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

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10284 of 2023

(Arising out of OIA-KND-CUSTM-000-COM-08-2022-23 dated 27/12/2022 passed by Commissioner of CUSTOMS-KANDLA)

MVR INTERNATIONAL ……...**Appellant**
Ami Jharna B-2 204 Kanya Pada Film
City Road Goregoan East Andheri
Mumbai, Mumbai, Maharasthra

VERSUS

C.C.-KANDLA ……...**Respondent**
Custom House, Near Balaji Temple,
Kandla, Gujarat

APPEARANCE:
Shri. Pratik Karande for the Appellant
Shri Girish Nair, Assistant Commissioner (AR) for the Respondent

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

Final Order No. 12081 /2024

DATE OF HEARING: 12.09.2024
DATE OF DECISION:23.09.2024

SOMESH ARORA

Intelligence gathered by Directorate of Revenue Intelligence, Mumbai Zonal Unit (hereinafter also referred to as Port Intelligence, Mumbai) showed that certain importers of 'Nutritional Supplements' classifiable under Customs Tariff Item No. 21061000 and chargeable to Customs duty @ 30%/40% Basic Customs Duty (BCD) and Integrated Goods and Services Tax (IGST) @ 28%/18%, along with Cess as applicable during various periods, were resorting to mis- declaration of value, so as to evade payment of appropriate Customs duty at the time of import of these goods at Kandla SEZ (KASEZ). The intelligence further indicated that one such importer i.e. the present appellant, situated at Ami Jharna, B-2-204, Kanya Pada, Film City Road, Goregaon (East), Mumbai- 400 063 (hereinafter also referred to as M/s. 'MVR) was indulging in mis-declaration of value and had evaded Customs duty on import of 'Nutritional Supplements' through the Kandla SEZ.

2. On the basis of the above intelligence, the premises of the Custom House Agent (CHA) of the importer, M/s A.D. Mehta Clearing Agency situated at 16-21-22, Kasezia Building, Gandhidham (Kutch)- 370230, Gujarat was searched by the officers of DRI on 16.01.2019 under the provisions of Section 105 of the Customs Act, 1962 under regular panchanama dated 16.01.2019. During the course of the search, the officers of DRI withdrew certain documents under the reasonable belief that they were necessary for the investigations being carried out against the importer MVR.

3. During the course of investigations, the under-valuation & mis-classification of goods imported by MVR was noticed. The Statements of Smt. Manisha Umashankar Bathina, Proprietor of MVR was recorded on 22.04.2019 & 18.10.2021 under the provisions of Section 108 of the Customs Act, 1962. In order to have a fair idea of the rate of the products imported, statement of Shri Nitin Ghanshyam Modi, Director (Finance) of M/s. Glanbia Performance Nutrition India Pvt. Ltd., the Indian subsidiary of the manufacturer of the concerned bond was recorded on 03.09.2019 under the provisions of Section 108 of the Customs Act, 1962.

3.1 From the investigations carried out against the importer, it was revealed that the importer MVR had resorted to undervaluation in respect of the Nutritional Supplements' imported by them from the Supplier Muscle Fusion FZE, UAE. It was also seen from the import documents that the country of origin of the goods was United States of America (USA). This fact was also confirmed by Smt Manisha U. Bathina, the Proprietor of the importer firm in her Statement recorded on 18.10.2021 under the provisions of Section 108 of the Customs Act, 1962. She had confirmed that all the Nutritional items which were imported by her were having origin in America. During the course of Statement of Smt Manisha U Bathina recorded on 22.04.2019 and 18.10.2021, she had also admitted to the undervaluation in respect of the import of the Nutritional Supplements which were warehoused at KASEZ and subsequently cleared for home consumption from there. The importer, thereafter had worked out the value of the imported goods in respect of the goods where they had indulged in undervaluation and submitted a statement showing differential duty of Rs.12,25,602/- as payable by MVR and voluntarily paid part differential duty amounting to Rs. 12,25,602/ vide Demand Draft Nos.375835 dated 11.04.2019 and 376603 dated 08.05.2019 issued by Canara Bank, J.B. Nagar, Andheri (East), Mumbai. Thus, in all these cases, the importer herself had admitted to the undervaluation of the transaction value. Smt. Manisha U. Bathina has also admitted that the cash generated in respect of the undervalued goods was collected from her by the supplier. However, the importer could not furnish as per the department the corresponding documents as the imports were done in connivance with their suppliers who had received the differential value of the undervalued goods in cash. Thus, in view of foregoing declared values in respect of all the above imports appellant to be admittedly manipulated and false to the department.

3.2 It was found by the department that the imports of the 'Nutritional Supplements' were through the same suppliers and the undervaluation was admittedly done with the connivance of the suppliers. Therefore the transaction value of all the imports made by M/s. MVR from the said suppliers were found to be mis-declared by the department as also admitted in respect of the other consignments. In view of this, the valuation of all the imports made by M/s. MVR were also checked. On comparing the values declared by the importer initially at the time of import as well as the values admitted by the Proprietor of M/s. MVR during the course of investigation, with the contemporaneous values of identical products, it was found that there was a huge difference in these values. It was also seen that though the importer had admitted to the undervaluation of the imported products, the values admitted by MVR were found less when compared to the contemporaneous imports made by other importers during the relevant period. In view of the above, these values were not acceptable as the transaction value under Section 3 of the CVR, 2007 and therefore it was necessary to be ascertained from Rules 4 to 9 of the CVR, 2007, to arrive at the correct valuation of the all the other products imported by MVR.

3.3 It was found that the importer had already admitted that the 'Nutritional Supplements' imported by them have been manufactured in the USA. Hence, to arrive at the correct value, the comparison of the value was done with the identical 'Nutritional Supplements' that were imported from USA by other importers. The Proprietor of the importing firm M/s.MVR had also admitted that the nutritional supplements imported by them from UAE were not of inferior quality and the origin of the Nutritional Supplements imported from the UAE was from United States of America and manufactured in USA. It was also found that the goods received from the USA were also ready to sell goods, needing no further manufacturing or processing and the quality of the Nutritional Supplements' of the respective brands imported from UAE are same as that which are imported directly from the United States of America to India. It was further found in respect of Nutritional Supplements where the importer had indulged in mis-classification while importing the goods at KASEZ, that the values presented to the Customs authorities while clearing these goods were also understated values in as much as they were also imported from the same suppliers and on comparison with the contemporaneous values of identical goods, it was found that they are also undervalued. The importer M/s. MVR had admitted to the above undervaluation and had voluntarily paid a part of the differential Customs duty evaded by them in respect of some of the consignments. Hence, in view of the above, recourse to Rule 4 of the CVR, 2007 was taken in respect of all the imports of Nutritional Supplements where contemporaneous value of the identical goods was available. The details of all such goods, where contemporaneous value of identical goods have been taken for re determination of the value of the imports of M/s. MVR, were mentioned in the Show Cause Notice.

3.4 It was also found that the importer M/s. MVR had imported Whey Proteins of brand ON and BSN manufactured by M/s Glanbia Performance Nutrition Inc., USA. In the Statement dated 03.09.2019, Shri Nitin Ghanshyam Modi, Director (Finance) of M/s Glanbia Performance Nutrition India Pvt. Ltd., the Indian subsidiary of the above manufacturer, recorded under the provisions of Section 108 of the Customs Act, 1962 has confirmed that the distributor for ON and BSN products was one M/s. Bright Commodities (presently known as M/s. Bright Performance Nutrition). Gandhidham, Gujarat. He has also stated that the quality of the products manufactured by M/s Glanbia Performance Nutrition Inc., USA is the same when imported to India or UAE. He has further confirmed that as the quality of the products manufactured by M/s Glanbia Performance Nutrition Inc., USA is the same, the cost of the product is substantially the same wherever it is sold. Further, the authorised importer/distributor of Nutritional Supplements of brand 'MuscleTech' manufactured by lovate Health Science, USA was one M/s Muscle Pro Nutrition till around 2018-19 and thereafter the distributor was one M/s. Sri Balaji Overseas. It was found that in these cases, these manufacturers have appointed their authorised importers/distributors to sell their products in India. It was found that the values of the imports made by their authorised distributors are the fair market value of that particular brand. Thus, it appears that the values at which the identical goods bearing the same brands have been imported by the above distributors of the respective brands are the fair value of those brands. These imports were also found to be contemporaneous in nature to the imports of the same brands made by M/s. MVR.

3.5 Similarly, it was found that M/s. Pearl International, Mumbai was the authorised distributor of the 'Nutritional Supplements' of brand 'Dymatize'. The values at which the identical goods bearing the said brand were imported by M/s Pearl International, Mumbai, were the fair value of this brand as per the department. However, during the course of investigation by DRI in respect of the imports made by M/s Pearl International, it was noticed that they had undervalued their products by resorting to manipulation of import invoices and had understated the actual transaction value of the goods of brand Dymatize brand. Consequently, on the basis of the investigations carried out, the values were re-worked and a Show Cause Notice No. DRI/MZU/B/Int/09/2020 dated 24.12.2020 (RUD-07) had been issued to the importer M/s. Pearl International. Thus, the re-worked actual values on the basis of actual invoice value retrieved from M/s. Pearl International, as mentioned in the said Show Cause Notice, found to be the correct contemporaneous value at which the said Nutritional Supplements of the Dymatize brand was imported by M/s. MVR.

4. QUANTIFICATION OF DIFFERENTIAL VALUE

4.1 In view of the evidences revealed during investigation, as described above, the declared value appears liable for rejection to the department under the provisions of Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (CVR, 2007) read with Section 14 of the Customs Act, 1962. The declared value, therefore, merits re-determination under CVR, 2007. In this case, it was found that the value of the goods mentioned are on CIF basis and the same has been taken for working the difference of values.

4.2 Thus, the importer appeared liable to pay the differential duty on the ascertained differential value determined under Rule 4 of the CVR, 2007 for their various imported goods to the department. They also appeared liable to pay the differential duty on account of the Mis- classification of the

Dietary/Food/Nutritional Supplements, as detailed in Annexure B to this Show Cause Notice. The Summary of the differential duty payable by them for the period from 20.07.2017 to 06.11.2017 as worked out by the department is as under:-

Annexure	**Assessable Value (In Rs.)**	**Duty Paid By the Importer (In Rs.)**	**Ascertained Assessable Value (In. Rs.)**	**Ascertained Duty (In. Rs.)**	**Differential Duty (In Rs.)**
Annexure A	1,53,84,016	1,03,92,210	3,64,72,498	2,46,37,902	1,12,42,691
Annexure B	96,002	64,851	1,87,331	1,02,024	37,173
TOTAL	**1,54,80,017**	**1,04,57,061**	**3,66,59,829**	**2,47,39,926**	**1,42,82,865**

4.3 Accordingly, after investigation, the declared value and classification of the imported goods were challenged vide Show Cause Notice bearing No. GEN/ADJ/COMM/257/2022-Adjn-O/o Commr- Cus-Kandla dated 23.06.2022. The charges framed under the said Show Cause Notice were as under:

i. The declared assessable value of ₹ 1,54,80,017/- (Rupees One Crore Fifty Four Lakhs Eighty Thousand And Seventeen Only) in respect of the import of 'Dietary/Food/ Nutritional Supplements' by M/s. MVR, as detailed in Annexure A & Annexure B to this Show Cause Notice should not be rejected under the provisions of Rule 12 of the CVR, 2007 read with the Section 14 (1) of Customs Act, 1962;

ii. The ascertained assessable value calculated in respect of the import of Dietary/Food/ Nutritional Supplements' by M/s. MVR amounting to 3,66,59,829/- (Rupees Three Crores Sixty Six Lakhs Fifty Nine Thousand Eight Hundred and Twenty Nine Only) as detailed in Annexure A & Annexure B should not be treated as the correct assessable value of the goods imported by them,

iii. The imported Dietary/ Food/ Nutritional Supplements' which do not contain Protein concentrates and textured Protein substances' classified by the importer under CTI 21061000 should not be appropriately classified under CT1 21069099

iv. The differential Customs duties as detailed in Annexure A & Annexure B to this notice, amounting to t 1,42,82,865/- (Rupees One Crore Forty Two Lakhs Eight Two Thousand Eight Hundred and Sixty Five Only), should not be demanded and recovered from them under the provisions of Section 28(4) of the Customs Act, 1962 along with interest under Section 28AA of the Customs Act, 1962;

v. The impugned imported goods with a total assessable value of 3,66,59,829/- (Rupees Three Crores Sixty Six Lakhs Fifty Nine Thousand Eight Hundred and Twenty Nine Only) as mentioned in Annexure A & Annexure B to this notice should not be held liable for confiscation under section 111(m) of the Customs Act, 1962;

vi. Penalty should not be imposed on them in terms of Section 112 (a) and Section 112(b) of the Customs Act, 1962;

vii. Penalty should not be imposed on them in terms of Section 114A of the Customs Act, 1962;

viii. Penalty should not be imposed on them in terms of Section 114AA of the Customs Act, 1962;

ix. An amount of ₹12,25,602/- (Rupees Twelve Lakhs Twenty Five Thousand Six Hundred And Two Only) voluntarily paid by M/s. MVR vide Demand Draft Nos.375835 dated 11.04.2019 and 376603 dated 08.05.2019 issued by Canara Bank, J.B. Nagar, Andheri (East), Mumbai should not be appropriated against the differential duty and interest payable by the importer.

5. A detailed reply dated. 15.12.2022 was filed by he appellant rebutting foregoing allegation. However, show cuase notice was upheld by the Commissioner and feeling aggrieved by the order, appellant has preferred the present appeal.

6. The Learned AR reiterates the finding as contained in the order of lower authority. The advocate for the appellant has taken various pleas including that

they were not offered cross-examination of the witness, testimony of which has been relied upon during the course of the adjudicating proceeding and that the dispute involved is of valuation as well as on the issue of classification. Department had desired classification under Tariff Heading 21069099, whereas, they had indicated a Tariff Heading 21061000 for contain products as they did not contain any protein. The Learned Advocate stated they have agreed for classification proposed by the department for 16 products involved as they admitted they contained proteins contained concentrate and texture proteins substances and were thus classifiable under CH 2169099 and also extent of undervaluation was also admitted by them in the statement. That the department generally had failed to follow the Customs Valuation Rules and rejection of transaction value is improper and so is re-opening of assessment. The Authorized Representative on the other hand emphasises that the case was made out on the basis of admission of the proprietress of the concerned appellant who also admitted that number of goods did not have protein and also branded goods were undervalued vis-a-vis importers who were directly importing the goods for USA.

7. We have considered the rival submissions. We find that the order does not deal with various issues raised by the appellant including that the goods were assessed and the assessment could be re-opened only through review by the department. It has to be examined that assessment by itself being appealable even by the department whether the facts justified a fresh show cause notice? We also find that valuation has to be determined even if be on contemporaneous price by sequentially following Customs Valuation Rules by rejecting all those which are not legally accepted. Also the statement of the Director (Finance of M/s. Glanbia Performance Nutrition India Pvt. Ltd) which has been relied upon to indicate mis-description and valuation is required to be tested on cross-examination and all documents of contemporaneous price to be adopted by the department are required to be supplied to the appellants. The statement of Director (Finance) of another rival Company even if is to be

relied upon same has to be backed with import data. We find that no such exercise has been carried out by the department in instant matter and in the absence of same, appellants cannot offer effective reply. Further, some of the products that do contain proteins do not prima facie merit consideration under T.H 21069099. Same needs detailed Consideration.

8. In view of the foregoing, the matter deserves to be re-considered by the adjudicating authority by offering a proper opportunity, as well as relevant import data/ documents as may be relied upon by the department and required in defence by the party.

9 Matter is accordingly remanded. Appeal is allowed by way of remand.

(Pronounced in the open court on 23.09.2024)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi