

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL**  
1st Floor, WTC Building, FKCCI Complex, K. G. Road,  
BANGLORE-560009

**COURT-2**

**Customs Appeal No. 20559 of 2018**

*[Arising out of the Order-in-Original No.COC-CUSTOMS-000-COM-49/17-18 dated 29.01.2018 passed by the Commissioner of Customs, Cochin.]*

**M/s. Nitta Gelatin India Limited**

**....Appellant**

54/1446, SBT Avenue,  
Panampilly Nagar,  
Cochin – 682 036.

**Vs.**

**Commissioner of Customs**

**....Respondent**

**Custom House,**

Wellington Island,  
Cochin – 682 009.

**Appearance:**

Mr. V. Sridharan, Sr. Advocate

**....For Appellant**

Mr. P.R.V. Ramanan, Special Counsel

**.... For Respondent**

**CORAM:**

**HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)**

**HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)**

**Date of Hearing: 20/09/2023**

**Date of Decision: 12/03/2024**

**FINAL ORDER No. 20135 of 2024**

**Per R. BHAGYA DEVI:**

The appellant M/s. Nitta Gelatin India Limited used to import goods declared as 'fish protein' and since 2012 classified the same under Customs Tariff Heading 3504 0099. During inspection of goods imported vide bill of entry No.5034927 dated 25.04.2016, it was found that the imported products were found in poly propylene bags

having marks as "Decalcified fish scale for collagen (fish protein)". The Revenue after investigation and testing the goods, found that the declaration of the goods as 'fish protein' was incorrect as the impugned goods were found to be processed/de-mineralized fish scale classifiable under Custom Tariff Heading 0511 9190. During investigation, it is found that about 57 shipments valued at approximately Rs. 27 Crores have been imported from diverse suppliers from countries like Japan, China etc. stretched over a period of nearly five years where the suppliers described the imported goods as fish protein. Accordingly, show-cause notice was issued to the appellant for mis-declaring the goods. Based on the test reports, various documents found during investigation and based on various statements, the Commissioner in the impugned order classified the products under chapter heading 0511 9190 and demanded the differential duty. Since most of them were cleared under Advance Authorisation Scheme declaring them as 'fish protein', the benefit of Notification No. 96/2009 dated 11.09.2009 was denied. On account of suppression of the correct description of the goods and for mis-declaring the same, the goods were confiscated and allowed to be redeemed on payment of redemption fine. Penalties were imposed under Section 112(a), 114A and 114AA of the Customs act 1962.

2. The Learned Sr. counsel on behalf of the appellant placed on record technical literature, various test reports, documents and the statements to submit that the goods were rightly classifiable under chapter heading 3504 0099. Submissions by the Appellant are summarized below:

A) Fish Scale mainly contains 30 to 40% protein and 40 to 60% minerals. Fish obtained by fishing are taken to a Fish Fillet unit, therein skin, bone etc., are separated from flesh using a knife or scalpel. This edible portion of fish, after necessary further processing, is sold in the market as fish fillet and one of the residues of said fish fillet unit, inter-alia, is the fish scale. A Fish Scale is a small rigid plate that grows out of the skin of a fish. Fish scales can be nutritious, containing a layer of protein-rich mucus, a rich source of protein. Tilapia is one of the fish species known to be a very good source of protein. The Fish Scales are washed thoroughly with water and then subjected to treatment with diluted hydrochloric acid, the acid treatment removes inorganics/minerals like Calcium Present in the Fish Scale and this process is called Decalcification or demineralization. The resultant product essentially consists of protein and moisture, with traces of inorganic substances (i.e. crude ash) and other impurities. The decalcified Fish Scale contains various types of proteins of which Collagen Protein Type I is the major ingredient. Proteins are made up of diverse amino acids, out of them the main amino acids that make collagen are Proline, Glycine and Hydroxyproline. These amino acids group together to form Protein fibrils in a triple helix structure. This type of Protein is called as Collagen and Collagen Protein is the most abundant of the Protein in the Fish Scale. It is submitted that the above information of the product is corroborated by various test reports obtained by the Department

from external agencies, of the samples drawn by the Department from the imported goods.

B) To substantiate their above claims the appellant also relied upon the technical literature based on the article titled "Tilapia (Oreochromis Aureus) Collagen for Medical Biomaterials)" authored by David R. Valenzuela and others dated 03.04.2018 which reads as:

*"During the production of commercial fish products, byproducts such as skin, bones, and scales rich in collagen are generated. The isolation of collagen from byproducts from fish would reduce the environmental impact generated during its decomposition by providing an added value to these wastes. The collagen isolated from fish is easier to digest and absorb than that of terrestrial origin, due to the different hydroxyproline contents and a lower denaturation temperature. However, the information reported on the characteristics and methods of extracting collagen is still not enough. Tilapia (Oreochromis aureus) is one of the main groups of fish grown and sold as whole frozen fish and frozen and fresh fillet. Tilapia skin is a byproduct that contains about 27.8% collagen and can be used for the extraction of collagen increasing the economic value of these industries.*

*It has been reported that collagen is composed of glycine (33%), proline (12%), alanine (11%), and hydroxyproline (10%) but is deficient in essential amino acids such as lysine and tryptophan. The methodology for the extraction of collagen includes steps such as pretreatment of the raw material and isolation of collagen. The fish products as collagen sources need a previous cleaning and size reduction, in order to facilitate the elimination of impurities and ensure the maximum collagen extraction. In addition, it is important to classify the waste generated by industrial processing such as the skin, scales, fins, and bones since they have characteristic elements that require different methodologies for the isolation of collagen. For the removal of non-collagen proteins and pigments, and alkaline treatment is recommended, and diluted NaOH has been used the most because the performance of the collagen is not affected. However, increasing the NaOH concentration induces significant collagen losses. Skierka et al. Purpose of using NaCl to remove non-collagen proteins from cod skin, but NaOH has shown greater efficacy than NaCl. The most effective method for the removal of fat from fish skin is with butyl alcohol. The demineralization of scales and bones has been carried out with citric acid, HCL, and ethylenediaminetetraacetic acid (EDTA), achieving efficiencies greater than 90%. However, the selection of the chemical agent*

*is of great importance due to the loss off collagen with the use of these acids. After the removal of non-collagen proteins, demineralization, and defatting of the byproducts, the collagen is extracted. The properties and performance of collagen depend on the execution procedures; therefore, it is important to establish the right conditions."*

C) The learned Counsel also relied on the Relevant extract from article titled "Isolation and Characterization of Fish Scale Collagen of higher thermal stability" authored by Falguni Pati and others published in the Journal Bio-source Technology which reads as under:

*"Collagen is the most abundant protein nearly 30% of total proteins in the animal body. It is the major component of extracellular matrix and is vital for mechanical protection of tissues, organs, and physiological regulation of cellular environment (Kielty et al. 1993) Type I collagen has also been extracted from skin, bone, fins, and scales of fresh water and marine fishes. Extraction off collagen from fish scales: Extraction of collagen from fish scales was done in two sequential steps. In the first step, fish scales were demineralized using EDTA and subsequently isolation of collagen was done by dilute acetic acid treatment. Both processes were carried out at 4°C to reduce chain fragmentation (Fruchour and Koeing, 1975)*

*Fish scales of Rohu and Catla were collected from local market and washed thoroughly with distilled water. The scales were washed in a solvent system at pH7.5 containing 1.0M NaCL, 0.05 M Tris HCL, 20.0 mM EDTA for a period of 48 h with 0.5M EDTA solution at pH 7.4. The demineralized fish scale was washed thrice with distilled water and used further. Demineralized fish scale was analyzed by thermogravimetry (TGA) to confirm the complete dissolution of calcium phosphate."*

D) It is further claimed that prior to June 2010, they produced peptide from Bovine Bone Protein and later proposed to manufacture Peptide using an alternate starting material, namely Fish Protein. Before a new line of activity is commenced, external expert opinion is obtained about compliance with various laws including import/custom laws. Accordingly, the Appellant vide letter dated 31.05.2010 together with a technical write-up of the

proposed imported product, sought the opinion of Foreign Trade consultants, namely Trade Track, Cochin. In that letter dated 31.5.2010, Appellant inter alia, queried the expert about applicability of Heading 05.04 or Heading 35.04 of Customs Tariff Act, 1975 to the imported goods. The said Consultants opined that imported Protein made from Fish Scale would fall under Tariff Item 3504 0099. In April 2016, supplier PT Fortune Star from a new country Indonesia, was identified by them and the same goods were being imported from countries like China, Japan etc. were imported from the said supplier in Indonesia vide Bill of Entry No. 5034927 dated 25.04.2016. In the said bill of entry, the goods were described as Fish Protein falling under Tariff Item 35040990. In the Invoice, packing list and Health Certificate filed with Customs for the consignment, the goods were described as "Fish Protein". However, the goods were described as "Decalcified fish scale for collagen (Fish Protein - HS Code 35040000) in the certificate of Country-of-Origin and in the markings on the packages of imported goods. It is further stated that along with bill of entry, a technical write up dated 21.4.2016 was filed with customs which reads as:

*"Fish Protein from fish scale is produced by acid treatment of fish scales to remove minerals. The fish scale is constituted as a form of protein, calcium, phosphorous and moisture. The scale is treated with dilute Hydrochloric Acid the minerals like calcium and phosphorous gets dissolved into acid to form a complex called Mono Calcium Phosphate (MCP) and the balance remains in the solid form is the protein in the scale. This protein is recovered and washed with water to remove the remaining acid and MCP content. This protein substance is dried to reduce moisture content."*

E) To justify their classification the Learned Counsel submits that One of the very first suppliers of the product in question i.e.,

"Seiko Trading Co., Ltd", indicated the description of the goods in question as "China Origin dry fish protein Tilapia)" in the offer sheet dated 08.04.2011 addressed to the Appellant. This is the description *Suo-moto* adopted by the said supplier, without any prompting or a leading suggestion by the Appellant. The same description as Fish Protein was also mentioned in purchase order, packing list, certificate of analysis and invoice of the said supplier. This buttresses the fact that the description "Fish Protein" is a correct and true description of the product in the international market. During the period in dispute, about 57 shipments valued at approximately Rs. 27 Crores have been imported from diverse suppliers from countries like Japan, China etc. stretched over a period of nearly five years where the suppliers described the imported goods as fish protein. It is claimed that there is not even a suggestion in the SCN, let down any evidence or averment, that this description as fish protein by these suppliers is at the prompting of the appellant. This also establishes that goods in question are commercially bought and sold internationally as fish protein only. Since imported goods in question are essentially protein, and the source of the protein is fish, Appellant imported the goods, under the nomenclature Fish Protein. The terms like milk protein, soya protein etc. indicate the source of the protein. Similarly, Fish Protein indicates that the source of the protein is fish. If the imported product is to be described by the process employed by overseas supplier to obtain it, it could be equally described as decalcified fish scale or more accurately, demineralized fish scale. It is therefore obvious that the

expressions "fish protein" and "decalcified fish scale" are synonyms terms and are not mutually exclusive or contradictory terms. A consignment of fish protein was imported by Appellant vide Bill of Entry No. 7867111 dated 06.09.2012 of China Origin where it was classified under Tariff Item 3504 0090. Along with the Bill of Entry, they filed Health Certificates issued by the regulatory authority of the exporting country and the Health Certificate bears a description "*Fish Protein was made from Tilapia Scale*".

