

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 1

CUSTOMS Appeal No. 10849 of 2021-DB

(Arising out of OIA-MUN-CUS-000-APP-279-307-19-20 dated 28.02.2020 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-MUNDRA)

**GLANBIA PERFORMANCE NUTRITION
INDIA PVT LIMITED**

502/504, 5TH FLOOR, STAR HUB, BUILDING, NO.2,
NEAR ITC MARATHA HOTEL, SAHAR ROAD, ANDHEDI
MUMBAI-MAHARASHTRA

.....APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS –MUNDRA RESPONDENT

OFFICE OF THE PRINCIPAL COMMISSIONERATE OF CUSTOMS, PORT USER BULD.
CUSTOM HOUSE MUNDRA KUTCH, GUJARAT-370421

WITH

- (i) Customs Appeal No. 10850 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (ii) Customs Appeal No. 10851 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (iii) Customs Appeal No. 10852 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (iv) Customs Appeal No. 10853 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (v) Customs Appeal No. 10854 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (vi) Customs Appeal No. 10855 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (vii) Customs Appeal No. 10856 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (viii) Customs Appeal No. 10857 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (ix) Customs Appeal No. 10858 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (x) Customs Appeal No. 10859 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xi) Customs Appeal No. 10860 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xii) Customs Appeal No. 10861 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xiii) Customs Appeal No. 10862 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xiv) Customs Appeal No. 10863 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xv) Customs Appeal No. 10864 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xvi) Customs Appeal No. 10865 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xvii) Customs Appeal No. 10866 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xviii) Customs Appeal No. 10867 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xix) Customs Appeal No. 10868 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);

- (xx) Customs Appeal No. 10869 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xxi) Customs Appeal No. 10870 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xxii) Customs Appeal No. 10871 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xxiii) Customs Appeal No. 10872 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xxiv) Customs Appeal No. 10873 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xxv) Customs Appeal No. 10874 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xxvi) Customs Appeal No. 10875 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xxvii) Customs Appeal No. 10876 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);
- (xxviii) Customs Appeal No. 10877 of 2021 (GLANBIA PERFORMANCE NUTRITION INDIA PVT LIMITED);

(Arising out of OIA-MUN-CUS-000-APP-279-307-19-20 dated 28.02.2020 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-MUNDRA)

APPEARANCE:

Shri. V. Lakshmikumaran, Sh.Manish Jain, Sh. Sidhant Indrajeet and Ms. Shruti Khanna, Advocates, for the Appellant

Shri. G. Kirupanandan, Superintendent (Authorized Representative)for the Respondent

CORAM: HON’BLE MR. RAJU, MEMBER (TECHNICAL)
HON’BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)

Final Order No. A/ 11846-11874 /2023

DATE OF HEARING: 11.05.2023
DATE OF DECISION:01.09.2023

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These appeals have been filed by the appellants against change of classification of the goods by the original and first appellate authority.

2. Learned counsel for the appellant stated that M/s. Glanbia Performance Nutrition (India) Pvt. Ltd., the Appellant, is engaged in the business of importing and selling nutritional supplements in India. In this batch of appeals, the Appellant is contesting the combined first appellate order issued vide Order-in-Appeal No. MUN-CUSTOM-000-APP-279 to 307-19-20 dated 28.02.2020 passed by Commissioner of Customs (Appeals), Ahmedabad. Learned counsel for the appellant pointed out that Commissioner (Appeals) changed the classification for impugned goods as detailed in Table below:

Summary of classification dispute			
S. No.	Product Name	Department’s Classification	Appellant’s Classification

1.	BSN Syntha 6 Chocolate	21061000	18069040
2.	BSN Truemass 1200 Chocolate	21061000	18069040
3.	Isopure Low Carb – Chocolate	21061000	18069040
4.	Isopure Zero Carb – Chocolate Mint	21061000	18069040
5.	Optimum Nutrition 100% Casein- Chocolate Supreme	21061000	18069040
6.	Optimum Nutrition 100% Whey Gold Standard- Chocolate	21061000	18069040
7.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Hazelnut	21061000	18069040
8.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Malt	21061000	18069040
9.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Mint	21061000	18069040
10.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Peanut Butter	21061000	18069040
11.	Optimum Nutrition 100% Whey Gold Standard- Cookies and Cream	21061000	18069040
12.	Optimum Nutrition 100% Whey Gold Standard- Double Rich Chocolate	21061000	18069040
13.	Optimum Nutrition 100% Whey Gold Standard Isolate – Chocolate	21061000	18069040
14.	Optimum Nutrition 100% Whey Gold Standard Isolate – Chocolate Bliss	21061000	18069040
15.	Optimum Nutrition 100% Whey Gold Standard- Mocha Cappuccino	21061000	18069040
16.	Optimum Nutrition 100% Whey Gold Standard- Rocky Road	21061000	18069040
17.	Optimum Nutrition Serious Mass – Chocolate	21061000	18069040

Learned counsel for the appellant argued that Ld. Commissioner (Appeals) and Learned AC have failed to consider the nature and composition of the impugned goods, and simplistically re-classified the impugned goods under residual tariff heading 2106 of Customs Tariff.

3. Learned counsel for the appellant stated that the Appellant is engaged, *inter alia*, in the import, storage, marketing, sales, and distribution of impugned goods in India. Appellant have started directly importing the impugned goods into India from March 2019from its related supplier, *i.e.*, M/s. Glanbia Nutritionals (Ireland) Ltd. In view of the Appellant’s relationship with the foreign supplier, valuation aspect of the transaction was referred to Special Valuation Branch (**SVB**) for further scrutiny. Accordingly, the goods imported by the Appellant have been assessed provisionally in terms of Section 18. The bills of entry against which impugned OIO and Order in Appeal was issued, have not yet been finalised.

4. Learned counsel for the appellant pointed out that while the assessments continued to be provisional for the afore-mentioned reasons in respect of the impugned bills of entry, the Respondent alleged that the impugned goods are properly classifiable under CTH 2106 of Customs Tariff. For this reason, the clearance in some of the Bills of Entry was not permitted. Learned counsel for the appellant pointed out that notwithstanding the provisional nature of assessments due to ongoing SVB proceeding, the Respondent chose to issue a speaking order under Section 17 of the Customs Act, 1962 seeking to classify the impugned goods under CTI 2106 10 00 and re-assessed the Bills of Entry. This required the appellant to deposit additional duty and interest under protest and seek clearance of the impugned goods. Ld counsel for the appellant pointed out that aggrieved by the impugned OIO, the Appellant filed appeals before Learned Commissioner (Appeals) disputing the re-assessment and change in classification of the goods mentioned in **Table** above. The Learned Commissioner (Appeals) upheld the classification concluded by Learned AC vide a common impugned order. Learned counsel for the appellant pointed out that the primary reasons for finding against the Appellant are provided below:

- Predominant ingredient: Impugned goods contain 72% protein with 'Whey Protein Isolate' and 'Whey Protein Concentrate' being the main ingredients.
- Common Parlance: In common parlance the impugned goods are known as nutritional supplements consisting of whey protein concentrates.
- Note 5 to Chapter 21 of Customs Tariff includes Protein Concentrates and suggests classification under CTH 2106.
- Cocoa is not the main ingredient in the impugned goods.

5. Learned counsel for the appellant argued that without considering the submissions made by the Appellant, the classification mentioned in **Column-3** to **Table** above was upheld by Ld. Commissioner (Appeals). Ld counsel for the appellant pointed out that aggrieved by the classification of impugned goods concluded vide the impugned order, Appellant filed 29 individual appeals before the Tribunal stated to be involving same issue.

6. Learned counsel for the appellant argued that the products mentioned in **Table** above, include nutritional supplements, pre-workout beverages and general health products, sports supplements, protein products in powder format and ready-to-drink format. These products are whey protein powders containing cocoa in different proportions.

Accordingly, the impugned goods in the general trade parlance are considered as **nutritional products broadly understood as protein powders with cocoa**. In other words, the impugned goods are **identifiable as chocolate protein powders/chocolate-flavoured protein powders**. Ld counsel for the appellant argued that the aforementioned understanding in the trade parlance is further contributed by the fact that the labels of impugned goods refer such products as “*Gold Standard 100% Whey (Chocolate Peanut Butter)*”, “*Isopure Low Carb (Naturally and Artificially Flavoured Chocolate)*”, amongst others. He pointed out that the ingredients mentioned on the label also mention cocoa as an ingredient in the food preparation. He argued that on perusal of Bills of Material, it is evident that the impugned goods contain differential amount cocoa and protein content. However, the impugned goods have been classified merely on the basis of the presence of protein content without reference to the appropriate chapter headings and discussion on the General Rules of Interpretation of the Customs Tariff. The supplier of the Appellant has shared a bill of material for each impugned product indicating the raw materials used in the food preparation.

7. Learned counsel for the appellant argued that the following are key issue under consideration before this Hon’ble Tribunal:

- (i) Whether the impugned goods are classifiable under CTH 1806 or CTH 2106 of Customs Tariff?
- (ii) Whether the Respondent is entitled to do piece-meal finalisation of provisional assessment?

The Ld counsel has conceded on the second issue and sought that the issue of classification may be finalised by the tribunal as is apparent from the submissions recorded in para 30 below. Therefore the only issue which remains to be decided is if the impugned goods are classifiable under CTH 1806 or CTH 2106 of Customs Tariff.

8. On the merits of classification Learned counsel for the appellant argued that before getting into the classification of impugned goods, it is important to analyse the general rules governing classification of goods under Customs Tariff. He argued that it is trite law that a product is to be classified basis the condition in which such goods are presented for clearance to the Customs Authorities. He relied on the following decisions

- (i) ***Dunlop India Ltd. v. UOI* 1983 (13) E.L.T. 1566 (SC);**
- (ii) ***Commissioner v. Sony India Ltd.* 2008 (231) E.L.T. 385 (S.C.)].**

He further argued that the appropriate classification of goods is determined by following the General Rules for the Interpretation of Import Tariff ("**GIR**"). He argued that for the purposes of present submission, it is important to consider GIR Rule 1, 3(a) and 6, which must be applied sequentially. He relied on the following

- (i) **Taj Sats Air Catering Ltd. v. CC Ex., Delhi-II, 2016 (334) E.L.T. 680 (Tri-Del.);**
- (ii) **Circular 36/2013-Cus. Dated 05.09.2013**

He argued that as per the GIR Rule 1, the classification of goods must be done in accordance with the Chapter Heading (CTH) and any relevant Section and Chapter Notes. These Notes provide detailed explanation as to the scope and ambit of the respective Sections and Chapters under Customs Tariff. He relied on the following decisions

- (i) **Saurashtra Chemical, Porbandar vs. Collector of Customs, 1986 (23) ELT 283 (Tri-LB) [upheld in1997 (95) ELT 455 (SC)];**
- (ii) **Central Excise vs. Simplex Mills Co. Ltd, 2005(181) E.L.T. 345 (S.C) and**
- (iii) **CC, ICD, New Delhi v. Industrial Importers, 2014 (300) E.L.T. 584 (Tri-Del)].**

He argued that only when the goods cannot be classified in terms of GIR Rule 1 and 2, recourse can be made to GIR Rule 3(a), which provides that the heading which provides the most specific description must be preferred. Lastly, GIR Rule 6 requires that while interpreting the sub-headings of the tariff for classification, the guidance of the GIRs can be applied *mutatis mutandis* to other levels. He further argued that in addition to the foregoing rules of classification, for purposes of uniform interpretation of the Harmonized System of Nomenclature (hereinafter referred to as "**HSN**"), WCO has published detailed **Explanatory Notes to HSN** which have long been recognized as a safe guide to interpret the Customs Tariff. He relied on the following decisions

- (i) **O.K. Play (India) vs. CCE, (2005) 180 ELT 300 (SC 3-member bench);**
- (ii) **CC. Ex., Pune-I v. Praj Industries, 2009 (242) E.L.T. 430 (Tri-Mum);**

9. He argued that on application of GIR Rule 1, the following are the relevant CTH under consideration:

CTH	PARTICULARS
1806	Chocolate and other food preparations containing cocoa
1901	Malt extract; Food preparations of flour, groats, meal,

	starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; Food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included
2106	Food preparations not elsewhere specified or included

He argued that in the light of the aforementioned relevant CTHs, it would be prudent to now examine the scope of each of the aforementioned CTHs.He argued that that CTH 1806 of Customs Tariff covers “*Chocolate and other food preparations containing cocoa*”. The precise heading along with the entry has been provided hereinbelow for the ease of reference:

Tariff Item	Description of goods	Unit	Rate of duty	
			Std.	Pref. Areas
(1)	(2)	(3)	(4)	(5)
1806	Chocolate and other food preparations containing cocoa	Kg.		-
[...]	[...]	[...]	[...]	[...]
1806 90	- Other	Kg.	30%	-
1806 90 10	--- Chocolate and chocolate products		30%	
1806 90 20	--- Sugar confectionary containing cocoa		30%	
1806 90 30	---- Spreads containing cocoa		30%	
1806 90 40	---- <u>Preparations containing cocoa for making beverages</u>		30%	
1806 90 90	---- Other			

He argued that the phrase “*food preparation*” have not been defined in the Customs Tariff Act or Explanatory Notes. Hence, emphasis must be laid on the plain meaning of the phrase and its use in general parlance. He argued that the term ‘preparation’ has been defined in **Kothari Chemicals v. UOI, 1996 (86) E.L.T.** and **Reckitt and Colman of India Ltd., Calcutta v. CCE, Calcutta, 1985 (22) ELT 216 (Tribunal)** as products made from separate components. Thus, a product can be categorized as ‘food preparation’ when there is a process undertaken to give rise to a ‘prepared food’ that is different from its ingredients. He argued that all the CTHs under consideration deal with “food preparation”.

10. He argued that GIR Rule 1 provides that the classification of products must also be in terms of relative Section and Chapter Notes. In

this regard, Chapter Note to Chapter 18 of Customs Tariff provides the following:

*"This Chapter **does not cover the preparations** of headings 04.03, **19.01**, 19.04. 19.05, 21.05, 22.02, 22.08, 30.03 or 30.04"*

He argued that that Chapter 18 only covers such cocoa and cocoa preparations which are not covered any of the aforementioned headings. He argued that HSN General Explanatory Notes to Chapter 18 provides that this Chapter covers *"cocoa (including cocoa beans) in all forms, cocoa butter, fat and oil and preparations **containing cocoa (in any proportion)**", except for the aforementioned exclusions. He argued that this view is further corroborated by the fact that HSN Explanatory Notes to CTH 1806provides that it includes *"all food preparations containing cocoa (other than those excluded in the General Explanatory Note to this Chapter)"*.He argued that mere perusal of the aforementioned enlisted headings, it can be seen that the goods under consideration are not likely to be covered under any other CTH, except CTH 1901 of Customs Tariff, which requires further analysis. The CTH 1901 is extracted hereinunder:*

1901	<i>Malt extract; food preparations of flour, groats, meal , starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; <u>food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included</u></i>
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He argued that CTH 1901 of Customs Tariff covers *"food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included"*. He pointed out that similar narration has also been provided in HSN General Explanatory Notes to Chapter 19. CTH 1901 covers the following:

- (i) 'food preparations' of CTH 0401 to CTH 0404 of Customs Tariff; and
- (ii)It contains 'less than 5%' of defatted cocoa by weight.

