

Medtronic

India Medtronic Pvt Ltd

CIN: U33110MH1993PTC204814

Awfis, No:143, 03rd Floor, Gemini Circle,

Uthamar Gandhi Road, Nungambakkam,

Chennai – 600034 |, India

www.medtronic.co.in

Date: 10.05.2021

The Joint Commissioner of Customs,

Air cargo complex

Bangalore International Airport

Devanahalli,

Bengaluru – 560300



Kind Attn: Shri M J Chethan

Dear Sir,

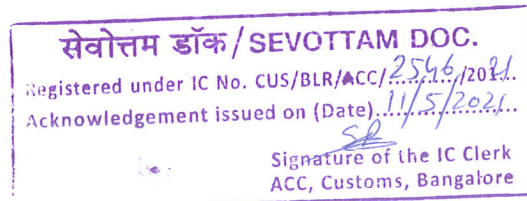
Sub: Reply to Show Cause Notice no. 01/2021-22 dated 17 April 2021

Ref: C No. VIII/10/391/2019 BACC SIIB

Intimation for payment of penalty vide letter dated 05 March 2021

Query vide Letter in C. No. VIII/10/391/2019 BACC SIIB dated 23 December 2019

Our submissions dated 19 May 2020 made on 20 May 2020



This is in reference to the captioned show cause notice (hereinafter referred as 'SCN') issued by your good self and received by **India Medtronic Private Limited** (hereinafter referred to as 'India Medtronic' or 'the Company' or 'Us' or 'We') on 19.04.2021.

1. Background and Facts

- 1.1 India Medtronic is primarily engaged in the import and re-sale of medical instruments and appliances in India.
- 1.2 India Medtronic had imported the captioned product ("Camera Control Unit set" or "CCU set" or "the product") and classified under Customs Tariff Heading (CTH) 9018 of Custom Tariff Act ("CTA"), 1975. The classification under CTH 9018 was adopted between the period 18 December 2017 till 6 October 2018, basis the fact that this product is a part which is specifically and solely designed to be used for medical purposes.
- 1.3 Thereafter, we internally reviewed the classification of the impugned product and re-classified under CTH 8525 being more specific entry. We submit that for the import of CCU sets made from **13 February 2019 onwards**, the Company adopted the classification under CTH 8525, and appropriate customs duty has been paid thereon. We submit that the classification was reviewed and changed to CTH 8525 Suo-moto. Under these facts and

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circumstances, alleging suppression of facts, willful misstatement with an intent to evade payment of duty is completely misplaced and bad in law.

- 1.4 Vide captioned letter dated 23 December 2019, your good-self raised a query whereby it was mentioned that the CCU set should be classified under CTH 8525 80 90 'Television cameras, digital cameras and video camera recorders - Others' and it has been specifically mentioned in the letter that the importer have cleared the CCU set at different instances by classifying it correctly under CTH 8525 8090 (Para 4 of the captioned letter dated 23 December 2019)
- 1.5 We filed our detailed response to the letter dated 23rd December 2019 and paid the differential duty along with applicable interest.
- 1.6 Thereafter, your goodself vide letter dated 05 March 2021 had directed us to pay penalty under Section 28(5) of the Customs Act, 1962 being penalty amounting to INR 7,12,170 equal to 15% of the differential duty payable. We submitted our response dated 22 March 2021 outlining the reasons why a penalty under section 28(5) does not payable.
- 1.7 Now, we are in receipt of captioned Show Cause Notice - SCN no. 01/2021-22 dated 17.04.2021 in File no. VIII/10/391/2019 BACC SIIB proposing to levy penalty on the grounds of inappropriate classification of the products adopted by the Company. Vide the SCN, your good-self has called upon to show cause before Additional Commissioner of Customs or Joint Commissioner of Customs, Airport & Air cargo Commissionerate, Menzies Aviation Bobba Cargo Terminal, First Floor, Air Cargo Complex, Devanahalli, Bangalore, within 30 days of receipt of the captioned SCN, as to why: -
 - i. an amount of ₹ 47,47,796/- (Rupees Forty Seven Lakhs, Forty Seven Thousand, Seven Hundred and Ninety Six only), being the differential Customs duty (inclusive of BCD, SWS and IGST) in respect of the 06 Bills of Entry, as detailed in the Worksheet enclosed as Annexure-1, should not be demanded and recovered from them under the provision of Section 28(4) of the Customs Act, 1962;
 - ii. an amount of ₹ 47,47,796/- (Rupees Forty-Seven Lakhs, Forty-Seven Thousand, Seven Hundred and Ninety-Six only), paid by the Importer vide Challan No.20 dated 20.05.2020, should not be appropriated towards the demand at (i) above.
 - iii. the applicable interest ₹ 15,53,349/- (Rupees Fifteen Lakhs, Fifty Three Thousand, Three Hundred and Forty Nine only), involved on the differential Customs Duties as mentioned at (iii) above, should not be demanded and recovered from them under the provisions of Section 28AA of the Customs Act, 1962.

