

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

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 10629 of 2023 – DB

[C/Misc/11061/2024]

(Arising out of Order in Appeal KDL-CUSTM-000-APP-148-23-24 dated 11/07/2023 passed by Commissioner of Customs (Appeals) -Ahmedabad)

KITCHEN XPRESS OVERSEAS LTD

.....Appellant

Plot No. 623, Shed No. 402,
New area Kandla Special Economic Zone
Gandhi Dham, Kachchh, Gujarat- 370201

VERSUS

Commissioner of CUSTOMS - Kandla Customs

.....Respondent

Office of the Commissioner of Customs,
Near Balaji Temple,
Kandla, Kachchh, Gujarat- 370210

APPEARANCE:

Shri S J Vyas, Advocate for the Appellant

Shri Sanjay Kumar, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 12800/2024

DATE OF HEARING: 18.11.2024

DATE OF DECISION: 25.11.2024

RAMESH NAIR

The brief facts of the case is that the appellant being SEZ unit engaged in importing pulses and processing them i.e. sorting, grading and polishing. After carrying out the said process, Pulses that were of exportable quality were exported. Non-exportable coarse pieces of pulses " the impugned product" namely offspecs pulses, tukdi of pulses- broken pulses, bhushi/ bhuki of pulses mixed with impurities/ pulses waste(not of export quality) were cleared into Domestic Tariff Area. It is this waste product, classification of which is involved in this appeal. As per the appellant the classification of the said goods is under chapter heading 0713 which is eligible for duty exemption under Notification No. 12/2012 (Sr. No. 21).

1.1 The case of the Department is that the classification of the said goods is under sub heading 23025000. Accordingly, the appellant was forced to pay the duty. Consequently, the appellant paid the duty under protest and thereafter a show cause notice dated 20.09.2021 was issued to decide the protest and also the classification dispute. The adjudicating authority vide order-in-original No. KDL/ADC/RHM/19-2021-22 dated 11.03.2022 decided the classification under Custom Tariff item 23025000 and confirmed the duty of Rs. 15,21,135/- paid under protest. Being aggrieved by the said order-in-original, the appellant filed an appeal before the Commissioner (Appeals) who vide order-in-appeal No. KDL-CUSTOM-000-APP-148-23-24 dated 11.07.2023 rejected the appeal upholding the order-in-original.

2. Shri S J Vays, Learned Counsel appearing on behalf of the appellant submits that heading 2302 applies only to the Bran, Sharps and other residues derived from shifting, milling or other working of cereals or leguminous plants. He submits that from the above heading, it can be seen that the residue should arise from working of either a cereal or leguminous plant. It is submitted that in the present case the waste arises from pulses and pulses are not covered either as cereal or leguminous plant and therefore they are outside the scope of the said entry. Furthermore, there is no process or working of leguminous plant. The process or working is of leguminous vegetable.

2.1 He submits that since, the classification adopted by Department is not correct, the entire proceeding is vitiated and the impugned order must be set aside and the classification followed by appellant must be upheld. He placed reliance on the following judgments: -

- Precision Rubber Industries – 2016 (4) TMI 841 SC
- PepsiCo Holdings Pvt Ltd 2019 (4) TMI 320 TRI

- Warner Hindustan Ltd-1999 (8) TMI 75 SC
3. Shri Sanjay Kumar, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.
4. We have carefully considered the submission made by both the sides and perused the records. We find that the dispute in the present case is that whether the goods in question is classifiable under 2302 5000 as claimed by the department or under chapter heading 0713 as claimed by the appellant. To arrive at a conclusion on the classification, it is necessary to go through the rivel tariff entries, which are reproduced below: -

