order' had been issued and nor the revision accepted by the importer. It is also on record that 'checklist', which manifests entries that importers are required to declare under section

46 of the Customs Act was for assessment at rate of duty corresponding to tariff item 8517 6290 of First Schedule to the Customs Tariff Act with claim for concessional rate of duty in terms of notification[21] and that this claim was discarded for assessment at rate of duty applicable to tariff item 8518 3000 of First Schedule to the Customs Tariff Act. Such revision could have been prompted either from the acceptance of proposed classification by the importer or, notwithstanding resistance on the part of the importer, upon re-assessment by the proper officer. The first appellate authority had merely concluded from certain proposals at the consultation stage, as prescribed in the notification of the Central Board of Excise and Customs (CBEC), together with lack of show cause notice that importer and 'proper officer' were at one on the appropriate classification. There is also no finding that the claim by the appellant, of the 'proper officer' not having permitted them to continue with the classification as declared in the bill of entry, was not acceptable.

11. Indeed, in the circumstances, we find no reason to consider this claim to be incorrect inasmuch as the appellant had taken recourse to section 128 of the Customs Act which they would not had they acquiesced in the revision. Furthermore, it is also on record that, at the time of discharge of duty liability in the 'self- assessed bill of entry', a 'protest' letter had been lodged which is incongruous with such acquiescence. On the other hand, between filing of 'check list' and generation of bill of entry after payment of duty, the entire process, as well as the instrument, are under the rigorous control of customs authorities and mere denial of access to bill of entry suffices to bring even the most obdurate importer to heel.

12. An assessment carried out by the 'proper officer' is no precedent – that is ever a consequence of appellate determination. It is the obligation of

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21. No. 57/2017-Cus dated 30th June 2017

every importer to declare appropriate tariff item for self-assessment of duty liability in terms of section 17(1) of the Customs Act. That such exercise of self-assessment has been interfered with by the 'proper officer' is not only deplorable but tantamount to contravention of law which provides for responsible re-assessment only through verification and scrutiny of documentation expressed in 'speaking order'; anything else is an illegality that may not be condoned. We do believe that such unauthorized interference in self-assessment should be taken note of by the administrative authorities and, accordingly, direct that a copy of this order be placed before the Chairman, Central Board of Indirect Taxes and Customs (CBIC) with the request that the prevalence of such practice in customs formation be examined.

13. The classification declared in the checklist varies from the classification of the goods that were finally assessed and cleared. The wherewithal for substitution of the classification is not on record but, from the circumstances of the discharge of duty liability as well as filing of appeal, it may be inferred to be consequence of re-assessment and, that too, re-assessment to which the importers had not subscribed their concurrence. In these circumstances, the lack of 'speaking order', as envisaged under section 17(5) of the Customs Act, is travesty of law. In the absence of justification for revision of classification and denial of concessional rate of duty, the first appellate authority lacked, just as we do, any material ground to enter the mind of the 'proper officer' who determined revision. It is not open to the first appellate authority, without issue of such notice as prescribed in second proviso of section 128A(3) of the Customs Act to reflect upon the merit of tariff item adopted to fasten duty liability on the imported goods.

14. In the light of our findings above and given the constraints in

determining the merit of the rival classifications, we are left with no option but to set aside the impugned order and restore the assessments back to the original authority for fresh decision on the classification in the bill of entry as proposed in the checklist and for variation thereof, if any, to be elaborated upon in terms of section 17(5) of the Customs Act. The appeals are, thus, disposed off by way of remand.

(Order pronounced on **28.11.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C J MATHEW)
MEMBER (TECHNICAL)

**/as*