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- iv. the amount of ₹ 15,53,349/- (Rupees Fifteen Lakhs, Fifty-Three Thousand, Three Hundred and Forty-Nine only) paid by the Importer vide Challan No.20 dated 20.05.2020, should not be appropriated towards the demand of interest at (iii) above.
- v. Why penalty should not be imposed on the importer under Section 114(a) of the Customs Act, 1962
- vi. Why penalty should not be imposed on the importer under Section 117 of the Customs Act, 1962

2.1 Our Submissions:

2.1.1 In response and in reply to the above allegations, under a belief that the submissions to follow would be considered with care, sympathy and a quasi-judicial disposition, we submit for kind consideration of your good self as under and state that all the submissions are alternative and without prejudice to each other.

2.1.2 We submit that vide our submission dated 20.05.2021, we have already accepted that the product should be appropriately classified under CTH 8525 8090 and that's why we had also paid the differential duty of INR 47,47,796 vide Challan No.20 dated 20.05.2020 along with interest of INR 15,53,349 vide Challan No.20 dated 20.05.2020. We are not repeating the submissions again for the sake of brevity.

Section 28(4) should not be attracted as there is no collusion, willful mis-statement or suppression of facts

2.1.3 Vide Para 10.2 to the captioned SCN, your good self has alleged that the imported item 'Camera Control Unit' was deliberately and willfully mis-classified by the Importer under CTH 9018 9044 & 9018 9096 of the Customs Tariff, on their own volition, for improper clearance to avail the benefit of lesser rate of customs duties, thereby deliberately and willfully involving in the act of defrauding revenue to the Government.

2.1.4 In challenge the allegation of suppression of facts/willful misstatement with an intent to evade the payment of duty due to the following reasons:

- A. The Company has clearly and correctly described the imported goods as "camera control unit set" on the copy of bill of entries filed from 18.12.2017 till 06.10.2018.
- B. The Bill of entries were assessed and cleared without any dispute raised by the authority on the classification under CTH 9018 9044/ 9096. The imported goods were classified under CTH 9018 as the goods can be solely and principally used as a part of a medical device. The Company, during that period, was under a bonafide belief that the classification of goods should be CTH 9018 9044/ 9096.

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- C. Subsequently, during our internal review of the classification, the Company concluded that the classification of CCU set which is a parts of the medical devices is more appropriately classified as per Chapter Note 2(a) of Chapter 90 and hence the classification should be 8525. This change was done by the company suo-moto and without being pointed out by the tax authorities. All imports thereafter (from 13.02.2019) were made under CTH 8525 8090 and therefore we had no intention to evade payment of customs duties or improper clearance to avail the benefit of lesser rate of customs duties. Had it been so, the Company could have continued importing goods under CTH 9018 which attracts lesser rate of custom duty.
- D. While there has been a delay in payment of differential customs duty for the past period, the reason surely cannot be attributed to misstatement/misdeclaration with an intent to evade payment of duty. All mistake cannot be given the colour of malafide intent to invoke section 28(4) and section 28(5) of the Customs Act, 1962.
- E. The Company paid the differential duty along with interest
- F. The Company fully cooperated with the officer concerned due the investigation proceedings and provided all the details/information as requested.
- G. Therefore, from the above sequence of event, it is evident that the Company has not mis-declared the description of the goods imported at the time of clearance. Further, the Company Suo moto changed the classification and later acted in good faith in discharging the differential duly along with interest.

- 2.1.5 In this regard, we further wish to place reliance in judgment pronounced by CESTAT Mumbai in the cases case of HI- Tech Sweet Water Technologies Pvt. Ltd. versus Commr. of Customs (i) , Nhava Sheva, (2019 (12) TMI 652 – CESTAT Mumbai) wherein it was held that ***“when the son has admitted duty liability and had paid the same along with the interest due, the proceedings should have been abated against that person. In our view it is not the case of willful misstatement, suppression or mis-declaration, but a case of bonafide error in claiming the benefit of exemption which was not due to them, we do not find any merits in the penal proceedings undertaken against them. Appellants had in the Bill of Entries, clearly described the imported goods, declaring them to be “Filmtec Membrane 70078, TW30-1812-75 (Water Filter Parts)”, “Filmtec Membrane 70075, TW30-1812-50 (Water Filter Parts)”, “Filmtec Membrane 70195, BW30-7095 (Water Filter Parts)”, “Filmtec Membrane 70034, BW30-365 (Water Filter Parts)”, “Filmtec Membrane 70195, BW30-4040 (Water Filter Parts)”, “Filmtec Membrane 70037, BW30-400 (Water Filter Parts)” and “Filmtec Membrane 11357, BW30LE-4040 (Water Filter Parts)”. Since appellants have clearly and correctly described the imported goods as part of water filter, the error in claiming the benefit of wrong exemption notification cannot be act of deliberate misdeclaration. Hence we do not find any merits in the order of Commissioner imposing penalty on the appellants under Section 114A.***

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- 2.1.6 Therefore, Section 28(4) of the Customs Act, 1962 should not be attracted and the amount paid by Company should be appropriated towards demand of duty and interest under Section 28(2) of Customs Act, 1962. Also, penalty should not be imposed under Section 114A of Customs Act, 1962.