Entry No. 0713

Heading No.	H.S. Code	ITC(HS) Code	Description	Unit
0713			DRIED LEGUMINOUS VEGETABLES, SHELLED, WHETHER OR NOT SKINNED OR SPLIT	
		0713 10 00	Peas (Pisum sativum)	KGS
		0713 20 00	Chickpeas (garbanzos)	KGS
		0713 31 00	Beans (Vigna spp., Phaseolus spp.)Beans of the species Vigna mungo (L.) Hepper or Vigna radiata (L.) Wilczek	KGS
		0713 32 00	Small red (Adzuki) beans (Phaseolus or Vigna angularis)	KGS
		0713 33 00	Kidney beans, including white pea beans (Phaseolus vulgaris)	KGS
		0713 34 00	Bambara beans (Vigna subterranea or Voandzeia subterranea)	KGS
		0713 35 00	Cow peas (Vigna unguiculata)	KGS
	0713 39		Other:	KGS
		0713 39 10	Guar Seeds	KGS
		0713 39 90	Other	KGS
		0713 40 00	Lentils	KGS
		0713 50 00	Broad beans (Vicia faba var major) and horse beans (Vicia faba var equina, Vicia faba var minor)	KGS
		0713 60 00	Pigeon peas (Cajanus cajan)	KGS
	0713 90		Other:	KGS

		0713 90 10	Split	KGS
		0713 90 90	Other	KGS

Entry No. 23025000

HSCODE	PRODUCT DESCRIPTION
<i>Subhead:</i>	<i>Prepared animal feeder</i>
23025000	Bran sharps and other residues of legumins plant

4.1 The department has proposed the classification under 2302. From the plain reading of the chapter heading 2302, it is found that the same is applicable for the goods such as Bran, Sharps and others residues whether or not in the form of palates derived from the sifting, milling or other working cereal or of leguminous plants. That means it applies to the goods namely, cereals of leguminous plant. In the present case the waste arise from the pulses and pulses are not covered either as cereals or leguminous plant. Therefore, on this basis, it is clear that the appellant’s product being a waste arise from the pulses does not cover under the tariff heading 2302. It is a settled legal position that irrespective of the position whether the assessee’s claim of classification is right or wrong but if the classification proposed by the department fails than the entire proceeding is vitiated and no consequential demands will sustain. In this regard we refer to the following judgments: -

a) In case of Pepsico holdings Pvt Ltd (Supra) this Tribunal has given the following findings:-

"3. In the context of specific description within which the original authority sought to tax the goods, we do not have to examine whether the broader description of the heading would apply at all. From the disaggregation of the heading 'waffles and wafers', it would appear that there is a clear distinction between the two. The product in question is not a wafer which, by its very definition, is a thin product of baking process/drying process which is a far cry from the solidity of the impugned goods. It would appear that the adjudicating authority was more impressed by the reference to 'chocolate or containing chocolate' in the proposed classification which the impugned

goods, admittedly, contained, without paying attention to the dimension intended by the description.

4. We may not be in concurrence with the claimed classification; however, in view of the specific classification as 'communion wafers', we merely have to ascertain the appropriateness of the alternative so proposed.

5. 'Communion wafers' are produced for religious purposes which is evident from the adjective proceeding 'wafer' in the subheading. 'Communion' is a rite specific to the ritual of 'mass' celebrated in churches. No other meaning is assigned to that phrase in common parlance.

6. Learned Authorised Representative contends that 'communion wafers' are not normally made of or contain chocolates; however, no material is placed on record to support this contention. We, therefore, do not find any reason to discount the possibility of chocolate covered or chocolate filled 'communion wafers' being used in the ritual.

7. Learned Authorised Representative places reliance on the decision of the Hon'ble Supreme Court in Warner Hindustan Ltd v. Collector of Central Excise, Hyderabad [1999 (113) ELT 24 (SC)] to plead that the original authority should be permitted to attempt another alternative classification as the declared heading is not appropriate. That decision was handed down in the context of different classifications adopted by the original authority and the appellate authority causing the Tribunal, at further stage of appeal, to classify the goods under third heading and it was that decision of the Tribunal, without issue of a precedent show cause notice, which met with disapproval of the Hon'ble Supreme Court. Therein the Hon'ble Supreme Court has held

'2. The correct course for the Tribunal to have followed was to have dismissed the appeal of the Excise authorities making it clear that it was open to the Excise authorities to issue a fresh show cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionery.'.

as a prescription in law without placing the Tribunal under obligation to discharge the responsibility of the original authority in each and every dispute on rate of duty.

