IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 14082 OF 2024

Ascensia Diabetes Care India Pvt. Ltd. ...Petitioner
Versus
The Union of India & Ors. ...Respondents

Mr. Prakash Shah, Sr. Adv. a/w Durgaprasad Poojari and Vikas Poojari i/b PDS Legal for Petitioner.
Mr. Karan Adik a/w Sangeeta Yadav, Umesh Gupta for Respondent No.2.
Ms. Shruti D. Vyas, Addl. G.P. a/w Aditya Deolekar, AGP for Respondent Nos.3 and 4 - State.

CORAM: G. S. KULKARNI & AARTI SATHE, JJ.

DATE: 09 APRIL 2026

P.C.

1. This petition filed under Article 226 of the Constitution of India, essentially challenges the show cause notice dated 3 August 2024 issued to the petitioner. At the outset, it may be observed that without filing a reply to the show cause notice, the petitioner has approached this Court.

2. The facts lie in a narrow compass.

3. The petitioner is stated to be *inter alia,* engaged in the import and sale of complete blood glucose monitoring system (**for short the "the said goods")**. It is the petitioners case that the goods are classified to be falling under the HSN 90278990 in terms of prevailing tariff entry.

4. On 1 September 2023, the Deputy Commissioner of State Tax initiated audit proceedings against the petitioner for the period 2020-21, in terms of

Section 65 of the CGST Act. Under the said audit proceedings, the petitioner was called upon to produce books of accounts and records and other documents. It is the petitioners case that the petitioner complied with the said requisition.

5. It is the petitioners case that on 24 February 2023, on a purported belief of short payment of tax, owing to mis-declaration of supply, the Chief Commissioner CGST & CX, Mumbai Zone directed the Commissioner CGST & CX, Thane to verify tax compliance by the petitioner and recover tax dues, if any. It is also the petitioners contention that this was based on the observations of alleged short payment of tax owing to mis-declaration of supply of the subject-good "Blood Glucose Monitoring System" and consequent discharge of GST liability @12% instead of applicable GST @18%.

6. On 21 April 2023, a summons under Section 70 of the GST Act was issued to the petitioner. In compliance of the said summons, the Authorized signatory of the petitioner appeared before the Superintendent, (Anti Evasion) CGST and CX, Thane on 26 April 2023, wherein a statement was recorded.

7. On 12 May 2023, petitioner submitted documents viz. Form 26AS, RCM details, purchase registers, sales registers, electronic cash ledger, electronic credit ledger, GST rate notification of glucometer, sample BoE, Financial Statements, Revenue reconciliation as per GST returns as compared with Financial Statements, and made submissions regarding applicability of 12% GST rate on supply of the said goods.

8. On 26 October 2023, the petitioner was directed to appear before the GST Superintendent, wherein the petitioner appeared before the Inquiring

Officer and reiterated the earlier submissions made. It is the petitioner's contention that on 2 November 2023 and 20 November 2023, the petitioner furnished the information as requested by the GST Superintendent then incharge.

9. As seen from the record on 19 July 2024, an Audit Report was issued under Section 65(6) of the CGST Act in which, according to the petitioner all the audit findings were dropped. On 31 July 2024, pre-show cause notice intimation (DRC-01A) was issued by respondent No.2 alleging short payment of tax during the period July 2017 to January 2023, whereby the petitioner was called upon to pay tax along with the amount of applicable interest and penalty under Section 74(5) of the CGST Act by 1 August 2024.

10. The petitioner filed a detailed reply dated 31 July 2024, which was received by the Joint Commissioner (Anti Evasion) on 1 August 2024. The contents of the said reply are required to be noted which read thus:

> "Subject : Request for additional time to furnish reply against Notice in Form DRC-01A dated 31 July 2024
>
> Reference :
>
> - Notice in Form DCR-01A dated 31 July 2024
> - F.No.: V/CGST/Bhiwandi/AE/Gr-D3/Ascensia/41/2024-25
> - DIN: 20240767VQ0000340211
> - GSTIN: 27 AANCA9421BIZS
> - Summons issued dated 21 April 2023 by CGST Anti Evasion, Thane in said matter [DIN: 20230467VR0000611798/370]
> - In relation to such summons:
> - 1st Personal hearing attended on 26 April 2023
> - Our email submissions on 12 May 2023
> - 2nd Personal bearing attended on 26 October 2023

- **Our physical & email submissions on 2 November 2023**
- **Our physical & email submissions on 20 November 2023**
- **Our email dated 3 January 2024**

We, Ascensia Diabetes Care India Pvt. Ltd. (hereinafter referred to as 'we' or 'us' or company'), being registered under Maharashtra Goods and Services Tax Act 2017, Central Goods and Services Tax Act 2017 and Integrated Goods and Services Tax Act 2017 bearing the captioned GST registration number are in receipt of Intimation Notice in Form DRC-01A dated 31 July 2024 intimating and advising us about short GST lability payable under Section 74(5) of CGST Act, 2017 and Section 122 of the CGST Act, 2017 Maharashtra GST Act, 2017 read with IGST Act, 2017

The Intimation Notice alleges that company has short paid GST of INR 5.21 crores on supply declared under HSN 9027 and accordingly advised the company to discharge such short payment of GST along with interest and penalty as per Section 74(5) of CGST Aet, 2017, by 1 August 2024 failing which Show Cause Notice will be issued under section 74(1). It is further mentioned therein that, In case Company wished to file any submissions against the above ascertainment, the same may be furnished by 1 August 2024 in part B of the form GST DRC-01A

Copy of said notice is attached herewith as **"Annexure 1"**

At the outset, we strongly refute all the allegations made in said notice and the GST liability mentioned in captioned notice is not acceptable

We would like to highlight that we have received captioned Notice from your good office on 31 July 2024 requiring us to reply to your good office on 1 August 2024 I.e. within 1 day. On account of intimation of such short notice to file reply within 1 day, which is practically impossible to adhere to, therefore, it is respectfully prayed that your good self be pleased to grant us additional time of 10-12 days to produce our detailed submission before your good self.

Kindly take above on record and oblige us. We look forward for a favorable direction from your office

It is always our endeavour to extend our full co-operation to tax authorities. Do grant us opportunity of being beard before undertaking any adverse action."

11. Also an e-mail was addressed on 1 August 2024 requesting for additional time for a detailed reply to be submitted. The said e-mail is also required to be noted which reads thus:

"This is in relation to Notice in Form DRC-01A dated 31 July 2024 served upon us vide below mail.

> Attaching herewith our letter listing all the past events, Reiterating request for additional time to submit the detailed reply and seeking personal hearing.
>
> We are submitting the details in three emails.
>
> Kindly acknowledge the receipt of above. We look forward for a favorable direction from your office. It is always our endeavour to extend our full co-operation to tax authorities. Do grant us opportunity of being heard before undertaking any adverse action as principle of natural justice.
>
> Thank you
> For Ascensia Diabetes Care India Pvt. Ltd
> Ankita Gaikwad”

12. It is the petitioner’s case that however without an opportunity of being heard, the impugned show cause notice dated 3 August 2024 was issued. The show cause notice has been assailed on the ground that it is vague and therefore, the petitioner would not be in a position to deal with the said show cause notice. The primary contentions as urged on behalf of the petitioner are following:

(i) The Petitioner, during the period of dispute, imported and supplied "Blood Glucometers" under HSN 9027 and correctly paid GST at the rate of 12 per cent under sr. no. 212 of Notification No. 1/2017- Central Tax (Rate) dated 28.06.2017. The Respondents in their reply affidavit have accepted the same.

(ii) The other product imported and supplied by the Petitioner is "Diastix" - a ready to use test strip specifically designed to test the glucose in the urine under HSN 3822.

iii) There can be no demand in the impugned show cause notice on the Urine Glucometer as they are covered under HSN 3822 and are covered under Entry 80 of Schedule II and subject to 12 per cent GST.

(iv) The records of the Petitioner indicate that it supplied only Blood Glucose Meter of HSN 9027. No other product of HSN 9027 is supplied by the Petitioner.

(v) The Respondents, without complying with the directions of this Hon'ble Court dated 14.10.2024, in their reply, instead of indicating clearly whether impugned demand includes urine glucose monitoring instrument and if so, the break-up of the amount of 5.21 crores demanded in the impugned show cause notice, contends that the Petitioner succeeds in their contention that they are selling one and only blood glucose meter then the Petitioner is entitled to benefit of sr. no. 212 of notification dated 28.06.2017.

(vi) The impugned show cause notice is an abuse of process of law. The Respondents have issued impugned notice without any inquiry or verification and solely based on the communication dated 24.02.2023.

(vii) Respondent No. 2 has arbitrarily and erroneously invoked extended period of limitation by alleging suppression in facts of the present case.

13. Mr. Prakash Shah, learned senior counsel for the petitioner, on such backdrop has drawn our attention to an order passed by the coordinate Bench of this Court on 14 October 2024 which is also required to be noted which reads thus:

> "1 Heard learned counsel for the parties.
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> 2. We have noted the objection based on alternate remedy. Still, Mr. Shah, learned counsel for the petitioner, on instructions, states that the commodity which is the subject matter of the impugned show cause notice relates only to Blood glucose monitoring instruments, i.e., Glucometer and has nothing to do with Urine glucose monitoring instruments.
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> 3. Mr. Adik, learned counsel for the respondent no.2 submits that the above statement may not be prima facie correct. He refers to the statement of Mr. Vishal C. Shanbhag, Head of Finance of the petitioner in which, he has stated that the petitioner deals in sale of two commodities viz. Blood glucose monitoring and Urine glucose monitoring.
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> 4. The statement of Mr. Shanbhag, no doubt, refers to two commodities based on Blood glucose monitoring and Urine glucose monitoring instruments. However, from that, we cannot conclude that the impugned show cause notice proposing to raise demand therein pertains also to Urine glucose monitoring instruments.

> Besides in the show cause notice, we find that no break-up is given about the demanded amount of Rs.5.21 crores.
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> 5. In the above circumstances and considering the Judgment dated 10 November 2022 in Writ Petition No.5992 of 2021, we direct the concerned respondents to file an affidavit indicating clearly whether the impugned demand includes Urine glucose monitoring instruments and if so, the break-up of the amount of Rs.5.21 crores demanded.
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> 6. The above affidavit must be filed and served by 14 November 2024.
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> 7. List this matter on 25 November 2024 for further consideration.
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> 8. Until next date, adjudication of show cause notice should not be proceeded with."

14. Mr. Shah has contended that in the petitioner's own case, in **Ascensia Diabetes Care India Pvt. Ltd. Vs. The Union of India and Anr**[1]**,** the issue of classification was subject matter of adjudication, when the Court had considered that in the context of a show cause notice which was challenged by the petitioner, the petitioner had relied on the decision in **Bayer Pharmaceuticals Pvt. Ltd. Vs. Commissioner of Customs, Mumbai**[2] wherein it was held that the goods Glucometers consisting of Glucometer, test strips, Lancet device and user guide will get classified under 9027 and not under 9018, which was binding on the adjudicating authority. The petitioner also contended that they were incorporated in India in line with the global arrangement for sale between Bayer and Panasonic, and therefore, Bayer (supra) was the petitioner's own case. It is in such context that the Court delved on the issue of classification. The Court entertain the Writ Petition, rejecting the respondents contention on alternate remedy and considered the issues whether the Glucometer would be classified under item 9018 or 9027, as already considered by the tribunal. It was also held that an

1 2022 (11) TMI 871 Bombay High Court

2 2016 (331) E.L.T. 317

appeal to CESTAT against the impugned order would be an idle formality. Since the issue was already concluded by the tribunal, on this ground alone, it was opined that the impugned order on the show cause notice was required to be quashed and set aside. The relevant observations made by the Court in that regard are required to be noted which reads thus:

> "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.
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> 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, Mumbai1 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, 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.
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> 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.
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> 7. The fact 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 leaned 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, uren 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 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 Association3 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 ofBayer (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. 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*
(1)	*(2)*	*(3)*	*(4)*	*(5)*
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"

(emphasis supplied)

15. Although it may be true that insofar as the classification of Gluco meters are concerned, the same will be required to be classified under chapter heading/sub-heading/Tariff item 9027, however, the subject matter of the present show cause notice cannot be equated and/or would stand concluded in view of the decision in the petitioner's own case (supra) on classification. This is clear from the reading of the impugned show cause notice which is on a different

foundation as noted by us above. Also for completeness, the relevant part of the show cause notice is required to be noted which reads thus:

> "4. Based on the Intelligence reference No.CIU/MZ/1340/2023 vide letter F.No. IV/16-Tech-76/CI/PCCO/MZ/2021-Pt-II dated 24.02.2023 was received from the PCCO, CGST & CX. Mumbai Zone, an enquiry was initiated against the taxpayer, M/s. Ascensia Diabetes Care India Pvt Ltd. on the ground that M/s Ascensia Diabetes Care India Pvt Ltd (GSTIN-27AANCA9421BIZS) declared the supply of goods majorly under HSN 9027, which is for 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 viscocity, porosity, expansion, surface tension or the like: instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters), microtomes, and discharging GST liability @ 12% instead of applicable GST @ 18% and thereby the taxpayer has short paid the GST amount of Rs. 5.21 Crores during the period from July, 2017 to January, 2023. The details of the same are under:

(Amount in Crore)

Fys	HSN Declared by the taxpayer	Taxable Value	GST Paid	GST payable @ 18%	Difference GST to be paid
2017-18 to 2022-23 (upto January, 2023	90278990-90278090	85.80	10.23	15.44	5.21

> 5 The intelligence suggested that M/s. Ascensia Diabetes Care India Pvt Ltd. has short paid their tax liability amounting to Rs.5.21 Crores during the period 2017-18 to 2022-23 (upto January, 2023). On the basis of the intelligence, a visit was conducted on 20.04.2023 at the registered premises of the taxpayer situated at 1, Bella Vista, Ostwal Park, Pokhran Road No.2. Majiwada Junction Thane-400601 under visit authorisation issued under Section 67 (1) of the CGST Act, 2017.
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> 6. During the visit, of the registered premises of the taxpayer was found to be in existence at its PPOB. At the time of visit, in the said premises, Shri Ketan Patil was present. The issue mentioned in the CIU reference as mentioned above was discussed with him and he stated that the issue will be discussed with their accounts team and will be informed accordingly.
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> 7. Therefore, summons dated 21.04.2023 was issued to M/s Ascensia Diabetes Care India Pvt Ltd. for appearing on 26.04.2023 to tender oral evidence and submission of reconciliation statement of ITC with GSTR-1, GSTR-2A and GSTR-3B from the inception of GST registration alongwith other relevant documents.
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> 8. Shri Vishal C Shanbhag, Head of Finance of M/s Ascensia Diabetes Care India Pvt Ltd... appeared on 26.04.2023 in response to summons dated 21.04.2023. A statement of Shri Vishal C Shanbhag was recorded on 26.04.2023 under Section 70 of the CGST Act, 2017. Shri Vishal C Shanbhag in his statement has stated

that the Company is engaged in sale of two commodities ie. Blood Glucose monitoring and Urine Glucose monitoring and discharged their GST liability @12% since the inception of GST as per Notification No. 1/2017-Central Tax (RATE) dated 28.06.2017 Schedule (II) Entry No. 212, the applicable GST rate for Blood Glucose monitoring is 12% As per Entry No 417 of Schedule (III) for goods falling under HSN 9027, the GST rate is 18%, which is a generic entry, But there is a specific entry in the GST Rate Schedule for the product Blood Glucose Monitoring System. However, the representative assured that if any liability arises on the said issue the Company will pay the differential tax amount along with applicable interest and penalty.

9. The taxpayer M/s Ascensia Diabetes Care India Pvt Ltd. vide letter did. 20.11.2023 has submitted the reconciliation of Input Tax Credit (ITC) availed in GSTR-3B with GSTR-2A for the FY 2019-20 to 2021-22, sample copies of sales invoices, details towards reimbursement of expenses for FY 2018-19 and 2019-20, brief write up on nature of other income, details of export transactions for FY 2017-18 to 2021-22

10. Whereas the taxpayer M/s. Ascensia Diabetes Care India Pvt. Ltd. is dealing in goods as a supplier of instruments and appliances used in medical, surgical, dental or veterinary sciences including scientigraphic apparatus, etc and as per analysis of data, it is observed that the taxpayer has declared supply of goods majority under HSN 9027 which is for instruments and for physical or chemical analysis. The description of H5Ns 9027, 90278 90278090 of Chapter 90 rate of GST thereon is summarized as under:

Chapter : 90

Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus, parts and accessories thereof.

HSN - 9027

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 ike instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes.

HSN – 90278990:

Optical, Photographic, Cinematographic, Measuring, Checking, Precision, Medical or Surgical Instruments and Apparatus, parts and accessories thereof Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, sp)

HSN – 90278090:

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 o.

Chapter sub-heading	Description of Goods	Rate of GST	w.e.f
90278090	INSTRUMENTS AND APPARATUS FOR PHYSICAL OR CHEMICAL ANALYSIS (FOR EXAMPLE, POLARIMETERS, REFRACTOMETERS, GAS OR SMOKE ANALYSIS APPARATUS); INSTRUMENTS AND APPARATUS FOR MEASURING OR CHECKING VISCOSITY, POROSITY, EXPANSION SURFACE TENSION OR	18%	01.07.2017

Rate of GST of Chapter heading 9027 is shown as under:

Schedules	S.No.	Chapter heading/sub-heading/Tariff item	Description of Goods	CGST Rate (%)	SGST/ UTGST Rate (%)	IGST Rate (%)
III	417	**9027**	Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion surface tension or the like, instruments nd apparatus for measuring or checking quantities of heat, sound or light (including exposure meters)l microtomes	9%	9%	18%

<u>11. From the above, it is evident that, the taxpayer has declared the goods falling under HSN 9027 which attracts 18% GST. However, the taxpayer has discharged their GST liability thereon at the rate of 12% instead of 18% and thereby the taxpayer has short paid their GST liability amounting to Rs.5.21 Crores which is liable to be demanded and recovered from them under Section 74(1) of the CGST Act, 2017</u>

12. It is evident that the provisions of both the CGST Act and MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean

a reference to the same provisions under the MGST, Act.

13. The taxpayer is required to correctly assess the GST payable in respect of bills raised/supplies made by them. The taxpayer is operating under self-assessment system and the onus is on them to ensure that all the stipulations laid down in the CGST Act, 2017 and Rules made there under are complied with and the statutory dues are discharged. The above points explicit towards the fact that during the relevant period the taxpayer had short paid the tax in as much as, they have failed to correctly assess the appropriate taxes due on the value of taxable supplies under Section 49 of the CGST Act, 2017. Thus, it appears that the taxpayer has deliberately evaded the payment of tax due under the provisions of Section 59 of the CGST Act, 2017 read with Section 20 of the IGST Act. The suppression of the above-mentioned facts from the department appears to be willful and deliberate with the clear intent to avoid payment of Tax. Therefore, the said short paid tax along with applicable interest which was liable to be paid under Section 50(1) of the CGST Act, 2017 is required to be recovered under the provisions of Section 74(1) of the CGST Act, 2017 from the taxpayer. Thus from the above discussions, it appears that M/s.Ascensia Diabetes Care India Pvt Ltd. have contravened the following provisions for non payment of GST for differential value.

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15. In the instant case, the short/non payment of tax under came to the light only when the Department had launched an investigation against them which shows the willful intent of the taxpaye.. Had such investigation been been not conducted, the differential GST amounting to Rs.5.21 Crores payable for the period 2017-18 to 2022-23 (upto January, 2023) due to difference in GST rate would not have been detected."

(emphasis supplied)

16. In our opinion, in the aforesaid circumstances and considering the nature of the show cause notice (supra), the petitioner's assertion that it would not reply to the show cause notice on any count, and it is only the High Court which would adjudicate the petitioner's contentions on the show cause notice is not the correct approach. It is clear from the record that there was substantial material which was available as specifically noted by the proper officer in the show cause notice, which was *inter alia* on the basis of the survey and the documents as submitted on behalf of the petitioner, that there was reason to believe that the petitioner was liable to pay tax of Rs. 5.99 Crore. The petitioner's contention that there is no

bifurcation on the said liability and for the period etc. would not impress us, as the show cause notice itself has stated that the sales liability is in respect of period 2017-18 to 2022-23 and up to January 2023. If such assertion of the department is not to be correct, the petitioner is not precluded from raising such contention in reply to the show cause notice. It is hence necessary for the petitioner to raise such case in reply to the show cause notice and to point out to the officer the correct position.

17. We find that there is an increase in the tendency in the litigants to by-pass the statutory procedure and approach the High Court in proceedings under Article 226 of the Constitution in challenging the show cause notices, sometimes even before reply to the show cause notices are filed and obviously before a view is taken by the proper officer. It cannot be held as a matter of routine that the moment a show cause notice is issued, the party on some or the other ground, by labeling the same to be a jurisdictional issue can approach the High Court to assail the show cause notice and stall the proceedings of the show cause notice. Such litigation, in our opinion, needs to be deprecated, as this would amount to complete discarding of the statutory procedure mandated under the provisions of the concerned laws, whereunder not only an opportunity is available to the assessee to respond to the show cause notice on all counts including on jurisdiction, but also, a remedy of an appeal is available to assail any order which would be passed on the show cause notice, and still a further appeal before the Tribunal. However, very frequently such statutory mechanism is being circumvented with impunity, knowing well that there are disputed questions of

fact and/or issues which can be certainly gone into, in reply to the show cause notice, and Writ Petitions are nonetheless filed, and on such petitions a vehement assertion is put up before the Court, as if, the Court does not have any other pressing proceedings, except to entertain such Writ Petitions. This in our opinion, amounts to a litigant taking selective chances, as such litigants has means to resort to such luxury litigation. Such litigation would be nothing short of an abuse of the process of law in a given situation, deserving it to be dismissed with costs for waste of valuable judicial time.

18. The present case is one of such cases, where contentions which can be easily, certainly, conveniently and appropriately gone into by the proper officer are sought to be urged before the Court in the present proceedings. If such contentions as urged on behalf of the petitioner are to be entertained by the High Court in the proceedings under Article 226 of the Constitution, in our opinion, not a single show cause notice can proceed and every show cause notice would be assailed before this Court. This is certainly not the law. The relief a party may seek by assailing the show cause notice in a given case can be entertained considering the settled principles of law, when the show cause notice is wholly without jurisdiction and/or by any rationale, the same cannot be issued under the parameters the law would mandate and which on the face of it is illegal. However, the moment there is an element of debate, enquiry, investigation etc., the same cannot be subject matter of adjudication in the proceedings of a Writ Petition. The present case is not such an exceptional case that we need to exercise discretion and entertain a Writ Petition against the show cause notice.

19. We accordingly dismiss the petition, however, with liberty to the petitioner to file a reply to the show cause notice within a period of four weeks from today and if the same is filed, let the show cause notice be decided in accordance with law by the designated officer.

20. All contentions of the parties in that regard are expressly kept open.

21. No costs.

(AARTI SATHE, J.) **(G. S. KULKARNI, J.)**