Penalty not payable as the matter is related to interpretation of statute.

- 2.1.7 It is submitted that the matter involved in the present case is that of interpretation of the classification of a CCU set. It is humbly submitted that it is a set principal that penalty is not levied where the matter is related to interpretation of a Statute.
- 2.1.8 Without prejudice to the above, we would like to highlight that it is a settled principle in law that penalty is attracted where there is a mala fide intent i.e. an intention to evade payment of taxes or any will-full misstatement or suppression of facts. Reliance is placed on the judgement pronounced by the **Hon'ble Supreme Court** in the case of **Hindustan Steel Ltd. vs. State of Orissa [1978 (2) E.L.T. (J 159) SC] [1969 (8) TMI 31 – SC]** wherein it was held that **'an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation.**
- 2.1.9 Reliance is also placed in the case of **CCE VS Sikar Ex-Serviceman Welfare Coop. Society Ltd., [2006 (4) S.T.R. 213 (Tri. - DEL)] [2006 (2) TMI 52 - Appellate Tribunal, New Delhi]**, wherein it was held as follows -
- "Para 4. The Commissioner (Appeals) has set aside the penalty on the ground that there could be two interpretations of the word 'commercial concern' and in this case the respondents are registered as cooperative society for the welfare of the Ex-service men that could, possibly, interpreted that they are covered under the security agency, but they are not commercial concern. Penalty has been set aside only on the ground that there was a question of interpretation of law and it is a settled law that no penalty can be imposed where interpretation of law is in question."
- 2.1.10 Thus, we wish to reiterate that the Company has acted in good faith in discharging differential Customs duty along with applicable interest. There is no collusion or any willful misstatement or suppression of facts by the Company warranting the levy of penalty under Section 28(5) of Customs Act, 1962. The Company has acted in good-faith and undertook the change in the classification of CCU set from CTH 9018 to CTH 8525 8090 upon re-examination of additional facts with respect to the functioning of the product. Consequently, the penalty imposed under Section 114A of the Customs Act, 1962 is not tenable.

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2.1.11 Further, penalty is also imposed on importer under Section 117 of Customs Act, 1962. Under Section 117 of Customs Act, 1962 penalty can be imposed for any contraventions of any provision of Customs Act for which specific provisions for imposition of penalty is not provided for. The impugned SCN does not indicate as to which contravention, where no express penalty is elsewhere provided for such contravention or failure, has rendered the Company liable for imposition of penalty under Section 117 of Customs Act, 1962. In the absence of any such finding, the penalty imposed on the appellant under Section 117 of the Customs Act, 1962 is not tenable. Further, this is also supported by the ruling of CESTAT Allahabad in the case of M/S TRINITY INFRAVENTURES LTD. (EARLIER KNOWN AS GOLDSTONE EXPORTS LTD.) VERSUS COMMISSIONER OF CUSTOMS, (NOIDA), wherein it was held that *“the findings as reproduced in the earlier paragraph does not indicate as to which omission or commission on behalf of the appellant has rendered appellant liable for imposition of penalty under Section 117 of Customs Act, 1962 - In the absence of any such finding by the Original Adjudicating Authority the penalty imposed on the appellant under Section 117 of the Customs Act, 1962 is liable to be set aside”*

2.1.12 We submit that penalty under Section 28(5) and Section 117 cannot be levied together. Thus, the penalty proposed to be imposed should be dropped.

2.1.13 The above submission clearly proves that there is no intention to evade payment of duty. While the above is proved beyond doubt, however considering the amount of penalty (15% of the differential duty), cost of litigation and the value of time and efforts of the team in litigating the penalty notice, we have decided to pay penalty @ 15% of differential duty amounting to INR 7,12,170 under section 28(5) within 30 days of the issuance of notice. We therefore request your goodself to close the proceedings under this show cause notice and provide us necessary communication to this effect. **Copy of the challan is enclosed herewith as Annexure A.**

2.1.14 The relevant extract of the provision is re-produced here-in-below for ease of reference:

“Where any [duty has not been levied or not paid or has been short-levied or short-paid] or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to [fifteen per cent.] of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion —

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(i) ***that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein;***

PRAYER

In view of the details submitted, judicial precedents cited, it is most respectfully prayed that the proceedings initiated in the SCN be closed and:

A. Penalty should not be imposed under Section 114(a) of the Customs Act, 1962

B. Penalty should not be imposed under Section 117 of the Customs Act, 1962

We also crave leave to add, amend, modify, rescind, supplement or alter any of the grounds stated hereinabove either before passing any order or at the time of the hearing.

Thanks, and Regards,

Authorized Signatory,



For India Medtronic Pvt Ltd

Name: Elangovan Mani

Title: Deputy manager