

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Excise Appeal No. 21333 of 2016

[Arising out of Order-in-Original No. 22-30/2016 dated 27.05.2016 passed by
the Commissioner of Central Excise, Bangalore-II Commissionerate]

The Himalaya Drug Company
Makali, Bengaluru – 562 162

.....Appellant

VERSUS

Commissioner of Central Tax
Bangalore North West Commissionerate
2nd Floor, South Wing, BMTC Bus Stand
Complex, Shivaji Nagar
Bangalore – 560 051

.....Respondent

Appearance:

Mr. V. Raghuraman, Advocate for the Appellant

Mr. Rajesh Shastry (AR) for the Respondent

Coram:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 20065 / 2024

Date of Hearing: 25.07.2023

Date of Decision: 23.01.2024

Per: Pullela Nageswara Rao

M/s. Himalayan Drugs, the appellant is engaged in the manufacture of various products falling under Chapter 23, 30, 33 & 34 of first schedule to the Central Excise Tariff Act, 1985.

2. The brief facts are the appellant is clearing Ayurvedic medicines on payment of central excise duty at the applicable rates. The appellant has cleared the product 'LIV 52 Protec' without payment of duty

classifying the product under Chapter Heading 2309 of Central Excise Tariff Act, 1985. The Department gathered intelligence that the appellant has misclassified the product 'LIV 52 Protec' as "Animal Feed Supplement" under Central Excise Tariff Heading 230990/23099010 of Central Excise Tariff Act, 1985 and cleared the same without payment of Central Excise duty by misleading that the product does not have therapeutic value, whereas the product appears to be hepato-protective, which protects liver against ill effects of aflatoxins, anthelmintics, liver stimulant-helping in regeneration of liver cells, improves Food Conversion Ratio (FCR) and is a performance enhancer. The appellant also manufactured and cleared 'LIV 52 Vet liquid', which is also similar in content and usage classifying under Chapter 3004 as Ayurvedic P or P Medicine on payment of appropriate duty. The dosage of 'LIV 52 Protec' and 'LIV 52 Vet liquid' in poultry per 100 birds is the same as under;

Poultry	Dosage for 'Liv 52 Protec'	Dosage for 'Liv 52 Vet Liquid'
Chicks	5 ml per day	5 ml per day
Growers	10 ml per day	10 ml per day
Layers/Broilers	20 ml per day	20 ml per day

2.1 The product 'LIV 52 Protec', which is cleared without payment of duty is used for hepatic disorders and is hepato-protective like the other product 'LIV 52 Vet Liquid', which is cleared on payment of duty.

2.2 Since both 'LIV 52 Protec' and 'LIV 52 Vet Liquid' are used for the same purpose, Department has investigated into the matter and recorded statement of Smt. Veena Shyam Prasad, Proprietrix of M/s. Vidhya Nutricare (Job worker). In her statement, she has stated that; the raw-materials in natural form are pulverized, sifted for

separation of foreign particles and the powdered herbs are mixed in requisite proportion as per the direction of the appellant and they also undertake extraction of blended herbs with water and the decoction in concentrated form is supplied back to the appellants and that they do not carry any testing on the processed material. Further the statement of Dr. Vishwanath, Manager, Business Development was recorded and he has stated that his nature of work includes sales and marketing and technical services pertaining to animal health products, that the field staff meets the customers like veterinarians, consultants, feed manufacturers, livestock manufacturers, and discuss about the products and the benefits. They also meet the Veterinary doctors and apprise them of the benefits of product 'LIV 52 Protec'. Further, he stated that there is no difference in the literature distributed to veterinary doctors and other customers pertaining to 'LIV 52 Protec' and Geriforte Vet. Further, Dr. Rangesh Paramesh, Sr. Medical Advisor of the appellant in his statement stated that 'LIV 52' is the signature brand of the company, which was started in the year 1955 for human products, which was developed for treatment of liver disorders, subsequently the other products, which are focused on the organ-liver were prefixed with 'LIV 52'; the ingredients in the composition of 'LIV 52 Protec', as per the product's literature specifies that the product is used for hepatic disorders; the product's literature in respect of 'LIV 52 Vet Liquid' and 'Liv 52 Protec' mentions similar properties, which denote activity of ingredients used in both the products, the difference between the two is the concentration of the ingredients and the duration of the usage at which these benefits are seen.

2.3 Further, the chemical analysis report dated 26.04.2006 on the samples of the coded raw material and final product drawn from the job worker premises, M/s Vidya Nutricare of the Indian Institute of Chemical Technology confirm the following:

- i. The raw materials stated to be used in 'Liv 52 Protec' are qualitatively present in the finished product, quantitatively it may vary.
- ii. The formulation has hepato-protective properties.
- iii. Indicating the exact composition is difficult after mixing as set of herbal material. The geological and ecological factors will influence the composition of the ingredients in the herb. Use of each of the ingredients in traditional medicines is also provided.
- iv. When the raw material samples and products were analysed by Herboprint, it is observed that the ingredients and the product "Liv 52 Protec" have hepato-protective properties along with other herbal therapeutic properties.
- v. The powder analysis of the samples shows the presence of some cell structure.

2.4 In view of the above the therapeutic value of the product 'LIV 52 Protec' has been confirmed in the analysis, therefore it appeared that the product is not Poultry/animal feed to merit classification under Chapter 23 but actually a Veterinary Medicine or Ayurvedic Medicine falling under Chapter 30.

2.5 Further, as per Section VI of the HSN, the explanatory Note in respect of Chapter Sub-heading 30.03 states, "medicaments" (excluding goods of heading No. 30.02, 30.05 or 30.06 consisting of two or more

constituents, which have been mixed together for therapeutic or prophylactic uses, not put up in a measured doses or in forms or packing for retail sale)". The explanatory notes to this heading specify that the said heading covers medicinal preparations obtained by mixing two or more substances. However, if they are put in measured doses or in forms or packings for retail sale, they fall in heading 30.04. Other things remaining the same, the classification of product in heading 30.03 or 30.04 depends on whether the product is put up in measured doses or retail packing, where the same gets classified under 30.04 and if it is other than measured doses/retail packing, then the same gets classified under 30.03. Therefore, explanatory notes to heading 30.03 is squarely applicable to heading 30.04 as well, which amongst other things states at point 5 and 6 as under:

5) Medicinal compound vegetable extracts including those obtained by treating a mixture of plants.

6) Medicinal mixtures of plants or parts of plants of heading 12.11.

2.6 Further the explanatory notes to the heading 30.04 in the foot note excludes food supplements containing vitamins or mineral salts, which are put up for the purpose of maintaining health or wellbeing but have no indication as to use for the prevention or treatment of any disease or ailment.

2.7 In the present case, applying the Section Note VI of HSN in respect of Chapter 30.04 to the product 'Liv 52 Protec', it is observed that as per brochure or literature, the dosage and mixing ratio is specified and the said product is used in treating hepatic disorders. Accordingly, it appeared that the said product does not merit

classification under Chapter Sub Heading 2302 for the period up to February 2005 and under Chapter Sub Heading 23099010, from March 2005 onwards as 'Animal feed supplement' but is required to be considered as a 'Medicament' under Chapter Sub Heading 300339 for the period up to February 2005 and under Chapter Sub Heading 30049011 from March 2005 onwards.

2.8 The Department also relied on the contents of the product literature labels pasted on the packages of the product 'Liv 52 Protec', which *inter alia* contained the details like directions for use and benefits of Liv- 52 Protec.

3. In view of the above various literature, statements, Chapter Notes and other product ingredients and the chemical analysis report of the Indian Institute of Chemical Technology, the therapeutic property/utility of the said product is confirmed. Therefore, the product "Liv 52 Protec" was not an "Animal Feed Supplement" to merit classification under Chapter 23 but actually a veterinary medicine of Ayurvedic base and merit classification under Chapter 30 of Central Excise Tariff Act, 1985.

3.1 Further, from the product literature it also appeared that the ingredients used in the product have therapeutic functions and are also prescribed as Ayurvedic Medicine in the formulations.

3.2 Further, the appellant has also manufactured and cleared the product "Liv 52 Vet Liquid", classifying the same under Chapter 30 of CETA, 1985 and on payment of appropriate Central Excise duty whereas on the other hand classified the product "Liv 52 Protec" under Chapter 23 of CETA, 1985. Further, comparing the above two products, the

usage, ingredients of the products etc., are the same in all respects and both the said products have therapeutic value.

3.3 Further, it was alleged that the appellant has wilfully misstated the facts and wilfully classified the products as 'Animal feed supplement', under Chapter Sub Heading 2302/23099010, leviable to Nil rate of duty with an intent to evade payment of duty and hence the proviso to Section 11A (extended period) is invokable.

3.4 Consequently, a show-cause was issued proposing to classify 'Liv-52 Protec' under CETH 3003 39 for the period May 2002 to February 2005 and under CETH 3004 9011 for the period March 2005 to April 2007 of the Central Excise Tariff Act, 1985 as a Ayurvedic Medicament, demanding Central Excise duty along with interest and imposition of penalty under Section 11AC of Central Excise Act, 1944. Further for the subsequent period 8(eight) show cause notices were issued for the period May 2007 up to June, 2014. The show-cause notices were adjudicated by a common order by the learned Commissioner. The order confirmed the demand invoking the extended period in the show cause notice for the period May, 2002 to April, 2007 and confirmed demand of interest and imposed penalty under Section 11AC of the Central Excise Act, 1944 and for the subsequent periods the demands were confirmed with interest and penalty was imposed under Rule 25 of Central Excise Rules, 2004.

4. In the impugned common order, the Learned Commissioner has held that:-

a) It is evident that the use of the product is for prophylactic uses inasmuch as it helps prevent liver related diseases in

poultry/livestock. Further, it is evident from the literature of the product that the purpose of mixing the product in animal feed is not merely to optimize the feed ingredients but more for protecting the liver from feed/water related toxins/contaminates, for countering hepatic damage by de-worming agents and to stimulate hepato pancreatic activity. Hence, the classification under Chapter heading 2309.90 is patently, incorrect.

b) The chemical analysis report furnished by the Indian Institute of Chemical Technology, Hyderabad confirmed that the formulation has Hepato-protective properties along with other therapeutic properties. Further, the HSN explanatory notes to Chapter Heading 30.03 states that "medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of two or more constituents, which have been mixed together for therapeutic or prophylactic uses, not put up in a measured doses or in forms or packing for retail sale." The explanatory notes to this heading specify that the said heading covers medicinal preparations obtained by mixing two or more substances. However, if they are put up in measured doses or in forms or packing for retail sale, they fall in heading 30.04. Therefore, the explanatory notes to chapter heading 30.03 are squarely applicable to heading 30.04 as well, which amongst other things states at point 5 and 6 as under:

5) Medicinal compound vegetable extracts including those obtained by treating a mixture of plants.

6) Medicinal mixtures of the plants or parts of plants of heading 12.11

Further the explanatory notes to the heading 30.04 in the foot note excludes food supplements containing vitamins or mineral salts, which are put up for the purpose of maintaining health or well being but have no indication as to use for the prevention or treatment of any disease or ailment.

c) In this case 'Liv 52 Protec', apart from optimizing the utilization of animal feed ingredients, mainly protects the liver and helps counter hepatic damage thereby clearly indicating its use for prevention or treatment of liver diseases or ailments. Therefore, the product does not merit classification under CSH 2302 for the period upto February 2005 and under CSH 23099010 from March onwards but is required to be considered as medicament under CSH 300339 for the period upto February 2005 and under CSH 30049011 from March onwards.

d) The Hon'ble Apex Court in the case of Dabur India Ltd. Vs. CCE, Jaipur reported in 2015 (321) E.L.T. 21 (SC) has agreed with the judgment of the Tribunal for the sole reason that the Department's own laboratory, CRCL has opined that "Livfit Vet" is not described in authoritative books for Ayurvedic medicines and it can be considered as animal feed supplement. The Tribunal in the case of Dabur India Ltd. reported in 2005 (183) ELT 432 (Tri.-Del.) had made certain observations, which primarily tilted the decision in favour of the appellant (Dabur India Ltd.). The ground taken by the Tribunal and endorsed by the Hon'ble Supreme Court

to classify Livifit Vet is that the Departments own laboratory, CRCL has opined that the Livifit Vet is not described in authoritative books for Ayurvedic medicines and it can be considered as animal feed supplement. In the instant case, The Indian Institute of Chemical Technology, Hyderabad has categorically stated that the formulation has Hepato-protective properties along with other therapeutic properties.

e) Further, in the case of Dabur India Ltd. the appellant had submitted number of certificates from experts in the field and users of these products that 'Livifit Vet' is not a medicament and it does not have any therapeutic value. In the instant case, the appellant has produced letters from traders and veterinarians to substantiate that the product is poultry feed supplement. All these letters are of a general nature and do not in any way certify, whether the impugned product is a medicament or not. Hence, the ratio of the Supreme Court decision in the case of Dabur India Ltd., will not apply to this case. In view of the forgoing, the product 'Liv 52 Protec' is rightly classifiable under CSH 300339 for the period upto February 2005 and under CSH 30049011 from March, 2005, onwards.

f) On the issue of suppression of facts, it is held that the classification list submitted by the appellant to the Department was approved on the basis of the clarifications given by the appellant regarding the manufacturing process and raw materials used in the 'Liv 52 Protec' and that the preparation is used in the trade as preparation used in animal feeding. The appellant has failed to bring to the notice of the Department that the materials

used in the preparation of 'Liv 52 Protec' have therapeutic properties. It was only when the samples of the product were sent for testing to the Indian Institute of Chemical Technology, Hyderabad, it came to light that the product has hepato protective properties along with other therapeutic properties. Further, the appellant has also failed to bring to the notice of the Department that the impugned product is the same as 'Liv 52 Vet Liquid', which is manufactured and cleared on payment of duty under Chapter 3004 of the CETA. Further, although audits were conducted by the AG's audit party, there is nothing on record to evidence that the nature and use of 'Liv 52 Protec' was brought to the notice of the Department during the audit. Reliance is placed on the decision of Tribunal in the case of Agrico Engineering Works (India) Pvt. Ltd. Vs. CCE, Meerut –2000 (122) ELT 891 (Tribunal), wherein it was held that "the purpose of visit of excise officers was limited and there is nothing on record to show that the revenue authority pointed out this fact to the appellant and even after the discovery of this fact, the revenue has not taken any action."

g) The charge of suppression is justifiable only for the period from May 2002 to April 2007. The subsequent show cause notices being periodical in nature do not attract the provisions of Section 11AC. Hence, for the subsequent SCNs, it is held that the appellant has cleared the goods without payment of duty by misclassifying the goods thereby contravening the provisions of Rule 4, 6 and 8 of the Central Excise Rules, 2002 attracting penalty under Rule 25(1) (a) of the Central Excise Rules, 2002.

5. Assailing the impugned order, the appellant has filed this appeal before this Tribunal. The appellant has contended that the order is not a speaking order in view of the reason that the learned Commissioner has not given any findings in his order against the following contentions raised by them in reply to the show-cause notice.

a. Every month the appellants are submitting the online ER1 Returns showing the details of Animal Feed Supplements manufactured and cleared from their unit under nil rate of duty.

b. The Indian Institute of Chemical Technology, in the conclusion of the Analysis report at page 5, it is said that these tests are fingerprinted and interpreted. It was observed that the chemicals and therapeutic quality only was analysed as per the traditional concept. This does not purport to mean that they have conducted therapeutic efficacy studies to suggest that it is a medicament with the said activity.

c. Any goods which have the character of curing a particular ailment can be called as medicament and for manufacture thereof a drug license is definitely required.

d. The Hon'ble Supreme Court in the case of Dabur India Limited Vs. Commissioner of Central Excise –2005 (182) ELT 290 (SC) had held that scientific or technical meaning not to be resorted to. The product must be classified according to the perception of the product in popular parlance or popular meaning attached to it by those using the product.

e. In the very same decision, the Hon'ble Supreme Court has held that the responsibility of proper classification of the product is on revenue. For this purpose, the department should also bring the certificate from the industry or people, who uses the product and how that product is commonly known in the industry. In the present case, the department has not brought any such evidences or certificates and hence, based on the above said decision, the department has failed to bring evidence to classify the product under Chapter 30 and hence the product should be classified under Chapter 23 of CETA.

f. Further the following statement is given in the packing:

"Herbal veterinary preparation. Not for human use. Not for medicinal use".

g. The show-cause notice has ignored the above declaration printed in the packing, in the literature, etc. The product itself shows very clearly that the same is not for medicinal use and the same is herbal veterinary preparation. It further declares Animal Feed Supplement on the principal display panel of the label. Further, the literature does not contain a single word of therapeutic claim of the product. The product is clearly a hepatic stimulant and growth supporter.

h. As per the decision in the case of Dabur India Limited Vs. CCE-2005 (182) ELT 290 (SC) and various Circulars of the Department, the following requirements have to be fulfilled to classify a product under medicament:

- i. There must be drug license to manufacture a medicament;
 - ii. The ingredients should have been specified in authoritative Ayurvedic text books;
 - iii. Evidence of prescription from the Doctors or mode of prescription and use should be similar to that of a medicine/drug. It may be noted that medicaments are normally prescribed in doses for a limited times and for specific conditions/ailments
 - iv. Perception of the product in popular parlance
 - v. The products claimed to be medicaments should have substantial therapeutic claims, which are not subsidiary in nature
- i. The department has not produced any such evidence for therapeutic efficacy other than that the ingredients are specified in the Ayurvedic text books. The department has not brought any evidence from the third party to prove that the product is not animal/poultry feed supplement but the same is a medicament.
- j. The appellant had submitted letters received from the traders and veterinarians, who deal with the goods. In the said letters, it is stated that the product is poultry feed supplement. This clearly indicates that the product is to be classified under Chapter 23 and not under Chapter 30 of CETH.

k. The impugned order has considered and only states that the letters are of general nature and do not in any way certify whether the impugned product is medicament or not.

5.1. Further the appellant contended that the impugned order has been passed without any discussion on the above contentions of the appellant.

5.2 In this regard they have cited the case-laws of Hon'ble Apex Court in the case of M/s. Chandana Impex Pvt. Ltd. Vs. CCE, New Delhi 2001 (269) E.L.T. 433 (SC), wherein the Hon'ble Apex Court has ruled that the Court should have examined each question formulated with reference to material considered by the Tribunal giving its reasons. Remedy of appeal would be meaningless unless litigant made aware of reasons, which weighed with court in denying him relief prayed for. In the present case as well, the impugned order has been passed without giving full reference or finding about the submission of the appellant, which has rendered the impugned order meaningless and against the principles of natural justice. In this regard, the appellant had cited catena of decisions on this issue.

6. The learned Authorised Representative (AR) for the Revenue has submitted the following averments; the certificate furnished by the Indian Institute of Chemical Technology, Hyderabad states that as per the hebro print test, Liv 52 Protec contents, possess therapeutic attributes; the appellant's contention that the therapeutic efficacy study has not been done hence the report is not complete is devoid of any merit. Moreso when the appellant themselves have not adduced any

proof of efficacy study that 'Liv 52 Protec' does not have any therapeutic and prophylactic attributes; the argument of the appellant that if 'Liv 52 Protec' has to qualify as Ayurvedic medicament, the regulatory authority invariably would make them take the drug licence in compliance of the extant drug laws enforced by Government of Karnataka is not relevant to classification of goods; 'Liv 52 Protec' is manufactured using herbs i) Sarapunkha (ii) Bhumyaamlaki (iii) Arjuna (iv) Yavtika (v) Kakamachi (vi) Nimba (vii) Punarnava (viii) Bhringaraja; an expert casually certifying stating that 'Liv 52 Protec' is a food supplement and also known in the market as animal food cannot be the basis to classify 'Liv 52 Protec' as non-ayurvedic medicine; the argument that 'Liv 52 Protec' is used only to strengthen the liver or spleen is wholly devoid of merit and also against the basic tenets of Ayurveda, which is Doshahara/Parihara branch of medicinal science inferring that it has therapeutic attributes; traditionally a number of plants are used to treat various types of hepatic disorders but few of them are pharmacologically evaluated for safety and efficacy; ayurveda is centuries old traditional medicine practised even in India today; there are certain safe medicinal plants with well established medicinal properties both in clinical practice and in modern science publications; the appellant admits Kakmachi being one ingredient of 'Liv 52 Protec' and Guduchi being one ingredient of 'Liv 52 Vet' and the argument that 'Liv 52 Protec' per se has no therapeutic cum prophylactic attribute is wholly misrepresentation inasmuch as the combination of Andrographis paniculate (Kalmegha), Tinospora cordifolia (Guduchi), and Solanum nigrum (Kakmachi) was traditionally used in Indian System of Medicine (Ayurveda) for the treatment of various liver-related disorder; as

regards the classification under heading 2302 the learned Authorised Representative submits that preparations containing active substances (vitamins or provitamins, amino acids, antibiotics, cocidiostats etc.) would fall under heading 2302 of the Central Excise Tariff provided such preparations are of a kind used in animal feeding, however it may be noted that heading 2309 of HSN excludes products of Chapter 29 and medicaments of heading 3003 or 3004. Hence while deciding the classification of products claimed to be animal supplements, it may be necessary to ensure that the said animal feed supplements or ordinarily or commonly known in the trade as products for a specific use in animal feeding; further a study of the instruction on the packages claimed that 'Liv 52 Protec' protects damage against liver. The appellant has relied on the case of Dabur India reported in 2005 (183) ELT 432 (Tri.-Del.) wherein it is held that "now coming to the test report or opinion brought on record by both the sides we observe that CRCL has opined that 'Livfit Vet' is not described in authoritative books of Ayurveda medicine, CBEC vide Circular 25/1991 dated 03.10.1991 inter alia has stated that a preparation would merit classification as a Ayurvedic medicine, if in the common parlance it is known as an Ayurvedic medicine and all its ingredients are mentioned in the books of Ayurvedic medicines. It has also been observed that the aforesaid two tests have been upheld by the Hon'ble Supreme Court in the case of M/s. Richardson Hindustan; hence any preparations containing herbs and shrubs, the main ingredients of Ayurveda to qualify as Ayurvedic medicaments, they should be mentioned in the authoritative books of Ayurvedic medicines, the appellant has admitted that 'Liv 52 Protec' has presence of eight ingredients all of which undisputedly have a mention in the authoritative

books of Ayurvedic medicine. Hence, the first test to qualify as Ayurvedic medicine is fulfilled. The appellant on his own volition has accepted that there are five herbs (i) Bhumyaamlaki- Treatment of liver diseases (ii) Arjuna-Emaciation & Chronic Thrombosis); (3) Kakamachi – Treatment of Skin Diseases (iv) Punarnava – Treatment of Diuretic (5) Bhringaraja – Treatment of intestinal worm, all undisputedly present in the formulation prepared/manufactured by the appellant-company and sold in the market under the brand name 'Liv 52 Vet', which is admittedly classified under CSH 3004 as Ayurvedic P or P medicines and cleared on payment of appropriate duty; the comparison of the formulation of 'Liv 52 Protec' and 'Liv 52 Vet' show that they are having therapeutic cum prophylactic property and would merit classification as Ayurvedic medicine/medicament. This is supported by the statement of Dr. Ramesh Paramesh, Senior Medical Advisor R&D Himalayan Drug; admittedly 'Liv 52 Vet' being a polyherbal formulation of eighteen herbs is accepted as a veterinary medicaments and out of this eight herbs have a presence in 'Liv 52 Protec' proves the point beyond doubt that the impugned product manufactured by the appellant has therapeutic or prophylactic attributes; the appellant has quoted the self-procured certification/opinion about functional usage of 'Liv 52 Protec' from veterinary science teaching personnel/traders dealing with the impugned items stating that the item in the common parlance is known as animal feed supplement. However, there are differing use as could be seen in the YouTube channel, wherein it is shown in the titled program 'Veterinary Medicine Review', that 'Liv 52 Protec' is a Ayurvedic medicine. The learned Authorised Representative (AR) contends that the YouTube broadcast about 'Liv 52 Protec' has a larger audience and

public reach and hence that should be taken for the purpose of common parlance test. Consequently, in the common parlance test the product Liv 52 Protec qualifies as an Ayurvedic medicine.

7. Heard both sides and perused the records, carefully.

8. The issue to be decided in this case is whether the polyherbal preparation "Liv 52 Protec" manufactured by the appellant is classifiable under CETH 2302/230990/23099010 as 'Animal Feed Supplement' as classified by the appellant or under CETH 300339/30049011 as 'Ayurvedic Medicaments' as adjudged by the revenue.

9. We find that Tariff item Heading 23099010 under Chapter Heading 2309, "Preparation of a kind used in animal feeding", under others reads as 'Compounded animal feed'. The Tariff Heading 30049011 under Chapter Heading 3004, "Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses put up in measure doses (including those in the form of transdermal administration systems) or in forms or packages for retail sale", under others, "Ayurvedic, Unani, Siddha, Homeopathic or Biochemic systems medicaments, put up for retail sale" reads as "of Ayurvedic systems".

10. In this regard it is pertinent to examine the following terminology/ definitions;

a. Medicaments- A medication (also called medicament, medicine, pharmaceutical drug, medicinal drug or simply drug) is a drug used to diagnose, cure, treat, or prevent disease. Drug therapy (Pharmacotherapy) is an important part of the medical field and relies on the science of pharmacology for continual advancement and on pharmacy for appropriate management. Drugs

are classified in many ways. One of the key divisions is by level of control, which distinguishes prescription drugs (those that a pharmacist dispenses only on the order of a physician, from over-the-counter drugs those that consumers can order for themselves). Another key distinction is between traditional small molecule drugs, usually derived from chemical synthesis, and biopharmaceuticals, which include recombinant proteins, vaccines, blood products used therapeutically, gene therapy, monoclonal antibodies and cell therapy (for instance, stem cell therapies). Other ways to classify medicines are by mode of action, route of administration, biological system affected, or therapeutic effects.

b. Therapeutic - **Therapeutic effect** refers to the response(s) after a treatment of any kind, the results of which are judged to be useful or favorable. This is true whether the result was expected, unexpected, or even an unintended consequence. An adverse effect (including nocebo) is the converse and refers to harmful or undesired response(s). What constitutes a therapeutic effect versus a side effect is a matter of both the nature of the situation and the goals of treatment. No inherent difference separates therapeutic and undesired side effects; both responses are behavioral/physiologic changes that occur as a response to the treatment strategy or agent.

c. Prophylactic- **Prophylaxis** is a Greek word and concept. It means any action taken to guard or prevent beforehand. The corresponding adjective is **prophylactic**. The concept of prophylaxis has two parts. First is forethought. A person has to

realise the need first of all. Second is taking appropriate action. Any failure of prophylaxis is a failure at either stage 1 or stage 2. Successful prophylaxis means one has anticipated and avoided some undesirable outcome. Prophylaxis is the central idea in preventative medicine. People usually think medical treatment helps sick people to get healthy. Prophylactic treatment is helpful in a different way. *Primary prophylaxis* tries to stop healthy people from getting sick. *Secondary prophylaxis* tries to stop people, who are sick from getting worse.

11. A drug is any chemical substance that when consumed causes a change in an organism's physiology. Drugs are typically distinguished from food and other substances that provide nutritional support. In pharmacology, a drug is a chemical substance, typically of known structure, which, when administered to a living organism, produces a biological effect. A pharmaceutical drug, also called a medication or medicine, is a chemical substance used to treat, cure, prevent or diagnose a disease or to promote well-being. Traditionally drugs were obtained through extraction from medicinal plants, but more recently also by organic synthesis. Pharmaceutical drugs may be used for a limited duration, or on a regular basis for chronic disorders. *A medication or medicine* is a drug taken to cure or ameliorate any symptoms of an illness or medical condition. The use may also be as preventive medicine that has future benefits but does not treat any existing or pre-existing diseases or symptoms.

12. The appellant submits that their product 'Liv52 Protec' is not a medicament but an animal feed supplement and it does not have therapeutic or prophylactic properties. A food supplement gives

nutrition in the form of carbohydrates, proteins, vitamins, minerals, Trace minerals etc. The major herbs in 'Liv 52 Protec' are Andrographis paniculata (Yavtika) enhances the body's resistance against common infections by stimulating the production of antibodies. It also acts as a hepato-protective that helps prevent liver damage. Phyllanthus amarus (Bhumyaamalaki) is a rich antioxidant, which is effective in the treatment of infective hepatitis. It contains wedelolactone and dimethyl wedelolactone and stimulates the secretion of digestive enzymes. It eliminates toxins and aids in the regeneration of hepatopancreas. The herbal ingredients in the impugned product also have similar hepato-protective properties. We find that 'Liv 52 Protec' liquid stabilizes the hepatic cell membrane and promotes regeneration of the liver and also protects the liver from toxins, drugs and chemicals. Liv 52 Protec, is an appetite stimulant that increases and restores appetite in animal.

13. We find that as per the product literature the Key Benefits of 'Liv 52 Protec' are;

- An appetite stimulant that increases and restores appetite in animals.
- Stabilizes the hepatic cell membrane and promotes repair and regeneration of the liver.
- Protects the liver from toxins, drugs and chemicals.
- Enhances the secretory activity of the liver, which facilitates the overall metabolism of the body.
- Improves the functional efficiency of the liver and pancreas which leads to better utilization of feed.

And the directions for Use:

- Camels, cattle, buffalo and horses: 50ml twice daily
- Calves, pigs and foals: 20-25ml twice daily

14. We find that the impugned product 'Liv 52 Protec' is manufactured using herbs i) Sarapunkha (ii) Bhumyaamlaki (iii) Arjuna (iv) Yavtika

(v) Kakamachi (vi) Nimba (vii) Punarnava (viii) Bhringaraja and these ingredients have both Therapeutic as well as Prophylactic attributes and 'Liv 52 Protec' is administered to live stock to benefit from these attributes.

15. We find that the Appellant also manufacturers, 'Liv 52 Vet liquid' for cats and dogs, which is marketed as a drug under Chapter 30 of Central Excise Tariff Act, 1985. We find that the composition of 'Liv 52 Vet liquid' and 'Liv 52 Protec' or similar, except for certain herbs, which are not common to both the products. However, this does not take away the basic purpose of the impugned product 'Liv 52 Protec', which is a poly herbal preparation and a hepato-protective preparation. A food supplement is something, which provides nutrition to living being, animals, birds, aqua etc. It is in the form of carbohydrates, proteins, vitamins, amino acids, minerals, trace minerals, etc. Food supplements are administered in the cases of malnutrition or under nourishment, the impugned product, 'Liv 52 Protec' is not administered for that purpose. The impugned goods are liquid preparations using Poly herbals. The herbs used in 'Liv 52 Protec' are not chosen for nutritive value nor they are proteins or carbohydrates or amino acids or vitamins or minerals or trace minerals. Though, any plant material would have some elements of the above, they are not chosen for these properties but for the medicinal properties, which reduces the morbidity in animals, birds, aqua, etc. Therefore, the goods which are cleared by the appellant namely 'Liv 52 Protec' are in the category of medicaments/drugs classifiable under Chapter 30 of Central Excise Tariff Act, 1985.

16. The appellant has contended that for an item to be classified under Chapter 30, it is required to have a Drug licence from the

competent authority. We find that as regards the classification under Central Excise Tariff Act, 1985 the item, has to be classified only as per its functionality/properties under the appropriate Chapter Heading/sub heading/Tariff item. The requirement of any licence or otherwise would come subsequently and it has no bearing on the classification under the Central Excise Tariff Act, 1985.

17. In this case, the appellant is manufacturing a similar product 'Liv 52 Vet' and classifying the same under Chapter Heading 30 as an 'Ayurvedic medicament' and paying the appropriate duty. However, 'Liv 52 Protec' is branded and marketed as animal feed supplement. Animal feed supplements are mixtures that are added either to animal feed or fed directly to animals to provide extra nutrients such as vitamins and minerals. The impugned product 'Liv 52 Protec' does not have vitamins or minerals, which would supplement the animal feed. Further we find that the tariff heading item 2309 9010 reads as 'Compounded animal feed' and not as 'animal feed supplement.' Hence, we find that the classification of the impugned product as animal feed supplement is not proper under chapter heading 23 and it should be classified under Chapter 30.

18. In view of the above discussion, we are of the opinion that the product 'Liv 52 Protec' is rightly classifiable under Chapter Sub-heading 300339 for the period upto February 2005 and under Chapter sub-heading 30049011 from March 2005 onwards. The appellant relied on the case of Dabur India Ltd. CCE, Jaipur reported in 2015 (321) E.L.T. 21 (SC). The learned Commissioner has distinguished the case in view of the chemical analysis report of the Indian Institute of Chemical Technology, Hyderabad, and the mention of the ingredients in the

impugned product in the authoritative books of Ayurvedic Medicine, which we find is proper. Further the impugned goods are being marketed as Ayurvedic medicine in some of the media channels, hence the common parlance test is also satisfied. Further, we find that 'Liv 52 Protec Liquid' in bulk is exported under the Chapter Heading 30039011.

19. As regards the invocation of the extended period, we find that the appellant has been submitting ER-1 showing the details of the goods manufactured and cleared by them. The details of goods cleared *inter alia* include 'Liv52 Protec' as well as 'Liv 52 Vet Liquid'. Further the Department has also conducted an audit for the period under dispute and no audit point was raised to indicate that there is suppression of facts and the Department is fully aware of the facts and issues and the goods were cleared in accordance with the approved classification list. Therefore, we find that the invocation of extended period for confirmation of demand of duty for the period May 2002 to April, 2007 is not legally sustainable.

20. Since the correct classification of the product 'Liv 52 Protec' is under Chapter 30, the confirmation of the demand for the normal period in the impugned order covering the period May 2002 to April 2007 is upheld along with interest and the confirmation of demand for the subsequent periods from May 2007 to June 2014 along with interest is also upheld.

21. In the facts and circumstances of the case and as the issue involved is classification, the penalties imposed under Section 11AC and Rule 25 of Central Excise Rules, 2002 are not legally sustainable, hence they are dropped.

22. The appeal is accordingly disposed as per the above terms with consequential relief, if any, as per law.

(Order pronounced in Open Court on 23.01.2024)

(D.M. Misra)
Member (Judicial)

(P. Nageswara Rao)
Member (Technical)