

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

REGIONAL BENCH-COURT NO. 3

**Customs Appeal No. 10986 of 2021- DB**

(Arising out of OIA-MUN-CUSTM-000-APP-139-21-22 dated 27/08/2021 passed by Commissioner of CUSTOMS-AHMEDABAD)

**MUSCLE HOUSE I PRIVATE LIMITED**

10168 First Floor Main Guruwara Road Karol Bagh  
Dehli

**.....Appellant**

*VERSUS*

**Commissioner of Customs-Mundra**

Office of the Principal Commissionerate of Customs,  
Port User Buld. Custom House Mundra, Mundra  
Kutch Gujarat- 370421

**.....Respondent**

**WITH**

- (i) Customs Appeal No. 10384 of 2022- DB (PARADISE NUTRITION INCORPORATION)**
- (ii) Customs Appeal No. 10664 of 2022- DB (SHRI BALAJI OVERSEAS)**
- (iii) Customs Appeal No. 10670 of 2022- DB (KAR ENTERPRISES)**
- (iv) Customs Appeal No. 10675 of 2022- DB (MUSCLEPRO NUTRITION PVT LTD)**
- (v) Customs Appeal No. 10179 of 2024- DB (MUSCLE HOUSE I PRIVATE LIMITED)**

[(Arising out of OIA-MUN-CUSTM-000-APP-331-21-22 dated 21/03/2022 passed by Commissioner of CUSTOMS-MUNDRA), [(Arising out of OIA-MUN-CUSTM-000-APP-287-21-22 dated 16/02/2022 passed by Commissioner of Central Excise, Customs and Service Tax-MUNDRA), (Arising out of OIA-MUN-CUSTM-000-APP-451-22-23 dated 28/06/2022 passed by Commissioner of CUSTOMS-AHMEDABAD), (Arising out of OIA-MUN-CUSTM-000-APP-450-22-23 dated 28/06/2022 passed by Commissioner of CUSTOMS-AHMEDABAD), (Arising out of Order in Appeal MUN-CUSTM-000-APP-474-22-23 dated 12/08/2022 passed by Commissioner of CUSTOMS (Appeals)-AHMEDABAD)]

**APPEARANCE:**

Shri Vikash Mehta, Consultant for the Appellant

Shri Sanjya Kumar & Shri Prashant Tripathi Superintendent (AR) for the Respondent

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

**Final Order No. 13025-13030/2024**

DATE OF HEARING: 21.10.2024/21.11.2024

DATE OF DECISION: 04.12.2024

**RAMESH NAIR**

The issue involved in the present appeals are that:-

- (a) whether the health supplements imported by the assessee which are admittedly classifiable under CTH 2106 9099 are liable to

IGST @28% under Sr. No. 9 of Schedule IV of Notification No. 1/2017- IGST rate or at 18% under serial No. 453 of Schedule III of the said notification.

(b) Whether the demand for differential IGST is barred by limitation or otherwise.

2. Shri Vikas Mehta, Learned Consultant appearing on behalf of the appellant at the outset submits that the issue is no longer res-integra has the same has been decided in various judgments as follow: -

- Neuvera Wellness Venture P. Ltd V/s Commissioner of Customs Mundra vide final order No. 12343/2023 dated 20.10.2023
- Bright Performance Nutirtion V/s. Commissioner of Customs Mundra - 2024 (3) TMI 936 CESTAT Ahmedabad
- Raptakos Brett & Co. Ltd. Vs. Commissioner of Central Excise, Raigad- 2014 (307) ELT 565 (Tri.- Mumbai)
- ARC Distributors V/s. Commissioner of Customs, Mundra- 2024 (5) TMI 338 CESTAT Ahmedabad

2.2 He Further submits that show cause notice is time barred inasmuch as all the material particulars about the description and classification of goods were duly declared by the appellant in the bill of entry & the same have been duly accepted. He also submits that the show cause notice was issued not only after expiry of 02 years from the date of assessment but also after expiry of 02 years of the audit observation. The show cause notice was issued without conducting any inquiry or investigation and without bringing on record any means rea or positive act committed by the appellant. Moreover, any amount of IGST paid by the appellant would have translated into accrual of an equivalent amount of Input Tax Credit with appellant for making tax payment on further supply of the same goods to customers. As such, the appellant had nothing to gain by deliberately resorting to wrong classification with an intent to pay a lesser IGST. Notwithstanding this, it is an admitted position that the appellant had correctly described the goods in the bills of entry and hence, wrong classification, per se, without any positive evidence available on record, cannot result in invocation of extended period for demanding duty and imposition of mandatory penalty upon the appellant.

2.3 He submits that in view of the above submission, the appeals filed by the assesseees deserve to be allowed.

3. Shri Sanjay Kumar, Learned Superintendent and Shri Prashant Tripathi, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned orders.

4. We have carefully considered the submission made by both sides and perused the records. We find that the issue in the present case is no longer res-integra as the same has been considered by this Tribunal in the case of Neuvera Wellness Venture Pvt Ltd (Supra) wherein by the detailed finding, this Tribunal has considered that the nutrient/health supplements is not covered under Sr. No. 9 of Schedule IV whereas the same is covered under Serial No. 454 of Schedule iii for the purpose of charging the IGST. The relevant order is reproduced below:-

*"4. We have carefully considered the submission made by both the sides and perused the records. We find that the lower authorities have denied the exemption under entry No. 453 of Schedule IV of Notification No. 1/2017-IGST-Rate. Accordingly the IGST will attract @ 28% instead of 18%. For better understanding of the exact entry of both the Notification as claimed by the appellant as well as contended by the Revenue are reproduced below: 1) In exercise of the powers conferred by sub-section (1) of section 5 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), the Central Government, on the recommendations of the Council, hereby notifies the rate of the integrated tax of-*

*(i) 5 per cent. in respect of goods specified in Schedule I,*

*(ii) 12 per cent. in respect of goods specified in Schedule II,*

*(iii) 18 per cent. in respect of goods specified in Schedule III,*

*(iv) 28 per cent. in respect of goods specified in Schedule IV,*

*(v) 3 per cent. in respect of goods specified in Schedule V, and*

*(vi) 0.25 per cent. in respect of goods specified in Schedule VI appended to this notification (hereinafter referred to as the said Schedules), that shall be levied on inter-State supplies of goods, the description of which is specified in the corresponding entry in column (3) of the said Schedules, falling under the tariff item, subheading, heading or Chapter, as the case may be, as specified in the corresponding entry in column (2) of the said Schedules.*

**Schedule III- 18%**

| S. NO. | Chapter<br>Heading/Sub<br>heading/Tariff<br>Item | Description of Goods                                                                                                                                                           |
|--------|--------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (1)    | (2)                                              | (3)                                                                                                                                                                            |
| 23.    | 2106                                             | All kinds of food mixes including instant food mixes, soft drink concentrates, Sharbat, Betel nut product known as "Supari", Sterilized or pasteurized millstone, ready to eat |

|     |             |                                                                                                                                                                                                                                                                            |
|-----|-------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|     |             | <i>packaged food and milk containing edible nuts with sugar or other ingredients, 75[Diabetic foods, Custard powder; [other than batters including idli/dosa batter, Namkeens], bhujia, mixture, chabena and similar edible preparations in ready for consumption form</i> |
| 453 | Any Chapter | <i>Goods which are not specified in Schedule I, II, IV, V or VI</i>                                                                                                                                                                                                        |

**Schedule IV – 28%**

| S. NO. | Chapter Heading/Sub heading/Tariff Item | Description of Goods                                                                                                                                                                                                                                                                                                                                                                                |
|--------|-----------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (1)    | (2)                                     | (3)                                                                                                                                                                                                                                                                                                                                                                                                 |
| 9.     | 2106                                    | <i>Food preparations not elsewhere specified or included i.e. Protein concentrates and textured protein substances, Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and maltodextrine syrup, Compound preparations for making non-alcoholic beverages, Food flavouring material, Churna for pan, Custard Powder</i> |

5. The department seeks to apply serial No. 9 of the aforesaid Notification. From the entry of Serial No. 9 there are certain specific items which are covered in the description of goods under Serial No. 9 wherein the impugned goods of the appellant are not appearing, therefore, in our view, the appellant’s imported goods do not fall under Serial no. 9. We find that the lower authorities have contended that the food preparation not elsewhere specified and included suffixed with “i.e.” means all the products of the heading 2106 shall fall under this description “food preparation not elsewhere specified and included” is suffixed with i.e. and with specified items which means that only the items which are described after the words “i.e.”are only covered under this entry and no any other product. Admittedly, the appellant’s product are not covered under any of the goods described in serial No. 9, therefore serial No. 9 is not applicable in the appellant’s case. We find that serial No. 453 is applicable to goods of any Chapter which are not specified in Schedule I, II, IV, V and VI. Thus the appellant’s goods is not specified under Serial No. 9 of Schedule IV, whereas it will be covered by Serial No. 453 of Schedule III of Notification 1/2017-IGST-Rate. For a better understanding, it is necessary to read the entire tariff entry of 2106 which is given below :

| 2106     | FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED                                                                                                      |     |      |   |
|----------|------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|------|---|
| 21061000 | - Protein concentrates and textured protein substances                                                                                                     | kg. | 40%  | - |
| 210690   | - Other :                                                                                                                                                  |     |      |   |
|          | - Soft drink concentrates :                                                                                                                                |     |      |   |
| 21069011 | - Sharbat                                                                                                                                                  | kg. | 150% | - |
| 21069019 | - Other                                                                                                                                                    | kg. | 150% | - |
| 21069020 | - Pan masala                                                                                                                                               | kg. | 150% | - |
| 21069030 | - Betel nut product known as "Supari"                                                                                                                      | kg. | 150% | - |
| 21069040 | - Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup | kg. | 150% | - |
| 21069050 | - Compound preparations for making non-alcoholic beverages                                                                                                 | kg. | 150% | - |
| 21069060 | - Food flavouring material                                                                                                                                 | kg. | 150% | - |
| 21069070 | - Churna for pan                                                                                                                                           | kg. | 150% | - |
| 21069080 | - Custard powder                                                                                                                                           | kg. | 150% | - |
|          | - Other :                                                                                                                                                  |     |      |   |
| 21069091 | - Diabetic foods                                                                                                                                           | kg. | 150% | - |
| 21069092 | - Sterilized or pasteurized millstone                                                                                                                      | kg. | 150% | - |
| 21069099 | - Other                                                                                                                                                    | kg. | 150% | - |

From the above tariff entry, it can be seen that the entry covers various food preparation not elsewhere specified or included. However, out of the many items provided under tariff item 2106, the serial No. 9 described only some of those goods. This also establish that Serial No. 9 is not a general entry which covers entire entry of 2106 but only some of the goods which are specified in the description of goods are provided under serial no. 9 of Schedule IV,. This fact also strengthens the claim of the appellant that their goods are not covered under serial no. 9 of the schedule IV of Notification 1/2017-IGST-Rate and correctly falls under Serial No. 453 according to which the rate of IGST is 18%. As regard, the misinterpretation made by both the lower authorities on the word "i.e.", the appellant have relied upon the judgment in the case of Castrol India Limited (supra) wherein the Hon"ble Supreme Court dealing with the meaning of "that is to say" held as under:

"16. In Stroud's Judicial Dictionary, 4th Edition, Vol. 5, at page 2753, we find : "That is to say" is the commencement of an ancillary clause, which explains the meaning of the principal clause. It has the following properties : (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the physical clause is general in terms it may restrict it; see this explained with many examples, Stukeley v. Butler Hob, 1971". The quotation, given above, from Stroud's Judicial Dictionary shows that, ordinarily, the expression "that is to say" is employed to make clear and fix the meaning of what is to be explained or defined. Such words are not used as a rule, to amplify a meaning while removing a possible doubt for which purpose the word "includes" is generally employed. In unusual cases, depending upon the context of the words "that is to say", this expression may be followed by illustrative instances. (See State of T.N. v. PyareLal Malhotra [1976 (1) SCC 834], Mahindra Engineering and Chemical Products Ltd. v. Union of India [1992

(1) SCC 727]; *SaitRikhajiFurtarnal v. State of A.P.* [1991 Supp (1) SCC 202]; and *R. Dalmia v. C.I.T.* [1977 (2) SCC 467].

17. The expression "that is to say" is descriptive, enumerative and exhaustive and circumscribes to a great extent the scope of the entry. (See *Commissioner of Sales Tax, M.P. v. Popular Trading Company, Ujjain* [2000 (5) SCC 511]."

18. The expression "that is to say" in sub-heading 2710.60 has to be interpreted to be words of limitation. The fact that sub-heading 2710.60 contains an exclusion clause goes to show that there may be other lubricating oils which may fall in the residuary heading "others".

19. The sub-heading 2710.60 significantly uses two expressions. They are (i) "that is to say" and (ii) "excluding". The first expression is used in description, enumerative and exhaustive sense and to a great extent circumscribes the scope of the entry. But the second expression dilutes the pervasiveness by carving out an exception for the purpose of the particular sub-heading a particular type of lubricating oil. All other types of lubricating oil are covered by the residuary entry i.e. 2710.99.

20. Under the Notification 120/84-C.E., lubricating oil was exempted without reference to any tariff heading/sub-heading. Consequently, the criteria specified in the Notification were satisfied. That being so, majority view contained in the order of the CEGAT is not sustainable and is set aside. The minority view as expressed is confirmed.

*The appeals are allowed with no order as to costs."*

From the above decision, we are of the view that as explained in the above decision the word "that is to say" is "mutatis mutandis" applies in respect of the expression "i.e." in the present case. Accordingly, the word used "i.e." at serial number 9 of schedule IV of Notification (supra) it is fixed, specific and clear that only the description given in such entry shall be covered by serial no. 9. Consequently the goods of the appellant will fall under Serial No. 453 of Schedule III of the Notification 1/2017-IGST, therefore, the demand of differential custom duty shall not sustain.

6. As regard the submission of the learned Counsel on the demand being time barred, we find that there is no dispute that the physical assessment of bill of entry was made by the proper custom officer and the appellant have declared the goods correctly as per the documents and claimed the exemption of IGST rate in terms of Serial No. 23 and 453 of Schedule III of Notification 1/2017. Had the officer of the different view as raised in the present case, the show cause notice could have been issued immediately on assessment or objection should be raised at that time itself. However in the present case for the clearance for the period July 2017 to November 2017, the show cause notice was issued on 09.07.2022. As per the facts narrated above, since there was no suppression of fact on the part of the appellant, the demand is also hit by limitation. We find force in the submission of the learned counsel that whatever IGST needs to be paid by the appellant, it was available as an input tax credit to them, therefore, the present case is involved revenue neutrality. Accordingly, the malafide intention cannot be attributed to the act of the appellant. For this reason, the demand for the extended period is not sustainable also on time bar.

7. As per our above discussion and findings, the impugned order is not sustainable. Hence, the same is set aside. The appeal is allowed."

In view of the above judgment, the issue being identical is no longer res-integra. Accordingly, we are of view that the assessee imported good attract 18% IGST and not 28%.

4.2 We further find that as regard classification of goods namely food supplement, we find that the goods are ready to human consumption. Department seeks to classify under CTH 21061000 as Protein Concentrates and Textured protein substances. By description itself it appears that Protein Concentrates cannot be fit for human consumption. At the most Protein Concentrates can be categorized as input for making Protein based food/Health supplement. The department has neither got the goods tested nor adduced any evidence to establish the exact nature of the goods that whether the same is Protein Concentrates or otherwise. Therefore, the burden cast on the revenue in the matter of classification of goods has not been discharged. For this reason, itself as per settled legal position on this point, the case of department clearly fails.

4.3 We also find that in judgment in the case Raptakos Brett & Co. Ltd. (Supra) this Tribunal held that in Protein Concentrates the content should be 70% and above. The said judgment is reproduced below:-

**"5.** We have carefully considered the submissions made by both the sides.

**5.1** From the labels of the product it is seen that the products are marketed as a protein supplement and contains 30% of protein by weight. Bulk of the product is made up of carbohydrates, which accounts for 48 to 58% of the weight of the product. Therefore, it cannot be said that protein is predominant by weight over other substances. If a product has to be considered as a protein concentrate the minimum concentration that is required would be at least 50% of the weight of the product so that protein predominates over other materials. That is not the fact obtaining in the present case.

**5.2** Secondly, as per the expert opinion obtained and produced by the appellant, discussed in Para 3.1 above, and also from the technical literature available on the subject matter, it is seen that, to constitute protein concentrate, at least 70% of protein is required, both, in respect of soya protein products as also milk protein products. In the present case, the protein content is only 30% and nowhere near to 70% as mentioned in the technical literature. The expert opinion and the technical literature relied upon by the appellant has not been rebutted in a meaningful way by the Revenue nor any contrary opinion has been produced by the Revenue in support of their contention. As per the technical literature available, even skimmed milk powder contains 33% to 37% of protein and full cream milk powder contains 23% to 27% of proteins, but we do not classify milk powder as a protein concentrate.

**5.3** As regards textured protein products, textured food is based on spun proteins in which inexpensive vegetable proteins can be made to stimulate

*meat. The process adopted to obtain such textured product is spinning and extruding. In the present case, from the manufacturing process adopted by the appellant, these processes are not undertaken and, therefore, it cannot be said that the impugned goods are textured protein substances.*

**5.4** *It is a settled position in law, that it is for the Revenue to lead evidence in classification matters and not for the appellant. In Vicco Laboratories case [[2005 \(179\) E.L.T. 17](#) (S.C.)] the Hon'ble Apex Court held that the "burden of proof that a product is classifiable under a particular tariff head is on Revenue and must be discharged by proving that it is so understood by consumers of product or in common parlance". In the present case, the Revenue has completely failed in this regard. On the contrary, the appellant has led evidences by way of expert opinion and technical literature to show that the products manufactured by them did not come within the category of protein concentrates or textured protein substances. The appellant's products are consumed as such by people who are recuperating from illness and, therefore, it is a ready to eat packaged product. Consequently, the product merit classification under CETH 2106 90 99 and the appellant is rightly entitled to the benefit of Notification 3/2006, dated 1-3-2006. In Wockhardt Life Sciences Ltd. [[2012 \(277\) E.L.T. 299](#) (S.C.)], the Hon'ble Apex Court held that in classification of goods functional utility and predominant usage of the commodity must be taken into account apart from understanding in common parlance. If we apply this ratio to the facts of the present case, the classification under CETH 2106 90 99 is more appropriate.*

**6.** *In view of the above factual analysis, the appeals succeed. Accordingly, we allow the appeals with consequential relief, if any, in accordance with law."*

4.4 However, firstly the consumer product such as Food Supplement even by imagination cannot contain this much high percentage of protein. Secondly, the revenue could not bring any evidence on record to prove the percentage of Protein in the food supplement. Therefore, revenue has no basis to challenge the classification adopted by the assessee.

4.5 As regard the goods namely "Food Flavouring Material", revenue contended that the said entry is appearing at Sl. 9 of Schedule IV of Notification No. 01/2017- Integrated Tax (Rate) dated 28.06.2017. On scrutiny of records and the products leaflets available in appeal papers, we did not find any product which bears the name Food Flavouring Materials. There may be Food/Health supplement products containing miniscule percentage of food flavour which does not mean the said goods itself is food flavour material, therefore, we do not agree with the department's contention on this point.



4.6 The appellants have also submitted that the demand is time barred. In this regard we find that firstly the appellants have declared the goods as appearing in all the import documents. Therefore, there is no suppression of fact on that part. Secondly, this is a case of demand of IGST which is available as input tax credit for further sale of the goods. Therefore, under any circumstances, the mala fide intention cannot be attributed to the appellant. Accordingly, the demand under extended period is not sustainable also on the ground of limitation.

5. As per our above discussion and findings, the impugned orders are not sustainable. Hence the same are set aside. Appeals are allowed with consequential relief.

*(Pronounced in the open court on 04.12.2024)*

**(RAMESH NAIR)**  
**MEMBER (JUDICIAL)**

**(RAJU)**  
**MEMBER (TECHNICAL)**

Raksha