He argued that in case of food preparation of whey of CTH 0401 to CTH 0404 containing defatted cocoa more than or equal to 5% by weight (defatted), such food preparation would not be classified under CTH 1901 of Customs Tariff. He argued that this view is further augmented by specific exclusion provided in **HSN Explanatory Note to Chapter 18,**

HSN Explanatory Note to CTH 1901, and **HSN Explanatory Notes to CTH 2106** which provides that food preparations of CTH 0401 to CTH 0404 containing less than 5% cocoa (by weight) are instead covered under CTH 1901. He argued that if the product under consideration does not satisfy the dual condition as summarised in Para above, such goods irrespective of their cocoa content are classifiable under CTH 1806 of Customs Tariff. He relied on HSN Explanatory Notes to CTH 2106 and HSN Explanatory Notes to CTH 1806.

11. He argued that CTH 2106, covers "*Food preparations* not elsewhere specified or included". In other words, for classification under CTH 2106 of Customs Tariff requires two conditions to be satisfied, namely:

- a. It must a food preparation;
- b. It must not be specified or included elsewhere.

He argued that similar interpretation has also been provided under **HSN Explanatory Note to CTH 2106** which specifically mentions that CTH 2106 only covers those goods which are not covered under any other heading of the Nomenclature. He argued that the point of distinction as per **HSN Explanatory Notes** read with Customs Tariff in respect of CTH 1806, CTH 1901 and CTH 2106 is as follows:

- (i) If a food preparation contains cocoa (other than defatted cocoa) in **any proportion**, then it is classifiable under CTH 1806
- (ii) Food preparations of CTH 0401 to CTH 0404 containing **less than or equal to** 5% of cocoa on defatted basis are classifiable under CTH 1901;
- (iii) Food preparations of CTH 0401 to CTH 0404 **containing more than** or equal to 5% of cocoa (defatted basis) are classifiable under CTH 1806;
- (iv) Lastly, if the goods under consideration are not classifiable under the aforementioned CTHs, such goods can be classified under CTH 2106 of Customs Tariff.

He argued that in respect of classification under CTH 1806, CTH 1901 and CTH 2106, the impugned goods being in the nature of 'food preparations', the preliminary condition under each of the aforementioned CTH is satisfied. He argued that for classification under CTH 1901, the impugned goods contain albumin and other protein concentrates which are acting as the base material. He argued that the impugned goods are food preparations having constituent ingredients from CTH 3502 and CTH 3504, and are not food preparations of CTH 0401 to CTH 0404. He argued that the impugned goods do not satisfy the condition of classification under CTH 1901 of Customs Tariff.

Furthermore, he argued that cocoa used in the food preparation is not defatted cocoa. He argued that the impugned goods are in the nature of “*food preparations*”. This fact is undisputed between the parties. It is on this ground alone, classification under CTH 3502 and CTH 3504 of Customs Tariff are ousted as they do not relate to food preparations.

12. He argued that a combined reading of HSN Explanatory Notes to CTH 2106, HSN Explanatory Notes to CTH 1806 read with HSN General Explanatory Notes to Chapter 18 shows that CTH 1806 covers all other food preparations containing any amount of cocoa. He argued that in the present case, the impugned goods have cocoa content (not defatted) between the range of 1 to 10%. Therefore, he argued that the impugned goods merit classification under CTH 1806 of Customs Tariff, which covers “*Chocolate and other food preparations containing cocoa*”.

13. He relied on similar observations made by the Authority on Advance Ruling (AAR) in the decision of *In Re: Karnataka Co-operative Milk Producers Federation Ltd.*, 2021 (46) G.S.T.L. 160 (A.A.R. - GST - Kar.). He argued that on logically extending GIR Rule 6 read with GIR Rule 1 to sixth and eight-digit level, the impugned goods are appropriately classifiable under CTI 1806 90 40 of Customs Tariff, which reads as “*Chocolate and other food preparations containing cocoa: Other: Preparations containing cocoa for making beverages*”.

14. He further argued that the issue in respect of “Cookies & Cream” flavoured whey protein powder came up for discussion before the 68th WCO’s Harmonized System Committee of September 2021. He argued that this decision, having Doc. NC2855Eb/K/6, WCO’s HS Committee concluded that “Cookies & Cream” flavoured whey protein powder containing cocoa (along with processed alkali) of ~1% are appropriately classifiable under CTH 1806 90. He argued that the product at S. No. 11 of Table above are similar to the goods under consideration before WCO’s HS Committee. Hence, the WCO’s HS Committee decision applies to the present case.

15. He argued that in the light of the foregoing submissions, the classification undertaken by the Appellant and appearing in Column (4) of Table (above) is correct. Thus, the duty incidence in respect of impugned goods have been correctly discharged by the Appellant.

16. Ld Counsel relied on the WCO’s HS Committee decision, and other international rulings passed by the National Commodity Specialist

Division, US Customs and Border Protection (US Customs) to hold that impugned goods are classifiable under CTSN 1806 90 of HTSUS. Reliance was placed on

- (i) US Cross Ruling N025135 dated 15.04.2008** and
(ii) US Cross Ruling N204559 dated 02.03.2012

dealing with similar product classification wherein it was held that “100% Whey Classic- Chocolate” and “100% Whey Gold Standard-Chocolate” are classifiable under CTSN 1806.90.

17. Learned Counsel also relied on *Ruling No. 1E17NT-14-4988-04* dated 08.06.3027, EU Taxation and Customs Union wherein it was held that impugned goods are classifiable under CTSN 1806 90 of HSN. Ld Counsel also relied on Canada Border Services Agency *Advance Ruling No. C-2016-002882* dated 19.10.2016, wherein it was held that pre and post-workout protein snack based on whey protein isolate and containing cocoa powder are classifiable under CTSN 1806 90. Ld Counsel also relied on WCO’s 58th Session of Harmonized System Committee in October 2016 which classified ‘sugar coated milk chocolate sweets’ under CTH 1806 merely because of the cocoa content. Similar conclusions were also reached in WCO’s 68th Session of HS Committee in September 2021 pertaining to “Cookies & Cream” flavoured whey protein powder.

18. Learned Counsel argued that in the case of *Jagson International Ltd. v. CC*, 2006 (199) E.L.T. 553 (T), the Tribunal held as follows:

“India is a signatory to the International Convention on the Harmonized Commodity Description and Coding System which was devised, inter alia, to facilitate international trade and to facilitate the standardization of trade documentation and the transmission of data. The Harmonised System was intended to be used for the purposes of freight tariffs and transport statistics and intended to be incorporated into commercial commodity description and coding systems to the greatest extent possible, as contemplated by the preamble to the Convention. It was undertaken by its “Contracting Parties” that from the date on which the convention entered into force in respect of it, its customs tariff and statistical nomenclatures shall be in conformity with the Harmonised System. Each contracting party undertook in respect of its Customs tariff and statistical nomenclatures that: -

“(i) it shall use all the headings and subheadings of the Harmonised System without addition or modification, together with their related numerical codes;

(ii) it shall apply the General Rules for the interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes, and shall not

modify the scope of the Sections, Chapters, headings or subheadings of the Harmonised System; and
(iii) it shall follow the numerical sequence of the Harmonised System."

(Emphasis Supplied)

Learned Counsel argued that the HSN acts as the basis for the classification of the goods across the world. He submitted that the Indian Courts must also march hand-in-hand with the decisions rendered by the foreign counterparts in interpreting the treaties to which India is signatory relating to classification of goods. Reliance in this regard was placed on the decision of the Hon’ble Supreme Court in **CC v. G.M. Exports, 2015 (324) ELT 209 (SC)**. Similarly, reliance was also be placed on the decision of **CC v. C-Net Communication (I) Pvt. Ltd., 2007 (216) E.L.T.** wherein the Hon’ble Supreme Court relied upon the decision of Canadian Customs Tribunal.

19. Learned Counsel argued that globally the impugned goods are classified under CTH 1806 only. Reliance in this regard is placed on sample import documents on import of cocoa-based whey protein powders. Therefore, Ld Counsel argued that, impugned goods containing cocoa are appropriately classifiable under CTSN 1806 90 of Customs Tariff.

20. Learned counsel submitted that Ld. Commissioner (Appeals) classified the impugned goods under CTH 2106 of Customs Tariff. CTH 2106 of Customs Tariff reads as under:

<i>Tariff Item</i>	<i>Description</i>
<i>2106</i>	<i>Food Preparations Not elsewhere specified or included</i>
<i>2106 10 00</i>	<i>- Protein concentrates and texture protein substances</i>

21. Learned Counsel argued that Ld. Commissioner (Appeals), owing to the high protein content in the goods, directly jumped to the conclusion that such goods are specifically covered under CTI 2106 10 00 which covers “*Protein concentrates and texture protein substances*” without exhausting sequential application of GIR Rules.Ld Counsel argued that it is important to revisit GIR Rule 1 for the purpose of classification of goods under Customs Tariff. Under this rule, the goods under consideration must be classified in accordance with the terms of the Headings. In other words, the impugned goods must first satisfy the heading of CTH 2106, which covers “*Food preparations not elsewhere*

specified or included", before moving to the sub-heading level which *inter alia* covers "Protein concentrates".

22. Learned Counsel argued that the impugned goods on the basis of their cocoa content is specifically covered under CTH 1806, and therefore, condition (ii) i.e.

"It must not be specified or included elsewhere."

under CTH 2106 is not satisfied. Hence, the impugned goods are not classifiable under CTH 2106 of Customs Tariff. Ld Counsel argued that such goods would also not be classifiable under tariff sub-heading 2106 10 00 of Customs Tariff.

23. Learned Counsel also relied on the HSN Explanatory Note to CTH 2106 which specifically mentions that CTH 2106 only covers those goods which are not covered under any other heading of the Nomenclature. Relevant extract reproduced hereinunder:

"Provided that they are not covered by any other heading of the Nomenclature, this heading covers:

(A) Preparations for use, either directly or after processing [...]

(B) Preparations consisting wholly or partly of food stuffs [...]"

Ld Counsel argued that the aforementioned conclusion is also supported by virtue of specific exclusion provided under HSN Explanatory Notes of 2022 for CTH 2106. Here, it is relevant to note that under HSN Explanatory Notes of 2022 of CTH 2106, food preparations containing cocoa have been specifically excluded from falling under CTH 2106. Relevant extract reproduced hereinunder:

"[...] This heading further excludes

(a) Preparations containing cocoa, put up as food supplements for human consumption (heading 18.06)"

Learned Counsel argued that impugned goods are correctly classifiable under CTH 1806 and therefore they are *ipso facto* excluded from the scope of CTH 2106 of Customs Tariff.

24. Learned Counsel argued that as per GIR Rule 3(a), the heading that provides the most specific description of the goods shall be preferred to headings providing a more general description. It is pertinent to note that GIR Rule 3(a) envisages comparison at the CTH level only. Ld Counsel argued that a bare perusal of CTH 1806 which covers '*Chocolate*

and other food preparations containing cocoa and CTH 2106 which covers 'Food preparations not elsewhere specified or included', it is evident that impugned goods are covered more specifically under CTH 1806 or CTH 1901. Thus, on application of GIR Rule 3(a), the impugned goods are rightly classifiable under CTH 1806. He placed reliance on the case of *CC (Import) vs Abbott Healthcare Pvt. Ltd.*, 2015 (2) TMI 740 wherein the CESTAT has held that preparations for infant should not be classified under CTH 2106 which covers "Food preparations not elsewhere specified or included" as they are specifically covered by CTH 1901 which reads as "Preparations for infant use". He also placed reliance on the case of *Mauri Yeast India Pvt. Ltd. vs. State of UP*, 2008 (225) ELT 321 (S.C.) wherein it was held by the Hon'ble Supreme Court that if there is a conflict between two entries one leading to an opinion that it comes within purview of tariff entry and another the residuary entry, the former should be preferred.

25. He argued that it is settled law that in cases of the disputes involving classification of goods if two views are possible then the one in favour of the assessee should be preferred. Reliance in this regard was placed on the following judicial precedents:

- *India Steel Industries v. UOI*, 2018 (359) ELT 465 (Bom)
- *CC, Madras vs. Lotus Links* 1996 (87) E.L.T. 580 (S.C.);
- *Poulose and Mathen vs. CCE*, 1997 (90) E.L.T. 264 (S.C.);
- *CCE, Calcutta vs. Calcutta Springs Ltd.*, 2008 (229) E.L.T. 161 (S.C.);
- *Ocean Marketing v. CCEx&ST, Jaipur*, 2017 (348) E.L.T. 269 (Tri-Del).

Learned Counsel argued that Commissioner (Appeals) in Para 6.1 and Para 6.2 of the impugned order has relied upon the observations by Ld. AC regarding treatment of the product in the commercial parlance as 'nutritional supplements'. Accordingly, Ld. Commissioner (Appeals) confirmed the classification under CTH 2106 of Customs Tariff. He argued that the doctrine of commercial nomenclature or trade understanding must be departed where the statutory context in which the tariff item appears requires such departure. He placed reliance on decision of the Hon'ble Supreme Court in the case of *Akbar Badruddin Jiwani v. Collector of Customs*, 1990 (47) ELT 161 (SC). The Hon'ble Supreme Court in this case was dealing with the classification of 'marble'. This term in the technical criteria required gravity of 2.5% or more. Accordingly, the Hon'ble Supreme Court discarded the commercial understanding of the product and held that where HSN contains specific definition then such

definition must be preferred, and doctrine of commercial nomenclature must not be applied. Ld Counsel argued that similar observations have also been made by the Hon'ble High Court of Mumbai in the case of *Kulkarni Black & Decker Ltd. v. UOI*, 1992 (57) E.L.T. 401 (Bom). The relevant extract from *Kulkarni (Supra)* summarizing the legal position has been extracted herein under for ease of reference:

*"It is now settled by catena of decisions of the Supreme Court and this Court that **it is not permissible to take into consideration the trade meaning or commercial nomenclature when the definition provided in the statute is extremely clear and does not suffer from any ambiguity. In case where the application of commercial meaning or trade nomenclature runs counter to the statutory context in which the word is used in the Tariff Item, then the trade meaning or commercial nomenclature should be ignored.**"*

(Emphasis Supplied)

Learned Counsel argued that the trade/ commercial parlance is to be examined only if the tariff entry is ambiguous. Reliance in this regard is being placed on *Nirlon Synthetic Fibres v. UOI*, (1999) 110 E.L.T. 445 (Bom) (DB) and *Panama Chemical Works v. UOI*, 1992 (2) E.L.T. 241 (M.P). Ld Counsel argued that in the present case, cocoa products have been defined under the HSN Explanatory Notes to CTH 1806, CTH 1901 and CTH 2106. Ld Counsel argued that there is no ambiguity in respect of classification under such CTH. Hence, the reliance placed on the commercial parlance for the purpose of concluding classification of the impugned goods is incorrect.

26. Learned Counsel argued that the impugned goods are marketed as cocoa flavoured product only. Further, as submitted above, the impugned goods contain cocoa (along with alkali) within the range of 1 to 10 %, thereby providing cocoa benefits to the user of impugned goods. Ld Counsel argued that the impugned goods are commercially recognised as cocoa flavoured food preparations only.

27. Learned Counsel argued that Commissioner (Appeals) in Para 6.1 and 6.2 of the impugned order took a simplistic way of deciding the classification of impugned goods basis the pre-dominant weight or volume of the protein content. Ld Counsel argued that Commissioner (Appeals) directly applied the essential character test laid down under GIR Rule 3(b). He argued that it is trite law that GIR Rules must be applied in a sequential manner. Thus, before applying GIR Rule 3(b), the

classification of goods must be undertaken in terms of GIR Rule 1, GIR Rule 2 and GIR Rule 3(a).

28. Learned Counsel argued that merely on application of GIR Rule 1, *i.e.*, relying upon Section and Chapter Notes read with HSN Explanatory Notes, the impugned goods are classifiable under CTH 1806. Ld Counsel argued that the classification of impugned goods basis the pre-dominant weight [GIR Rule 3(b)] is erroneous. Reliance in this regard is being placed on the decision of *CC (Prev) Kolkata v. Anutham Exim Pvt. Ltd.*, 2021 (378) E.L.T. 611, wherein the Hon'ble CESTAT at Kolkata held that classification based on predominant test based on composition of the product is incorrect in law and may give rise to absurd classification result.

29. Learned Counsel argued that Ld. Commissioner (Appeals) in Para 6.1 of impugned order, observed that cocoa has not been mentioned as the main ingredient on the label of the product. He pointed out that the name on the label and Bills of Material gives reference to the cocoa content of the product. Ld Counsel argued that the label of the impugned goods invariably mentions the presence of cocoa on the product name.

30. Learned Counsel argued that the impugned goods are more appropriately classifiable under CTH 1806 of Customs Tariff and on account of failure of revenue to justify classification under the CTH 2106 of Customs Tariff, the entire proceedings initiated by the Department is unsustainable. He placed reliance on the decision of *L&T v. CC, Mundra*, 2021-VIL-224-CESTAT-AHM-CU wherein this Hon'ble Tribunal whilst relying on the *dictum* of *Hindustan Ferrodo Ltd. v. Collector of Central Excise, Bombay*, 997 (89) E.L.T. 16 (S.C.), *HP Chemicals Ltd. v. CCEx., Chandigarh*, 2006 (197) E.L.T. 324 (S.C.), *Pepsico Holding Pvt. Ltd. v. CCEx, Pune-III*, 2019 (25) G.S.T.L. 271 (Tri. – Mum) and *Warner Hindustan Ltd. v. Collector of CE, Hyderabad*, 1999 (113) E.L.T. 24 (SC) held as follows:

"10. In view of the above settled law, irrespective whether the classification claimed by the Appellant is correct or not since the classification proposed by the Revenue is absolutely incorrect, the entire case of the Revenue will not sustain. Therefore, we are not addressing the issue that whether the Appellant's classification was correct or otherwise. The Appellant also made an alternate submission that even if the classification declared by them under CTH 8306 2110 is incorrect the goods are otherwise classifiable under CTH 9703 in such tariff entry also the IGST Rate is 12% and therefore, there will be no revenue implication. Though alternate

classification suggested by the Appellant appears to be prima facie correct but since we have already taken a view that Revenue's claim of classification under CTH 8311 is absolutely incorrect and it is nobody's case in the Show Cause Notice that the goods are classified under CTH 9703 we are not addressing this issue. However, since the Revenue's claim of classification is held to be incorrect the entire proceeding of the Revenue is quashed. The impugned order is set aside. The appeal is allowed with consequential relief, if any arise, in accordance with law."

Learned Counsel argued that Ld. AC and Ld. Commissioner (Appeals) passed the orders while the assessment was provisional due to matter pending with SVB. Ld Counsel argued that the assessments cannot be finalised in a piecemeal manner. Ld Counsel argued that that a request for provisional assessment was made consequent to investigations initiated by the SVB in respect of imports from related party. However, till the date of hearing (25.08.2022), no Investigation Report pertaining to the import of goods from related party has been issued by the SVB. Thus, the provisional assessment of impugned BOE's are yet to be finalised by the proper officer in terms of Customs Act. Learned Counsel argued that despite the provisional nature of assessment, speaking order was passed in terms of Section 17(4) read with Section 17(5) of Customs Act on the issue of classification. Ld Counsel argued that it is trite law that the assessment cannot be undertaken by Learned AC in a piecemeal manner. Learned Counsel argued that during the pendency of the SVB investigation, passing of speaking order on issue of classification under Section 17(5) of Customs Act must be discouraged. He places reliance on the decision of *CCEx, Madras v. Enfield India Ltd.*, 1999 (114) E.L.T. 162 (Tri) wherein the Hon'ble CEGAT held that more than one order finalising the assessment cannot be made by the proper officer. In this case, the Hon'ble Tribunal noted that once an assessment is provisional, it is deemed to be provisional on all counts. He also relied on the case of *ITC Ltd. v. Collector of Central Excise, Patna*, 1998 (102) E.L.T. 660 (Tri), where the Tribunal held that issues of classification cannot be separated from the question of valuation. Thus, provisional assessment remains provisional in respect of all issues, which must be adjudicated together and not in a piecemeal manner. Accordingly, the Tribunal remanded the matter back for fresh adjudication including all the issues involved therein [*In Re: Castrol India Ltd.*, 2001 (138) E.L.T. 979 (Commr. Appls)]. He also relied on the case of *Nitco Tiles Ltd. v. CC (Export Promotion), Mumbai*, in Order No. S/491 to 497/08/CSTB/C-II

and A/485 to 491/08/CSTB/C-II dated 20.08.2008 [*Compilation*, p. 150]where taking note of the above-mentioned decision, remanded the case for fresh adjudication citing finalisation of provisional assessment in piecemeal manner. Ld Counsel argued that the impugned order results in multiplicity of proceedings and challenges the grundnorm as envisaged under the Customs Act. **Ld Counsel submitted that in order to conclude the classification dispute Tribunal may pass orders on the classification of the impugned goods determinatively.**

31. Learned AR pointed out that the goods imported and classification claimed by the appellant are as follows:-

Sl. No.	Name of product	CTH as per importer	Description in CTH
1	Nutritional Supplements Containing Cocoa	18069040	Preparations containing cocoa for making beverages.
2	Unflavoured Nutritional Substances	35040099	Peptones and their derivatives; other protein substances and their derivatives, not elsewhere specified or included; hide powder, whether or not chromed – Others.
3	Glutamine Powder	29241900	Acyclic amides (including acyclic carbamates) and their derivatives; salts therefor; - Others.
4	Creatine Powder	29252990	Carboxyimide-Function Compounds (Cluding Saccharin and its salts) and Imine-Function Compounds – Imines and their derivatives; salts thereof – Others

Learned AR pointed out that the Assessment of imported impugned goods was done provisionally for the following reasons:-

- (a) The issue regarding the relationship of the appellant with the foreign supplier viz., M/s. Glanbia Nutritionals (Ireland) Ltd, Ireland is under investigation before the Special Valuation Bench, Mumbai for SVB Investigation.
- (b) In addition to the above, the import goods have been mis-classified by the appellant instead of classifying them appropriately as given below:

Sl. No.	Name of product	CTH claimed by the appellant	CTH as per Department
(1)	(2)	(3)	(4)
1	Nutritional Supplements Containing Cocoa	18069040	21061000
2	Unflavoured Nutritional Substances	35040099	21061000
3	Glutamine Powder	29241900	21069099
4	Creatine Powder	29252990	21069099

Learned AR pointed out that the appellant has paid duty under protest on the imported goods under CTH No. 21061000 and CTH No. 21069099.

32. The Bills of Entry were re-assessed by way of Speaking Orders under Section 17(4) of the Customs Act, 1962 thereby the import goods are ordered to be classified under CTH 21061000 for Nutritional Supplements and under CTH No. 21069099 for Glutamine Powder and Creatine Powder. It was also ordered for vacation of protest for payment of customs duty. Aggrieved with the order of the assessment, the appellant have filed appeal before the Commissioner(Appeals), Customs, Ahmedabad. Ld AR pointed out that the appellant vide their letter dated 26-08-2022 have accepted the classification of Creatine Powder and Glutamine Powder under CTH No. 21069099.

33. Learned AR pointed out that the Labels of all the products produced by the appellant clearly mention that the main ingredients of the imported goods are “**Whey Protein Isolate (WPI) and Whey Protein Concentrate (WPC)**”. For example, the actual description of the import goods as declared in Bill of Entry No. 3139731 dated 07-05-2019 and their protein content per 100 grams as appearing in the label produced by the appellant, are given below:-

TABLE-A

Sl. No.	Description of the import goods	Unit Qty. in grams	Protein content in the import goods per 100 grams
1	On Ind 100% WGS AF/GF DBL Rich Choc 5 LB	100	78.90
2	On Ind 100% WGS AF Cookies & Cream 5 LB	100	72.70
3	BSN India True Mass Chocolate 5.82 LB	100	28.00
4	On Ind 100% WGS AF Cookies & Cream 5 LB	100	72.70
5	On Ind 100% WGS AF/GF DBL Rich Choc 5 LB	100	78.90
6	On Ind 100% WGS AF/GF DBL Choc 907 G	100	78.90
7	On Ind 100% WGS AF/GF DBL Choc 907 G	100	78.90
8	On Ind 100% WGS AF/GF DBL Choc 907 G	100	78.90
9	On Ind 100% WGS AF/GF DBL Choc 907 G	100	78.90
10	On Ind 100% WGS AF/GF Rocky Road 5 LB	100	76.00
11	On Ind 100% WGS AF/GF Mocha Capp 5 LB	100	75.00

Learned AR pointed out that from above table, it is evident that all the import items except item mentioned at Sl. No. 3 contain more than 72% protein in all the import goods. Thus, it is apparent that in the products imported as Nutritional Supplement, protein concentration is higher than 72%. Therefore, all the aforesaid products are clearly in the nature of

protein concentrates and are also being sold in the market so, by the appellant, therefore all these products are classified under CTH No. 21061000.

34. In respect of product at Sl. No. 3 of above table, the same contains 28% of protein and 55% carbohydrates. Thus, even this product is having the essential character of whey protein with carbohydrates as base material has rightly been declared on the labels and also being sold in the market so. Label of this product vis., BSN India True Mass Chocolate 5.82 LB (Nutrition Supplement) specifies as nutrition information of the product as under:-

Sl. No.	Value For	Quantity Per Serving	Quantity per 100 gms.	% Daily Values
1	Energy	2941 kJ/704 kcal	1782 kJ/426 kcal	26%
2	Protein	46 gm	28 gm	77%
3	Fat Total	17 gm	10 gm	57%
4	Saturated	4 gm	2 gm	-
5	Carbohydrate	90 gm	55 gm	-
6	Sugars	14 gm	8 gm	-
7	Sodium	300 mg	182 mg	24%

Learned AR pointed out that the above table reveals that BSN India True Mass Chocolate 5.82 LB (Nutrition Supplement) has protein of “77% daily values” ingredients as protein concentrate, soy lecithin, calcium caseinate, milk protein isolate, whey protein isolate, micellar casein, hydrolysed whey protein, egg whites, etc....”. Further, these products are known to buyers in the market as Whey Protein Concentrates. Therefore, in the trade and commercial parlance, identity/ classification of the import goods is clearly known as nutrition supplements consisting of whey protein concentrates which people take for the general well beings of humans.

35. Learned AR argued that the classification of import goods is to be determined as per the guidelines enunciated in “General Rules for the Interpretation of the Harmonized System”. It contains a set of 6 rules for classification of goods in the Tariff Schedule. These rules have to be applied sequentially.

36. Learned AR pointed out that the appellants have imported goods like Gold Standard 100% Whey, Isopure Protein Powder, Gold Standard 100% Isolate, Serious Mass, True Mass 1200, Syntha-6, etc. Ld AR

pointed out that these products are known in the market and by the public as "Nutrition Supplements". There is no dispute that the appellants have also declared these products as "Nutrition Supplements" in the Bill of Entries. He pointed out that these products are marketed in different flavours such as vanilla, strawberry, chocolate/cocoa, double rich chocolate, etc. Ld AR argued that the appellants have claimed classification of these products under CTH No. 18069040 as "Preparations containing cocoa for making beverages" under Chapter – 18 of the Customs Tariff Act, 1975 which covers "Cocoa and Cocoa Preparations". Ld AR argued that the products made from whey such as Whey Protein Concentrates and Whey Protein Isolates are not covered under chapter 18. The adjudicating authority clearly held that none of the labels of the import products mention Cocoa as the main ingredient of the import items for which classification has been claimed as falling under Chapter-18. Ld AR pointed out that merely because cocoa is added as a flavoring agent does not change the content, composition and character of these products and they do not become cocoa and cocoa preparations.

37. He argued that as per Supplementary Note – 5(a), protein concentrates and textured protein substances are covered under CTH 2106. The appellant have produced images of labels of some of the import goods. Ld AR pointed out that in these labels, "Chocolate" is mentioned as only a flavour but not as main constituent of the product. These products' main constituent is "protein and carbohydrate" and these products are known in the market as protein powder/ protein powder nutraceutical. These products are marketed as "Nutrition Supplements" with different flavours. For example, "GOLD STANDARD 100% WHEY PROTEIN POWDER" is marketed in different flavours such as Extreme Milk Chocolate, Delicious Strawberry, Vanilla Ice Cream and Double Rich Chocolate.

38. Learned AR pointed out that the appellants have submitted copies of commercial invoices. It can be seen that they have shown classification of same products under two different chapters of 18 and 21 for two different Flavors. Wherein product with description, "ON INDIA 100% WGS AF/GF MOCHA CAP 907G" is shown as covered under CTH No. 18069040 whereas another product with description, "ON INDIA 100% WGS AF/GF BANANA CRM 907G & ON INDIA 100% WGS AF/GF

STRAW 907G” are shown as covered under CTH No. 21061000. These products are known and sold in the market as “WHEY GOLD STANDARD”. The only difference is their flavour. Ld AR argued that mere addition of flavouring agent does not change the character, use or classification of the product.

39. Learned AR relied on the case of Wander Ltd Vs. Collector of Central Excise, Bombay, the Tribunal, Delhi – reported at 1999 (110) ELT 735 (Tribunal) to assert that protein concentrate are rightly classifiable under heading 2106 and not under chapter 4 as dairy product.

40. Learned AR relied on the case of Collector of Central Excise Vs. Frozen Foods Pvt. Ltd – reported at 1992 (59) ELT 279 (Tribunal), wherein it was held that dietary supplement ‘Surje’, consisting of whey protein and casein peptides (37%), carrier and sweetening agents (62%) and flavouring and vitamins (1%), put up in unit containers classifiable under sub-heading 2107.91 (presently covered under sub-heading 2106). Ld AR relied on the case of Commissioner of Customs(Import), Mumbai Vs. E. I. Dupant (I) Pvt. Ltd – reported at 2005 (190) ELT 20 (Tri.-Mumbai). Ld AR relied pointed out that the Tribunal while deciding similar issue of classification of Kit-Kat coated with chocolate in the case Nestle (India) Ltd Vs. CCE, Mumbai – 2000 (124) ELT 898 held that

“13. It might have been necessary, in view of the presence of chocolate, to refrigerate the product to prevent its melting or spoiling. That alone cannot justify the view that the product’s essential character of the product has been conferred upon it by chocolate. There is nothing to show that the buyers of the goods bought as chocolate, not as a combination of chocolate and biscuits; that it was the presence of the chocolate alone as distinct from the chocolate and biscuits which length of the product is appeal to customers. On the other hand, the market advertising brief produced by the appellant refers to the presence of the biscuit market as well as the chocolate market and it talks of the products as wafer covered with crisp chocolate and say that the product creates niche for itself, drawing from both the biscuit market as well as the chocolate market.”

This judgement in the case of Nestle (India) Ltd is also followed by the in the case of Little Star Foods Pvt. Ltd Vs. Commissioner of Central Excise, Hyderabad reported at 2006 (199) ELT 451 (Tri.-Bang.). In the case of Dhariwal Industries Ltd Vs. Commissioner of Central Excise, Pune-III reported at 2014 (304) ELT 585 (Tri.-Mumbai), the Tribunal, has held that

"4.2As per Rule 3(b), "Mixtures, composite goods consisting of different materials or made up of different components, and goods put up for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character. If this rule is applied, then the material which gives the essential character is the Pan Leaf Powder. Pan Leaf is part of a plant and preparation of pan leaves with other ingredients would merit classification under Heading 20.01 as preparation of fruits, nuts and vegetables and other parts of a plant prior to March, 2005 and under CETH 2008.9200 on or after March, 2005."

As per this judgement, product is to be classified based on its essential character. In the instant case, there is no dispute that the import goods are Nutrition Supplements made from Whey Protein Concentrate and Whey Protein Isolate. Ld AR argued that Tribunal in the case of Raptakos Brett & Co. Ltd Vs. Commissioner of C. Ex., Raigad – 2014 (307) ELT 565 (Tri.-Mumbai) held that to constitute protein concentrate, at least 70% of protein is required. It can be seen from the Annexure-A, import goods except goods at SI No. 7, 11 & 15, contain protein more than 70%. Hence these products can be classified as protein concentrates under CTH 21061000.

41. Learned AR argued that finalization of classification issue was under the competency of the adjudicating authority and the finalization on valuation issue was under SVB. That is the reason, the adjudicating authority in the order portion mentioned that "this order is issued without prejudice to the outcome of the issue of supplies from related party which is to be decided by the Special Valuation Branch, Mumbai".

42. Learned AR argued that it is not forthcoming whether the appellant have submitted labels of all their products, bills of materials, etc. before the adjudicating authority. It can be definitely said that all bills of materials submitted by the appellant before this hon'ble Tribunal are issued on 18-08-2022. These were not produced before the adjudicating authority or before the first appellate authority.

FINDINGS:

43. We have considered the rival submissions. After raising the ground of assessment being provisional and piecemeal finalisation of assessment the appellants have given up this issue. The Ld counsel has sought that the issue of classification may be finalised by the tribunal as is apparent

from the submissions recorded in para 30 above.The submission in this regard is reproduced below:

“Having said the foregoing, in order to conclude the classification dispute, it is most respectfully prayed before this Hon’ble Tribunal to pass orders on the classification of the impugned goods determinatively.”

In view of above, we proceed to decide the classification issue despite the assessment being provisional on account of Valuation.

44 The following table contains the classification sought by the appellant and the classification adjudicated by the Revenue.

S.No.	Product Name	Department’s Classification	Appellant’s Classification
1.	BSN Syntha 6 Chocolate	21061000	18069040
2.	BSN Truemass 1200 Chocolate	21061000	18069040
3.	Isopure Low Carb – Chocolate	21061000	18069040
4.	Isopure Zero Carb – Chocolate Mint	21061000	18069040
5.	Optimum Nutrition 100% Casein- Chocolate Supreme	21061000	18069040
6.	Optimum Nutrition 100% Whey Gold Standard- Chocolate	21061000	18069040
7.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Hazelnut	21061000	18069040
8.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Malt	21061000	18069040
9.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Mint	21061000	18069040
10.	Optimum Nutrition 100% Whey Gold Standard- Chocolate Peanut Butter	21061000	18069040
11.	Optimum Nutrition 100% Whey Gold Standard- Cookies and Cream	21061000	18069040
12.	Optimum Nutrition 100% Whey Gold Standard- Double Rich Chocolate	21061000	18069040
13.	Optimum Nutrition 100% Whey Gold Standard Isolate – Chocolate	21061000	18069040
14.	Optimum Nutrition 100% Whey Gold Standard Isolate – Chocolate Bliss	21061000	18069040
15.	Optimum Nutrition 100% Whey Gold Standard- Mocha Cappuccino	21061000	18069040
16.	Optimum Nutrition 100% Whey Gold Standard- Rocky Road	21061000	18069040
17.	Optimum Nutrition Serious Mass – Chocolate	21061000	18069040

45 The appellants have themselves ruled out the classification under chapter 4 or chapter 35 of the Customs tariff as the said headings do not relate to food preparations. In the written submissions they have argued as follows:

“B.2 Nature of food preparation:In the present case, on perusal of the Bills of Material and Labels available on **Page 288 and Page 273 of Additional Paper Book**, respectively, constituents of the impugned goods have undergone a process to make them independent of its constituents [**Process Chart, Additional Paper Book**, p. 305]. Hence, the impugned goods are in the nature of “*food preparations*”. This fact is undisputed between the parties. It is on this ground alone, classification under CTH 3502 and CTH 3504 of Customs Tariff are ousted as they do not relate to food preparations [**HSN Explanatory Notes to CTH 3502, Para (1), pg. VI-3502-1**; and **HSN Explanatory Notes to 3502, Para B (6), pg. VI-3504-1**] [*Compilation*, p. 33-34]

B.4 Coming to classification under CTH 1901, the impugned goods contain albumin and other protein concentrates which are acting as the base material [**Bill(s) of Material, Additional Paper Book**, p. 288-287].In other words, the impugned goods are food preparations of having constituent ingredients from CTH 3502 and CTH 3504, and are not food preparations of CTH 0401 to CTH 0404. Thus, it is submitted that the impugned goods do not satisfy the condition of classification under CTH 1901 of Customs Tariff. Furthermore, cocoa used in the food preparation is not defatted cocoa.”

They have themselves argued that the impugned goods are food preparations having constituent ingredients from CTH 3502 and CTH 3504 and are not food preparations of CTH 0401 to CTH 0404. They have also argued that the impugned goods do not satisfy the condition of classification under CTH 1901 of the Customs Tariff Act. They have also argued that the coco used by them in the food preparation is not defatted coco as required for classification under heading 1901. In view of the above, the only contesting classification that remain are CTH 1806 and CTH 2106.

46 In this regard the competing heading in the schedule to Custom Tariff Act 1975 in the instant case are reproduced below:

1806	CHOCOLATE AND OTHER FOOD PREPARATIONS CONTIANING COCOA			
1806 10 00	- Cocoa powder and other food preparations containing coca	Kg.	30%	-
1806 20 00	- Other preparations in blocks, slabs or bars weighing more than 2 kg or in liquid, paste, powder, granular or other bulk form in containers or immediate packings, of a content exceeding 2 kg.	Kg.	30%	-
	- Other, in blocks, slabs or bars:			
1806 31 00	-- Filled	Kg.	30%	-
1806 32 00	-- Not filled	Kg.	30%	-
1806 90	- Other:			
1806 90 10	--- Chocolate and chocolate products	Kg.	30%	-
1806 90 20	--- Sugar confectionary containing cocoa	Kg.	30%	-

1806 90 30	--- Spreads containing cocoa	Kg.	30%	-
1806 90 40	--- Preparations containing coca for making beverages	Kg.	30%	-
1806 90 90	--- Other	Kg.	30%	-

2106	FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED			
2106 1000	- Protein concentrates and textured protein substances	Kg.	40%	-
2106 90	- Other :			-
	--- Soft drink concentrates :			
2106 90 11	---- Sharbat	Kg.	150%	-
2106 90 19	---- Other	Kg.	150%	-
2106 90 20	--- Pan masala	Kg.	150%	-
2106 90 30	--- Betel nut product known as "Supari"	Kg.	150%	-
2106 90 40	--- Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrin syrup	Kg.	150%	-
2106 90 50	--- Compound preparations for making non-alcoholic beverages	Kg.	150%	-
2106 90 60	--- Food flavouring material	Kg.	150%	-
2106 90 70	--- Churna for pan	Kg.	150%	-
2106 90 80	--- Custard powder	Kg.	150%	-
	--- Other :			
2106 90 91	---- Diabetic foods	Kg.	150%	-
2106 90 92	---- Sterilized or pasteurized millstone	Kg.	150%	-
2106 90 99	---- Other	Kg.	150%	-

The products imported by the appellant are essentially Protein Concentrates of Whey Protein with additives, in different proportions. The other additives to the product can be of various kinds like flavouring agents, stabilisers etc. The argument of the appellant is that the description of Customs Tariff Heading 2106 which reads as under

“CHOCOLATE AND OTHER FOOD PREPARATIONS CONTIANING COCOA “

is more appropriate classification for the ‘Protein Concentrates containing Cocoa’ as compared to the Customs Tariff Heading 1806 which reads as under

“FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED”.

While doing so the Ld counsel has totally ignored the Supplementary Note 5(a) to Chapter 21. It is seen that the Supplementary Notes appearing in Chapter 21 distinguish the Chapter 21 of Customs Tariff from the Chapter 21 of the HSN (para 49 below). It is seen that in the entire appeal as well as written submissions the appellant has not dealt with the Supplementary Notes to Chapter 21. The argument of the appellants that while other ‘Protein Concentrates’ imported by them are classifiable under Customs Tariff Heading 2106 (Sub Heading 2106 1000), the ‘Protein Concentrates containing Cocoa’ are classifiable under Customs Tariff Heading 1806 (Sub Heading 1806 9040). This claim is solely based on the HSN ignoring the Supplementary Notes to Chapter 21. The competing subheadings are as follows

1806 1806 90 40	CHOCOLATE AND OTHER FOOD PREPARATIONS CONTIANING COCOA --- Preparations containing coca for making beverages	Kg.	30%	-
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2106 2106 1000	FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED - Protein concentrates and textured protein substances	Kg.	40%	-
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The heading 2106 is qualified by the Supplementary notes to Chapter 21. Therefore the Heading 2106 needs to be read with Supplementary Note 5(a) in terms of rule 1 of the Rules of Interpretation of Customs Tariff as discussed in para 49 onwards below..

47. Whey proteins are available in different flavours like Double Rich Chocolate, Chocolate Bliss, Cream Vanilla, Delicious Strawberry, Vanilla Ice-Cream, Mocha Cappuccino etc.The appellant has described the goods in the appeal memorandum as follows:

“The appellant is primarily engaged in the business of importing and selling nutritional supplements in India. In this regard, the appellant imported certain nutritional supplements containing cocoa, glutamine powder, creatine powder and certain unflavoured nutritional supplements from M/s Glanbia Nutritionals (Ireland) Ltd. The basic raw material of nutritional supplements imported by the appellant is ‘WHEY’.”

Ld Counsel has described the product as “**chocolate protein powders/chocolate-flavoured protein powders**” as can be seen from his submissions in para 6 above.These powders are used by the athletes and sport persons as food supplements to supplement their protein intake. **The argument of the appellants is that mere presence of cocoa in the impugned products rules out classification under heading 2106 and takes it into heading 1806.**

48 Such Protein Concentrates of Whey Protein are made in many flavours like Double Rich Chocolate, Chocolate Bliss, Cream Vanilla, Delicious Strawberry, Vanilla Ice-Cream, Mocha Cappuccino etc. The compositions and the main ingredients of all such products is similar. **All such products, except those containing cocoa, are classified by appellants themselves under heading 2106.** The dispute is solely related to the Protein Concentrates of Whey Protein containing some

amount of cocoa. The appellants are seeking to classify the same under heading 1806. The assertion is based on the Chapter and heading notes of the HSN to chapter 18 and 21 and some decisions of foreign countries and international bodies.

49 To examine the issue the comparative chart of relevant chapter notes appearing in HSN as compared to those appearing in Customs Tariff is reproduced below

**COMPARISON OF CHAPTER 21 OF HSN with THE
CHAPTER 21 OF THE CUSTOMS TARIFF**

CHAPTER NOTES OF CHAPTER 21 OF CUSTOMS TARIFF ACT	CHAPTER NOTES OF CHAPTER 21 OF HSN
MISCELLANEOUS EDIBLE PREPARATIONS	MISCELLANEOUS EDIBLE PREPARATIONS
NOTES:-	CHAPTER NOTES:-
1.- This Chapter does not cover : (a)Mixed vegetables of heading 0712; (b) Roasted coffee substitutes containing coffee in any proportion (heading 0901); (c) Flavoured tea (heading 0902); (d) Spices or other products of headings 0904 to 0910; (e) Food preparations, other than the products described in heading 2103 or 2104, containing more than 20 % by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16); (f) Yeast put up as a medicament or other products of heading 3003 or 3004; or (g) Prepared enzymes of heading 3507.	1.- This Chapter does not cover : (a)Mixed vegetables of heading 0712; (b) Roasted coffee substitutes containing coffee in any proportion (heading 0901); (c) Flavoured tea (heading 0902); (d) Spices or other products of headings 0904 to 0910; (e) Food preparations, other than the products described in heading 2103 or 2104, containing more than 20 % by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16); (f) Yeast put up as a medicament or other products of heading 3003 or 3004; or (g) Prepared enzymes of heading 3507.
2.- Extracts of the substitutes referred to in Note 1 (b) above are to be classified in heading 2101.	2.- Extracts of the substitutes referred to in Note 1 (b) above are to be classified in heading 2101.
3.- For the purposes of heading 21.04, the expression "homogenised composite food preparations" means preparations consisting of a finely homogenised mixture of two or more basic ingredients such as meat, fish, vegetables or fruit, put up for retail sale as	3.- For the purposes of heading 21.04, the expression "homogenised composite food preparations" means preparations consisting of a finely homogenised mixture of two or more basic ingredients such as meat, fish, vegetables or fruit, put up for retail sale as

infants or young children or for dietetic purposes, in containers of a net weight content not exceeding 250g. For the application of this definition, no account is to be taken of small quantities of any ingredients which may be added to the mixture for seasoning, preservation or other purposes. Such preparations may contain a small quantity of visible pieces of ingredients.	infants or young children or for dietetic purposes, in containers of a net weight content not exceeding 250g. For the application of this definition, no account is to be taken of small quantities of any ingredients which may be added to the mixture for seasoning, preservation or other purposes. Such preparations may contain a small quantity of visible pieces of ingredients.
SUPPLEMENTRY NOTES : 1. In this Chapter, "Pan masala" means any preparation containing betel nuts and any one or more of the following ingredients, namely: lime, katha (catechu) and tobacco whether or not containing any other ingredient, such as cardamom, copra or menthol. 2. In this Chapter "betel nut product known as Supari" means any preparation containing betel nuts, but not containing any one or more of the following ingredients, namely: lime, katha (catechu) and tobacco whether or not containing any other ingredients, such as cardamom, copra or menthol. 3. For the purposes of tariff item 2106 90 11, the expression "Sharbat" means any non-alcoholic sweetened beverage or syrup containing not less than 10% fruit juice or flavoured with non-fruit flavours, such as rose, Khus, Kevara, but not including aerated preparations. 4. Tariff item 2106 90 50, inter alia, includes preparations for lemonades or other beverages, consisting, for example, of flavoured or coloured syrup, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juice and intended for use in the manufacture of aerated water, such as in automatic vending machines. <u>5. Heading 2106 (except tariff items 2106 90 20 and 2106 90 30), inter alia, includes:</u> <u>(a) protein concentrates and textured protein substances;</u> (b) preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk or other liquids), for human consumption; (c) preparations consisting wholly or partly of foodstuffs, used in the making of beverages of food preparations for human consumption;	

(d) powders for table creams, jellies, ice-creams and similar preparations, whether or not sweetened; (e) flavouring powders for making beverages, whether or not sweetened; (f) preparations consisting of tea or coffee and milk powder, sugar and any other added ingredients; (g) preparations (for example, tablets) consisting of saccharin and foodstuff, such as lactose, used for sweetening purposes; (h) pre-cooked rice, cooked either fully or partially and their dehydrates; and (i) preparations for lemonades or other beverages, consisting, for example, of flavoured or coloured syrups, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juices and concentrated fruit juice with added ingredients. 6. Tariff item 2106 90 99 includes sweet meats commonly known as "Misthans" or "Mithai" or called by any other name. They also include products commonly known as "Namkeens", "mixtures", "Bhujia", "Chabena" or called by any other name. Such products remain classified in these sub-headings irrespective of the nature of their ingredients.	
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COMPARISON of CHAPTER 18 of HSN with THE CHAPTER 18 OF THE CUSTOMS TARIFF

CHAPTER NOTES OF CHAPTER 18 OF CUSTOMS TARIFF ACT	CHAPTER NOTES OF CHAPTER 18 OF HSN
NOTES:-	NOTES:-
1. This Chapter does not cover the preparations of headings 0403, 1901, 1904, 1905, 2105, 2202, 2208, 3003 and 3004.	1. This Chapter does not cover the preparations of heading 04.03, 19.01, 19.04, 19.05, 21.05, 22.02, 22.08, 30.03 or 30.04.
2. Heading 1806 includes sugar confectionary containing cocoa and, subject to Note 1 to this Chapter, other food preparations containing cocoa.	2. Heading 18.06 includes sugar confectionery containing cocoa and, subject to Note 1 to this Chapter, other food preparations containing cocoa.
Not aligned	GENERAL This Chapter covers cocoa (including cocoa beans) in all

	forms, cocoa butter, fat and oil and preparations containing cocoa (in any proportion), except: (a) Yogurt and other products of heading 04.03. (b) White chocolate (heading 17.04). (c) Food preparations of flour, groats, meal, starch or malt extract, containing less than 40% by weight of cocoa calculated on a totally defatted basis, and food preparations of goods of headings 04.01 to 04.04 containing less than 5% by weight of cocoa calculated on a totally defatted basis, of heading 19.01. (d) Swelled or roasted cereals containing not more than 6% by weight of cocoa calculated on a totally defatted basis (heading 19.04). (e) Pastry, cakes, biscuits and other bakers' wares, containing cocoa (heading 19.05). (f) Ice cream and other edible ice, containing cocoa in any proportion (heading 21.05). (g) Beverages, non-alcoholic or alcoholic (e.g, "crème de cacao"), containing cocoa and ready for consumption (Chapter 22). (h) Medicaments (heading 30.03 or 30.04). The Chapter also excludes theobromine, an alkaloid extracted from cocoa (heading 29.39).
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50. The dispute in the instant case relates to classification. For the purpose of classification, the Custom Tariff Act prescribes the general rules of interpretation. Rule 1, 2 and 3 of the said Rules are reproduced below:

"Classification of goods in the Nomenclature shall be governed by the following principles:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only, for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule). presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

We agree with the proposition made by the Ld counsel reproduced in para 8 above that product is to be classified basis the condition in which such goods are presented for clearance to the Customs Authorities referred to in para 8 above. He relied on the following

- (i) **Taj Sats Air Catering Ltd. v. CC Ex., Delhi-II, 2016 (334) E.L.T. 680 (Tri-Del.);**
- (ii) **Circular 36/2013-Cus. Dated 05.09.2013**

We also agree to the proposition referred in para 8 above to the effect that the appropriate classification of goods is determined by following the General Rules for the Interpretation of Import Tariff which must be applied sequentially. We also agree in principle to the proposition that only if classification cannot be made following Rule 1, can resort be made to rule 2, and thereafter only if classification cannot be made by following rule 1 or 2 can a recourse to rule 3 be made, and so on. We also find support for this proposition in the following decisions

- (i) In the case of CCE Nagpur vs Simplex Mills Co Ltd. 2005 (181) ELT 345 SC Hon'ble Apex Court has observed as follows:

"11. The rules for the interpretation of the Schedule to the Central Excise Tariff Act, 1985 have been framed pursuant to the powers under Section 2 of that Act. According to Rule 1 titles of Sections and Chapters in the Schedule are provided for ease of reference only. But for legal purposes, classification shall be determined according to the terms of the headings and any relevant section or Chapter Notes". If neither the heading nor the notes suffice to clarify the scope of a heading, then it must be construed according to the other following provisions contained in the Rules. Rule-I gives primacy to the Section and Chapter Notes along with terms of the headings. They should be first applied. If no clear picture emerges then only can one resort to the subsequent rules. The appellants have relied upon Rule 3. Rule 3 must be understood only in the context of sub-rule (b) of Rule 2 which says inter alia that the classification of goods consisting of more than one material or substance shall be according to the principles contained in Rule 3. Therefore when goods are prima facie, classifiable under two or more headings, classification shall be effected according to sub-rules (a), (b) and (c) of Rule 3 and in that order. The sub-rules are quoted :-

"(a) The heading which provides the most specific description shall be preferred to heading providing a more general description. However when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration."

12.Applying the Rules of Interpretation particularly Rule 1, we are of the opinion that the reasoning of the Tribunal in *Jyoti Overseas* is unexceptionable and in our opinion the decision in *Simplex-I* was correctly overruled."

- (ii) The Hon'ble Apex Court in the case of *C.C. Amritsar vs D.L. Steels* 2022 (381) ELT 289 (SC) has observed as follows:

"10.Classification under the Harmonised System is done by placing the good under the most apt and fitting sub-heading. This is done by choosing the appropriate Chapter, Heading, and sub-heading respectively. To facilitate interpretation and classification, each of the 97 Chapters in the HSN contain corresponding Chapter Notes, General Notes, and Explanatory Notes applicable to the Headings and sub-headings within that Chapter. In addition, there are six General Rules of Interpretation applicable to the Harmonised System as a whole.

11.GRI-1 states that the titles of Sections, Chapters, and sub-chapters are provided for ease of reference only. Therefore, they have no legal bearing on classification. Classification is to be effected : (a) according to the terms of the Headings and any relative Section or Chapter Notes; and, (b) provided the Headings or Chapter Notes do not otherwise require according to the provisions thereafter contained, viz., GRIs 2 to 6. Thus, it is clear from the above that : (i) the Headings, and, (ii) the relative Section or Chapter Notes must be considered before classification is done. Only after this exercise is done, if a conflict in classification still persists, the subsequent GRIs are to be resorted to. GRI-2 is not germane to the present case and therefore, we make no reference to it. GRI-3 provides for classification in the event when the goods are classifiable under two or more Headings. As per GRI-3, when by application of GRI-2(b) or for any other reason, the goods are, prima facie, classifiable under more than one Heading, then; (a) the 'most specific description' is

preferred, (b) a mixture of different goods will be classified as that good which gives the mixture its 'essential characteristic', and (c) when goods cannot be classified with reference to (a) or (b), they should be classified under the Heading which occurs last in the numerical order. The order of priority therefore is; (a) specific description, (b) essential character, and (c) the Heading which occurs last in numerical order. However, GRI-3 can only take effect provided the terms of the Heading or Section or Chapter Notes do not otherwise require. GRI-4 states that when the goods cannot be classified in accordance with the aforementioned rules, they shall be classified under the heading appropriate for the goods "to which they are most akin". GRI-5 applies exclusively to cases and packing material, and therefore, is not apropos. GRI-6 states that the classification of goods in the sub-headings of a Heading shall be determined according to the terms of those sub-headings and any related Notes, and mutatis mutandis to the above GRIs, on the understanding that only sub-headings at the same level are comparable."

- (iii) In the case of *Westinghouse Saxby Farmers Ltd.* 2021 (376) ELT 14 (SC) the Hon'ble Apex Court has observed as follows:

"31. But in invoking General Rule 3(a), the Authorities have omitted to take note of 2 things. They are : (i) that as laid down by this Court in *Commissioner of Central Excise v. Simplex Mills Co. Ltd.* [(2005) 3 SCC 51 = 2005 (181) E.L.T. 345 (S.C.)] the General Rules of Interpretation will come into play, as mandated in Rule 1 itself, only when no clear picture emerges from the terms of the Headings and the relevant section or chapter notes; and (ii) that in any case, Rule 3 of the General Rules can be invoked only when a particular goods is classifiable under two or more Headings, either by application of Rule 2(b) or for any other reason. Once the authorities have concluded that by virtue of Note 2(f) of Section XVII, 'relays' manufactured by the appellant are not even classifiable under Chapter Heading 8608, we do not know how the Authorities could fall back upon Rule 3(a) of the General Rules. There is a fundamental fallacy in the reasoning of the Authorities, that Rule 3(a) of the General Rules will apply, especially after they had found that 'relays' are not classifiable under Chapter Heading 8608, on account of Note 2(f) of Section XVII."

In all the aforesaid cases, it has been held that when the classification can be made on the basis of Interpretative Rule 1, there is no need to go for rule 2 to 6.

51. The Hon Apex court has held in many cases that if there is a difference between the chapter notes and Section notes of the Customs Tariff and the chapter notes and Section notes appearing in HSN, then those appearing in the Customs Tariff take precedence over those appearing in the HSN. In other words HSN can be relied for the purposes of classification under Customs Tariff only if the HSN is harmonised with the Customs Tariff.

(i) We find that Hon'ble Apex Court in the case of Global Healthcare Products 2015 (322) ELT 365 (SC) has observed as follows:

"10. The Commissioner, thus, noted that in the HSN Notes, sub-heading 3306.10 deals with dentifrices. The Commissioner noted that the meaning of dentifrices as per the Concise Oxford Dictionary is '*a paste or powder for cleaning of teeth*'. On that basis, he concluded that the product in question was paste, namely, the toothpaste for cleaning the teeth and, therefore, would fall under sub-heading 3306.10. *En passe*, the Commissioner also observed that there is no major difference in these products, namely, Close-Up Whitening and Close-Up Red/Blue/Green, except one ingredient used in the manufacture of Close-Up Whitening and the addition of that ingredient does not change the purpose, nature as well as definition of the product in a common market parlance. He observed that in the market the product was known as toothpaste. He also observed that it is treated as toothpaste as per the product manual issued by the Dental Invocation Centre, Mumbai. Discussion is summed up in para 32 of the order passed by the Commissioner, which reads as under :

"32. As narrated in the SCN that the tooth paste, being dentifrice has been correctly classified under the HSN and the Central Excise Tariff has been based on HSN. Accordingly it is essential to follow the correct classification of the product in question as described and classified under the relevant chapter of HSN. In this connection it may be mentioned that the Hon'ble Supreme Court in the case of *CCE, Shillong v. Wood Craft Product Ltd.* reported in [1995 \(77\) E.L.T. 23](#) (S.C.) in para 18 has held that the structure of Central Excise Tariff is based on the internationally accepted nomenclature found in the HSN and therefore, any dispute relating to tariff classification must, as far as possible be resolved with reference to the nomenclature indicated by the HSN unless there be an express different intention indicated in the Central Excise Tariff Act, 1985 itself.

Further it may be mentioned that the Hon'ble Bombay High Court in the case of *Jagdish D. Devgekar v. Collector of Central Excise, Poona* reported in [1978 \(2\) E.L.T. \(J581\)](#) in para 6 has held that the correct test in interpreting any item mentioned in the First Schedule to the Central Excise Act is to see the commercial sense in which the item is

understood or the sense in which traders or persons dealing in that terms understand it and not the technical or scientific sense.

Even it may be mentioned that the Hon'ble Tribunal in case *Veto Co. v. CCE* reported in [1992 \(62\) E.L.T. 584](#) (T) in para 6 has held that the goods have to be classified under the tariff schedule according to their popular meaning or as they are understood in their commercial sense and not as per their scientific or technical meaning. While holding so the Hon'ble Tribunal has referred to the observations of the Hon'ble Supreme Court's judgment in case of *Plasmac Machine Mfg. Co. Pvt. Ltd. v. CCE* reported in [1991 \(51\) E.L.T. 161](#) (S.C.) (Para 13)."

11. The aforesaid approach adopted by the Commissioner has been found fault with by the Tribunal. The Tribunal pointed out that there was material difference in the sub-heading 3306.10 in the Indian statute when contrasted with Harmonized Commodity Description and Coding System. Whereas, as per the Tariff Entry 3306.10 in the Excise Act, it is 'tooth powder' and 'toothpaste', under the Harmonized Commodity Description and Coding System, what is mentioned is 'dentifrices'. It is further noticed by the Tribunal that dentifrices was more generic in nature as it recognized all three types of products, namely, (i) toothpaste, (ii) other preparations for teeth and (iii) denture cleaners, than tooth powders and toothpaste. Thus, when under Indian statutory regime there is a restricted sub-heading under 3306.10, namely, tooth powder and toothpaste only, the approach of the Commissioner in taking aid of HSN Notes was erroneous. Discussion on this aspect runs as follows:

"A perusal of the HSN notes would indicate that all three types of 'Dentifrices' are recognized as (i) 'Toothpaste', (ii) Other preparations for teeth, and (iii) 'Denture cleaners'. The Note further explains that "Dentifrices" to include 'toothpaste' and "other preparations for teeth" whether for cleaning or polishing the assessable surface of teeth or for other purposes such as Anticaries prophylactic treatment. The Note also enumerates that 'toothpaste' and 'other preparations for teeth' remains classified under Heading 3306 whether or not they contain abrasives and whether or not they are used by dentist. The correct scope of the heading as per the submission of the appellants is that when one refers to HSN Item 3306 and the bifurcations as also under CETA, 1985 there is a variance seen. In other words, this bifurcation under Heading 3306 for HSN and is not *pari materia* and under CETA, 1985 and therefore, the sub-heading structure of HSN would not apply to CETA.

The CETA proves preparation for oral or dental hygiene including Dentifrices and Denture Fixative paste and powders under Heading 3306 and at the four digit level it is para material HSN. The scope of sub-heading 3306.10 of CETA, 1985 restricts it to only 'tooth powder and paste' and any entity which is not a 'toothpowder or toothpaste' would be covered under Heading 3306.90. This submission has to be upheld."

We find ourselves in agreement with the aforesaid approach of the Tribunal having regard to the cogent reasons given by it.

12. This Court in the case of *Camlin Limited v. Commissioner of Central Excise, Mumbai* - (2008) 9 SCC 82 = [2008 \(230\) E.L.T. 193](#) (S.C.) held that if the entries under HSN and the entries under the Central Excise Tariff are different, then reliance cannot be placed upon HSN Notes for the purposes of classification of goods under Central Excise Tariff. This is so stated in para 24 of the judgment that makes the following reading :

"24. In our considered view, the Tribunal erred in relying upon the HSN for the purpose of marker inks in classifying them under Chapter sub-heading 3215.90 of the said Tariff. The Tribunal failed to appreciate that the entries under the HSN and the entries under the said Tariff are completely different. As mentioned above, it is settled law that when the entries in the HSN and the said Tariff are not aligned, reliance cannot be placed upon HSN for the purpose of classification of goods under the said Tariff. One of the factors on which the Tribunal based its conclusion is the entries in the HSN. The said conclusion in the order of the Tribunal is, therefore, vitiated and, accordingly, set aside. We agree with the findings recorded by the Commissioner (Appeals)."

- (iii) Hon'ble Apex Court in the case of *Camlin* 2008 (230) ELT 193 (SC) has observed as follows:

"26. In our considered view, the Tribunal erred in relying upon the HSN for the purpose of marker inks in classifying them under Chapter Sub-Heading 3215.90 of the said Tariff. The Tribunal failed to appreciate that the entries under the HSN and the entries under the said Tariff are completely different. As mentioned above, it is settled law that when the entries in the HSN and the said Tariff are not aligned, reliance cannot be placed upon HSN for the purpose of classification of goods under the said Tariff. One of the factors on which the Tribunal based its conclusion is the entries in the HSN. The said conclusion in the Order of the

Tribunal is, therefore, vitiated and, accordingly, set aside. We agree with the findings recorded by the Commissioner (Appeals)."

(iii) From the above decisions of Hon'ble Apex Court, it is apparent that reliance on the HSN Section Notes, Chapter Notes and Explanatory Notes can be placed only when the Customs Tariff is harmonized with HSN. Wherever there is a difference between the Customs Tariff and HSN reliance cannot be placed on HSN Section Notes, Chapter Notes and Explanatory Notes for the purpose of classification. In such cases reliance is to be placed on the Chapter Notes and Section Notes appearing in the Customs Tariff. The appellants have also relied on the decision of Tribunal in the case of Anutham Exim P. Ltd. 2021 (378) ELT 611 (T-Kol.). In the said decision also in para 13 following has been observed:

"13.The Schedule to the Customs Tariff Act, 1975 (commonly referred to as Customs Tariff) is based on, although it is not identical to, the Harmonised System of Nomenclature (HSN) - an internationally recognised scientific method of classifying all goods. Sometimes there are differences between the HSN and the Customs Tariff in which case, the latter is relevant for determining the duty liability under the Customs Act. In view of the explanation to this effect in the IGST Notification specifying the rates of IGST chargeable on different goods, IGST is also to be charged as per the classification under the Customs Tariff. Customs Tariff, groups goods into Sections, each of which is further divided into Chapters with a two digit Chapter number. Within each Chapter, there are four digit headings which are further divided into six digit and still further divided into eight digit tariff headings."

Thus even going by the decision cited by the appellant, it is seen that no reliance can be placed on HSN when the Schedule to the Customs Tariff Act is not aligned with the HSN.

52. It is seen that there are major differences between Customs Tariff and the HSN in respect of Chapter 21. A comparative table of the Chapter Notes appearing in Customs Tariff and the HSN is reproduced in para 49 above. It is noticed that while the Customs Tariff contains supplementary notes in Chapter 21, there are no such notes in the HSN. While supplementary notes are there in Chapter 21 of the Customs Tariff Act the same are not appearing in the HSN. In the HSN, there are only three chapter notes, which are as follows:

"Chapter Notes to Chapter 21 of HSN (Harmonized System of Nomenclature)

1-This Chapter does not cover:

- (a) Mixed vegetables of heading 07.12;
- (b) Roasted coffee substitutes containing coffee in any proportion (heading 09.01);
- (c) Flavoured tea (heading 09.02);
- (d) Spices or other products of headings 09.04 to 09.10;
- (e) Food preparations, other than the products described in heading 21.03 or 21.04. containing more than 20% by weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16);
- (f) Yeast put up as a medicament or other products of heading 30.03 or 30.04; or
- (g) Prepared enzymes of heading 35.07.

2- Extracts of the substitutes referred to in Note 1 (b) above are to be classified in heading 21.01.

3- For the purposes of heading 21.04, the expression "homogenised composite food preparations" means preparations consisting of a finely homogenised mixture of two or more basic ingredients such as meat, fish, vegetables or fruit, put up for retail sale as infant food or for dietetic purposes, in containers of a net weight content not exceeding 250 g. For the application of this definition, no account is to be taken of small quantities of any ingredients which may be added to the mixture for seasoning, preservation or other purposes. Such preparations may contain a small quantity of visible pieces of ingredients."

In the Custom Tariff Act, notes apart from three chapter notes there are additional 'Supplementary Notes' which reads as follows:

"SUPPLEMENTARY NOTES :

1. In this Chapter, "Pan masala" means any preparation containing betel nuts and any one or more of the following ingredients, namely: lime, katha (catechu) and tobacco whether or not containing any other ingredient, such as cardamom, copra or menthol.

2. In this Chapter "betel nut product known as Supari" means any preparation containing betel nuts, but not containing any one or more of the following ingredients, namely: lime, katha (catechu) and tobacco whether or not containing any other ingredients, such as cardamom, copra or menthol.

3. For the purposes of tariff item 2106 90 11, the expression "Sharbat" means any non-alcoholic sweetened beverage or syrup containing not less than 10% fruit juice or flavoured with non-fruit flavours, such as rose, Khus, Kevara, but not including aerated preparations.

4. Tariff item 2106 90 50, inter alia, includes preparations for lemonades or other beverages, consisting, for example, of flavoured or coloured syrup, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juice and intended for use in the manufacture of aerated water, such as in automatic vending machines.

5. Heading 2106 (except tariff items 2106 90 20 and 2106 90 30), inter alia, includes:

(a) protein concentrates and textured protein substances;

- (b) preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk or other liquids), for human consumption;
- (c) preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption;
- (d) powders for table creams, jellies, ice-creams and similar preparations, whether or not sweetened;
- (e) flavouring powders for making beverages, whether or not sweetened;
- (f) preparations consisting of tea or coffee and milk powder, sugar and any other added ingredients;
- (g) preparations (for example, tablets) consisting of saccharin and foodstuff, such as lactose, used for sweetening purposes;
- (h) pre-cooked rice, cooked either fully or partially and their dehydrates; and
- (i) preparations for lemonades or other beverages, consisting, for example, of flavoured or coloured syrups, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juices and concentrated fruit juice with added ingredients.

6. Tariff item 2106 90 99 includes sweet meats commonly known as "Misthans" or "Mithai" or called by any other name. They also include products commonly known as "Namkeens", "mixtures", "Bhujia", "Chabena" or called by any other name. Such products remain classified in these sub-headings irrespective of the nature of their ingredients."

These supplementary notes appearing in Custom Tariff are not part of the HSN. In this background it is seen that the Customs Tariff Act is not aligned to the HSN (Harmonized System of Nomenclature) on account of the text contained in supplementary notes to Chapter 21. **Thus it is seen that Government of India has deliberately chosen to deviate from the Harmonised System of Nomenclature (HSN). By this Supplementary note the Government of India has chosen to enlarge the scope of the Heading 2106 by specifically including in it the various items listed in Supplementary note. In view of deliberate changes made in the Customs Tariff the HSN notes lose their relevance.**

53. The Supplementary notes of Chapter 21 of the Schedule to the Custom Tariff Act prescribes at S.No. 5(a) that 'Protein Concentrate and

Textured Protein Substances’ would fall under heading 2106.The heading 2106 of the Custom Tariff Act reads as follows:

2106	FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED			
2106 1000	-Protein concentrates and textured protein substances	Kg.	40%	-
	- Other :			
2106 90	--- Soft drink concentrates :			-
	---- Sharbat			
2106 90 11	---- Other	Kg.	150%	-
2106 90 19	--- Pan masala	Kg.	150%	-
2106 90 20	--- Betel nut product known as "Supari"	Kg.	150%	-
2106 90 30	--- Sugar-syrups containing added flavouring or	Kg.	150%	-
2106 90 40	colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrin syrup	Kg.	150%	-
	--- Compound preparations for making non-alcoholic beverages	Kg.	150%	-
2106 90 50	--- Food flavouring material			
2106 90 60	--- Churna for pan	Kg.	150%	-
2106 90 70	--- Custard powder	Kg.	150%	-
2106 90 80	--- Other :	Kg.	150%	-
	---- Diabetic foods			
2106 90 91	---- Sterilized or pasteurized millstone	Kg.	150%	-
2106 90 92	---- Other	Kg.	150%	-
2106 90 99		Kg.	150%	-

It is seen that OIA in the instant case relies on Supplementary Note 5(a) and interpretative Rule1 for the purpose of classifying the Protein Concentrates containing coco imported by the appellant under Heading 2106. There is no argument made in the appeal memorandum or in the written submissions of the appellant as to why the Supplementary Note 5(a) should not be followed in the instant case. It is apparent from the above reading of supplementary note 5(a) to Chapter 21 and that the "Protein Concentrate and Textured Protein Substances" would fall under the "heading 2106". It is seen that the sub heading 21061000 of Customs Tariff (just like HSN) specifically covers "Protein Concentrates and Textured Protein Substances", still a chapter supplementary note was introduced to place the 'Protein Concentrate and Textured Protein Substances'under heading 2106. It is noted that the supplementary Note 5(a) does not prescribe that "Protein Concentrate and Textured Protein Substances" would fall under 'sub heading 2106 1000' but it clearly states that "Protein Concentrate and Textured Protein Substances" would fall under 'Heading 2106'. This provision in the chapter notes has been prescribed specifically to place "Protein Concentrate and Textured Protein Substances" under the 'heading 2106'. Any other interpretation would make the said note 5(a) redundant since these goods are as it is covered under sub heading 2106 1000 in the tariff itself. In other words there was no need of the Supplementary Note 5(a) if the goods are already covered under sub heading 2106 1000. Hon'ble Supreme Court in the

case of Oswal Agro Mills Ltd. 1993 (66) ELT 37 (SC) has observed as follows:

3. The provisions of the Tariff do not determine the relevant entity of the goods. They deal whether and under what entry, the identified entity attracts duty. The goods are to be identified and then to find the appropriate heading, sub-heading under which the identified goods/products would be classified. To find the appropriate classification description employed in the tariff nomenclature should be appreciated having regard to the terms of the headings read with the relevant provisions or statutory rules of interpretation put up thereon. For exigibility to excise duty the entity must be specified in positive terms under a particular tariff entry. In its absence be deduced from a proper construction of the tariff entry. There is neither intendment nor equity in a taxing statute. Nothing is implied. Neither can we insert nor anything can we delete but it should be interpreted and construed as per the words the legislature has chosen to employ in the Act or Rules. There is no room for assumption or presumptions. The object of the Parliament has to be gathered from the language used in the statute. The contention that toilet soap is commercially different from household and laundry soaps, as could be seen from the opening words of Entry 15, needs careful analysis. It is well, at the outset, to guard against confusion between the meaning and the legal effect of an expression used in a statute. Where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the statute. The court would interpret them as they stand. The object and purpose has to be gathered from such words themselves. Words should not be regarded as being surplus nor be rendered otiose. Strictly speaking there is no place in such cases for interpretation or construction except where the words of statute admit of two meanings. The safer and more correct course to deal with a question of construction of statute is to take the words themselves and arrive, if possible, at their meaning, without, in the first place, reference to cases or theories of construction. Let us, therefore, consider the meaning of the word soap "household". The word household signifies a family living together. In the simplistic language toilet soap being used by the family as household soap is too simplification to reach a conclusion. Therefore, one has to gather its meaning in the legal setting to discover the object which the Act seeks to serve and the purpose of the amendment brought about. The task of interpretation of the statute is not a mechanical one. It is more than mere reading of mathematical formula. It is an attempt to

discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts. It is also idle to expect that the draftsman drafted it with divine prescience and perfect and unequivocal clarity. Therefore, court would endeavour to eschew literal construction if it produces manifest absurdity or unjust result. In *Manmohan Das v. Vishnu Das* [AIR 1967 SC 643] a Constitution bench held as follows :

“The ordinary rule of construction is the provision of a statute must be construed in accordance with the language used therein unless there are compelling reasons, such as, where a literal construction would reduce the provision to absurdity or prevent manifest intention of the legislature from being carried out.”

Hon’ble Apex Court in the case of *Calcutta Jute Manufacturing Co.* 1997 (93) ELT 657 has observed as follows:

“10. The State is empowered by the legislature to raise revenue through the mode prescribed in the Act so the State should not be the sufferer on account of the delay caused by the tax payer in payment of the tax due. The provision for charging interest would have been introduced in order to compensate the State (or the Revenue) for the loss occasioned due to delay in paying the tax [vide *Commissioner of Income Tax (A.P.) v. M. Chandra Sekhar* - 1985 (1) SCC 283 and *Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income Tax* - 1986 (3) SCC 461]. When interpreting such a provision in a taxing statute a construction which would preserve the purpose of the provision must be adopted. It is well-settled that in interpreting a taxing statute normally, there is no scope for consideration of principles of equity. It was so said by Rowlatt J. in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921 (1) KB 64 at page 71] :

“In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

The above observation has been quoted with approval by a Bench of three Judges of this Court in *Commissioner of Income Tax, Madras v. Ajax*

Products Ltd. [55 STC 741]. In another decision rendered by a Bench of three Judges of this Court in *The State of Tamil Nadu v. M.K. Kandaswami and others* [36 STC 191] it has been observed thus:

“In interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book should be eschewed. If more than one construction is possible, that which preserves its workability and efficacy is to be preferred to the one which would render it otiose or sterile.”

In view of above, it is apparent that Supplementary Note 5(a) would be rendered otiose if we read it to mean that “Protein Concentrate and Textured Protein Substances” are to be classified under sub-heading 2106 1000. The note clearly means and states that the said goods are to be classified under “Heading 2106”.

54. From the above proposition in para 49 to 53 above it is apparent that

- (i) The Customs Tariff is not harmonized with the HSN, and therefore the conclusions based on HSN cannot be relied when it contradicts prescriptions of the Customs Tariff.
- (ii) If the classification can be made relying on interpretative Rule 1 there is no need to proceed further on any other Rule.
- (iii) The Supplementary Note 5(a) clearly provides that Protein Concentrate and Textured Substances would be classified under “Heading 2106”.

Rule 1 of the General rules of interpretation is reproduced below:

“Classification of goods in the Nomenclature shall be governed by the following principles:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only, for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

It is seen that it clearly states that ‘for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes’. In the instant case Supplementary Note 5(a) clearly provides that Protein Concentrate and Textured Substances would

be classified under "Heading 2106". In view of above in terms of interpretative Rule-1, the goods imported by the appellant would be classified under Heading 2106 in terms of Supplementary Note 5(a). Any other interpretation would make Supplementary Note 5(a) otiose. Since the goods are specifically classified under heading 2106 by virtue of Supplementary Note 5(a), there is no need to further go into interpretative Rule 2 to 6.