F) The Learned Counsel also claims that the Custom Authorities Suo Moto draw sample from the above consignment and sent them for testing to the Central Institute of Fisheries Technologies ('CIFT') and the CIFT vide test report dated 20.09.2012 stated as under:

*"A detailed analysis of the samples have been carried out by different methods including High Performance Liquid Chromatographic analysis and the Chromatogram was compared with animal protein also. The Chromatogram revealed the product as animal protein. Hence, we confirm that the samples supplied by M/s. Nitta Gelatin Limited is Fish Protein only"*

Letter dated 14.07.2016 was addressed to CIFT by Superintendent of Customs, Group VII and reads as under:

  
**OFFICE OF THE COMMISSIONER OF CUSTOMS**  
 CUSTOM HOUSE, WILLINGDON ISLAND, KOCHI - 682 009  
 Tel: 0484-2668068/2668390. PBX: 0484-2668861 to 6864. Fax: 0484-2668468

F No. DEEC Bond 2000792492  
 Deec 174 / 14 - 15

Dated: 14.07.2016

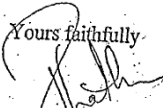
To  
 The Director,  
 Central Institute of Fisheries Technology,  
 Matsyapuri Post, Willingdon Island, Kochi - 29

G/men,

Sub: Analysis of samples - regarding

Please refer to the analysis reports 2-104/2016 QAM dated 01.07.2016 and 11.07.2016

This office forwarded the samples with the letter dated 13.06.2016 to ascertain whether the samples are fish scales nor not. In the above mentioned test reports it was not clearly stated whether the samples were fish scales or not. The report, mentioned above only states that the "sample amino acid composition appears to be fish protein from fish scale". The samples from the same lot were forwarded from another department of this office and the analysis report issued from your office state that the samples are fish scales. Therefore you may look into the matter and confirm whether the samples are fish scales or not.

Yours faithfully  
  
 (R. LATHA)  
 SUPERINTENDENT OF CUSTOMS - GROUP VII

CIFT - report on 4 pages 67-69 + 71-73

Not given to us Not - RUD Not - RUD

DESPATCHED  
 मारीक / DATE 18.07.16  
 समय / TIME 11.30 am

o/c

Based on the above letter, it is submitted by the learned counsel that the CIFT had clearly opined that the sample amino acid composition appears to be fish protein from fish scale. Technical opinion obtained by appellant from Dr. M D Nair Ph. D FNAE (Consultant to Healthcare Industry) inter alia concludes that *"Terminology used by the Appellant (fish protein) is appropriate and acceptable from a scientific point of view"*;

G) The relevant portion of the test report dated 20.5.2016 of CIFT for first two samples is reproduced below –

PART C: TEST RESULTS

| Sl. No. | Test      | Test Method | Unit | Results obtained |
|---------|-----------|-------------|------|------------------|
|         | Sample-I  |             |      |                  |
| 1.      | Calcium   | AOAC 2012   | Ppm  | 84.52            |
| 2.      | Potassium | AOAC 2012   | Ppm  | 8.181            |
|         | Sample-II |             |      |                  |
| 1.      | Calcium   | AOAC 2012   | Ppm  | 423.8            |
| 2.      | Potassium | AOAC 2012   | Ppm  | 15.05            |

| Sl. No. | Test                  | Test method | Unit | Result Obtained |       |
|---------|-----------------------|-------------|------|-----------------|-------|
|         | Proximate composition |             |      |                 |       |
| *1      | Moisture              | AOAC 2012   | g%   | 10.96           | 11.27 |
| *2      | Ash                   | AOAC 2012   | g%   | 0.297           | 0.07  |
| *3      | Protein               | AOAC 2012   | g%   | 88.9            | 91.4  |
| *4      | Fat                   | AOAC 2012   | g%   | 0.69            | 0.228 |

\* Not under NABL scope

Report dated 8.6.2016 of CIFT of the third sample reads thus:

| Sl. No. | Test              | Test Method                          | Unit   | Results obtained |
|---------|-------------------|--------------------------------------|--------|------------------|
| 1.      | Moisture          | AoAC Official Methods (2012) 950.46  | g/100g | 16.07            |
| 2.      | Ash               | AoAC Official Methods (2012) 938.08  | g/100g | 0.13             |
| 3.      | Fat               | AoAC Official Methods (2012) 991.36  | g/100g | 4.59             |
| 4.      | Protein (TNx5.86) | AoAC Official Methods (2012) 2001.11 | g/100g | 77.40            |
| 5.      | Carbohydrate      | Manometric Techniques, Page 239      | g/100g | 2.90             |
| 6.      | Calcium           | AOAC 2012                            | ppm    | 602.7            |
| 7.      | Potassium         | AOAC 2012                            | ppm    | 28.82            |

| Sl. No. | Test          | Test Method                   | Unit   | Results obtained |
|---------|---------------|-------------------------------|--------|------------------|
|         | *Amino acid   |                               |        |                  |
| 1.      | Aspartic acid | J. Chromatography 204:143-148 | g/100g | 6.89             |
| 2.      | Threonine     | J. Chromatography 204:143-148 | g/100g | 2.75             |
| 3.      | Serine        | J. Chromatography 204:143-148 | g/100g | 3.46             |
| 4.      | Glutamic acid | J. Chromatography 204:143-148 | g/100g | 10.82            |
| 5       | Proline       | J. Chromatography 204:143-148 | g/100g | 11.99            |
| 6       | Glycine       | J. Chromatography 204:143-148 | g/100g | 24.19            |
| 7.      | Alanine       | J. Chromatography 204:143-148 | g/100g | 10.17            |
| 8.      | Cysteine      | J. Chromatography 204:143-148 | g/100g | 0.00             |

| Sl. No. | Test           | Test Method                      | Unit   | Results obtained |
|---------|----------------|----------------------------------|--------|------------------|
| 9.      | Valine         | J. Chromatography<br>204:143-148 | g/100g | 2.76             |
| 10.     | Methionine     | J. Chromatography<br>204:143-148 | g/100g | 1.19             |
| 11.     | Isoleucine     | J. Chromatography<br>204:143-148 | g/100g | 1.54             |
| 12.     | Leucine        | J. Chromatography<br>204:143-148 | g/100g | 3.42             |
| 13.     | Tyrosine       | J. Chromatography<br>204:143-148 | g/100g | 5.36             |
| 14.     | Phenyl alanine | J. Chromatography<br>204:143-148 | g/100g | 1.69             |
| 15.     | Histidine      | J. Chromatography<br>204:143-148 | g/100g | 2.23             |
| 16.     | Lysine         | J. Chromatography<br>204:143-148 | g/100g | 5.75             |
| 17      | Arginine       | J. Chromatography<br>204:143-148 | g/100g | 7.32             |

Central Marine Fisheries Research Institute vide their report dated 20.05.2016 opined as under:

*“With reference to the above, we have analyzed both the samples, and we confirm it as Processed Fish Scales. The protein content of sample No. 5034927 is 941.97 mg True protein/g and sample No. 5059997 is 720.53mg True protein/g. The DNA analysis may take two more weeks so as to find out the species of the fish from which the scales were removed.”*

Extract from test report dated 12.06.2016 by Central Marine Fisheries Research Institute of the three samples shown by SIIB from three bills of entries read thus:

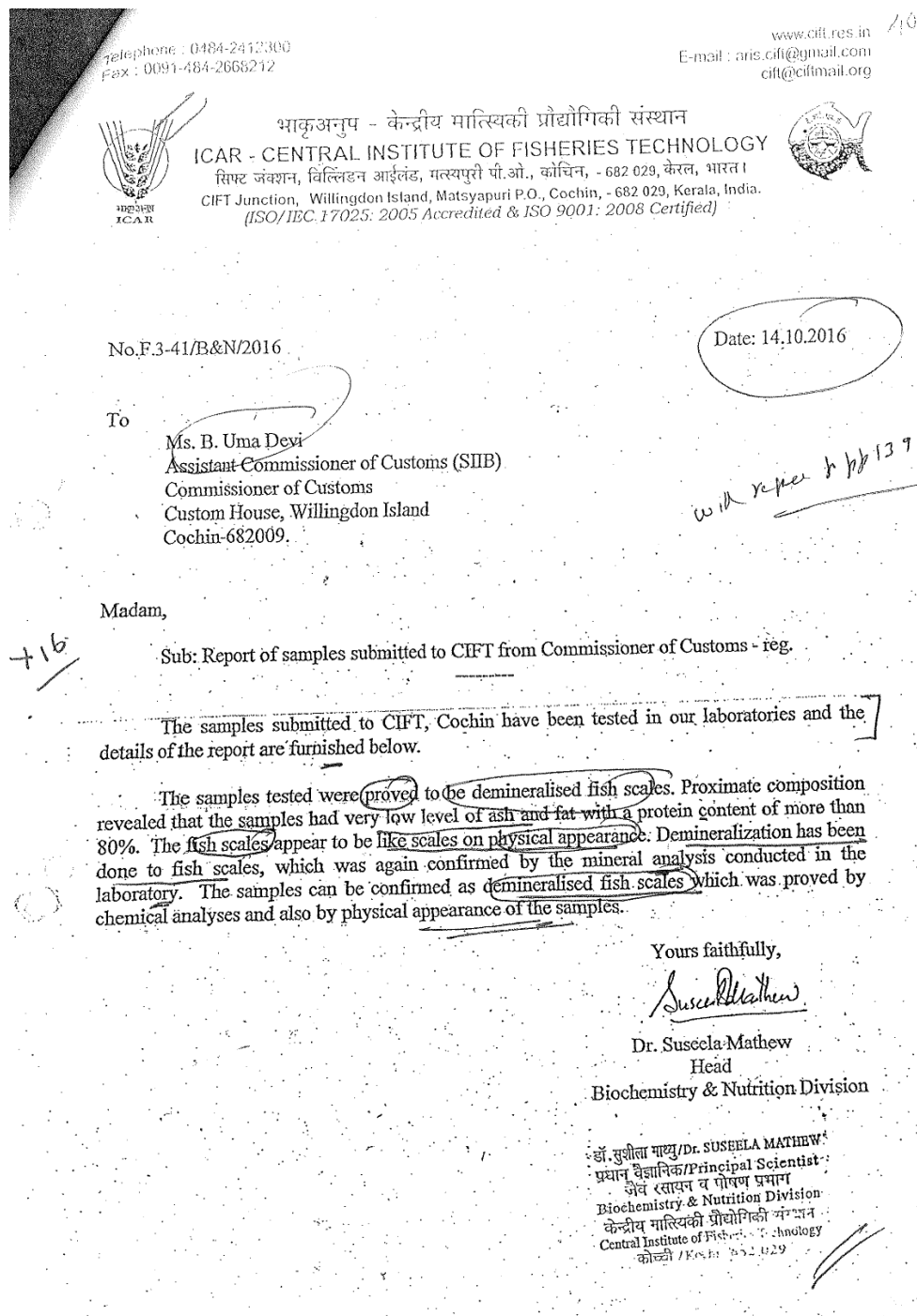
Report of Proximate composition analysis

|                                                                       | Sample1<br>No.5034927/<br>25.04.16 | Sample 2<br>5059997/<br>27.04.16 | Sample 3<br>5150434/0<br>4.05.2016 |
|-----------------------------------------------------------------------|------------------------------------|----------------------------------|------------------------------------|
| Crude Protein<br>(% (Nitrogen<br>equivalent to<br>protein             | 97.39+1.31                         | 98.08+0.31                       | 96.70+0.67                         |
| Moisture (%)                                                          | <2.52                              | <1.12                            | <3.21                              |
| Crude ash (%)                                                         | 0.93+0.006                         | 0.93+0.006                       | 0.93+0.006                         |
| All other parameters (crude fat (%), crude fibre (%), NEE) negligible |                                    |                                  |                                    |

H) It is submitted that the relied upon documents of the Department as per the test reports of the three samples both by CMFRI and by CIFT, show that imported goods are essentially and

practically proteins only, apart from moisture and traces of inorganic impurities i.e. crude ash. Hence, they are indeed Fish Protein based on the nature and composition of the imported goods. Equally, and without any contradiction, the goods can be described as Decalcified Fish Scale or demineralized fish scale which is based on process undertaken to obtain the product in question. This does not at all imply or mean that Fish Protein is not decalcified fish scale or vice versa. The term 'Decalcified Fish Scale' and Fish Protein are not mutually exclusive terms/expressions which is conveniently glossed over by the Department.

I) It is further submitted that in all the letters dated 3.5.2016, 12.5.2016 and 12.5.2016 the department queried the testing agencies as to whether the samples are processed fish scale or not. Accordingly, CIFT vide letter dated 20.5.2016 vide letter dated 8.6.2016 reported that samples are processed fish scale duly demineralized. Similarly, letter dated 20.5.2016 of CMFRI stated the three samples are processed Fish Scale. Letter dated 09.08.2016 of CIFT in specific reply to letter dated 14.7.2016 to Superintendent of Group VII replied that samples are demineralized fish scale. To the departments query vide letter dated 7.10.2016 where SIIB had specifically asked for a generalized write-up, post their test report, CIFT vide letter dated 14.10.2016 reported as under:



J) Thus, prompted by the above-referred repeated letters of the Department, as to whether the imported goods are processed Fish Scale, CIFT/CMFRI, inter alia, indicated that the tested samples are processed fish scales obtained by demineralization. These letters/tests reports have to be understood in their context and nowhere directly or indirectly, expressly or by implication, suggest the imported goods are not Fish Protein. The imported decalcified fish scale/fish protein is treated with dilute sulphuric acid in their

factory which helps precipitating non-collagen proteins present in imported decalcified fish scale/fish protein. Balance/remainder is collagen protein. The Appellant thereafter undertakes enzymatic reaction to break longer chain protein into shorter chain peptide by hydrolyzing with hot water. Thus, collagen peptide is obtained from imported starting material Fish Protein/decalcified fish scale. In view of the above it is submitted that the SCN and Impugned order suggests that the imported goods turn into protein only after they are subjected to the processes undertaken by appellant in India which is incorrect.

K) The learned counsel further submits that it is well settled that a statute has to be read as a whole and therefore the chapter headings 3501 to 3504 are to be examined. Heading 3501, *inter-alia*, covers Casein. It is well known that casein is a protein found in milk. Heading 3502, *inter-alia*, covers Albumin and whey protein derivatives. Albumin is a protein isolated either from milk, egg or blood. Whey protein is the protein from whey, the watery portion of milk that separates from the curds when making cheese. Heading 3503, *inter-alia*, covers Gelatin. Gelatin is a protein isolated from bovine hide & bone, porcine hide & bone etc. Heading 3504, *inter-alia*, covers other protein substance and their derivatives not elsewhere specified or included. Term "others" represents other proteins which are not covered by heading 3501-3503. On a plain conjoint reading of the Headings, 35.01 to 35.04 it is evident that chapter 35 is a natural place for the family of protein. There are numerous types of protein. The proteins

specifically enumerated in heading 3501, 3502, 3503 will fall under the respective heading. All other proteins fall under heading 3504. The above is also supported by HSN Explanatory Notes of Heading 3504 which states that Heading 35.04 inter alia covers: Glutelins and prolamins which are endosperm proteins of seeds, Globulins which are extracted from seeds, Glycinins found in soyabeans, Keratin found in hair, nails, feathers, horns, claws of animals Nucleoproteins isolated from yeasts through precipitation or filtration Protein isolates obtained by treating the de-oiled vegetable sources. A plain reading of explanatory notes makes it clear that the said heading expressly covers Keratin found in hair, nails, feathers, horns, claws of animals. Accordingly, heading 3504 covers both plant and animal-based proteins. Therefore, it is claimed that the Ld. Commissioners observation that in view of the presence of impurities, the goods cannot be classified under Heading 3504 is factually incorrect. It is practically impossible to obtain 100% pure protein. All test reports without any exception confirms that the product in question has high amount of protein (almost 95%) balance being moisture and traces of impurities in the form ash (inorganic). Accordingly, the classification under Heading 35.04 cannot be rejected on account of existence of traces of impurities, particularly in the absence of any section note or chapter note stipulating purity criteria in this Heading 35.04. Further, Ld. Commissioner also observed that that for getting protein, there has to be some process like extraction and purification. According to impugned order, the unwanted material (namely calcium and other minerals) alone are being separated by

overseas supplier and no extraction is involved to obtain the protein. Therefore, the imported goods are not classifiable under Heading 3504. The above observation of Ld. Commissioner are not valid or correct. Heading 3504 does not stipulate that protein must be '**extracted**' in order to fall under the same. There is no reference to extract or extraction in Heading 35.04. it is claimed that many proteins falling under specific Heading 3501, 3502, 3503 and other protein falling Heading 3504 are also obtained by the process of separation and not only by extraction. As per the Ld. Commissioner, the imported goods are classifiable under Heading 0511 only on account of the fact that the impugned goods look like fish scales and had fish odour and described as demineralized fish scales in the Test report. Heading 0511 covers Animal Products not elsewhere specified or included and dead animals of Chapter 1 or 3 not fit for human consumption. It is not the case of the Department that the goods in question are dead animals. Therefore, the goods in question must necessarily fit into the category of "Animal products not elsewhere specified or included". Relevant portion of General Explanatory Notes to Chapter 5 "products reads as under: This Chapter covers a variety of materials of animal origin, unworked or having undergone a simple process of preparation, which are not normally used as food (**except** certain blood, guts, bladders and stomachs of animals) and which are not dealt with in other Chapters of the Nomenclature. Undertaking of process upto which goods will remain Headings of Chapter 5 and undertaking process which taken the products out of chapter 5 are clearly specified in the

text of the respective headings themselves. Simple process or preservation specified in General explanatory notes vary according to the product. These simple processes are specified in explanatory notes under respective headings. While in some cases only washing or scouring is permitted (human hair of CTH 0501), in other cases such as bones even de-gelatinization is regarded as simple process. Only in respect of bones treated with acid, heading 0506 tolerates and retain them with chapter 5. Otherwise, for other products of Chapter 5, simple process of preservation alone is permitted. All products of Heading 0511 will remain therein only when they are fresh or preserved. In other words, only fresh fish scales or preserved fish scales can fall under Heading 05.11. If any process other than preservation are undertaken, that would take the product out of the Heading 0511. The fish scales in question are imported by the Appellant after they have been reacted/treated with dilute sulphuric acid and thus are post demineralization/ decalcification and can no longer be regarded as fresh or simply preserved. Expert opinion of Dr. M.D. Nair Ph. D DNAE has expressly confirmed that irreversible chemical process has taken on the imported goods by demineralization, hence, it cannot be described as simple preservation. Also, between Heading 05.11 and Heading 35.04, Heading 05.11 is a residuary heading and therefore not to be preferred.

L) Imports of Fish Protein other than under Advance Authorizations were always cleared by Appellant on payment of

duty under Tariff Item 35040090. Also, in instances where final product was not exported though imports were against advance authorizations, Appellant have paid Suo-moto from time-to-time duty otherwise applicable under Tariff Item 35040090. Customs duty under Tariff Item 05119190 was always lower than the Customs Duty under Tariff Item 35040090. Hence, in cases where goods were not cleared against Advance Authorizations, but on payment of duty, no differential duty of Customs is demanded in the SCN or the order. Thus, the entire demand of duty involved in the present case has been only on goods imported against Advance Authorization and not on any other import.

M) The learned Counsel further submits that pending investigation, SIIB informed DGFT not to grant 'Export Obligation Discharge Certificate' and not to issue further Advance Authorization to the Appellant. Hence, during the period from April 2016 to September 2019, duty was paid under protest even for imports against Advance Authorization. After the issuance of impugned order, Appellant applied for Advance Authorization describing the goods proposed to be imported as Decalcified Fish Scale and customs classification thereof as Tariff Item 05119190 and accordingly Advance authorization was granted by the DGFT mentioning imported goods as decalcified fish protein of Tariff Item 05119190. Except for change in the description of imported goods and the change in its classification, everything remained the same and therefore it is claimed that goods imported were the same as in the past and subjected to the same manufacturing

process and the same final product, i.e. peptide was manufactured and exported. Later in June 2016, Customs insisted that the goods in question are covered by Tariff Item 05111190 and import thereof is restricted under ITC (HS) Item 05111190 read with General Licensing Note 7(B) of ITC (HS) and then they applied for Sanitary Import Permit to the Department of Animal Husbandry which was granted by the said Department without any doubt or objection. Accordingly, all consignments of imports post September 2016 were cleared without any objection by customs from import licensing angle.

N) Notification No. 96/2009-Cus dated 11.09.2009 grants exemption to materials imported into India against Advance Authorization in terms of para 4.1.3 of the Foreign Trade Policy. relevant extract of Notification 96/2009 dated 11.9.2009 is reproduced below -

*“.....the Central Government, hereby exempts materials imported into India against an Advance Authorization issued in terms of paragraph 4.1.3 of the Foreign Trade Policy xxx from the whole of the duty of customs leviable thereon, xxx subject to the following conditions, namely :-*

*xxx*

*(iii) that the materials imported correspond to the description and other specifications where applicable mentioned in the authorization and the value and quantity thereof are within the limits specified in the said notification....”*

There is no dispute that value and quantity of goods imported by the Appellant are within the limits stipulated in the Advance Authorization and all other requirement of notification 96/2009 has been fulfilled by appellant. A bare perusal of the Notification

reveals that it exempts all goods, irrespective of the classification. As already stated supra, the imported goods are indeed Fish Protein, even while they can be simultaneously described as decalcified fish scale and hence, Condition (iii) of Notification is fulfilled and therefore duty demand is not maintainable. All applications of Advance Authorization License has been accompanied by technical write up about the process undertaken abroad before goods are imported as also the process to be undertaken in India after imports Advance authorization has been issued accordingly. Whether the goods are Decalcified Fish Scale or Fish Protein as claimed by Customs or Appellant respectively, or whether it falls under Heading 05.11 or Heading 35.04 as claimed by Customs or Appellant respectively, one thing is certain and clear. In view of technical write up filed with the application for advance authorizations, the goods actually imported are the very goods mentioned in the application, based on which advance authorizations have been issued by the licensing authority to the Appellant. There is no doubt that the imported goods fully satisfy this technical write-up with reference to which advance authorization has been issued. Thus, there can be no doubt that goods imported are the very goods referred to in application of appellant for grant of advance authorization. Thus, demand of duty in the present case is not sustainable. It is further stated that prior to amendment in September 2016, i.e. for the period involved in the present case, general licensing Note 7(B) is not applicable to decalcified fish scale/fish protein since pre-September 2016, it applied only for animal feed or fish feed

containing fish product. Only post September 2016 fish product themselves are covered by note 7(B) – since the period involved in the present case is prior to September, 2016, there is no breach of restriction imposed by ITC (HS) and therefore no penalty can be levied under Section 112(a) read with 111(d). General licensing note regarding import policy [note 7(B)] reads as under:

*“Import of Meat and Meat Products of all kinds including fresh, chilled and frozen meat, tissue or organs of poultry, pig, sheep, goat; egg and egg powder; milk and milk products; bovine, ovine and caprine embryos, ova or semen; and pet food products of animal origin shall be subject to a sanitary import permit to be issued by Department of Animal Husbandry and Dairying, Government of India, as per Section 3A of Live-stock Importation Act, 1898, as incorporated by Live Stock Importation (Amendment) Act, 2001 (Act No. 28 of 2001, 29th August, 2001), or as amended from time to time”*

As per Section 2(d) of the Live-stock Importation Act, 1898, reads thus:

*“live-stock products” include meat and meat products of all kinds including fresh, chilled and frozen meat, tissue, organs of poultry, pig, sheep, goat; egg and egg powder, milk and milk products; bovine, ovine and caprine, embryos, ova, semen; pet food products of animal origin and any other animal product which may be specified by the Central Government by notification in the Official Gazette.*

Vide Notification S.O. 2666 (E), dated 16.10.2014, issued by the Department of Animal Husbandry, Dairying and Fisheries in the Ministry of Agriculture, the Government notified a number of livestock products which require a Sanitary Permit for import. Amongst the various livestock products so notified, the show cause notice and O-I-O refers to and rely upon only SI. No (xiv) of the said Notification as applicable to the present case. The said serial number is extracted below:

*"(xiv) Animal feed and fish feed containing milk and milk products of bovine, ovine, caprine, meat and meat products, tissues, organs of poultry, pig, sheep, goat, fish and fish products;*

This entry refers to animal and fish feed containing fish and fish products. This entry does not apply to fish product itself is imported. The above is further fortified by the subsequent amendment. Notification S.O 3112 (E) dated 30.09.2016 amended Notification S.O 2666 I dated 16.10.2014. By the said amended notification dated 30.9.2016, scope of entry No. (vii) of Notification dated 16.10.2014 was expanded. The un-amended and amended entry reads as follows

“Unamended entry - (vii) Eggs and seeds of all aquatic animals including fish, crustaceans and molluscs;”

Amended entry - (vii) Eggs, seeds and **products** of all aquatic animals including fish, crustaceans and molluscs;

O) Only after amendment made by notification dated 30.09.2016, products of Fish products were covered by general licensing Note 7(B). Thus, there has been no violation of restrictions imposed under the Foreign Trade Policy and therefore Section 111(d) is not invocable. Since the goods are not liable for confiscation under Section 111(d) the Act, there is no liability to penalty under Section 112 (a). Goods covered by Tariff Item 05119190 of ITC (HS) restricted for import and not prohibited for import. Advance authorizations are valid for import of goods in the restricted list and are not valid only for the goods in prohibited list. The above position is expressly clarified in policy circular 54 (RE-2008)/2004-2009 dated 19.1.2009.

