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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5992 OF 2021

Ascensia Diabetes Care India Pvt. Ltd.

.....Petitioner

Vs.

The Union of India and Anr.

.....Respondents

Mr. Rafique Dada, Senior Advocate a/w Mr. Mihir Deshmukh, Mr. Zubair R. Dada, Mr. Rajan Mishra i/by Patankar and Associates.
Mr. Jitendra Mishra a/w Mr. Ram Ochani for Respondents.

CORAM : K. R. SHRIRAM &
A. S. DOCTOR, JJ.
DATE : 10th NOVEMBER, 2022

P.C.:-

1. Petitioner, being aggrieved by an order dated 31st December, 2020 passed by Respondent No.2, has approached this Court impugning the same. By consent Petition is taken up for hearing at this stage. Rule. Rule made returnable forthwith.

2. Petitioner is engaged in import and sale of complete blood glucose monitoring system under the brand name “Contour” (with variants Contours Plus, Contour Plus One, Contour TS and Contour) (hereinafter referred to as Glucometer). The said product, i.e., Glucometer is used to quantify glucose levels in blood and is used by people to test their blood sugar at home primarily. The fact that the item was Glucometer, which is the subject matter of this Petition, is not disputed.

3. Chapter 90 of the Customs Tariff Act, 1975, covers optimal, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus, parts and accessories thereof.

Tariff item 9018 covers instruments appliances used in medical, surgical, dental or veterinary sciences, including scientigraphic apparatus, other electromedical apparatus and sight testing instruments.

Item 9027 covers instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes.

4. Petitioner imported various quantities of Glucometers and filed Bill of Entry classifying Glucometer under item 9027 in Chapter 90 of the Customs Tariff Act. Cumulative assessable value of the said goods was to the tune of Rs.5,44,42,993/-. Petitioner paid customs duty at NIL rate and paid IGST of Rs.65,33,159/- at the rate of 12%. Post clearance, Department during the audit of the Bill of Entry observed that the subject goods had been allegedly misclassified under CTH 90278090 and therefore Petitioner was issued a Consultative letter dated 5th March, 2020 asserting that the subject goods should be classified under CTH 90189099 and proposing to demand differential duty amounting to Rs.30,79,295/-. Petitioner was also

issued a pre-notice consultation letter and granted personal hearing/opportunity for making submissions with documentary evidence. This was followed by a show cause notice dated 30th June, 2020 mentioning the differential duty and calling upon Petitioner to show cause as to why the differential duty of Rs.30,79,295/- should not be paid. It was mentioned in the show cause notice that subject goods fall under chapter heading 9018 whereas Petitioner has classified it under chapter heading 9027 and therefore Petitioner has misdeclared the goods and demanded differential duty of Rs.30,79,295/- was payable.

5. Petitioner filed reply to the show cause notice and submitted that the goods were in fact classifiable under chapter 9027. Petitioner also submitted that Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in the case of ***Bayer Pharmaceuticals Pvt. Ltd. Vs. Commissioner of Customs, Mumbai***¹ has held that these goods, i.e., Glucometers consisting of Glucose meter, test strips, Lancet device and user guide will get classified under heading 9027 and not under 9018, which is binding on the adjudicating authority. It was also brought to the notice that even the Appellate Authority in another matter had accepted that Glucometer will get classified under 9027 and not 9018. It is pertinent to mention that Petitioner even clarified to the adjudicating authority that Bayer AG, Germany sold its entire diabetes care business to Panasonic Healthcare,

1 2016 (331) E.L.T. 317

Japan. Panasonic Healthcare, Japan for the acquisition of diabetes care business formed a new company named Ascensia Diabetes Care across the world including India. Accordingly, Petitioner was formed by Panasonic in India to acquire diabetes care business in India. Petitioner was incorporated in India on 5th November, 2015 in line with the global arrangement for sale between Bayer and Panasonic. Mr. Dada therefore submitted that the Bayer (supra) was in Petitioner's own case.

6. Mr. Dada further submitted that judicial discipline would require that Respondent No.2 had followed the ruling of CESTAT in Bayer (supra) since ratio laid down by CESTAT in Bayer (supra) was binding on the Department.

7. The facts in Bayer (supra) were identical to the case at hand and the short Judgment in Bayer (supra), for ease of reference, is reproduced herein;

“ This appeal is directed against the order in appeal passed by Commissioner (Appeals) holding the classification of the impugned imported goods under Customs Tariff Heading 90.18.

2. The facts of the case are that the appellant imported blood Glucose meters having the brand-name Breeze 2 Meter. The imported product consisted of a blood glucose meter and the users guide. The classification of the goods was sought under tariff item number 902780.90 which covers instruments and apparatus for physical or chemical analysis. And exemption from basic customs duty was claimed under notification number 24/05-Cus dated 1.3.2005. The Department did not accept this classification and in adjudication the Assistant Commissioner held the goods to be classifiable under Heading 90.18 which covers instruments and appliances used in medical, surgical, dental or veterinary sciences. In appeal, the Commissioner (Appeals) upheld the classification under Heading 90.27.

3. *The Learned Counsel for the appellant stated that the Commissioner (Appeals) is not following an earlier decision of the Commissioner (Appeals) vide Order dt. 12.11.2008, holding that the blood Glucose meter is classifiable under Heading 90.27 as an instrument for chemical analysis and not under Heading 90.18 as an instrument or appliance used in medical science. This has resulted in judicial indiscipline. He relied on the Supreme Court judgement in the case of Birla Corporation Ltd. Vs. Commissioner 2005 (186) ELT 266 (SC). According to him, the product in question in the present case is identical to the product in respect of which the order dated 12.11.2008 was passed by the Commissioner (Appeals).*

3.1. *The further contention is that the function of the Glucose meter is to undertake chemical analysis of the human blood and find out the level of glucose present in the blood sample and measure it in terms of numerical value. Therefore the product in question is an instrument for chemical analysis appropriately classifiable under Heading 90.27. He stated that internationally, Glucose meters are classified under heading 90.27 only. He referred to the United States Customs Department Ruling on this issue which classifies similar products under Heading 90.27. He also referred to the Canadian International Trade Tribunal which took the view that glucose testing devices fall under heading 90.27 only. And these countries, like India, also follow the Customs Tariff based on the WCO HSN Explanatory notes. But the Commissioner in the impugned Order held that the earlier Order of Commissioner (Appeals) as well as the U.S. Customs and Canadian Tribunal Rulings dealt with complete glucose monitoring systems whereas the goods in the present case are only Glucose meters with user guide and not a complete glucose monitoring systems set. The learned Counsel argued that the Glucose meter will continue to be classified under Heading 90.27 only, irrespective of the fact whether it is packed with test strips etc. because the glucometer gives the essential character to the entire kit. According to him, the actual analysis is undertaken by the glucometer only and the test strip does not play any role in testing and analyzing of the sample by the glucose meter. To substantiate this point, he referred to Sr. No. 65 of notification No. 6/2006 which specifies that Blood Glucose monitoring system (Glucometer) and test strips will be subject to SAD duty of 4%. According to him, this indicates that the glucose monitoring system refers to glucometer only.*

3.2. *The learned Counsel argued that HSN Explanatory Note to Heading 90.18 state that the goods therein are handled by professionals which is not so in the case of Glucose meters. He also referred to para (o) of the Explanatory Note which state that heading 90.18 does not cover Instruments and Appliances used in laboratories to test blood, tissue fluids, Urine etc. which would generally fall under the heading 90.27.*

4. *The learned AR appearing on behalf of Revenue*

reiterated the findings of the Commissioner (Appeals).

5. *We have carefully considered the rival contentions of both sides. The competing Headings for classification of the impugned goods are extracted below:*

***9027** instruments and apparatus for physical or chemical analysis (for example, polarity meters, refractory meters, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion...*

***9018** instruments and appliances used in medical, surgical dental or veterinary sciences...*

The learned Counsel showed us the product imported i.e. those which are covered by the earlier order of Commissioner appeals dated 12.11.2008 having the brand-name contour TS meter. These goods consist of Glucose meter, test strips, Lancing device and user guide. And the also showed product in question having the brand-name breeze 2 meter which consists of Glucose meter and user guide. A point to be examined is whether the two products would be classified separately only because in the first case the product includes lancets and test strips. We are of the view that the essential character of the goods in both cases is to draw the blood and test it for glucose content. With changes in technology, the glucose meter can be expected to become more sophisticated and compact without change in its essential function. The essential function of a Glucose meter is to draw the blood as well as test the blood for Glucose level. The product in question is also able to draw the blood as well as test the blood. The testing of blood and then its analysis for indicating blood sugar content as revealed by the Glucometer is undisputedly the outcome of a chemical analysis. That is, the Glucometer is an instrument for chemical analysis. Having noted the essential characteristic of both a Glucose meter system with strips and lancets and the Glucose meter without strips, it would be illogical to say that the Glucose meter with strips will be classifiable under heading 90.18 whereas the Glucose meter without strips will get classified under heading 90.27. Therefore we reject this argument of the Commissioner.

6. *For a deeper examination of the issue, we may refer to the HSN Explanatory Notes and the Customs Tariff Act. The General Rules for the Interpretation of the Customs Tariff Act provide that (Rule 1) for legal purposes classification shall be determined according to the terms of the Headings and any relative Section or Chapter notes We find in this case that heading 90.27 covers instruments for chemical analysis. This heading appears to be more specific than the description of heading 90.18 which covers instruments used in medical, surgical etc. sciences. Thus by virtue of Rule 3 which says that a specific description is to be preferred over a*

general description, the Heading 90.27 appears more appropriate.

6.1. *Further, we may refer to the HSN Explanatory Note to heading 90.18 which states that This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (for example, by doctors, surgeons, dentists,.) either to make a diagnosis, to prevent or treat an illness or to operate etc. Instruments and appliances for anatomical or autoptic work, dissection etc. are also included From the language of this Note it appears that only those instruments fall under heading 90.18 which are used in professional practice in the vast majority of cases. It is obvious that the Glucose meters are not vastly used only in professional practice. Mostly they are used by individuals at home or in the workplace, that is, by common people other than professional practitioners. Further under paragraph (o) of the same Note it is stated This heading does not cover, - instruments and appliances in laboratories to test blood, tissue fluids, urea etc. whether or not such tests serve in diagnosis (generally heading 90.27). It is quite evident that the product in question is not an instrument which is generally used in laboratories. Therefore by virtue of the Explanatory Note under Heading 90.18, the impugned goods, that is Glucose meters are classifiable under heading 90.27.*

7. *In view of the above, we hold that the imported goods namely Glucose meters are classifiable under heading 90.27 and are eligible for exemption under notification No. 24/05-CUS dated 1-3-2005.*

8. *Impugned order is set aside. Appeal allowed."*

8. Mr. Mishra at the outset submitted that the Petition ought to be rejected since Petitioner has an alternate efficacious remedy of filing an Appeal before CESTAT. Mr. Mishra relied upon the Judgment of this Court in ***Hover Automotive India Private Limited Vs. Union of India & Ors.***² dated 29th October, 2021 (unreported) to submit that Writ Petition can only be entertained in exceptional circumstances where there is a breach of fundamental rights, violation of principles of natural justice, excess of jurisdiction or a challenge to the various of the statute or delegated

² Writ Petition (O.S.) No.2223 of 2021

legislation. Mr. Mishra submitted since none of these circumstances arises in the case at hand, Court should direct Petitioner to exercise the alternate remedy. Mr. Mishra also relied upon a Judgment of the Hon'ble Apex Court in *Union of India Vs. Coastal Container Transporters Association*³ to submit that only if there was matter of jurisdiction or violation of principles of natural justice should the Court entertain the Petition. This Judgment is not applicable in our view because the Hon'ble Apex Court was considering a matter where the Court had entertained a Writ Petition under Article 226 of the Constitution of India at the stage of show cause notice.

9. We are inclined to reject this submission of Mr. Mishra on alternate remedy because Respondent No.2 has not even examined the merits of the case when there was a binding order of CESTAT in the case of *Bayer (supra)*. Having considered the judgment of *Bayer (supra)*, relegating Petitioner to exercise its alternate remedy would be a mere exercise in formality when CESTAT has already passed well considered order in exercise of its statutory jurisdiction in Petitioner's own case. As the Tribunal has already expressed its views in an identical matter and has classified the Glucometer under 9027, an Appeal to CESTAT against impugned order would be a mere idle formality.

10. Moreover, with this background, Petitioner will also have to make compliance with an onerous precondition of mandatory pre-deposit.

3 2019 (22) G.S.T.L. 481 (S.C.)

When the order is *ex facie* erroneous and patently in violation of principles of judicial discipline and doctrine of stare decisis, in our view, this is a fit case for us to exercise our jurisdiction under Article 226 of the Constitution of India. Moreover, there are no disputed facts and the only issue to be considered is whether the Glucometer should get classified under item 9018 or item 9027, which has already been considered by CESTAT. Since this is already concluded by CESTAT, on this ground alone, the impugned order requires to be quashed and set aside. Moreover, Respondent No.2, in paragraph No.21 of the impugned order has held as under;

“21. Further, I find that as per Serial No.576 of Notification No.50/2017-Customs dated 30.06.2017, the goods the ‘Blood Glucose Monitoring System (Glucometer) and test strips’ falling in chapter 90 or any other chapter attracts standard rate of BCD @ 5%. The same is reproduced below:

Sr. No.	Chapter or Heading or Sub-heading or tariff item	Description of goods	Standard rate	Additional duty rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
576	90 or any other chapter	Blood Glucose Monitoring System (Glucometer) and test strips	5%	-	-

From above, it is seen that in notification no.50/2017 at sr. no. 576, ‘Blood Glucose Monitoring System (Glucometer) and test strips’ have been specifically mentioned attracting standard rate of duty of 5%. Thus the notification envisages that the said goods classified under 90189099 where basic rate of duty is 10% will attract effective 5% duty under aforesaid notification. Whereas, if classified under 90278090, the basic duty rate is ‘Nil’ and therefore it would not be so that vide aforesaid notification, the duty rate would be increased from 0% to 5%. So it is evident that the said goods are rightly classifiable under 90189099 with effective BCD @5%. The above notification was issued on 30.06.2017 and therefore the event of charging of duty on the impugned goods as per the same would prevail over any notification which was issued prior

to the said date. Further, in view of above notification, the said case is distinguished from the case of Bayer Pharmaceuticals Pvt. Ltd. Submitted by the party”

11. First of all this conclusion is erroneous particularly in view of findings of the CESTAT in Bayer (supra). Moreover, the said notification will apply only where goods are classified under item 9018. The notification would not apply when goods are classified under 9027. Therefore, the attempt of giving reasons or explaining how the notification is applicable only to those goods classified under item 9018 could be applicable to goods under item 9027 is not acceptable. Non considering and following Bayer (supra) itself is a reason for us to interfere under Article 226 of the Constitution of India.

12. We would also add, before we conclude that we entirely agree with the conclusions/findings of CESTAT in Bayer (supra) since the goods are identical.

13. The impugned order dated 31st December, 2020 is hereby quashed and set aside. So also the consequential notices of demand.

14. Petition accordingly disposed with no order as to costs.

(A. S. DOCTOR, J.)

(K. R. SHRIRAM, J.)