55. The appellants have relied on various international decisions. The said decisions are examined as under:-

(I) In the decisions given by Thomas J Russo, in US Cross Ruling N204559 dated 02.03.2012, following has been observed:

"Ingredients breakdowns accompanied your November letter. Additional information was provided with your February letter and an email transmission dated February 29, 2012. Whey Protein Powder will be offered in two flavors-chocolate and vanilla. Ingredients common to both products are approximately 37-38 percent whey protein isolate, 34-36 percent whey protein concentrate, 12-13 percent fructose, 6 percent l-glutamine, 2-3 percent chicory root extract (inulin), one percent erythritol, and less than one percent, each, colloid gum powder, sodium chloride, aminogen (plant enzyme), cream flavor, red orange extract, ascorbic acid and stevia- rebiana. Other ingredients, depending on the flavor, include about 2 percent cocoa (lecithinated), 2 percent chocolate flavor and 1 percent natural vanilla flavor. Both products will be put up for retail sale in containers holding 908 grams, net weight, and used as a food supplement.

You have suggested that the subject products are classifiable in subheading 0404.10.0500. Harmonized Tariff Schedule of the United States (HTSUS), which provides for whey protein concentrates. We disagree. Based on the ingredients breakdowns, they will be classified elsewhere.

The applicable subheading for the Chocolate Whey Protein Powder will be 1806.90.9090, HTSUS, which provides for other food preparations containing cocoa... other... other...other. The rate of duty will be 6 percent ad valorem.

The applicable subheading for the Vanilla Whey Protein Powder will be 2106.90.8200, HTSUS, which provides for food preparations not elsewhere specified or included... other... other... containing over 10 percent by weight of milk solids... other... other. The rate of duty will be 6.4 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at <http://www.usitc.gov/tata/hts/>.

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at 301-575-0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Bruce N. Hadley, Jr. at (646) 733-3029."

From the above decision it is apparent that the said authority has held that:

- (i) Vanilla Whey protein will be classifiable under heading 2106.90.8200 of HTSUS;
- (ii) The chocolate whey protein powder will be classifiable under 1806 90.9090 HTSUS (Harmonized Tariff Schedule of United States);
- (iii) Whey proteins of this kind will not be classified under heading 0404.10.0500 HTSUS.

(II) Similar conclusion has been reached in ruling No. 025135 dated 15.04.2008 given by Robert B. Swierupski Director National Commodity Special Division wherein he has clarified as follows:

"The subject merchandise is described as 100% Whey Classic - Chocolate and 100% Whey Gold Standard-Chocolate. The main ingredients in 100% Whey Classic-Chocolate are Protein Blend (Whey Protein Isolate, Whey Protein Concentrate and Whey Peptides), Cocoa (processed with alkali), Artificial Flavor, Lecithin and Acesulfame Potassium. The main ingredients in 100% Whey Gold Standard-Chocolate are Protein Blend (Whey Protein Isolate, Whey Protein, Concentrate and Whey Peptides), Cocoa (processed with alkali), Artificial Flavor, Lecithin and Acesulfame Potassium.

All products are in powder form, put up for retail sale in plastic containers. The 100% Whey Classic-Chocolate comes in sizes weighing either 2 pounds or 5 pounds. The 100% Whey Gold Standard - Chocolate comes in sizes weighing 1 pound, 2 pounds, 5 pounds or 10 pounds. The product is mixed with water, milk or other beverages to make a dietary supplement.

The applicable subheading for the 100% Whey Classic - Chocolate and 100% Whey Gold Standard-Chocolate will be 1806.90.90, Harmonized Tariff Schedule of the United States (HTSUS), which provides for chocolate and other food preparations containing cocoa... other... other... other. The rate of duty will be 6 percent ad valorem."

(III) Similarly in the tariff Ruling No. N028196 dated 02.06.2008 by Robert B. Swierupski Director National Commodity Specialist Division, has clarified as follows:

"Ingredients breakdowns, descriptive information, and a manufacturing flow chart for two products were submitted with your letter. The products, described as pink-colored, free-flowing powders, will be used as nutritional supplements. 100 percent Whey Gold Standard - Strawberry consists of approximately 55 9

percent whey protein isolate, 37.9 percent whey protein concentrate, 4.8 natural and artificial flavor, and less than one percent each of whey peptides, Sucralose, color, citric acid, aminogen, and lactase. Classic Whey-Strawberry consists of approximately 95.7 whey protein concentrate, 1.3 percent each of lactalbumen (whey peptides) and whey protein isolate, 1 percent natural and artificial flavors, and less than one percent each of Sucralose, acesulfame potassium, citric acid, and color. 100 percent Whey Gold Standard-Strawberry, containing approximately 78 percent protein, will be put up in 2-, 5-, and 10-pound containers. The Classic Whey- Strawberry product, containing approximately 69 percent protein, will be put up in 2- and 5-pound containers.

The applicable subheading for these products will be 2106.10.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for food preparations not elsewhere specified or included... protein concentrates and textured protein substances

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR. 177)."

From the above rulings, it is apparent that the various international rulings are based on harmonized system of nomenclature and have ruled that the "Protein Concentrates" of the kind imported by the appellant are to be classified under heading 21061000 if the same do not contain cocoa. However same product, "Protein Concentrates",if containing coco would be classifiable under 1806.90.90 of HTSUS. This conclusion is based on the reading of HSN and its chapter and section notes. In most cases the HSN has been totally adopted in the Schedule to the Customs Tariff Act, 1975. However, in some cases, like in case of heading 2106, the government has chosen to deviate from the language and prescription of the HSN by introducing Supplementary Notes to Chapter 21. Since all international rulings are based on the HSN, which is different from the Customs Tariff in respect of Chapter Heading 2106, no reliance can be placed on these decisions.

56. Ld counsel has also relied on the fact that the Explanatory Notes to the HSN were amended by the HSN Committee in its 64th Session in September 2019 to introduce a specific exclusion for Chapter heading 2106 ("**Amendment to Chapter heading 2106**"). The amendments were made applicable from 1st December 2019. The relevant extract of the Amendment to Chapter heading 2106 is reproduced below for ease of reference-

.. CHAPTER 21

Heading 21.06

Page IV-2106-3. Item (16)

....

Insert a new exclusion note (c):

(c) Preparations containing cocoa, put up as food supplements for human consumption (heading 18.06).

While such amendments would have relevance if the Customs Tariff is aligned with the HSN, such changes have no relevance when Government of India has chosen to deviate from the HSN by specially prescribing that the impugned products would be classified under 'Heading 2106'. The prescription in Chapter Supplementary Note 5(a) would take precedence over the HSN Heading Notes of the CTH 2106. **In case of heading 2106, the government has chosen to deviate from the prescription of the HSN by introducing Supplementary Notes to Chapter 21 which specifically classify the impugned products under 'Heading 2106'. In these circumstances the HSN notes to the Chapter heading, and amendments made therein, which are in conflict with the supplementary notes to the Chapter, are to be ignored.**

57. In view of above discussion we hold that the impugned goods are rightly classifiable under Heading 2106, sub heading 2106 1000 of the Customs Tariff. The impugned order is upheld and the appeals are dismissed.

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

SOMESH ARORA, MEMBER (JUDICIAL)

58. I have gone through the above order, authored by my learned brother. I not only agree with his findings as well as, the analytical reasoning made available therein, but also appreciate the in-depth knowledge he has brought on record out of his expertise, experience of properly analyzing various headings and their background, including historical moorings of chapter 21. Same not having been aligned to the HSN in totality. It has been properly highlighted, how it needs to be correctly interpreted in view of peculiar changes brought in by Indian Custom Tariff, despite India being a signatory to HSN and agreeing largely to its frame work. It will not be out of place for me to appreciate the efforts which have been put in, both by the learned advocate as well as learned departmental representative including the appellate authority below, who analyzed the propositions involved. Proper assistance by officers of court sure enables better deliberation of the issues.

59. At the heart of the issue are the specific provisions which were created by Indian legislature, while being a signatory to the Customs Cooperation Council (which as an organization is now called World Customs Organization). The HSN is one of the most significant instrument, derived as an outcome of cooperative efforts of the comity of nations in international trade that aims at bringing out not only uniformity of nomenclature for goods, but also the trade data and statistics compilation. All this to make the economic policy making of the member nations, reliable as well as conducive to comparison for the purpose of International Trade. Much later, after creation of HSN, the statistical data assumed importance when under aegis of World Trade organization, exceptional measures to liberalized tariff like Anti-Dumping, Safeguard and Countervailing duty, came to be implemented.

60. I would like to briefly dwell upon the evolution of public international law in Indian context and how entering into various international treaties did not circumscribe the sovereignty of member states including India. Whenever International Treaties were sought to be implemented by the sovereign states in their capacity as members of such treaties, reservations were either permitted by the treaties or were brought in for approval by member states to safeguard their own national interests.

61. As far as the Constitution of India is concerned which acts as a grundnorm, for all laws made by Indian Legislature. Validity of enactments by legislature is derived from Article 73 of the Constitution of India delineates the extent of executive power of the union which extends for all matters with respect to which the Parliament has a right to make laws and it extends to the exercise of such wide authority and jurisdiction as are excisable as a Central Government by virtue of any treaty or agreement.

62. This gives, through Article 73 (b), the Central Government a power to enter into international treaties/ agreement/ conventions under Article 73 and also to the Parliament the power to legislate in respect of such treaties/ agreements/ conventions. It is equally open to Parliament to refuse to perform such treaties/ agreements/ conventions. In such a case while the treaties made/ agreements/ conventions bind the Union of India as against the other contracting parties, Parliament may refuse to perform them leading the Union of India in default.

63. Regarding Course of action available to sovereign states and prevalence of municipal laws over public international law, following ruling of the apex court provides guidance:

"In Gramophone Company of India Ltd. v. Birendra Bahadur Pandey and Others [(1984) 2 SCC 534], the Apex Court held as under :

"5. There can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognizes the position that the

rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with Act of Parliament. Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National Courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid conformation with the comity of Nations or the well-established principles of International law. But if conflict is inevitable, the latter must yield."

Therefore, it is brought out that sovereign states can not only bring about reservations in treaties, wherever allowed but also in case of any provision not being in tune with treaty provisions, it will be municipal law which shall prevail."

64. Now coming to specific provisions about HSN, the following are the relevant extracts as derived from HS Classification Handbook of World Custom Organization November-2013 Edition part II/1 following has been stated as object of bringing in world product nomenclature:

"At its 1976 Sessions, the United Nations Statistical Commission took a policy decision that UN economic classifications should be harmonized by using HS subheadings as building blocks. The Standard International Trade Classification (SITC, Rev. 3), the International Standard Industrial Classification of all economic activities (ISIC) and the Central Products Classification (CPC) have been prepared on the basis of this decision.

As regards the application of the Harmonized System by users other than Customs authorities and statisticians, good progress has been made in broadening the acceptance of the System. Several maritime conferences and numerous European and Asian railway networks associated with the International Union of Railways (UIC) have agreed to use the System as a basis for their freight tariffs.

The World Trade Organization (WTO) and individual countries are using the Harmonized System as a common language of trade for purposes of trade negotiations. In this connection, it should be noted that most countries' WTO schedules of tariff concessions are already written in terms of the Harmonized System and the process of converting the remaining WTO schedules to the Harmonized System continues. The Harmonized System is also providing a basis for new internationally accepted Rules of Origin which are being developed jointly by the WCO and the WTO."(*Emphasis supplied*

As far as Structure of HS is concerned same has been provided for in the Hand Book at Chapter 2 page II/5:

“2. Structure of the HS

The Harmonized System comprises:

- *General Rules for the interpretation of the System:*
- *Section and Chapter Notes, including Subheading Notes:*
- *A list of headings arranged in systematic order and, where appropriate, subdivided into subheadings.*

(a) The Interpretative Rules

To be completely sound, a classification system must associate each individual product with a single heading (and, as the case may be, subheading), to which that product can be simply and unequivocally assigned. Hence it must contain rules designed to ensure that a given product is always classified in one and the same heading (and subheading), to the exclusion of any others which might appear to merit consideration. All classification decisions must be based upon the application of these rules.

The text of the Harmonized System therefore incorporates a series of preliminary provisions codifying the principles on which the System is based and laying down general rules to ensure uniform legal interpretation.

There are six of these rules, known as the General Rules for the Interpretation, which are applied in hierarchical fashion, i.e., Rule 1 takes precedence over Rule 2, Rule 2 over Rule 3, etc. The General Interpretative Rules are explained at the beginning of Volume 1 of the Explanatory Notes to the Harmonized System.

General Interpretative Rule 1 provides that, for legal purposes, classification is determined by the terms of the headings and of the Section or Chapter Notes. There are, however, cases where the texts of the readings and of these Notes cannot, of themselves, determine the appropriate heading with certainty. Classification is then effected by application of the other Interpretative Rules.

The first part of Rule 2 (a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, provided that, as presented, it has the essential character of the complete or finished article. The second part of Rule 2 (a) provides that complete or finished articles presented unassembled or disassembled, usually for reasons such as the requirements or convenience of packing, handling or transport, are to be classified in the same heading as the assembled article.

Rule 2 (b) extends the scope of any heading referring to a material or substance or articles made therefrom. Under this Rule, goods consisting of more than one material or substance must, unless another heading refers to them in their mixed or composite state, be classified according to the principles of Rule 3.

Rule 3 provides classification principles for goods which, prima facie, fall under two or more headings.

Rule 3 (a) stipulates that goods should be classified in the heading giving the most specific description. However, there is a provision that if two or more headings each refer to only one of the materials or substances contained in mixed or composite goods, or to only some of the articles included in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete description than the other.

Rule 3 (b) deals with mixed or composite goods, goods consisting of an assembly of different articles and goods put up in sets. By application of this Rule, goods are classified in the heading applicable to the material or component which gives them their essential character.

Rule 3 (c) applies only where goods cannot be classified by application of Rule 3 (a) or Rule 3 (b); it provides that goods should be classified in the heading which occurs last in numerical order amongst those which equally merit consideration in determining their classification.

Rule 4 provides that goods which (for example because they have newly appeared on the world market) are not specifically covered by any heading of the Harmonized System shall be classified in the heading appropriate to the goods to which they are most akin.

Rule 5 (a) governs the classification of cases, boxes and similar containers presented with the articles for which they are intended, while Rule 5 (b) applies more generally to packing containers presented with the goods they hold. It should be noted that the classification of packing materials and containers not covered by Rule 5 (a) or 5 (b) is left to the discretion of countries, which may take whatever measures they consider appropriate in this area.

Finally, Rule 6 provides that classification in the subheadings of a heading must be determined, mutatis mutandis, with reference to the principles applicable to classification in the 4-digit headings; in any event, the terms of the subheadings or Subheadings Notes must be given precedence. This Rule also specifies that, for classification purposes, only subheadings of the same level are comparable; this means that, within a single heading, the choice of a 1-dash subheading may be made only on the basis of the texts of the competing 1-dash subheadings; similarly, selection of the appropriate 2-dash subheading, where necessary, may be made only on the basis of the texts of the subdivisions within the applicable 1-dash subheading.

The Interpretative Rules thus establish classification principles which are applicable throughout the Harmonized System Nomenclature.

Moreover, the Interpretative Rules clearly provide a step-by-step basis for the classification of goods within the Harmonized System so that, in every case, a product must first be classified in its appropriate 4-digit heading, then to its appropriate 1-dash subdivision within that heading and only thereafter to its appropriate 2-dash subheading within the predetermined 1-dash subdivision. It should be emphasized that at each step in

the process, no account is taken of the terms of any lower-level subdivisions. This principle applies without exception throughout the Harmonized System.

(Emphasis supplied)

(b) Section and Chapter Notes, including subheading Notes

Certain Sections and Chapters are preceded by Notes which, like the Interpretative Rules form an integral part of the Harmonized System and have the same legal force. Some of these Notes, grouped under the title "Subheading Notes", refer solely to the Interpretation of subheadings.

The function of the Notes is to define the precise scope and limits of each subheading, heading (or group of headings), Chapter or Section. This has been achieved, depending on the circumstances, by means of:

- *Either general definitions delineating the scope of a subheading or heading or the meaning of particular terms; for example sparkling wine is defined by Subheading Note 1 to Chapter 22, while Legal Note 5 to Section XI gives a general definition of the sewing thread of headings 52.04, 54.01 and 55.08 in terms of its appearance and texture; or*
- *Non-exhaustive list of typical examples: thus, Note 3 to Chapter 86 specifies the railway and tramway track fixtures and fittings covered by heading 86.08; or*
- *An exhaustive list of the goods covered by a heading or group of headings. Thus, Notes 2, 3 and 4 to Chapter 31 list the products that fall to be classified as fertilisers in headings 31.02, 31.03 and 31.04; or*
- *Exclusions, which list certain articles that must not be included in a particular subheading, heading (or group of headings), Chapters or Section. For example, Note 2 to Chapter 64 lists the articles which must not be regarded as parts of footwear within the meaning of heading 64.06.*

Certain Notes employ several of these drafting formulae. The definition of "synthetic rubber" in Note 4 to Chapter 40 provides an example of a definition in general terms, in accordance with scientific criteria, followed by an enumeration of products which, within the context of this definition, are to be taken as covered by the definition.

Under Interpretative Rule 6, the Section and Chapter Notes also apply to the classification of goods in the subheadings unless, of course, the context otherwise requires. This is the case, for example, with Note 4 (b) to Chapter 71 (definition of the term "platinum"), which cannot apply to subheadings 7110.11 and 7110.19, for which the term "platinum" is more restrictively defined by Subheading Note 2 to Chapter 71.

It would no doubt have been possible, at least in certain cases, to incorporate the substance of these Notes in the text of the headings or subheadings themselves. But this would have greatly lengthened these texts, making them difficult to understand, and would have involved a great deal of repetition. The Notes thus made it possible to

draft the headings in concise form while at the same time safeguarding the precision and exactness of interpretation that are essential to avoid doubts and disputes in classification.

To distinguish these Section, Chapter or Subheading Notes from the Explanatory Notes, which are not legally binding under the Convention, they are normally referred to as "Legal Notes".

Additional Notes (or supplementary Notes) may be included at the national level by an administration for its own national use and are national in scope. They may be binding at the national level only.

To complement the legal core, there are Explanatory Notes to the HS published separately by the WCO. While these notes do not form part of the legal provisions of the HS, it is important that they be consulted during the classification process."

(Emphasis supplied)

Whatever the obligations and expectations from the Member States while implementing HSN has been brought out in Chapter 4 titled '**The Harmonized System and National Customs Tariffs**' at page II/27 of the above hand Book:

"Contracting Parties to the Harmonized System Convention have to apply the Harmonized System Nomenclature for Customs purposes (Article 3 of the Convention, which deals with obligations of Contracting Parties- see Annex B). This means that they have to introduce the structure of the Harmonized System into their national Customs tariff. In a simple situation, the goods or categories of goods referred to in the national Customs tariff relate to the Harmonized System categories on a one-to-one basis, i.e., the categories in the Harmonized System are the same as those in the national Customs tariff. However, very often they do not coincide with the Harmonized System categories and, consequently, further subdivisions of the Harmonized System nomenclature have to be introduced at the national level. Furthermore, if other Customs measures are to be implemented, further subdivisions of Harmonized System categories may be required.

It is thus clear that the HSN itself acknowledges and rather accepts the need for various member countries to make structural changes into their National Customs Tariff subject to guidance that Rule 1 to 5 of General Interpretative Rules (G.I.'s) of the HSN shall applied *mutatis mutandis* to national sub-heading by virtue of General Interpretative Rule 6, thus clearly providing the leverage for the Member Nations to make suitable changes in their custom tariffs. This respects the sovereignty of member nations as well as their fiscal and statistical needs. The concept of providing need based suitable changes in HSN is

therefore, in tandem with Indian Constitution as well as the structural provisions of HSN.

65. This has been aptly pointed out by learned brother in course of the decision on chapter 21 of India Custom Tariff Act, 1975 (specially the heading 2106) with related supplementary notes. These supplementary notes have been in existence since inception of HSN based Custom Tariff of India. Similar changes have also been made by not only India but various other Countries beyond Chapter 97 which were originally not part of the HSN. Chapter 98 is again outcome of India's need, as is manifested in its own Custom Tariff.

66. As observed above, the Customs Cooperation Council while permitting member countries to de-align from HSN to serve their own needs has mandated a particular requirement that the same should not be made in a manner the General Interpretative Rules cannot be pressed into service for interpretation.

67. In short, heading 2106 under Chapter 21 as well as supplementary notes to chapter 21 have been specifically carved out in the Indian Custom Tariff. The relative chapter notes including supplementary notes as well as headings and sub-headings, therefore, will have to be construed differently from HSN, albeit, with the help of general interpretative notes is the requirement of Customs Cooperation Council. Learned Brother has dealt at length and correctly so, to indicate that chapter note 5 of supplementary notes which reads as follows "Heading 2106 (except tariff item 2106 9020 and 2106 9030), inter alia, includes: "(a) Protein Concentrates and Textured Protein Substances" which is found that in sub-heading Protein Concentrates and Textured Protein Substances are mentioned as 2106 1000.

68. It is to be noted that the supplementary note 5 specifically provided in Chapter 21 of the Indian Customs Tariff, is not sub-heading note but the supplementary Chapter Note to TH 2106, therefore it seeks to enlarge the scope of Tariff heading, specifically. Note 3, 4 and 6 of the same Chapter, despite being supplementary notes deal with scope of specific sub-headings and particularly expend the scope of sub-heading. But Chapter note 5 expands the scope of heading 2106, as distinguished from supplementary notes -3, 4 and 6 which describe the inclusions and exclusions even from 8 -digit sub heading. And therefore expend/

contract the scope of such sub-headings following mandate of above Handbook on HSN as above.

69. From the structure of HSN, section notes and chapter notes including sub-heading notes cited supra it is clear that chapter notes like the interpretative rules form an integral part of the harmonized system and have the same legal force being legal notes. It is also a prescription that sub heading notes refer solely to the interpretation of sub-heading. It is thus clear that since the function of the notes is to define the precise scope and limits of heading or group of headings, chapter or section or even for that matter the sub heading. Therefore, chapter note, which is by way of supplementary note 5 seeks to define the scope and limits of heading 2106. It is thus clear that the expression "Food preparation not elsewhere specified or included" figuring in tariff heading 2106 when expanded by virtue of chapter note 5 (supplementary note) makes heading 2106 to specifically include "Protein Concentrates and Textured Protein Substances" therefore the legislature has clearly expanded the scope of tariff heading 2106 by virtue of supplementary notes 5 as brought out above. All this exercise makes even Heading 2106 also as specific in relation to Protein Concentrates and textured proteins, and other items mentioned in Chapter note 5. This is in consonance with HSN Handbook narrative, a portion of which is therefore worthy of reproduction, even at the cost of little repetition:

"It would no doubt have been possible, at least in certain cases, to incorporate the substance of these Notes in the text of the headings or subheadings themselves. But this would have greatly lengthened these texts, making them difficult to understand, and would have involved a great deal of repetition. The Notes thus made it possible to draft the headings in concise form while at the same time safeguarding the precision and exactness of interpretation that are essential to avoid doubts and disputes in classification."

Above interpretation also gets fortified from the directive of the Customs Cooperation Council which requires minimal disturbances to be done by the Member States so as to maintain the statistical and data collection similarity between Member States. Learned brother is thus correct in pointing out that in view of the special circumstances of Chapter 21 and heading 2106 in Indian Custom Tariff, the inclusion of 'Protein Concentrates and Textured Protein Substances' is clearly specific and that too in tariff heading 2106. The net effect of supplementary note 5

in TH 2106 in Indian Custom Tariff Act is that the heading description 2106 i.e. "Food preparation not elsewhere specified or included" ceases to be a residuary head, in relation to those products which are included in heading 2106, specifically (even if by virtue of any supplementary note). Given above, it is clear that till the product has dominance of Protein Concentrates and Textured Protein Substances (sold as whey protein in the present instance), which is undisputed in this case as other similar Whey Protein with different flavours, have been included by the party itself in this head.

70. From the foregoing it is also clear that Chapter 21 of India Custom Tariff Act read with supplementary notes not having been cast in accordance with HSN, the Explanatory Notes as well as other rulings of other countries including of WCO, till it does not contain realities of Chapter 21 and supplementary of Chapter 21 which are peculiar to India, cease to have even persuasive value and become incomparable as they seek to compare the incomparable. Indian Chapter 21 being exclusive and peculiar has to be interpreted with all its peculiarities.

80. Coming to Chapter 18, it is to be noted that Chapter 1806 is applicable to Chocolate and other food preparations containing COCOA. It is to be noted that chapter 18 has two chapter notes relevant for the purpose of this discussion which are reproduced below:

"This Chapter does not cover:

(a).....

(b) Preparations of headings 0403, 1901, 1902, 1904, 1905, 2105, 2202, 2208, 3003 or 3004.

2. Heading 1806 includes sugar confectionery containing cocoa and, subject to Note 1 to this Chapter, other food preparations containing cocoa."

Since we are confining ourselves only to the tariff headings and chapter notes for the purpose of our discussion, therefore, the only GI Rules which remains relevant is General Interpretative Rule – I, as has been correctly pointed out by the learned brother. Both of these have statutory force and therefore prevail over other legal aids like HSN Explanatory Notes or decisions in other territories as well as of WCO which in certain conditions of tariff being aligned, certainly command persuasive value. Same are therefore, correctly discarded in the factual matrix of the matter.

81. Coming to chapter note of heading 1806, chapter note-2 only mentions sugar confectionery containing cocoa and other food preparations containing cocoa shall be classified under Chapter 1806. Clearly chapter note 1806 does not do away with the requirements of predominance of cocoa in the food preparations in relation to heading 1806. In such a situation, heading 2106 read with Supplementary Note-5 having become more specific for “Protein Concentrates and Textured Protein Substances”(known to market as ‘whey protein’) clearly becomes the preferred head as the product has the predominance of Protein. Again we find that Chapter 18 only excludes preparations of heading 0403, 1901, 1902, 1904, 1905, 2106, 2202, 2208, 3003 or 3004. In chapter note 3 to heading 1904, it has been mentioned that heading 1904 does not cover preparations containing more than 6% by weight of cocoa calculated on a totally defatted basis or completely quoted with chocolate or other food preparation containing cocoa of heading 1806.

82. Above chapter note has been pointed out by way of example that wherever weight percentage other than the pre-dominance is to be considered, the chapter notes have gone on to specifically mention the percentage of weight. Similar is the situation with heading 1901.

HS Code	Item Description
1901	Malt extract; food preparations of flour, groats, meal starch or malt extract, not containing cocoa or containing < 40% by weight of cocoa calculated on a totally defatted basis. Not elsewhere specified or included; food preparations of goods of headings 04.01 to 04.04, not Containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted Basis, not elsewhere specified or included.

Even Chapter note 5 to Chapter 71 dealing with alloys of precious metals has specifically given prescription of 2% or more by weight of gold, platinum and even silver to be treated as alloy of gold, platinum and silver respectively.

83. Thus, it is clear that wherever a particular (lower) percentage is required to be read into any preparation the same has been provided either by way of chapter note or in the heading itself. This not being the case with tariff item 1806, the expression ‘Food Preparations containing Cocoa’ has to be decided by the pre-dominance of ingredients in

admixture which in this case is of Protein. While doing so no resort to explanatory notes is being taken in view of impugned contesting entries and their difference from HSN.

84. Thus, it is clear that in instant case classification in favor of 2106 can be decided without resort to Explanatory Notes which in any case do not part of the legal provisions of the harmonized system. Matter can be decided with the help of statutory provisions of Indian Customs Tariff Act, 1975. There is then no need to go further. The advocate for the appellant was at length that the resort should be taken to GI-3 specially Rule 3(a) and while so asserting it has been argued that specific description shall be preferred to general description. The fallacy of the notion has already been brought out in relation to TH to indicate that how the matter can be decided by section or chapter notes.

85. While not agreeing with the proposition of resort being required to be taken to G.I Note 3 (even if for the sake of argument), it has to be considered as to which head provides more specific description for a product which has dominance of Protein Concentrates and Textured Protein Substances, from the discussion above, it is clear that under Indian Tariff 2106 of Indian Customs Tariff above. Learned brother has gone at length with heading 2106 having been extended to include Protein Concentrates and Textured Protein Substances, the same becomes in any case, more specific in description to 1806, in which other food preparations containing Cocoa have been included. It is to be kept in mind that unlike other tariff headings, where the percentage of cocoa has been mentioned the heading 1806 does not speak of percentage of cocoa. Therefore, it is clear that even GI Rule – 3 would have made TH 2106 only as more specific heading for the impugned product.

86. Learned advocate during arguments had taken resort to HSN explanatory notes to justify lower percentage of Cocoa to term products still as 'preparation of Cocoa'. But in doing so, the argument has sidetracked the reality of Indian tariff being different and capable of providing answer through its own existing statutory clauses by way of supplementary notes, as discussed above.

87. While arriving at the above conclusion, support is also drawn from the decision in the matter of Collector of Central Excise vs. Frozen Food P.L. reported in 1992 (59) ELT 279 (Tri.) which was the decision under

HSN based Central Excise Tariff(which also had similar head and supplementary notes de-aligned from HSN- though numbered differently) in relation to the additive supplement “surje”, following observations are relevant:

*“42. As for the argument that protein concentrates mentioned in HSN Chapter Note 5(a) of Chapter 21 would refer to protein concentrated from sources other than milk like Soya protein, groundnut, etc., there is no warrant for such a claim. The items which are covered under Chapter IV find specific mention in headings and sub-headings, of that Chapter. **We do not find any mention of the expression “protein concentrates” in this Chapter and for this reason alone, protein concentrates would be covered under Chapter 21 by virtue of Note 5(a).***

43. We agree with the contention of Shri Chakrabarty that because of interpretative Rule 1, classification of a product is to be determined according to the terms of the headings and relative Section of Chapter Notes. By application of this principle, the indication in Note 1(a) of Chapter 30 that dietetic, diabetic or fortified foods and food supplements are covered by Section IV is a clear indication of the classification of these products. This note has therefore, legal force and is not merely an indication of the possible classification as contended by Shri Lakshmi Kumaran.”

(Emphasis supplied)

The above decision has been approved by the Hon’ble Supreme Court as reported in 1998 (98) ELT 295 (SC). Therefore, it is clear that addition of any additive of flavoring content will not alter the characteristic of protein concentrate etc. and will not take it out from the entry 2106 in the present instance.

88. In view of the foregoing, I agree with the views of learned brother and accordingly uphold the classification of the department for the impugned product. Appeal dismissed.

(Pronounced in the open court on 01.09.2023)

**(SOMESH ARORA)
MEMBER (JUDICIAL)**

Neha