8. In the light of the above, we cannot decide on a classification that has not been pleaded before us. Once the classification proposed by Revenue is found to be inappropriate, that claimed, while clearing the goods, will sustain even if it may appear to be inappropriate. We cannot also, in our appellate capacity, direct or accord the latitude for invoking section 11A of Central Excise Act, 1944 by obliteration of the proceedings leading to the impugned order. The mandate of the law pertaining to recovery of duties not paid or short-paid will have to be followed to the letter.

9. Consequently, the impugned order must be set aside and appeal allowed."

b) In the case of Warner Hindustan Ltd (supra) the Hon'ble Apex Court has given the following findings:-

"Not much needs to be stated to allow this appeal.

2. The appellant manufactures what it calls "Halls Ice Mint tablets". It classified these tablets as "Ayurvedic medicines" under Heading 3003.30 of the Central Excise Tariff. It was issued a notice to show cause why these tablets should not be classified under Tariff Heading 3003.19 as "patent or proprietary medicines". The Assistant Collector, after hearing the appellant, held that the tablets were patent or proprietary medicines classifiable under Heading 3003.19. In appeal by the appellant, the Collector of Central Excise (Appeals) held that the tablets were Ayurvedic medicines classifiable under Heading 3003.30. The Excise authorities went in appeal to the Tribunal and, for the first time, took the stand that the tablets were correctly classifiable under Heading 17.04 as "confectionery". The appellant, of course, stuck to its stand that the tablets were Ayurvedic medicines classifiable under Heading 3003.30. The Tribunal noted that the Assistant Collector had classified the tablets under Heading 3003.19, that is, as patent or proprietary medicines. This was clear indication that the stand of the Excise authorities prior to the stage of the appeal to the Tribunal was that the tablets were patent or proprietary medicines classifiable under Heading 3003.19. The Tribunal also noted that "both sides have not adduced any detailed arguments as to why these tablets can be considered as confectionery item or otherwise although a plea is there from the Collector in the grounds of appeal that the goods are assessable under Tariff 17.04". In our opinion, the Tribunal was quite wrong in these circumstances in allowing the appeal of the Excise authorities and classifying the mint tablets as items of confectionery under Heading 17.04. The correct course for the Tribunal to have followed was to have dismissed the appeal of the Excise authorities making it clear that it was open to the Excise authorities to issue a fresh show cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionery. This would have given the appellant the opportunity to place on record such material as was available to it to establish the contrary. It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before the authorities below.

3. In the result, the appeal is allowed. The judgment and order of the Tribunal under appeal is set aside and the appeal filed by the Excise authorities before the Tribunal is dismissed. It shall be open to the Excise authorities to issue to the appellant a notice to show cause why the tablets should not be classified as items of confectionery under Heading 17.04, provided it is open to the Excise authorities to do so in law.

No order as to costs."

From the above judgments, it is settled that once the claim of the department on any classification gets failed then the entire proceeding consequential to the said proposals will also be set aside. Therefore, in the present case, since, it could not be established that the goods in question is classifiable under tariff heading 2302. The impugned order is not sustainable.

4.2 Without prejudice to the above, we also find that the appellant have claimed the classification of their goods i.e. waste of pulses under 0713. The entry of the same reads as "DRIED *LEGUMINOUS VEGETABLES, SHELLLED, WHETHER OR NOT SKINNED OR SPLIT*". We find that as against the cereal and vegetable plants, the goods is appropriately classifiable as dried leguminous vegetables. Therefore, in our considered view, we hold that the appellant have correctly classified the goods under 0713.

5. As per our above discussion and finding, supported by the judgment as cited by above, the impugned order is not sustainable, hence, the same is set aside. Appeal is allowed with consequential relief. MA also stands disposed of.

(Pronounced in the open court on 25.11.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha