

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

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 10072 of 2024 - DB

(Arising out of Order in Original MUN-CUSTM-000-COM-16-23-24 dated 03/11/2023
passed by Commissioner of Customs-Custom House Mundra)

**BRIGHT PERFORMANCE NUTRITION
PRIVATE LIMITED**

317, CTS No. 240/1-8, Neelkanth Corporate IT Park,
Kiroli, Vidya Vihar (West), Mumbai – 400086

.....Appellant

VERSUS

Commissioner of Customs-Mundra Customs

Office of the Principal Commissioner of Customs,
Customs House, Mundra, Kutch, Mundra Port
And Special Economic Zone, Mundra-370421

.....Respondent

APPEARANCE:

Shri Pramod Kedia, Advocate, appeared for the Appellant

Shri G Nair, Assistant Commissioner (AR) appeared for the Respondent

**CORAM: HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MR. Dr. AJAYA KRISHNA VISHVESHA, MEMBER
(JUDICIAL)**

Final Order No. 10073/2025

DATE OF HEARING: 06.01.2025

DATE OF DECISION: 30.01.2025

C L MAHAR

The brief facts of the matter are that the appellant have been importing "Mass Weight Gainer" classifying the same under CTH 21061000. The description of the imported consignment was made as "Mass Weight Gainer-Nutrition Supplement" on their bills of entry cleared through Mundra port and paid basic customs duty at the rate of 30% and 40% ad valorem from the year 2018 till date. The department is of the view that the Mass/ Weight Gainer is high calorific value food supplements enriched of carbohydrates and therefore, the same is more appropriately classifiable under Customs Tariff Heading 21069099. The basic argument of the department has been that the classification under the CTH

21061000 covers only "Protein Concentrates and textured Protein Substance" which are enriched of protein and therefore, only the goods namely "Protein Concentrates" are classifiable under CTH 21061000. However, the other food items such as "Protein Enriched Food Supplements" like "Whey Protein, Protein Food Supplements" are more appropriately classifiable under CTH 21069099. Thus, the department has entertained a view that Mass Weight Gainer-Nutrition Supplement" is more properly classifiable under 21069099 and therefore, the classification of the subject goods declared by the importer as CTH 21061000 should be rejected and the bills of entry are to be re-assessed in terms of the provisions of the Section 17 of the Customs Act, 1962. A show cause notice dated 25.01.2023 came to be issued demanding differential amount of the customs duty as well as change in classification of imported product from CTH 21061000 to CTH 21069099 of the Customs Tariff Act. The matter got adjudicated vide impugned order-in-original dated 03.11.2023 wherein all the charges has invoked in the show cause notice have been confirmed by the Adjudicating Authority. The appellant are before us against the above mentioned impugned order-in-original.

2. The Learned Advocate appearing for the appellant has pointed out that the Learned Adjudicating Authority under para 13.1 of the impugned order-in-original has given finding that the appellant has imported Mass Gainer from M/s. Glanbia Performance Nutrition, M/s. Scitec (Jumbo Nutrition), M/s. Ultimate Nutrition and M/s. Mutant (Mutant Mass Weight Gainers) with following ingredients:-

- (i) On Serious Mass-whey protein concentrate blends-15%, Carbohydrate-76.64%, Fat-06% and other nutritional elements

- (ii) Mutant Mass contains Protein-20%, Carbohydrate-70%, Fat-3.5% and other nutritional elements,
- (iii) Scitec Jumbo- Protein-22.7%, Carbohydrate-66%, Fat-3.1% and other mineral elements.

2.1 From above, it was concluded that in the imported consignments wherein, the protein contents varied between 15% to 20% whereas, Carbohydrate substance varied between 66% to 77%. The Adjudicating Authority reached to the conclusion that the imported consignment namely "Mass Weight Gainers" are nothing but high calorie supplements that contains various % levels of the proteins, fat, carbohydrates, minerals, vitamins, amino acids and various other supplements. The Adjudication Authority has concluded that since, the imported consignment were having low level of the protein in comparison to other nutritional supplements like carbohydrates and fats and therefore, the 'Mass Gainer' is typically consumed to increase the calorie intake in the body and further to instigate muscle gain.

2.2 The Learned Advocate has further submitted that the Adjudicating Authority failed to appreciate the fact that the item under import namely "Mass Weight Gainer-Nutrition Supplement" is nothing but a type of the protein supplement and is used for weight gain and building muscle mass of the body. The imported consignments were nothing but 'Whey protein concentrates' and same are a dietary supplement.

2.3 The Learned Advocate has pointed out that percentage of the protein varies in various imported brands and same is not fixed for all brands. The Learned Advocate has strongly contended that in order to be called "a protein concentrate" it does not require that a particular product need to have 100% protein in it in order to make itself eligible for

classification under CTH 21061000. The Learned Advocate has pointed out that it is standard practice that a 'protein concentrate' powder may include other ingredients such as added sugars, artificial flavoring, thickeners, vitamins and minerals. It has been pointed out that the amount of protein per scoop can vary from 10 to 50 grams and even if protein content varies between 10 to 50 grams, the same is called a protein concentrate in commercial parlance and same is used for body building and as a food supplement.

2.4 It has further been submitted that this can be appreciated from the Labels used on these products that the said powders do essentially contain "Whey protein concentrate" and other nutrients and flavouring materials. These powders are marketed in retail as "weight gainers/mass gainers" which is essentially a function of "protein". Though the said powders also contain other substances viz. carbohydrates, other nutrients or flavouring materials, but the fact remained that the product is nothing but protein concentrate which gives them the essential characteristics and marketability. In these circumstances, it is submitted that applying the principles enunciated under Rule 2(b) and also 3(b) of General Rule of Interpretation of the Customs Tariff, the goods confirm to the specific description "Protein Concentrate and Textured Protein Substances" at Tariff Heading 21061000 and accordingly the appropriate duty of Customs has been paid on such goods. It is further submitted that as per Rule 1 of the General Rules of Interpretation of the Customs Tariff, for legal purposes, the classification of goods has to be determined in accordance with terms of heading and any relative Section Note or Chapter Note. It is also submitted that in terms of Rule 2 (b) of the said Rules, a reference in a heading to a material or substance shall be taken to include a

reference to mixtures or combination of that material or combination of that material or substance with other material or substance. 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 said Rule also provides that classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3. Further, as per Rule 3 (a), the heading which provides the most specific description shall be preferred to headings providing a more general description and as per Rule 3 (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 Rule 3 (a), shall be classified as if they consisted of material or component which gives them their essential character, insofar as this criterion is applicable. In the instant case by application of Rule 3 (a) and Rule 3 (b), the most specific description for the product in question is Protein concentrates and also it is this component which gives the said product its essential character and marketability. Thus, the said product has been rightly classified by the Appellants at Tariff Heading 21061000 while importing.

2.5 It is contended by the Learned Advocate that That the order issued by the Ld. Adjudicating that Authority failed to appreciate that the combination of complex amino acids with the proteins, fortifies the fact that the essential character of the products lies in proteins. These proteins and amino acids are used for building muscular mass, not simply for weight gain as assumed in the show cause notice. These are body building products which includes muscle mass gain. In *Collector of Central Excise Hyderabad v. Bakelite Hylam Ltd.* (1997 (91) E.L.T. 13 (S.C.)) it was held

that even the Decorative Laminate Sheets contained 60-70% paper, 30-40% resin, the essential character was determined by the presence of resin, though numerically in lesser quantity, by applying the rule 3 (b) of the GRIs. This case was followed in Collector of Central Excise, Ahmedabad v. Jai Laminates Ltd. (1997 (93) E.L.T. 368 (Tribunal)), which was also affirmed in the Hon'ble Supreme Court in Jai Laminates Ltd. v. Collector [1997 (93) E.L.T. 368 (Tribunal)]. The ratio of Hon'ble Tribunal Order in Rana Enterprises v. Commissioner of Customs, Mumbai (2011 (267) E.L.T. 546 (Tri. Mumbai)) is that classification has to be determined by essential character test and not by percentage of composition. Further, even in value terms, the 'essential character' of the imported products consists of high quality concentrated proteins and amino acids and not carbohydrates. One cannot go by just comparative weight of the constituents. The expression used is not "main ingredient", but "essential character".

2.6 It is humbly submitted that recently in case of M/s Glanbia Performance Nutrition India Pvt. Ltd. Versus Commissioner of Customs, Mundra {(2023) 10 Centax 390 (Tri.-Ahmd)), the stand of the Customs Department was that Nutritional Supplements are correctly classifiable under CTH 21061000 (Para 31 of the said decision), as against the CTH 18069040 claimed by the Importers. The case was decided in favor of the Customs Department by the Hon'ble Tribunal. In the case of present appellants also, the goods under import are Mass Gainer Nutritional Supplements only and therefore the classification of these goods also merit under CTH 21061000 following the ratio of aforesaid judgment

2.7 The case law of Raptakos Brett & Co. Ltd. Versus Commissioner of C. Ex., RAIGAD (2014 (307) E.L.T. 565 (Tri. Mumbai)) as quoted by the

Ld. Adjudicating Authority in Para 13.7 of the said Order-in-Original is not squarely applicable to the present case, since in that case the product was consumed by people recuperating from illness, which is not the case here. In the present case, the product under import i.e. Mass Gainer Nutrition Supplement is consumed by people desirous of gaining muscle and mass and not by people recuperating from illness.

2.8 The Ld. Adjudicating Authority in Para 13.8 of the subject Order-in-Original has examined Section 17 of the Customs Act, 1962 and in Para 13.8.1 concluded that the differential duty is payable by the importer (the Appellant in this case). In this regard, it is humbly submitted that the description of goods was well written on the Bills of Entry filed with the Department which is not at all in dispute. The show cause notice dated 25.01.2023 and also the subject Order-in-Original dated 03.11.2023 does not point towards any instance or any particular instance which was suppressed intentionally from the department at the time of filing of Bills of Entry or other documents, thus there was no instance of suppression of any fact on the part of the importer. The acts of the importer were purely based upon bona-fide belief and the issue in this case is purely related to interpretation of the statute and declaration of CTH in the import Bills of Entry, hence there was no intention to evade the Customs duty on the part of the importer. Moreover, in case of Samsung India Electronics Pvt Ltd vs Principal Commissioner, Customs, ACC, New Delhi on 20 December, 2023 the Hon'ble CESTAT, Principal Bench, New Delhi in Customs Appeal no. 50484 of 2021 in Para 31 has held that,

31. "...All the elements necessary for assessing the duty are filled in the Bill of Entry itself which is the entry of the goods made under Section 46. Thus, the Bill of Entry has factual elements such as the nature of the

goods, quality, quantity, weight, transaction value, country of origin, etc. which all need to be correctly declared and elements which are in the nature of the opinion of the importer such as classification of the goods, exemption notifications which apply, etc. While the facts are verifiable as correct or incorrect, opinions can differ. The importer may find that the goods are classifiable under one CTH while the officer re-assessing the goods may classify them under a different CTH. If appealed against, different views can be taken at different levels of judicial hierarchy from Commissioner (Appeals) all the way up to the Supreme Court. Similar will be the case with the availability of the benefit of exemption notifications.

32. It is impossible for the importer to predict if the proper officer would re-classify the goods and if the proper officer would, after rejecting the transaction value, re-determine the value based on contemporaneous imports or through other methods or what value the officer will fix. Nothing in the law requires an importer to anticipate what classification the proper officer will find proper for the goods and classify the goods or anticipate if the proper officer will reject the transaction value and anticipate what value he will determine and assess duty accordingly".

2.9 The Learned Advocate has also submitted that entire demand is barred by the period of limitation as impugned show cause notice dated 25.01.2023 demands the short payment of customs duty on the Bills of entry which cover the period from 28.03.2018 to 03.03.2021. The Learned Advocate has submitted that there was no misdeclaration on the Bills of entry or any other import documents by the appellant. All the facts were before the department. It has further been mentioned that once the description of the goods is not at all in dispute and it is only a question of the interpretation of the classification, the charge of deliberate misdeclaration against the appellant is legally not sustainable. It has further been said that the neither the impugned show cause notice nor order-in-original brings out any evidences to allege that the appellant have intentionally within intent to evade customs duty has mis-declared the description or any other documents in the subject import consignments. It has further been mentioned the extended period of limitation for demand of the customs duty can be invoked only when deliberate attempt to mis-declare or suppress the facts are present. It is

clear from the plain reading of Section 28 (4) of the Customs Act, 1962 that element of collusion, suppression of facts, mis-declaration or any other contravention within intend to evade customs duty need to be present for invoking the extended time proviso under the Customs Act, 1962. The Learned Advocate has vehemently contended that none of the above elements are present in this case, the description which has been given by them on the bills of entry and accompanying import documents were very much before the assessing officers and same was accepted by the assessing officers in the first hand and therefore, it is wrong on the part of the department to invoke extended time proviso for demanding customs duty under Section 28(4) of Customs Act, 1962. In support of his arguments, the Learned Advocate has cited the decision of Hon'ble Apex Court in case of Collector of the Central Excise vs. CHEMPHAR DRUGS & LINIMENTS reported under 1989 (40) E.L.T. 276 (SC). It has further been contended that since there was no mis-declaration in the description of the import consignments, therefore, invoking of the Section 111 (m) of the Customs Act, 1962 is also not warranted and legally not sustainable.

3. The Learned Departmental Representative, Shri Girish Nair has reiterated the findings has given in the impugned order-in-original and has relied upon following decisions to support his arguments:-

- Judgement of Hon'ble CESTAT, Mumbai in the case of Raptakos Brett & Co Ltd vs Commissioner of C.Ex., Raigad reported at 2014 (307) E.L.T. 565 (Tri.-Mumbai)
- Judgement of Hon'ble CESTAT, Principal Bench, New Delhi in the case of Dry Tech Processors (1) Pvt Ltd vs Commissioner of C. Ex., Bhopal reported at 2015 (327) E.L.T 696 (Tri.-Del.)

- Judgement of Hon'ble Supreme Court in the case of Union of India vs Jain Shudh Vanaspati reported at 1996 (86) E.L.T. 460 (S.C.)

4. Having heard the rival contentions and going through in detail the record of the appeal, we find that following questions need to be answered by us in this matter:-

- i. Whether the classification of the imported consignments of Mass Gainer- Food Supplement classified by the appellant under Customs Tariff Heading 21061000 is correct or same is to be rejected and re-classified under 21069099 of the Customs Tariff Act, 1962.
- ii. Whether the demand of customs duty by invoking extended time proviso under Section 28 (4) of the Customs Act, 1962 is legally sustainable or not.

4.2 Before proceeding to answer the above mentioned questions, we would like to mention the facts that up to January, 2018 the basic customs duty on the goods falling under CTH 21061000 and the goods classifiable under CTH 21069099 were charged to same rate of customs duty i.e. at the rate of 30% in terms of the Notification No.12/2012-CUS dated 17.03.2012. However, vide the Notification No.06/2018-CUS dated 02.02.2018 effective rate of the BCD in respect of the sub heading 210690 was increased to 50%. However, the customs duty rate under CTH 21061000 remained the same at the rate of 30% till 22.05.2018. Further, vide Notification No.45/2018- CUS dated 23.05.2018 effective rate of the basic customs duty in respect of Customs Tariff Heading 21061000 was increased to 40%. However, the basic customs duty under sub heading 210690 still remained at 50% ad valorem. The entire dispute has arisen only after the difference in the effective rate of the customs duty was

created by the above mentioned customs notification. It is worthy to note as submitted during hearing of the matter that before January 2018 and thereafter, the department has accepted the classification of product under import namely Mass gainer- Food supplement under CTH 21061000. The department is seeking re-assessment of Bills of entry under CTH 21069099 vide impugned show cause notice dated 25.01.2023.

4.3 The fact remain that the appellant has declared the imported consignment as “Mass Weight Gainer-Nutrition Supplement” and paid the custom duty at the rate of 30% and 40% ad valorem as per the effective rates of the customs duty as per Notification No.12/2012-CUS dated 17.03.2012 and Customs Notification 45/2018-CUS dated 23.05.2018. The department in the impugned show cause notice has only one argument that subject import consignment were of the food supplement and not of the protein concentrates and therefore, the consignment should have been classified under CTH 21069099 under the entry “Others” of Chapter Heading 2106 and not under 21061000 which primarily covers “Protein Concentrates and textured Protein Substance”.

4.4 Before proceeding further in this matter, it will be relevant to have a glance at the relevant entries under Chapter Sub Heading 2106 of the Customs Tariff Act, 1975:-

<i>Tariff Item.</i>	<i>Description of goods</i>
(1)	(2)
2106	Food Preparations Not Elsewhere Specified or Included
21061000	Protein concentrates and textured protein substances
210690	-Other:
	--Soft drink concentrates :
21069011	--- Sharbat

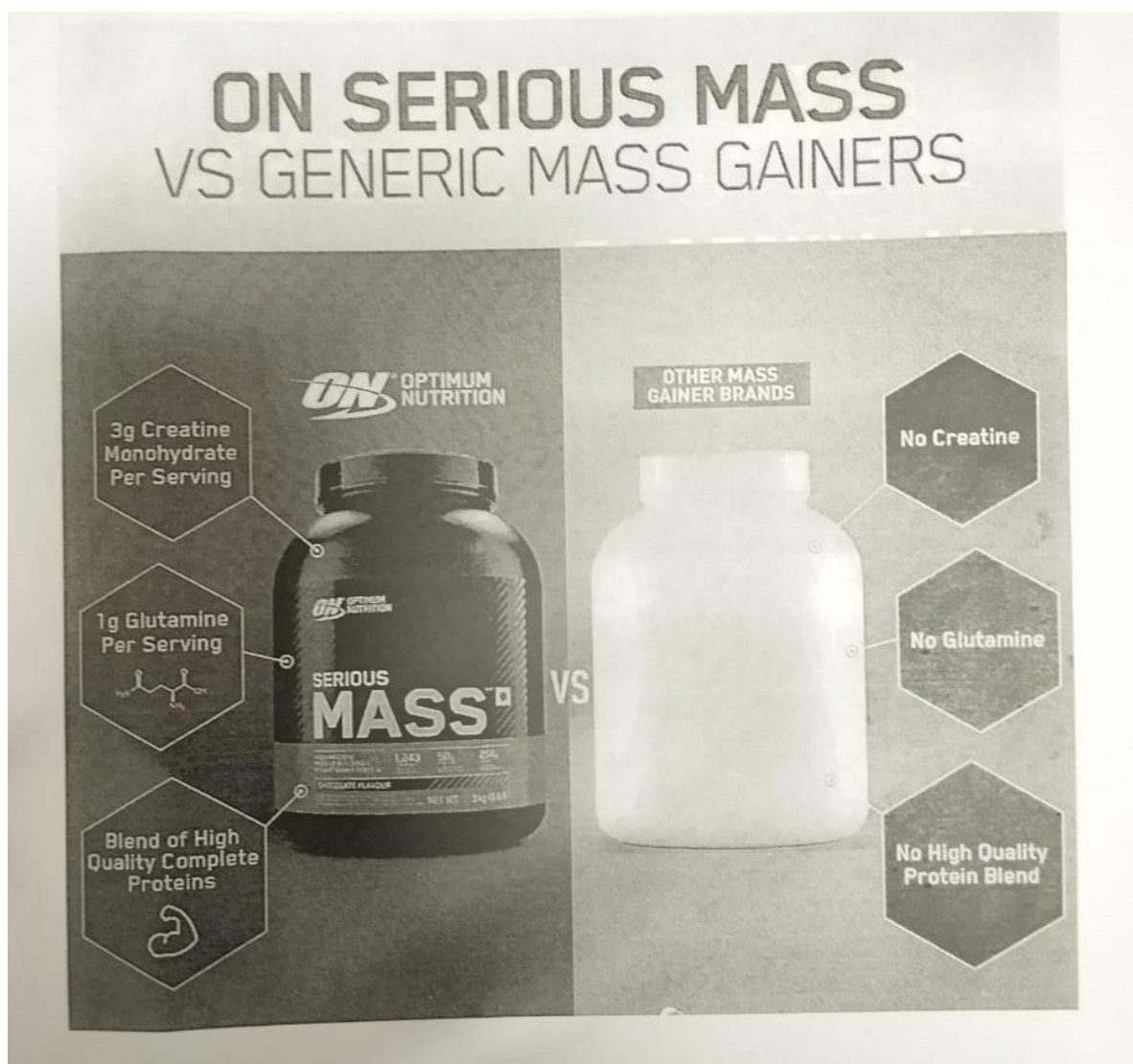
21069019	--- Other
21069020	--- Pan masala
21069030	--- Betel nut product known as "Supari"
21069040	--- Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup
21069050	--- Compound preparations for making nonalcoholic beverages
21069060	--- Food flavouring material kg.
21069070	--- Churna for pan
21069080	--- Custard powder
	--- Other :
21069091	--- Diabetic foods
21069092	--- Sterilized or pasteurized millstone
21069099	--- Other

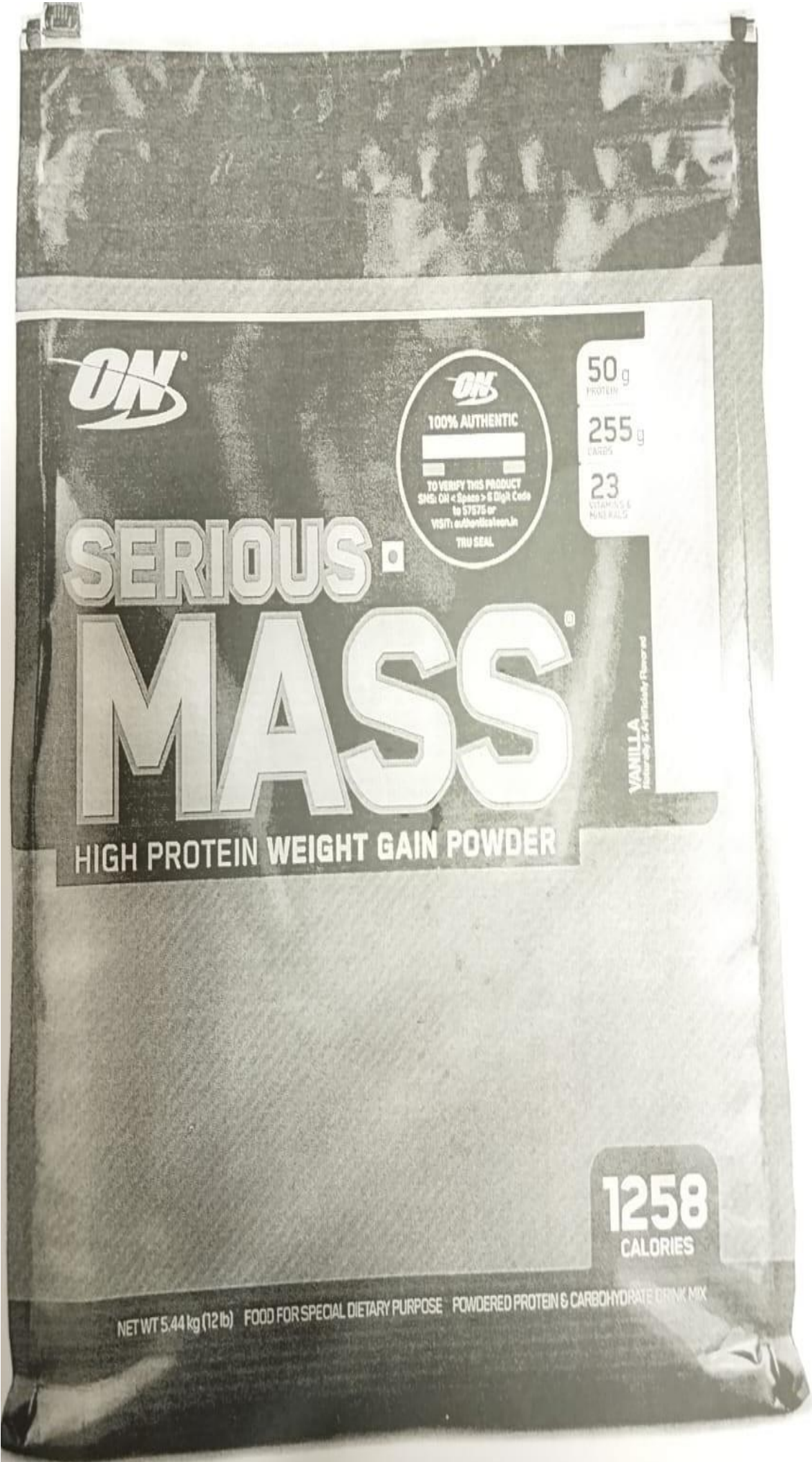
4.5 A perusal of the above Chapter Sub Heading reveals that CTH 2106 cover " Food preparation not elsewhere specified or included", it primarily has two sub headings one is "Protein Concentrates and textured Protein Substance" and second is "Others". The sub heading "Others" have various other sub headings which includes products such as, Sharbat, Pan masala, Diabetic food, Custard powder, Food flavouring material etc. The supplementary Chapter note to the Chapter 21 under Serial No.6 mentions as follows:-

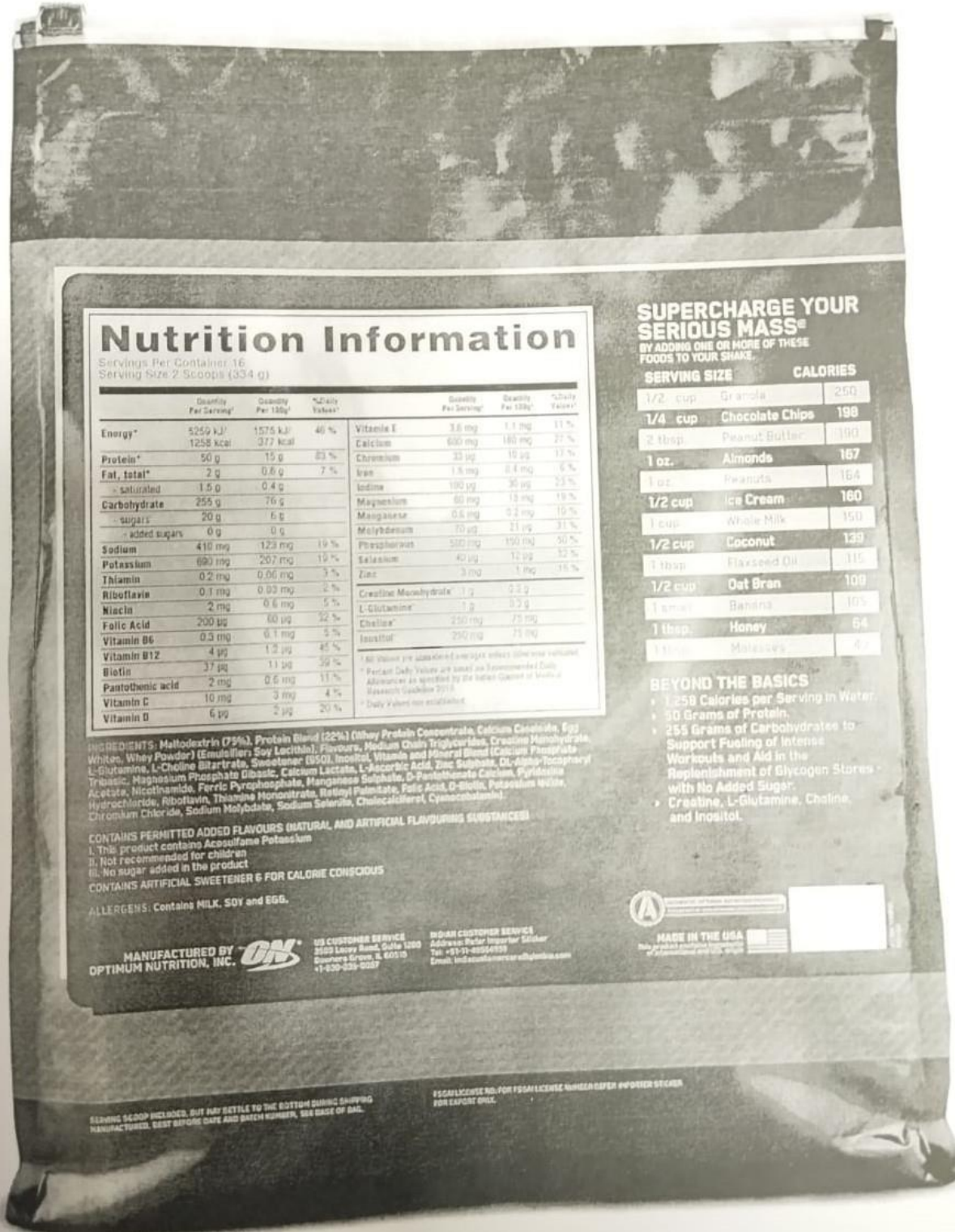
"6. Tariff item 2106 90 99 includes sweet meats commonly known as "Misthans" or "Mithai" or called by any other also include products commonly known as "Namkeens", "mixtures", "Bhujia", "Chabena" or called by any other S products remain classified in these sub-headings irrespective of the nature of their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

4.6 The Customs Tariff itself explains that Tariff item 21069099 includes product like sweet meats, misthans etc. and such products to remain classified under this sub heading irrespective of nature of their ingredients. The products which have been imported by the appellant is

not of the category of mithai, namkins, bhujia etc. which are primarily covered under 21069099. The products which have been imported under the impugned bills of entry by the appellant are primarily food supplement which contains protein concentrate along with other substances such as Carbohydrate, Fats etc. From the submission which have been made by the appellant before us and the literature which have been submitted indicate that the mass gainer is nothing a product containing protein concentrate along with other substances which are used for weight gain and for building muscle mass. It has further been mentioned that import consignment of the Mass Gainer- Food Supplements contains whey protein concentrate and other dietary supplements. The some of the literature as well as photographs which have been produced before us at the time of hearing are reproduced herebelow:-







4.7 it can be seen from the perusal of the photographs of the product submitted by the appellant that it mentioned that the import consignment was of the high protein weight gainer powder. Before proceeding further in this matter, it will be appropriate to have a reference to General Rules Of Interpretation of the Customs Tariff, the relevant rule 2 and 3 are reproduced hearing below:

"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 (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 numerical order among those which equally merit consideration."

4.8 It can be seen that Rule 2 (b) specifically mentions that any reference to goods of a given material of substance shall be taken to include a reference to the goods consisting wholly or partly of such material of such substance and the classification of the goods consisting more than one material or substance shall be according to principles of Rule 3.

4.9 It can be seen that general Rule of interpretation 3 (a) provides that heading which provides most specific description shall be preferred to the heading providing a more general description. From the literature and photographs as mentioned above, it can be seen that the product is

primarily sold in the commercial parlance and known as protein concentrate for weight gain and building muscles and since the customs tariff heading 21061000 has a specific mention of "Protein Concentrates and textured Protein Substance" and the entry under 210690 is a generic entry covering the goods which are otherwise not specifically mentioned under the sub-heading 2106. We are of the opinion that entry 21061000 covers two elements, (1) Protein Concentrate and (2) Textured Protein and the word "Substances" covers both of these elements i.e. Protein Concentrate and Textured Protein. Since the import consignments are made of the protein concentrate along with other substances, we are of the opinion that appropriate classification for the imported consignment will be CTH 21061000 not CTH 21069099 which is primarily for the goods not elsewhere specified and supplementary chapter note (6) provides as to what kind of the goods will fall under chapter sub-heading 21069099, we are of opinion that this sub-heading certainly does not cover the food supplement containing protein concentrate. It can be seen that supplementary chapter note (6) provides that only products such as mithais, namkins, chabanas and such kind of the goods are classifiable under CTH 21069099. While holding the above view, we also take support of this Tribunal's decision in the case of Glambia Performance Nutrition India Pvt Ltd vs. Commissioner of Customs, Mundra reported at (2023)10 Centax 390 (Tri-Ahmedabad):-

"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	Kg.	150%	-

	<i>included; lactose syrup; glucose syrup and malto dextrin syrup</i>			
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	CHOCOLATE AND OTHER FOOD PREPARATIONS CONTIANING COCOA			
1806 90 40	--- Preparations containing coca for making beverages	Kg.	30%	-

2106	FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED			
2106 1000	- Protein concentrates and textured protein substances	Kg.	40%	-

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	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

<i>weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16);</i> <i>(f) Yeast put up as a medicament or other products of heading 3003 or 3004; or</i> <i>(g) Prepared enzymes of heading 3507.</i>	<i>weight of sausage, meat, meat offal, blood, fish or crustaceans, molluscs or other aquatic invertebrates, or any combination thereof (Chapter 16);</i> <i>(f) Yeast put up as a medicament or other products of heading 3003 or 3004; or</i> <i>(g) Prepared enzymes of heading 3507.</i>
<i>2.- Extracts of the substitutes referred to in Note 1 (b) above are to be classified in heading 2101.</i>	<i>2.- Extracts of the substitutes referred to in Note 1 (b) above are to be classified in heading 2101.</i>
<i>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.</i>	<i>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.</i>
SUPPLEMENTRY NOTES : <i>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.</i> <i>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.</i> <i>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.</i> <i>4. Tariff item 2106 90 50, inter alia, includes preparations for lemonades or other beverages, consisting, for example,</i>	

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.	
---	--

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. <i>Heading 1806 includes sugar confectionary containing cocoa and, subject to Note 1 to this Chapter, other food preparations containing cocoa.</i>	2. <i>Heading 18.06 includes sugar confectionery containing cocoa and, subject to Note 1 to this Chapter, other food preparations containing cocoa.</i>
Not aligned	GENERAL <i>This Chapter covers cocoa (including cocoa beans) in all forms, cocoa butter, fat and oil and preparations containing cocoa (in any proportion), except:</i> <i>(a) Yogurt and other products of heading 04.03.</i> <i>(b) White chocolate (heading 17.04).</i> <i>(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.</i> <i>(d) Swelled or roasted cereals containing not more than 6% by weight of cocoa calculated on a totally defatted basis (heading 19.04).</i> <i>(e) Pastry, cakes, biscuits and other bakers' wares, containing cocoa (heading 19.05).</i> <i>(f) Ice cream and other edible ice, containing cocoa in any proportion (heading 21.05).</i> <i>(g) Beverages, non-alcoholic or alcoholic (e.g, "crème de cacao"), containing cocoa and ready for consumption (Chapter 22).</i> <i>(h) Medicaments (heading 30.03 or 30.04).</i> <i>The Chapter also excludes theobromine, an alkaloid extracted from cocoa (heading 29.39).</i>

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 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."

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 colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrin syrup	Kg.	150%	-
2106 90 40	--- Compound preparations for making non-alcoholic beverages	Kg.	150%	-
2106 90 50	--- Food flavouring material	Kg.	150%	-
	--- Churna for pan			
2106 90 60	--- Custard powder	Kg.	150%	-
2106 90 70	--- Other :	Kg.	150%	-
2106 90 80	---- Diabetic foods	Kg.	150%	-
	---- Sterilized or pasteurized millstone			
2106 90 91	---- Other	Kg.	150%	-
2106 90 92		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 percent 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 percent 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):

(a) 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."

4.10 The Departmental Representative has primarily relied upon the decisions of this Tribunal's decision in case of Raptakos Brett & Co Ltd vs Commissioner of C.Ex., Raigad reported at 2014 (307) E.L.T. 565 (Tri.-Mumbai). The Tribunal in this particular case has held as follows:-

"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."*

4.11 It can be seen from the reading of the above para that this Tribunal has allowed the classification of their product under 21069099 because the appellant in case of M/s. Raptakos could establish that the product manufacture by them was the products consumed under the category of the protein concentrate by the people who are recuperating from illness. We find that the product under import in the impugned show cause notice are not meant for use by the people suffering from any illness they are primarily used as food supplement and for building muscles, we therefore differentiate that following of this Tribunal in this case is not relevant to the matter of hand and other two decisions mentioned in the preceding para are not relevant to the imported consignment in this case. Therefore, the argument taken by the Learned AR not acceptable.

4.12 In view of entire above discussion, we are of the opinion that import consignment namely Mass Gainer- Food Supplement are nothing but protein concentrates which are use as food supplements for building muscles and since there is specific entry to this effect under Chapter 21061000 and we follow the General Rules of Interpretation and hold that correct classification of the product will be under chapter 21061000.

4.13 Now coming to the second argument which has been taken by the appellant that entire demand is hit by period of limitation as show cause notice has been issued on 25.01.2023 by invoking the provisions of Section 28 (4) of the Customs Act, 1962 for the consignments which have been imported by the appellant from March 2018 to 03.03.2021. We find that Section 28(4) mentions as follows:-

"4) Where any duty has not been ¹⁰[levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been ¹¹[so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

4.14 It can be seen that for invoking the provisions of sub section 4 of Section 28, the department needs to establish that the appellant has short paid the duty on account of collusion, any wilful mis-statement or suppression of facts with an intention to evade duty. We find that the description given by the appellant is the same as mentioned on the

product as well as on the import document such as invoice, purchase order and other documents accompanying the Bills of Entry. We also find from the show cause notice that the importer has submitted the literature/ brochure related to mass/ weight gainer- food supplement at the time of the import to the customs authorities. Since all the documents have been available before the customs authority at the time of the assessment, examination of the goods, we find that the allegation of the suppression of the facts or mis-declaration with regard to description of the imported goods as required for invoking the provisions of Section 28(4) of the Customs Act, 1962 have not been established by the department. We are also take note of the fact that for about three years i.e from March 2018 to March 2021 the department accepts the classification of the import consignments of Mass-gainer- Food Supplement under CTH 21061000. We are therefore of the opinion that extended time proviso is not invokable in this particular case and therefore the demand of the customs duty is barred by period of limitation as provided under Section 28(4) of Customs Act, 1962. While holding the above view, we take support of the decision of the Hon'ble Supreme Court in the case of Collector of the Central Excise vs. CHEMPHAR DRUGS & LINIMENTS reported under 1989 (40) E.L.T. 276 (SC), relevant extract of the same is reproduced herebelow:-

"8. Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before

the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence."

5. In view of entire above discussion, we hold that on merit as well as on the period of limitation the impugned order-in-original is not legally sustainable, therefore, we set aside the same. Accordingly, the appeal is allowed.

(Pronounced in the open court on 30.01.2025)

(C L MAHAR)
MEMBER (TECHNICAL)

(DR. AJAYA KRISHNA VISHVESHA)
MEMBER (JUDICIAL)

Bharvi
