# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
## <u>MUMBAI</u>

WEST ZONAL BENCH

## CUSTOMS APPEAL NO. 85134 OF 2018

(Arising out of Order-in-Appeal No: MUM-CUSTM-AMP-APP-549 to 605/17-18 dated 28th September 2017 passed by the Commissioner of Customs (Appeals), Mumbai–III)

**Boston Scientific India Private Limited** **.....Appellant**
3rd Floor, Bestech Business Tower, Sohna Road
Sector – 48, Gurgaon – 122018

versus

**Principal Commissioner of Customs (Import)** **.....Respondent**
**Air Cargo Complex**
Sahar, Andheri (E), Mumbai - 400099

**WITH**

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|---|---|---|---|
| **C/85135/2018** | **C/85136/2018** | **C/85137/2018** | **C/85138/2018** |
| **C/85139/2018** | **C/85140/2018** | **C/85141/2018** | **C/85142/2018** |
| **C/85143/2018** | **C/85144/2018** | **C/85145/2018** | **C/85146/2018** |
| **C/85210/2018** | **C/85214/2018** | **C/85215/2018** | **C/85216/2018** |
| **C/85217/2018** | **C/85218/2018** | **C/85219/2018** | **C/85221/2018** |
| **C/85224/2018** | **C/85225/2018** | **C/85226/2018** | **C/85227/2018** |
| **C/85231/2018** | **C/85232/2018** | **C/85233/2018** | **C/85234/2018** |
| **C/85241/2018** | **C/85246/2018** | **C/85251/2018** | **C/85256/2018** |
| **C/85262/2018** | **C/85266/2018** | **C/85267/2018** | **C/85268/2018** |
| **C/85269/2018** | **C/85270/2018** | **C/85271/2018** | **C/85272/2018** |
| **C/85278/2018** | **C/85279/2018** | **C/85280/2018** | **C/85281/2018** |
| **C/85282/2018** | **C/85283/2018** | **C/85284/2018** | **C/85285/2018** |
| **C/85286/2018** | **C/85287/2018** | **C/85288/2018** | **C/85289/2018** |
| **C/85290/2018** | **C/85291/2018** | **C/85292/2018** | **C/85293/2018** |
| **C/85294/2018** | **C/85295/2018** | **C/85297/2018** | **C/85298/2018** |
| **C/85299/2018** | **C/85300/2018** | **C/85301/2018** | **C/85308/2018** |
| **C/85309/2018** | **C/85310/2018** | **C/85311/2018** | **C/85312/2018** |
| **C/85313/2018** | **C/85314/2018** | **C/85315/2018** | **C/85318/2018** |
| **C/85321/2018** | **C/85323/2018** | **C/85324/2018** | **C/85325/2018** |
| **C/85326/2018** | **C/85327/2018** | **C/85328/2018** | **C/85329/2018** |
| **C/85330/2018** | **C/85331/2018** | **C/85332/2018** | **C/85333/2018** |
| **C/85334/2018** | **C/85335/2018** | **C/85336/2018** | **AND** |
| **C/85337/2018** | | | |

**<u>APPEARANCE</u>:**

Shri T Vishwanthan, Shri Akhilesh Kangsia and Ms Madhura Khandekar and Shri Siddharth Sen, Advocates for the Appellant

Shri Ram Kumar, Assistant Commissioner (AR) of 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: 02.12.2024**

**FINAL ORDER NO's: 87129-87217/2024**

**PER: C.J. MATHEW:**

These 89 appeals of M/s Boston Scientific India Pvt Ltd, arising from their grievance that revision in classification of goods imported by them had been upheld in their challenge to assessment in as many bills of entry, seek relief from the burden of differential duty affirmed by order of Commissioner of Customs (Appeals), Mumbai Zone – III in relation to 57 bills of entry[1] for 23rd October 2015 to 28th November 2016 and 32 bills of entry[2] for 8th December 2016 to 27th June 2017 respectively. The latter of the orders impugned before us records that the appellant therein had not entered appearance in the personal hearing but had requested for disposal on the lines of argument preferred in the proceedings of appeal against the former bunch of bills of entry. Hence, all the appeals are taken up now for disposal by this common order.

2. Learned Counsel for appellant submitted that 'leads of pacemakers' imported by them had been permitted for clearance at rate of duty corresponding to tariff item 9021 5000 or tariff item 9021 9090 of First Schedule to Customs Tariff Act, 1975[3], enabled thereby to avail benefit of notification no. 21/2012-Cus dated 17th March 2012 since March 2012 and that the impugned order did take note of the restricted compass of dispute after the concessions were revised with effect from 19th January 2016 by notification[4]. He drew our attention to investigations by the Directorate of Revenue Intelligence (DRI) that culminated in show cause notice for

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**1. MUM-CUSTM-AMP-APP-549 to 605/17-18 dated 28th September 2017**
**2. MUM-CUSTM-AMP-APP-666 to 697/17-18 dated 31st October 2017**
**3. the Customs Tariff Act**
**4. Notification no. 4/2016-Cus and no. 5/2016-Cus dated 19th January 2016**

recovery of differential duty for past imports at the rate corresponding to tariff item 9033 0000 of First Schedule to Customs Tariff Act and pointed out that the assessing authorities refused thereafter to permit clearance of goods except on discharge of higher duties for which their consent had not been obtained leaving them with no option but to challenge both aspects before the first appellate authority.

3. It was further submitted that their grievance about revision of classification of goods, as conforming more appropriately to the description corresponding to tariff item 9033 0000 of First Schedule to Customs Tariff Act attended upon by denial of benefit of concession without issue of 'speaking order', contemplated in section 17(5) of Customs Act, 1962[5] was compounded not only by affirmation of the re-assessment in the impugned order but also by trivializing the blatant breach of statutory responsibility. It was also pointed out that the logic adopted for the latter in the impugned order lacks any of the trappings of judicial determination. Reliance was placed on the decision of the Tribunal in **Commissioner of Customs (Preventive), Jodhpur** vs. **Shiv Ganesh Exim Pvt Ltd**[6] to urge restoration of the self-assessed liability.

4. According to Learned Authorized Representative, the classification adopted for assessment is appropriate and the explanation of the appropriateness in the impugned orders suffices for us to uphold the levy of higher duties.

5. In the impugned order, and strangely too, the disinclination on the part of the 'proper officer' to issue 'speaking order' has been held to be inconsequential and insistence thereto on the part of importer to be

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**5. the Customs Act**
**6. 2024-TIOL-856-CESTAT-DEL**

superfluous from judicial determination having held bills of entry, of themselves and without separate orders, to be appealable owing to which the lack was not prejudicial. In holding that

> "5. I have gone through the facts and submissions of the case and find that the present 51 Appeals are against the assessment of 'leads of pacemaker" under Customs Tariff Heading 9033 which attracts Customs duty at the rate of 7.5% + 12,5%+ 4% as against 90219090 where the effective duty rate is 7.5% +0+4%. I find that the assessment of impugned 57 bills of entries was subsequent to the detailed investigation by DRI and issuance of SCN dated 06.02.2015 and during the course of investigation the appellant was given opportunity to explain its view point while recording of statements under section 108 of Customs Act, 1962. Needless to say that section 124 and section 122A of Customs Act, 1962 have provisions in line with the principles of natural justice and once the same are followed, it cannot be alleged that the doctrine has been violated. The submissions made in the appeal memorandum suggest that the appellant had made payment of Rs. 56 lakhs and Rs. 71.87 lacs as differential duty and Rs. 6.16 lacs as interest for imports made till February 2015. In this background asking for speaking order against individual bill of entry amounts to stretching a technical route too much to open another front of litigation particularly when the department is contemplating issuance of Order-in-Original on the same issue and if stand of the appellant is vindicated at any stage, he would be eligible for all benefits. Without prejudice, the appellant has chosen to challenge the assessment of bill of entry which itself is appealable order as held by Hon'ble Tribunal in case of Ashok Leyland vs CCE, Chennai 2004 (173) E.L.T. 518 (Tri - Chennai) ; J.M. Industries vs CC, Jamnagar 2003 (156) E.L.T. 977 (Tri. - Del); Airport Authority of India vs CC, New Dehli 2005 (192) E.L.T. 179 (Tri. - Del.); CC (Port) Kolkata vs Kothari Metals Ltd 2014 (311) E.L.T. 207.(Tri. - Kolkata); Anant Wines & Spirits vs CC, Amritsar 2016 (342) E.L.T. 419 (Tri. - Chan.)."

the first appellate authority has, impliedly, approved the breach of the mandate in assessment process on the ground of principles of natural justice not having been compromised. Effectively, the first appellate authority has subordinated the legal right of the importer for accountability in assessment to right of appeal vested independently by law. According to the impugned order, the stand of Revenue was clearly made known to the importers from a show cause notice issued to them for recovery of differential duty on previous imports and requiring no further explanations insofar as subsequent imports, while under assessment, are concerned. It is bizzare, indeed, for a creature of the statute, and, that too, one emplaced in the appellate hierarchy established by the statute, to suggest that a notice issued by an investigation agency under section 28 of Customs Act and unadjudicated at that, is surrogate for 'speaking order' of 'proper officer' obliged to take re-assessment to logical conclusion mandated in section 17 of Customs Act. The overreach and distortion of the law is so patent that deployment of such a proposition in support of assessment jars, to say the least. That appeal was entertained against bills of entry is neither an act of grace sufficing to empower condoning of irresponsible discharge of assessment nor exercise of discretion enabling adjudgement of re- classification in the absence of any reasoning for such available for appellate evaluation.

6. It is on record that the 'proper officer' has not elaborated upon the cause for re-assessment and, yet, the first appellate authority took it upon itself to stand in for the 'proper officer' to offer reasons for adoption of the revised classification. This was undertaken without pre-requisite, in terms of second proviso to section 128A(3) of Customs Act of notice to importer and more especially warranted in circumstances of neither notice preceding the commencement of the dispute nor such proposal on record by way of appeal

of Revenue. A notice issued in connection with some other imports, in the absence of any legal provision extending existing proceedings to future imports, is no substitute. Such is not the case and that the first appellate authority had taken recourse to lack of prejudice and compliance with principles of natural justice to proceed with disposal on merit places the outcome beyond the pale of validity. The first appellate authority was as bereft, as we continue to be, of any material on record, to determine that the exercise of re-assessment conformed to enacted law in the form of General Rules for Interpretation of the Tariff appended to Customs Tariff Act and within the framework of judicially determined rules of engagement in disputes over classification. And just as it would be inappropriate for us to adjudge 'free floating' attempt at classification on the part of the first appellate authority, it was no less so for the first appellate authority to venture upon a decision on merit of assessment by the original authority.

7. That the appellant herein had, in the bills of entry, preferred claim for classification of goods against tariff item privileged with lower duty liability from attendant notification is not in dispute; such entered in the 'check list', upon discharge of duty liability, is transformed as assessed bill of entry for clearance from customs control under section 47 of Customs Act. The revision occurred between filing of bill of entry and the conclusion of assessment under section 17 of Customs Act and all this while, except by foregoing, albeit temporarily, release of goods, the importer is under the absolute power of 'proper officer' which appears to have caused them to acquiesce in the determination of higher duty burden. This is not in conformity with

> "(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in

> section 85, self-assessment the duty, if any, leviable on such goods."

of section 17 of Customs Act with option afforded to 'proper officer' in terms of

> "(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods."

therein. Such misdirection of 'self-assessment' is inappropriate exercise of statutory authority and it is but proper for superior authorities to set right such travesty of law. A copy of this order may, therefore, be placed before Chairman, Central Board of Indirect Taxes & Customs (CBIC) for his attention.

8. The first appellate authority had been cognizant of the circumstances in which the appeal came to be filed and was aware that justification for revision, as required by

> "(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 Customs Act was not in existence. Affirmation of re-assessment without any material to go by invalidates it ab initio. The lack thereof should have prompted the first appellate authority to enforce compliance with consequence of revision. Not having done so invalidates the impugned order.

9. Accordingly, we set aside the impugned orders and restore the bills of entry before the original authority for disposal in the manner set out in section 17 of Customs Act. These appeals are allowed by way of remand.

(Order pronounced on **02.12.2024**)

**(JUSTICE DILIP GUPTA)**
**PRESIDENT**

**(C J MATHEW)**
**MEMBER (TECHNICAL)**

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