Government of India  
Ministry of Commerce  
Directorate General of Foreign Trade  
Udyog Bhavan, New Delhi -110 011.

**Policy Circular No. 54 (RE-08)/2004-2009 Dated: 09.01. 2009**

To

All Regional Authorities;  
All Commissioners of Customs;  
Trade & Industry

Subject: Import of Restricted items under Advance Authorization Scheme - regarding.

Trade and Industry have represented this Directorate that certain field formations of DGFT and Customs Authority are not allowing import of restricted items (such as those notified vide Notification No. 63/2008 dated 21.11.2008 and 64/2008 dated 24.11.2008 etc.) against Advance Authorisations

2.The matter has been examined in this Directorate. It is evident from paragraph 4.1.13 of Foreign Trade Policy that import of prohibited items or items reserved for imports by State Trading Enterprises (STEs) are not allowed to be imported by the Authorisation holder. Accordingly, it is clarified that restricted items (unless otherwise specifically mentioned) are allowed to be imported for export production under Advance Authorisation Scheme, wherein inputs always remain under actual user condition even after completion of export obligation.

This issues with the approval of Competent Authority.

(Tapan Mazumdar)  
Jr. Director General of Foreign Trade  
Tele: 011-2306 1050  
E-mail: tmazumdar@nic.in

(Issued from File No. 01/94/180/AA-Restricted items/AM 09/PC-4

The above is also evident from a bare comparison of para 4.1.13 of Foreign Trade Policy 2009-2004, as it stood prior to 4.6.2012 and corresponding para as it stood after that date. Said para 4.1.13 as it stood prior to 5.6.2012 read as:

|                                |                                                                                                             |
|--------------------------------|-------------------------------------------------------------------------------------------------------------|
| <b><i>Prohibited Items</i></b> | 4.1.13 Prohibited items of imports mentioned in ITC(HS) shall not be imported Advance Authorization / DFIA. |
|--------------------------------|-------------------------------------------------------------------------------------------------------------|

Para 4.1.13 as it stood from 5.6.2012 reads thus

**13. Importability/Exportability of items that are Prohibited/Restricted/STE**

(a) No export or import of an item shall be allowed under Advance Authorization/DFIA if the item is prohibited for exports or imports respectively.

(d) Import of restricted items shall be allowed under Advance Authorization/DFIA.

Pursuant to the objection of Department, the Appellant applied for Sanitary Import Permit which was granted without any doubt or objection vide permit dated 4.8.2016 and 7.12.2016 and permit dated 26.7.2018. This establishes that, even in the past i.e. during the period involved in the present case appellant has always been fulfilling the purpose behind the stipulation to obtain Sanitary Import Permit. Hence, the objection of the customs is purely procedural not warranting any penalty since breach if any, in the past is not contrary to the object behind the restriction imposed by ITC(HS).

Description of imported goods as fish protein is a correct and valid one, even if the goods are also equally covered by the expression "decalcified fish scale". Hence, there was no mis-description of the goods. Therefore, Section 111(m) is not attracted and no penalty is attracted under Section 112(a) of the Customs Act 1962. consequent to denial of exemption under Notification 96/2009 for imports under advance authorizations, goods imported under said advance authorizations and Notification are confiscated which is incorrect because Section 111(o) applies only when goods are exempted subject to conditions, which conditions is not fulfilled. Section 111(o) is attracted when post

import condition subject to which exemption from duty has been granted is not satisfied. The SCN and impugned O-I-O hold that the goods are not eligible for exemption at the threshold stage itself i.e. at the time of import itself, non-entitlement to exemption under Notification 96/2009 is at the time of import. Such non-eligibility to exemption from duty at the time of import itself, is not a violation of post import condition. Hence, Section 111(o) is inapplicable. Consequently, Section 112(a) is also inapplicable.

The Larger Bench of the CESTAT in case of **Bhagyanagar Metals Ltd Vs. CCE 2016 (333) E.L.T. 395 (Tri. – LB)** held that there can be no redemption fine/fine in lieu of confiscation in the absence of any seizure or provisional release of such seized goods under proper bond. Accordingly, no confiscation can be attracted or fine in lieu of confiscation be imposed in cases provisional assessment under Section 18, even if a bond has been furnished for the purpose of provisional assessment of duty. In the present case, there has been no seizure and/or provisional release of seized goods. In the impugned order, Ld. Commissioner has held that goods cleared under the provisional assessment bond are liable to be confiscated with the option to redeem the goods under Section 125 on payment of redemption fine. This conclusion of Ld. Commissioner is contrary to law declared by Larger Bench in the above case. Hence, the fine of Rs.10 Lakhs imposed on goods assessed provisionally under Section 18 is invalid.

P) As per the Impugned Order, in the present case all the ingredients mentioned in Section 28(4) of the Customs Act, 1962 are attracted and invokable in the present case. The order alleges collusion as well as willful mis-statement as well as suppression of facts simultaneously at the same time, which is incorrect and baseless hence, the impugned order is liable to be set aside. Apart from bare allegations, there is absolutely nothing on record to establish that the Appellant has colluded or resorted to any willful misstatement or resorted to suppression of facts, as full and complete facts were already in the knowledge of the Department. It is undisputed that the Department had drawn samples from bill of entry No. 7867111 dated 6.9.2012 and got it tested from CIFT and CIFT vide report dated 20.9.2012 confirmed goods as fish protein. Thereafter, the goods assessed under Heading 35.04 and released for home consumption. Letter dated 14.7.2016 of Superintendent of Group VII of CIFT confirms that CIFT, in their report on the sample drawn by group even as late 2016, has reported goods to be Fish Protein. The duty demand in the present case is only on goods imported under advance authorization. If appellant has applied for import as decalcified fish scale and/or heading 05.11, the advance authorization would have been issued to them and customs could not have any grievance therein. In fact, post impugned order, advance authorization have been indeed so granted by licensing authority. Hence, there is no need or incentive to resort to collusion or mis-statement or suppression of facts.

The following observations of **Gujarat High Court in L&T Hydrocarbon Engineering Limited vs. Union of India** (special civil application no. 1120 of 2019 (decided on 03.02.2022) vide para 100 which is produced below –

*“100. We may also refer to a decision of the CESTAT in the **Geep Industrial Syndicate Ltd. vs. CCE – 1999 (114) ELT 850**. In the said case, the benefit of exemption notification was available to the assessee, subject to following the procedure specified in the notification. The assessee failed to follow that procedure. The Revenue invoked the extended period of limitation. In that context, the CESTAT held as under:*

*“failure to follow procedure may be an error or omission on the part of the assessee, but it cannot amount to suppression and the question of suppression will arise only when an assessee wants to obtain a benefit not available to him under the law and will not arise when any exemption conferred by law is sought to be denied due to non- fulfilment of procedural requirement.”*

Appellant has obtained the opinion of an external expert. Trade Track, before commencing the present import who opined vide letter dated 31.5.2010 product falls in Heading 35.04. For all consignments, Health Certificate issued by supplier was filed with customs. They specifically showed that imported goods were obtained by decalcification of fish scale of Tilapia fish. Even in the regime of self-assessment, when the goods have been described correctly, correct classification is the responsibility of Department. In Principal Commissioner of **Customs Vs. Kanka Electronics 2021 11 TMI 960 CESTAT Kolkata**, it has been held as under: as under:

*“19. In other words, the Bill of Entry filed under Section 46 contains certain factual information such as the details of importer, IEC, exporter, Country of origin, Rotation number, line number, nature of the goods imported, quantity, etc. which have to be correctly declared by the importer. The officer cannot change the declaration by the importer but he may find that the declaration was wrong (say, 1000 pieces were imported and not 800 as declared) and reassess duty accordingly and also take action for mis-declaration. The*

Bill of Entry also contains certain information such as Customs tariff heading and exemption notifications, which reflect the importer's self-assessment which, unlike declarations, can be changed by the officer. Wrong self-assessment is not the same as wrong declarations. Under Section 111(m), goods which do not correspond to the entry made under section 46 are liable for confiscation and not goods which are wrongly self-assessed to duty although self-assessment under section 17 is also done through the process of filing the Bill of Entry. Any column in the Bill of Entry which can be modified by the officer through re-assessment under section 17 is self-assessment by the importer. Whatever cannot be modified by the officer is a declaration by the importer under Section 46. The self-assessment is the importer's opinion which is subject to re-assessment by the officer and further subject to appeals. The declaration by the importer in the Bill of Entry are factual aspects which must be correctly declared and failure to do so entails action under the Act and the officer cannot modify the importer's declaration. Wrong self-assessment is not mis-declaration by the importer. Similarly, the officer is not liable if his re-assessment gets overturned on appeal nor is the appellate authority liable if his order gets overturned on further appeal."

In ***Midas Fetchem (P) Ltd. and Others Vs. Principal Commissioner – 2023 1 TMI 998 CESTAT New Delhi*** it was held as under:

"50. In practice, the importer makes an entry under section 46 and also self-assesses duty under section 17(1) by filing the Bill of Entry. There is no separate mechanism to self-assess duty. The columns pertaining to classification, valuation, rate of duty and exemption notifications which determine the duty liability are part of the Bill of Entry which is also an entry under section 46. Thus, although the Bill of Entry requires the importer to make a true declaration and further to confirm that the contents of the Bill of Entry are true and correct, the columns pertaining to classification, exemption notifications claimed and in some cases even the valuation are matters of self-assessment and are not matters of fact. Self-assessment is also a form of assessment but the importer is not an expert in assessment of duty and can make mistakes and it is for this reason, there is a provision for re-assessment of duty by the officer. Simply because the importer claimed a wrong classification or claimed an ineligible exemption notification or in some cases, has not done the valuation fully as per the law, it cannot be said that the importer mis-declared. As far as the description of the goods, quantity, etc. are concerned, the importer is bound to state the truth in the Bill of Entry. Thus, simply claiming a wrong classification or an ineligible

exemption notification is not a mis-statement. Assessment, including self-assessment is a matter of considered judgment and remedies are available against them. While self-assessment may be modified by through re-assessment by the proper officer, both self-assessment and the assessment by the proper officer can be assailed in an appeal before the Commissioner (Appeals) or reviewed through an SCN under section 28. Therefore, any wrong classification or claim of an ineligible notification or wrong self-assessment of duty by an importer will not amount to mis-statement or suppression.”

Thus, the extended period of limitation is not invokable in the present case. Section 28(4) of the Customs Act, 1962 was amended and the normal period of limitation was enhanced to a period of 2 years from erstwhile 1 year on 14.05.2016. It is a settled position of law that once the demand is barred by limitation, it cannot be subsequently revived by amendment as observed by the Tribunal in the case of **Aveco Technologies Private Limited vs. CC Hyderabad: 2018 (362) ELT 624 (Tr. – Hyderabad)** and maintained by the Hon’ble Supreme Court in **2018 (362) ELT A164 (S.C)** which reads as under:

“15. We also find that a part of the demand raised in the Notice is barred by limitation. The Commissioner has held in the order that the larger period of limitation available under the proviso to Section 28 is not invocable in the present case as there was no deliberate suppression or misstatement. He has therefore confined the demand for a period of the normal period of limitation. He has however applied two years to be the normal period of limitation and, since the show cause notice was issued on 8-11-2014, all imports made after 8-11-2014 have been held to be falling within the normal period of limitation. The appellant has contested this approach by pointing out that demands for the period from 8-11-2014 till 13-5-2016 was time-barred and therefore could not have been the subject matter of the recovery proceedings. It was pointed out that the normal period of limitation was enhanced from one year to two years with effect from 14-5-2016. This was done by an amendment made to the Customs Act by Finance Act, 2016. The position thus was that as on 13-5-2016 i.e. prior to the Finance Act, 2016 coming into force, demand for the period prior to 13-5-2015 had already become barred by limitation. This amendment made was not professedly a retrospective one and thus demands which had already become barred by

limitation could not get revived by the amendment. Thus, demands for the period 8-11-2014 till 13-5-2015 which had already become time-barred could not have been confirmed by the Commissioner by applying the amended period of two years. The fact that the Notice had been issued on 8-11-2016, by which time the limitation period had increased to two years, could not give the Revenue an authority to revive and resurrect demands which had already become dead before the amendment. To do so, would be to give the amended provision a retrospective effect which the Legislature did not do while bringing in the amendment. It is a settled law that any statutory amendment is prospective in its operation unless it is specifically declared to have retrospective operation. The Finance Act, 2016 does not contain any provision according to a retrospective operation to the said Act. As such, demands which had already become irrecoverable as on 13-5-2015 could not, by virtue of the amendment with effect from 14-5-2016 get resurrected or revived.”

Thus, the demand which was already barred on 14.05.2016 (when period of limitation was 1 year) cannot be revived by the subsequent amendment. Hence, demand upto 14.5.2015 is barred by time. Demand between 2.11.2014 (i.e. two years prior to SCN dated 21.11.2016) to 14.5.2015 is also barred by limitation. Further, the Department has placed reliance on email correspondence between the official of the Company and the Indonesian supplier, there is nothing in the email correspondence which even remotely establishes any lack of *bona fide* on the part of Appellant. The Appellant was in communication with a new supplier from a new country in Indonesia. Initially the foreign supplier proposed to sell dried/raw fish scales. However, because of commercial needs, the Appellant emphasized on supply of processed (demineralized / decalcified) fish scale. Hence, to avoid confusion and mix up, Appellant particularized goods needed by them namely as decalcified fish scale, as opposed merely dried fish scale. Indian Customs Tariff was aligned with HS Code only

upto six-digit level. India has implemented 8 digit the sub-classification Indonesia does not have 8-digit tariff. Thus, there is non-alignment of CTH at 8-digit level, between Indonesia Customs Tariff and Indian Customs Tariff. Tariff Item 35040099 figured in Indian Customs Tariff, Indonesia had only sub-headings Tariff 35040000. Communications exchanged highlighted these aspects. Request to the supplier to stick to the description of fish protein in invoice, packing list etc. is necessary. In documentary credits like letter of credit, there should be no discrepancy in the description in the documents. Otherwise, banks can dishonour the letters of credit issued by them. Similar difficulty can arise with insurance agencies also. Even for this consignment, country of origin certificate and marking on label described the goods as "decalcified fish scale (fish protein)". It is stated that technical write up was duly filed with customs and they have purchased these very goods under this description for nearly 5 years from various suppliers in countries like China, Japan, for nearly 58 consignments valued at more than Rs. 27 Crores. The communication to indicate description as "fish protein" is no way mis-statement or suppression.

3. The learned Senior Counsel for the Revenue submitted that investigations conducted with 3 live consignments revealed that the impugned goods were 'demineralised fish scale' and not 'fish protein' as described in the bills of entry by the appellant. The test reports relating to the samples drawn from live consignments also indicated that the goods were 'demineralised fish scale'. The

learned Senior Counsel's submissions are summarised as given below:

I) Whether the goods imported by the appellant were classifiable under chapter heading 3504 or under 0511 of the Customs Tariff Act?

The test reports from central Institute fisheries institute of Fisheries technology (CIFT) and central marine fisheries research Institute (CMFRI) show that the product under import were 'demineralised fish scales' with variable protein content, obtained by treating the fish scales with hydrochloric acid. The impugned goods were in the form of scales and had a 'fishy odour'. They retained the basic characteristic of the parent material i.e. fish scales.

- i) The protein content in the impugned demineralised fish scales as per analysed samples was 70 to 80%. While these products contain fibrous protein called collagen, they are themselves not protein. They are a combination of collagen (protein), proteoglycan (contains some amount of protein), basis of hydroxyapatite (contains calcium), moisture and traces of minerals and fat.
- ii) The manufacturing process adopted by the appellant including the main process of hydrolysis, results in the final product known as collagen peptide. The final product yield is approximately 55% of the raw material used and the remaining comprises moisture, ash, insoluble proteins, sulphate ions, foreign matter including impurities as averred

by the Assistant General Manager of the appellant. The physical properties of 'collagen peptide' are totally different from 'demineralised fish scales'.

- iii) In The form in which they imported the impugned goods cannot be regarded as 'other protein substances and their derivatives', in particular, protein isolates, which are extracted from vegetable or animal sources. Demineralised fish scales a source of protein and are not protein substances by themselves. They cannot be directly used but had to be hydrolysed before they become a protein substance. Hence, in terms of chapter notes, and tariff descriptions and explanatory notes, impugned goods do not merit classification under heading 3504 as claimed by the appellant. The products covered under heading 3504 are final products and they are extracted or derived from a protein source. Impugned goods do not satisfy this criterion. The analogy of keratins is not relevant; further, classification of any product should be done in terms of the general interpretative rules and not by citing analogies.
- iv) The expression 'fish protein' is of the generic nature. It is commonly used to denote protein extracted or obtained from fish sources, as different from protein derived from sources like milk, plants and animals. The appellant had misleadingly described the impugned goods as fish protein even though they had clear knowledge that the impugned goods were only fish scales, which are actually waste products subject to decalcification. Therefore, the impugned goods is only a

source of protein and not protein perse. Hence classification of the impugned goods under chapter heading 3504 is ruled out.

- v) The appellant has relied upon three test reports of CIFT to justify the description indicated by them in the bills of entry. These test reports provide a list of amino acids present in the sample. Based on the same CIFT has opined, after comparing with the animal protein, the sample is fish protein. What has been indicated is that the amino acids present in the subject samples were protein from fish scales not from any animal source. These reports do not indicate that the samples were themselves protein.
- vi) The impugned goods were packed in bags containing paper label having the description "decalcified for scales for collagen (fish protein)". What is referred to as fish protein is with respect to collagen not the goods under import. The website of the Indonesian supplier shows that they manufacture dried scale and chemically treated fish scales. They do not claim that the manufacture fish protein.
- vii) With reference to the impugned goods, the only process that raw fish scales have undergone is removal of calcium from the outer layer of the fish scales. In physical appearance and smell, the goods were nothing but fish scales. The said process was only a preparatory process for further expression of protein called collagen.
- viii) The email communication exchange between the appellant and the suppliers revealed that the former on that the goods

to be described as 'fish protein' to steer clear of the import restrictions on 'fish scales' under Indian imported policy. In fact, the former did not want any HS code, particularly, heading 0511, mentioned in the documents/labels. It also transpires that in the exporting country Indonesia export of goods falling under heading 3504 was forbidden. In all the documents submitted with the bill of entry such as invoice, purchase order, FTA certificate, health certificate, the description shown was decalcified fish scale for collagen (fish protein). No nowhere it is stated that impugned goods were fish protein, even then the appellant described the goods to be fish protein in the bills of entry to match the description and the advance authorisation issued by the JDGFT, Kakkand and to claim classification under heading 3504 for customs purposes.

- ix) The goods imported clearly were demineralised/decalcified fish scales and they are sources of protein called collagen and are not usable as protein as such. They had to be necessarily processed further to extract protein that is collagen peptide. In form and smell they were nothing but for scales. Hence the correct classification of the impugned goods is under chapter heading 05119190 and not under 35040099.
- x) Based on the General Rules of Interpretation and Explanatory notes the goods are rightly classifiable only under chapter heading 0511 because the goods are in the form of fish scales and by no stretch of imagination they can be regarded as protein substances. Rule 4 of the General Interpretative

Rules the kinship Rule would alone apply and the classification of the impugned goods being akin to the fish is rightly classifiable under chapter heading 0511.

II) Whether there was a deliberate default on the part of the appellant describing the subject goods in the relevant bills of entry.

Referring to the observations of the Commissioner at paragraph 50 of the impugned order it is submitted that the officers of the appellant were aware that the impugned goods were not protein perse and Collagen had to be extracted from the impugned products. The mention of the product description as 'decalcified fiscal for collagen' in the purchase order, the email conversations, the statements of the officials, and the markings of the documents and packages clearly indicate that the officials knew that the products were decalcified for scales and not fish protein to be classifiable under heading 3504. In spite of that the impugned goods were classified as fish protein to claim the benefit of advance authorisation scheme read with the notification 96/2009.

III) Whether the appellant had contravened the conditions described under notification 96/2009 dated 11.11.2009 for availing the benefit of duty-free import under the advance authorisation scheme.

The advance licences under which the appellant had imported 49 consignments and claimed duty free benefit were issued for import of 'fish protein' falling under chapter heading 3504 0099, but the goods imported against the said license 'decalcified fish scales' falling under chapter heading 0511 9190. The present imports were therefore not in conformity with the license description. Thus, availment of duty-free import was irregular. While fish protein was freely importable, import of decalcified fish scales falling under chapter heading 0511 was restricted. Despite prior knowledge, the appellant imported the restricted item by mis declaring the description of the goods. Further through such misdeclaration they availed duty free benefit and caused revenue loss of 8.77 crores. The impugned goods, being fish products, where import shall be allowed only against sanitary permit issued by the Department of animal husbandry, diary and fisheries in the Ministry of Agriculture in terms of section 2(d) of the livestock Importation Act,1898 and notification S.O.655 (E) and the procedure laid down in the schedule annexed thereto. Further vide notification S.O.2666 (E) dated 16/10/2014 livestock has been defined to include fish products. The appellant did not obtain such sanitary permits for their import of impugned goods.

The appellant was fully aware that the goods imported by them were not fish protein. They advised their suppliers not to indicate in their documents the HS code of the product but in the bills of entry the description of the goods to be fish protein and

its classification to be under heading 3504 for customs purposes and for availing the benefit of advance authorisation scheme. There was a deliberate default on the part of the appellant with the deliberate intention to avail the benefit of the benefit of the above scheme.

4. Heard both sides and perused the records. The issues to be decided are:

- (i) Whether the imported item is fish protein as declared by the appellant or is it processed/demineralised fish scales as per the test reports.
- (ii) Whether the product is to be classified under chapter heading 0511 9190 based on the description is demineralised fish scales allowed to be classified under chapter heading 3504 0099 as claimed by the appellant.
- (iii) Whether the appellant had mis-declared the description of the product in order to claim the benefit of advance authorization.
- (iv) Whether the appellant had made any willful mis-declaration of the description of the goods which attracted invocation of extended period under the provisions of the Customs act 1962 which warranted imposition of various penalties.

5. The first is regarding the classification of the imported goods by the appellant. Let's examine the test reports and the technical literature placed before us to understand the nature of the product. The goods imported vide bill of entry No.5034927 dated 25.04.2016 it was found that the imported products were found in

poly propylene bags having marks as "Decalcified fish scale for collagen (fish protein)", HSN code 35040000. Since it was found that the Chapter heading declared by the appellant was incorrect, samples were drawn and sent for testing. The Central Institute of Fisheries Technology (ICAR) Willingdon Island and the Head of Marine Biotechnology Division, Central Marine Fisheries Research Institute (CMFRI) Ernakulam confirmed that the samples can be confirmed as demineralised fish scales and confirms the presence of protein collagen as seen from the test reproduced below.

Telephone : 0484-2412300  
Fax : 0091-484-2668212

www.cift.res.in  
E-mail : aris.cift@gmail.com  
cift@ciftmail.org

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भारतअनुप - केन्द्रीय मात्स्यकी प्रौद्यौगिकी संस्थान  
ICAR - CENTRAL INSTITUTE OF FISHERIES TECHNOLOGY  
सिफ्ट जंक्शन, विलिंग्डन आईलैंड, मत्स्यपुरी पी.ओ., कोचिन, - 682 029, केरल, भारत।  
CIFT Junction, Willingdon Island, Matsyapuri P.O., Cochin, - 682 029, Kerala, India.  
(ISO/IEC 17025: 2005 Accredited & ISO 9001: 2008 Certified)

No.F.3-41/B&N/2016

Date: 14.10.2016

To  
Ms. B. Uma Devi  
Assistant Commissioner of Customs (SIIB)  
Commissioner of Customs  
Custom House, Willingdon Island  
Cochin-682009.

Madam,

Sub: Report of samples submitted to CIFT from Commissioner of Customs - reg.

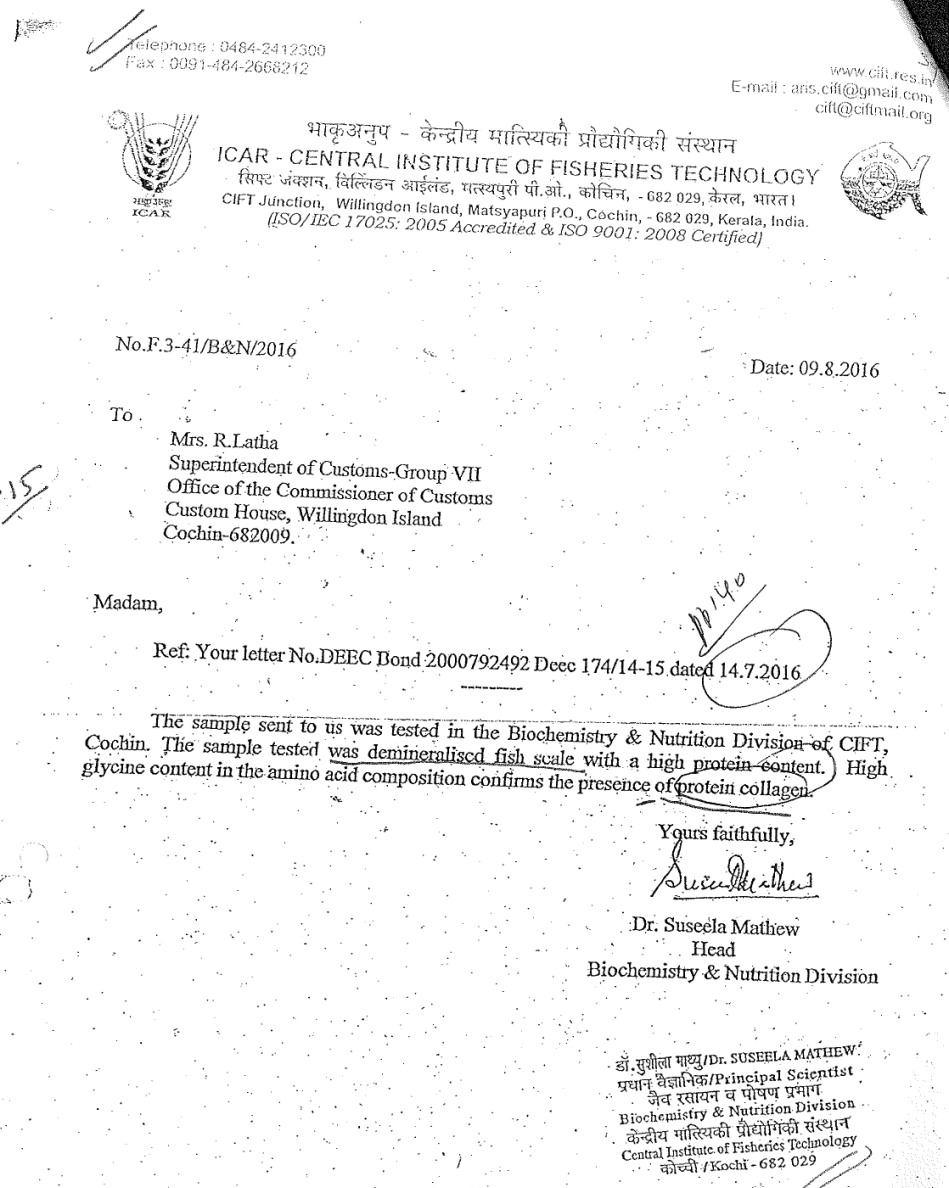
The samples submitted to CIFT, Cochin have been tested in our laboratories and the details of the report are furnished below.

The samples tested were proved to be demineralised fish scales. Proximate composition revealed that the samples had very low level of ash and fat with a protein content of more than 80%. The fish scales appear to be like scales on physical appearance. Demineralization has been done to fish scales, which was again confirmed by the mineral analysis conducted in the laboratory. The samples can be confirmed as demineralised fish scales which was proved by chemical analyses and also by physical appearance of the samples.

Yours faithfully,  
Dr. Suseela Mathew  
Head  
Biochemistry & Nutrition Division

डॉ. सुशीला माथु/Dr. SUSEELA MATHEW  
प्रधान वैज्ञानिक/Principal Scientist  
जैव रसायन व पोषण प्रभाग  
Biochemistry & Nutrition Division  
केन्द्रीय मात्स्यकी प्रौद्यौगिकी संस्थान  
Central Institute of Fisheries Technology  
कोच्ची / Cochin - 682 029

with reply to pp 139



6. Based on the above test reports, there is no dispute that the Fish Scales have undergone the process called Decalcification or demineralization. The resultant product essentially consists of protein and moisture, with traces of inorganic substances (i.e. crude ash) and other impurities. The decalcified Fish Scale contains various types of proteins of which Collagen Protein Type I is the major ingredient and the Proteins are made up of diverse amino acids, out of them the main amino acids that make collagen are Proline, Glycine and Hydroxy proline and this type of Protein is called as Collagen and Collagen Protein is the most abundant of the Protein in the Fish Scale are not at all in dispute.

Demineralisation is considered as the primary procedure for preparation of the scale for the extraction of collagen. Based on the above it is very clear that the product imported by itself is not a protein but the protein is extracted only after further processing is being undertaken by the appellant. The appellant and the revenue based on the various literatures and the test reports do admit that the item imported is a rich source of protein. It is also admitted that after certain processes the protein is extracted and then exported. Therefore, the question arises whether the item is classifiable as demineralised fish scale under chapter heading 0511 or as protein under CTH 3504.

7. Now let's examine the two contesting headings along with the relevant General notes, Chapter notes and the Explanatory notes along with the Rule of Interpretation of Customs Tariff. The Rules of Interpretation for classification in a nutshell are as follows:

“Rule 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:

xxx

Rule 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.

Rule 4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

6. For legal purposes, 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 sub headings notes and, mutatis mutandis, to the above rules, on the understanding that only sub headings at the same level are comparable.

**Chapter 5 : Products of animal origin, not elsewhere specified or included**

| (1)                   | (2)       | (3)                                                                                                              | (4) | (5) | (6) |
|-----------------------|-----------|------------------------------------------------------------------------------------------------------------------|-----|-----|-----|
| 0511                  |           | Animal Products Not Elsewhere Specified Or Included; Dead Animals Of Chapter 1 Or 3, Unfit For Human Consumption |     |     |     |
| 0511<br>10 00         | -<br>-    | Bovine semen<br>Other:                                                                                           | kg. | 30% | -   |
| 0511<br>91            | --        | Products of fish or crustaceans, molluscs or other aquatic invertebrates; dead animals of Chapter 3 :            | kg. |     |     |
| <b>0511<br/>91 10</b> | ---       | <b>Fish nails</b>                                                                                                | kg. | 30% | -   |
| <b>0511<br/>91 20</b> | ---       | <b>Fish tails</b>                                                                                                | kg. | 30% | -   |
| <b>0511<br/>91 30</b> | ---       | Other fish waste                                                                                                 | kg. | 30% | -   |
| <b>0511<br/>91 90</b> | ---       | <b>Other</b>                                                                                                     | kg. | 30% | -   |
| 0511<br>99            | --<br>--- | Other :<br>Silkworm pupae                                                                                        |     |     |     |

The General explanatory notes for Chapter 5 read as "Chapter covers a variety of materials of animal origin, unworked or having undergone a simple process of preparation, which are not normally used as food (except certain blood, guts, bladders and stomachs of animals) and which are not dealt with in other Chapters of the Nomenclature and it includes the following:

- 1) Animal semen.
  - 2) Animal embryos,
  - 3) Animal blood, liquid or dried, edible or not.
  - 4) Cochineal and similar insects, unfit for human consumption
  - 5) Inedible fish eggs, roes and milt.
  - 6) Waste of fish or crustaceans, molluscs or other aquatic invertebrates.
- i. Maws (swim bladders), raw, dried or salted, used in the manufacture of

- in Glass and fish glues.
- ii. Fish guts and waste of skins used for glue manufacture, etc.
- iii. Fish waste.

**Chapter 35: Albuminoidal substances; modified starches; glues; enzymes**

|            |     |                                                                                                                                                                 |     |     |   |
|------------|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|-----|---|
| 3504       |     | <b>Peptones and their Derivatives; other Protein Substances and their Derivatives, not Elsewhere Specified or Included; Hide Powder, Whether or not Chromed</b> |     |     |   |
| 3504 00    | -   | Peptones and their derivatives; other protein substances and their derivatives, not elsewhere specified or included; hide powder, whether or not chromed:       |     |     |   |
| 3504 00 10 | --- | Peptones                                                                                                                                                        | kg. | 30% | - |
|            | --- | - Other :                                                                                                                                                       |     |     |   |
| 3504 00 91 | --- | Isolated soya protein                                                                                                                                           | kg. | 30% | - |
| 3504 00 99 | --- | Other                                                                                                                                                           | kg. | 30% | - |

**35.04 Peptones and their derivatives; other protein substances and their derivatives, not elsewhere specified or included; hide powder, whether or not chromed.**

This heading covers:

- (A) Peptones and their derivatives.
- (B) Other protein substances and their derivatives, not covered by a more specific heading in the Nomenclature, including in particular:
- (C) Hide powder, whether or not chromed.

From the above Chapter notes and the HSN explanatory notes it is very clear that fish nails and fish waste are being classified under chapter 5 while Chapter 35 in fact is the classification for peptones and their derivatives which is the final product manufactured by the appellant using the fish scales imported by them as their main source of protein. The fact that the demineralized fish scale consists of protein does not itself make the product protein substance to be classified under chapter 35. The fish waste which is rich source of protein is specifically covered under CTH 0511 (highlighted) and the explanatory notes also clearly mentions that

this CTH includes fish waste. It is an admitted fact that the appellant manufactured peptide by using the fish protein contained in the demineralized fish scales imported by them, just because it contains protein which has been extracted through various processes to manufacture peptide the final product it does not make the imported product 'demineralized fish scale' a 'fish protein'. It is an admitted fact peptide is the product exported by them which is manufactured by using the collagen protein that contained in the demineralized fish scale imported by the appellant. The above facts very clearly depicted in their own technical write-up and process of manufacture (reproduced below) placed before the authorities concerned and it proves that it is fish scale.

|                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                    |                                                                                                                                                                                     |                                                                                                                                                                           |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  <p><b>Nitta Gelatin India Limited</b><br/>(Formerly Nitta Chemicals and Proteins Limited)<br/>Joint Venture of Kerala State Industrial Development Corporation Ltd. and Nitta Gelatin Inc.</p> | <p>Post Box 4262<br/>54/1445, 581 Avenue<br/>Parampally Nagar<br/>Cochin - 682 036 India<br/>Tel: 0484 3099444, 2317805<br/>Fax: 0484 2310568<br/>Email: nita@nittagelatin.com</p> | <p>OFFICE DIVISION<br/>Post Box 3109<br/>PO Info Park, Kakkanad<br/>Cochin - 682 042 India<br/>Tel: 0484 3099233, 2415506<br/>Fax: 0484 2415504<br/>Email: gln@nittagelatin.com</p> | <p>OSSE-84 0805 04<br/>PO Kakkadum<br/>(Vaj Korally)<br/>Trehua - 680 30+ India<br/>Tel: 0480 3029331, 2719490<br/>Fax: 0480 2719943<br/>Email: odis@nittagelatin.com</p> |
| CIN : L24299KL1975PLC002691                                                                                                                                                                                                                                                        |                                                                                                                                                                                    | Website: www.nittagin.com                                                                                                                                                           |                                                                                                                                                                           |

Ann-17  
324

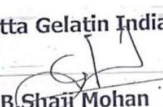
24.06.2016.

TECHNICAL WRITE UP OF FISH PROTEIN

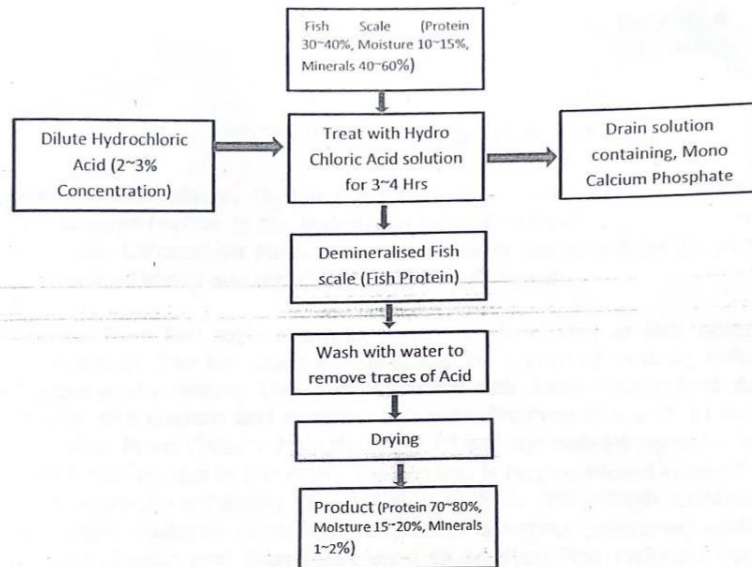
We manufacture Collagen Peptide (Peptone with HS code 35040010) from Fish Protein. Collagen Peptide is the hydrolysed form of Collagen, a fibrous protein present in the Extracellular Matrix of living cells. After the hydrolysis the product loses its gelling ability and makes it soluble in cold water.

Fish Protein (HS Code 35040099) is manufactured from fish scale by acidulation of fish scales to remove minerals. The fish scale is constituted of protein, calcium, phosphorous and moisture. The fish scale is treated with dilute Hydrochloric Acid and in the process minerals like calcium and phosphorous gets dissolved into acid to form a complex called Mono Calcium Phosphate (MCP) and the balance remains in the solid form is the protein part of the scale. This protein is recovered and washed with water to remove the remaining acid and MCP content. The resultant protein substance is dried to reduce moisture content. This protein is called Fish Protein.

For Nitta Gelatin India Limited

  
**B. Shaji Mohan**  
 Executive Director (Corporate)

Fish Protein (Decalcified fish scale) manufacturing Process.



As has been stated by the Learned Senior Counsel for the revenue, Rule 4 of General Rules of Interpretation the goods are more akin to CTH 0511 and nowhere can be classified under CTH 3504. All the technical literature placed on record only suggests that the impugned product is a rich source of protein and it is not dispute at all. But classification depends on the specific Section and chapter headings read with the Rules of interpretation.

8. The Supreme Court of India in the case of **Commr. of C. Ex., New Delhi Versus Connaught Plaza Restaurant (P) Ltd. 2012 (286) E.L.T. 321 (S.C.)** decided on 27-11-2012 while deciding whether 'soft serve' served at the restaurants/outlets commonly and popularly known as McDonalds, is classifiable under Heading 21.05 (as claimed by the revenue) or under Heading 04.04 or 2108.91 (as claimed by the assessee) of the

Central Excise and Tariff Act, 1985 (for short "the Tariff Act"),  
observed that

"Heading 04.04 reads "other dairy produce; edible products of animal origin, not elsewhere specified or included" whereas Heading 21.05 reads "ice-cream and other edible ice". Neither the headings nor the chapter notes/section notes explicitly define the entries in a scientific or technical sense. Further, there is no mention of any specifications in respect of either of the entries. Hence, we are unable to accept the argument that since 'soft serve' is distinct from "ice-cream" due to a difference in its milk fat content, the same must be construed in the scientific sense for the purpose of classification. The statutory context of these entries is clear and does not demand a scientific interpretation of any of the headings. Therefore, in the absence of any statutory definition or technical description, we see no reason to deviate from the application of the common parlance principle in construing whether the term "ice-cream" under Heading 21.05 is broad enough to include 'soft serve' within its import.

On the basis of the authorities cited on behalf of the assessee, it cannot be said that "ice-cream" ought to contain more than 10% milk fat content and must be served only frozen and hard. Besides, even if we were to assume for the sake of argument that there is one standard scientific definition of "ice-cream" that distinguishes it from other products like 'soft serve', we do not see why such a definition must be resorted to in construing excise statutes. Fiscal statutes are framed at a point of time and meant to apply for significant periods of time thereafter; they cannot be expected to keep up with nuances and niceties of the gastronomical world. The terms of the statutes must be adapted to developments of contemporary times rather than being held entirely inapplicable. It is for precisely this reason that this Court has repeatedly applied the "common parlance test" every time parties have attempted to differentiate their products on the basis of subtle and finer characteristics; it has tried understanding a good in the way in which it is understood in common parlance."

9. In the present case, the test reports and the technical literature clearly establish that the product imported is demineralised fish scale. As observed by the apex court in the above case the content of protein cannot establish the product as a protein instead it is only a source of protein. More over there is a specific entry for fish waste and it is a settled issued that specific entry will be preferred over other entries and the chapter

notes, headings and the explanatory notes clearly establish the product is rightly classifiable under Chapter 5. In view of the above, the products imported by the appellant are rightly classifiable under Chapter Heading 0511 9090.

As rightly stated by the Learned Senior Counsel for the Revenue in physical appearance and smell, the goods were nothing but fish scales, the only process that raw fish scales had undergone is removal of calcium from the outer layer of the fish scales, which was only a preparatory process for further extraction of protein called collagen. It is also an admitted fact that the item imported is not protein but a rich source of protein the processes undertaken by the appellant in their factory clearly bring out this aspect. Classification is based on the description at the time of import and not on the basis of its content as claimed by the appellant.

10. The second issue is whether the appellant had mis-declared the description of the product in order to claim the benefit of advance authorization.

Notification No. 96/2009-Cus., dated 11-9-2009]

**Advance authorisation — Exemption to imports thereunder**

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, **hereby exempts materials imported into India against an Advance Authorisation issued in terms of paragraph 4.1.3 of the Foreign Trade Policy** (hereinafter referred to as the said authorisation) from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty, safeguard duty and anti-dumping duty leviable thereon,

respectively, under Sections 3, 8B and 9A of the said Customs Tariff Act, subject to the following conditions, namely :-

(i) that the said authorisation is produced before the proper officer of customs at the time of clearance for debit;

(ii) that the said authorisation bears,-

(a) the name and address of the importer and the supporting manufacturer in cases where the authorisation has been issued to a merchant exporter; and

(b) the shipping bill number(s) and date(s) and description, quantity and value of exports of the resultant product in cases where import takes place after fulfilment of export obligation; or

**(c) the description and other specifications where applicable of the imported materials and the description, quantity and value of exports of the resultant product in cases where import takes place before fulfilment of export obligation;**

**(iii) that the materials imported correspond to the description and other specifications where applicable mentioned in the authorisation and the value and quantity thereof are within the limits specified in the said authorisation;**

(iv) that in respect of imports made before the discharge of export obligation, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen percent per annum from the date of clearance of the said materials;

(v) that in respect of imports made after the discharge of export obligation, if facility of CENVAT Credit under CENVAT Credit Rules, 2004 has been availed, then the importer shall, at the time of clearance of the imported materials furnish a bond to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself, **to use the imported materials in his factory or in the factory of his supporting manufacturer for the manufacture of dutiable goods and to submit a certificate, from the jurisdictional Central Excise officer or from a specified chartered accountant within six months from the date of clearance of the said materials, that the imported materials have been so used :**

Provided further that if the importer pays additional duty of customs leviable on the imported materials but for the exemption contained herein, then the imported materials may be cleared without furnishing a bond specified in this condition and the additional duty of customs so paid shall be eligible for availing CENVAT Credit under the CENVAT Credit Rules, 2004;

(vi) that in respect of imports made after the discharge of export obligation in full, and if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or CENVAT credit under CENVAT Credit Rules, 2004 has not been availed and the importer furnishes proof to this effect to the satisfaction of the Deputy Commissioner of Customs or the Assistant Commissioner of Customs as the case may be, then the imported materials may be cleared without furnishing a bond specified in condition (v);

Provided that the Commissioner of Customs may within the jurisdiction, by special order, or by a Public Notice, and subject to such conditions as may be specified by him, permits import and export from any other seaport/airport/inland container depot or through any land customs station;

(viii) that the export obligation as specified in the said authorization (both in value and quantity terms) is discharged within the period specified in the said authorization or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorization and in respect of which facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 has not been availed :

Provided that an Advance Intermediate authorization holder shall discharge export obligation by supplying the resultant products to exporter in terms of paragraph 4.1.3 (ii) of the Foreign Trade Policy;

(ix) that the importer produces evidence of discharge of export obligation to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, within a period of sixty days of the expiry of period allowed for fulfilment of export obligation, or within such extended period as the said Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may allow;

(x) that the said authorisation shall not be transferred and the said materials shall not be transferred or sold:

Provided that the said materials may be transferred to a job worker for processing subject to complying with the conditions specified in the relevant Central Excise notifications permitting transfer of materials for job work:

Provided further that, no such transfer for purposes of job work shall be effected to the units located in areas eligible for area based exemptions from the levy of excise duty in terms of notification Nos. 49/03-C.E. and 50/03-C.E. both dated 10th June, 2003, 32/99-C.E., dated 8th July, 1999, 33/99-C.E., dated 8th July, 1999, 8/04-C.E., dated 21st January, 2004, 20/07-C.E. dated 25th April, 2007, 56/02-C.E., dated 14th November, 2002, 57/02-C.E. dated 14th November, 2002, 71/03-C.E., dated 9th September, 2003, 56/03-C.E. dated 25th June, 2003 and 39/01-C.E., dated 31st July, 2001;

(xi) that in relation to the said authorisation issued to a merchant exporter, any bond required to be executed by the importer in terms of this notification shall be executed jointly by the merchant

exporter and the supporting manufacturer binding themselves jointly and severally to comply with the conditions specified in this notification.

2. Where the materials are found defective or unfit for use, the said materials may be re-exported back to the foreign supplier within six months from the date of clearance of the said material or such extended period not exceeding a further period of six months as the Commissioner of Customs may allow:

Provided that at the time of re-export the materials are identified to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, as the materials which were imported.

3. Notwithstanding anything contained in this notification, the actual user condition specified in condition numbers (viii) and (x) shall not be applicable in respect of authorisation issued for import of raw sugar for imports made from the 17th February, 2009 till 30th September, 2009 and the export obligation may also be fulfilled by procuring white sugar from any other factory with effect from the 17th February, 2009.

Explanation, - For the purposes of this notification-

(i) "Dutiable goods" means excisable goods which are not exempt from central excise duty and which are not chargeable to 'nil' rate of central excise duty;

(ii) "Foreign Trade Policy" means the Foreign Trade Policy 2009-2014, published by the Government of India in the Ministry of Commerce and Industry vide *notification No. 1/2009-2014, dated the 27th August 2009* as amended from time to time;

(iii) "Licensing Authority or Regional Authority" means the Director General of Foreign Trade appointed under section 6 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) or an officer authorized by him to grant a licence under the said Act;

(iv) "Manufacture" has the same meaning as assigned to it in paragraph 9.37 of the Foreign Trade Policy;

(v) "Materials" means-

- (a) raw materials, components, intermediates, consumables, catalysts and parts which are required for manufacture of resultant product;
- (b) mandatory spares within a value limit of ten per cent. of the value of the licence which are required to be exported along with the resultant product;
- (c) fuel required for manufacture of resultant product;
- (d) packaging materials required for packing of resultant product;

(vi) "Specified Chartered Accountant" means a statutory auditor or a Chartered Accountant who certifies the importer's financial records under the Companies Act, 1956 (1 of 1956) or the Sales Tax/Value Added Tax Act of the State Government or the Income Tax Act, 1961 (43 of 1961).

11. Notification No. 96/2009-Cus dated 11.09.2009 grants exemption to materials imported into India against Advance Authorization in terms of Para 4.1.3 of the Foreign Trade Policy and Para 4.1.3 reads as:

### Importability/Exportability of items that are Prohibited/Restricted/STE

(a) No export or import of an item shall be allowed under Advance Authorization/DFIA if the item is prohibited for exports or imports respectively.

(b) Import of restricted items shall be allowed under Advance Authorization/DFIA.

12. The issue revolves around import of fish scales/fish protein imported by the appellant by filing 58 bills of entry. As per the notice, out of these 58, as seen from the appeal paper-book from pages 184 to 186, clearances 48 Bills of Entry were filed under the advance authorisation scheme. The question is whether the scheme was availed wrongly by misdeclaration/mis-classification of the goods imported. There is no dispute that the goods were initially tested and the test report dated 29.1.2012 declared the goods as fish protein. The test report dated 20.9.2012 is reproduced below:

**Ann-3**  
**133**  
 PO 46 98

2666845 to 2666848, 2666703 to  
 2666706 to 2666730  
 Telegram: Matsyoudyogiki / Fisheries, Cochin

  
**फ़िशरिज मत्स्यविज्ञान प्रौद्योगिकी संस्थान**  
**CENTRAL INSTITUTE OF FISHERIES TECHNOLOGY**  
 (ग्रोवरु पर्व, विलिंगटन) (GROVER PATTAM, WILLINGTON)  
 (INDIAN COUNCIL OF AGRICULTURAL RESEARCH)  
 (इंडियन काउंसिल ऑफ़ अग्रिकल्चरल रिसर्च)  
 WILLINGTON ISLAND, MATSYPURU P.O., COCHIN-682 620

Fax: 0091 -484-2668712  
 E-Mail: cinfo@rediffmail.com  
 cinfo@fishnet.in

**TEST CERTIFICATE**

|                   |                                                                                                               |        |            |
|-------------------|---------------------------------------------------------------------------------------------------------------|--------|------------|
| Report No.        | : 1814 (Non - NABL)                                                                                           | Date : | 20.09.2012 |
| Issued to         | The Approving Officer<br>For Asst. Commissioner of customs,<br>Customs House<br>Willington Island<br>Cochin-9 |        |            |
| Customer Ref. No. | : 832/ 53/11 GV. VII Cus                                                                                      | Date : | 07.09.2012 |

**PART A: PARTICULARS OF SAMPLE SUBMITTED**

|    |                                     |                                                                                               |
|----|-------------------------------------|-----------------------------------------------------------------------------------------------|
| a) | Name of sample                      | : China Origin Fish Protein                                                                   |
| b) | Grade/Variety/Type/Size/Class, etc. | : Imported                                                                                    |
| c) | Declared values, if any             | : Nil                                                                                         |
| d) | Code No.                            | : B/E No.7867/III dt.06.09.2012                                                               |
| e) | Quantity                            | : 200g x 2                                                                                    |
| f) | Mode of packing                     | : Polyethylene pack in cloth lined paper pack                                                 |
| g) | Any other information               | : Sample drawn, sealed & sent by Cochin Customs for M/s. Nitta Gelatin India Limited, Cochin. |
| h) | Test performing dates               | : 10.09.2012 - 20.09.2012                                                                     |

  
 Head of Division  
 Authorized signatory

  
 Technical Manager

  
 Quality Manager  
 Page 1 of 2



134

PART B: SUPPLEMENTARY INFORMATIONS

- a) Reference to sampling procedure : Sample drawn and sent by Cochin customs
- b) Supporting documents for the measurements taken and results derived : Nil
- c) Deviation from the test methods as prescribed in relevant ISS/Work instructions, if any : Nil

REPORT NO. 1814 (Non - NABL)      Sample Name: China Origin Fish Protein  
PART C: TEST RESULTS

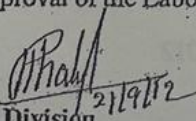
Date of report : 20.09.2012  
Sample Name : Fish Protein  
Sample Code : 10091893

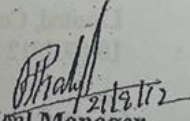
B/E/ No.7867111 dated 06.09.2012

A detailed analysis of the samples have been carried out by different methods including High Performance Liquid Chromatographic analysis and the Chromatogram was compared with animal protein also. The Chromatogram revealed the product as animal protein. Hence, we confirm that the samples supplied by M/s. Nitta Gelatin Ltd., is fish protein only.

PART D: REMARKS : Nil

- NB: 1. The results stated above relate only to the items tested.  
2. This Test Certificate shall not be reproduced except in full without the written approval of the Laboratory.

  
Head of Division  
Authorized signatory

  
Technical Manager

  
Quality Manager

Page 2 of 2



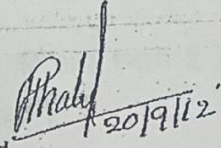
135

BIOCHEMISTRY & NUTRITION DIVISION

Test Report

Date of report : 20.9.2012  
 Sample Name : Fish protein  
 Sample Code : 10091893  
 B/L No. 7867111 dated 06.07.2012

A detailed analysis of the samples have been carried out by different methods including High Performance Liquid Chromatographic analysis and the Chromatogram was compared with animal protein also. The Chromatogram revealed the product as animal protein. Hence, we confirm that the samples supplied by M/s. Nitta Gelatin Ltd. is fish protein only. ✓

  
 Head  
 Biochemistry & Nutrition Division

The Commissioner in the impugned order observed that:

50(iii)..... *“I find that the reports were issued based on high-performance liquid chromatographic analysis done on the samples supplied and that the result of the analysis was that the product is animal protein. On perusal of the literature about high-performance liquid chromatographic analysis I find that it is an analytical tool to identify, quantify or purify the individual components of the sample. In other words, high-performance liquid chromatographic analysis is an analytical tool to identify the constituent components of a forgiven material. Thus, I find that the above result was regarding the constituent component of the samples supplied and not about the sample as such. The analytical test conducted department also found that the samples contain high protein content along components such as ash, fat, potassium, calcium etc.....Moreover no observation and no conclusion was made out in the said reports regarding the physical appearance as well as presence of constituent companies in the sample supply which is essential for arriving at the correct classification of the imported goods.....”*

13. From the above observations of the Commissioner, it is very clear that the imported goods were tested and certified that it was a fish protein and based on this test reports the goods were cleared under chapter heading 3504 as claimed by the appellant. The Commissioner's observations that the samples were not tested for the constituent material and were physically not examined is not a valid observation in as much as if revenue was not satisfied with the test report there was a provision for retest and they could have got tested as per their requirements and having not done and having accepted the test report the question of finding fault with the method of testing appears to be irrelevant as far as the classification is concerned. The earlier test reports cannot be brushed aside for the reasons stated by the Commissioner in the impugned order. Therefore, the question of disallowing the benefit of advance authorisation scheme during this period is not sustainable in as much as the goods were declared as fish protein and item was cleared as fish protein as per the advance authorisation scheme. Moreover, these imported goods were actually used in the manufacture of export goods and exported as per the notification 96/2009 is also not under dispute. The fact remains that all the conditions of the notification were satisfied and accordingly all the bills of entry serial number 1 to 42 are to be allowed as per the advance authorisation scheme since the above test reports holds good for all imports made during this period where no fresh samples were drawn or tested. The CESTAT, South Zonal Bench, Bangalore in the case of **Magus Metals (P) Ltd. Versus Commissioner of Cus.,**

**Hyderabad/Chenna-I vide Final Order Nos. 521-529/2005, dated 4-4-2005 as reported at 2005 (187) E.L.T. 73 (Tri. - Bang.)** observed that:

“5. We have gone through the rival contentions. The first show cause notice was issued on 21-8-2002. However, for the consignments cleared earlier in the year 2000-2001 & 2001-2002, the show cause notices were issued on 18-3-2003 and on 19-3-2003. As contended by the party, all the facts were available even when the first show cause notice was issued. Moreover the goods were cleared provisionally and assessments were finalised only on the basis of the test report by the Customs Laboratory, Chennai. In these circumstances, we hold that the demands in respect of all these orders are clearly time barred. The case laws relied on by the appellants are very relevant. Even otherwise, when the goods are cleared on the basis of test report by the Customs Laboratory, Customs House, Chennai, one cannot allege that there is suppression of facts. In any case, the test reports of EPTRI and NMDC cannot be made applicable to the earlier consignments. The case laws relied on by the learned Advocate are very relevant. In view of the observations stated above, we set aside both Orders-in-Original No. 13/04 dated 29-2-2004 passed by the Commissioner of Customs, Hyderabad and 3106/2004 dated 23-9-2004 passed by the Commissioner of Customs, Chennai. Hence the appeals, in Sl. Nos. 4 to 9 (total 06 appeals) mentioned at the above tabular column, are allowed”.

14. This decision of the Tribunal was upheld by the Supreme Court in the case of in the case of **Commissioner of Customs Versus Magus Metals P. Ltd.** decided on 25-10-2017 as reported **2017 (355) E.L.T. 323 (S.C.)** wherein the Supreme Court of India held that

“6. Insofar as the order of the learned Tribunal holding the show cause notice dated 18-3-2003 to be time barred in the six appeals referred to above, we do not find any error in the order of the Tribunal and its conclusions in arriving at the said conclusion. The ‘normal’ period of limitation for issuing a show cause notice under Section 28 is one year from the due date and unless there is suppression of facts or misstatement, the extended period of limitation will not be attracted. In the present case, the show cause notice, dated 18-3-2003 in respect of the earlier consignments, admittedly, is beyond one year. Such notice beyond the normal period of limitation could have been issued only if there have been suppression of facts. If, from the show cause notice, dated 16-4-2002 and the

report of the EPTRI and NMDC in respect of the samples from the consignments dated 24-12-2001 and 24-1-2002, the Revenue was already in the know of the relevant facts, it is difficult to understand as to how the Revenue could have the benefit of anything but the “normal” period of limitation to issue the show cause notices dated 18-3-2003. The order of the learned Tribunal insofar as the six appeals are concerned, holding show cause notices issued therein to be time barred and interfering with the adjudication orders dated 29-3-2004 and 23-9-2004, therefore, must have the approval of this Court.”

15. In view of the above observations of the Supreme Court the question of denying the benefit of the advance authorisation scheme to the earlier consignments based on the current test reports of the samples drawn from the 2016 consignments cannot be held against the appellant by invoking suppression.

16. At a later date after physically examining the goods imported vide Bill of Entry No. 5034927 dated 25.04.2016 and 5059997 dated 27.04.2016, samples were drawn noting that goods were packed in white propylene bags and that each bag contained paper label having description 'Declassified fish scale for collagen (Fish Protein)', in the goods had fishy order also. The test reports with regard to the samples clearly stated that they were nothing but fish scales with a high content of fish protein and therefore as discussed supra the goods are rightly classifiable under chapter heading 0511 and not under 3504 as claimed by the appellant. The fact that the technical write up was placed before the DGFT authorities who on verification had issued the advance authorisation license is also not in dispute. The correspondence through the mails and the statements given by various individuals clearly proves that the appellant was aware of

the fact that it was a fish scale and not fish protein. It is also a fact that during this period the items were restricted and import of these items required a sanitary permit which was not obtained at the time of import. The discussions with the suppliers by the appellant as seen from their mails and statements it is clearly established, they were very well aware that the goods are to be classified under 0511 and it was a restricted item. Therefore, the advance authorisation license obtained by them for fish protein is a misdeclaration and therefore the imports made by the appellants are not in accordance with the provisions of the Foreign Trade Policy. The import of these products shall be allowed only against a sanitary import permit to be issued by this department as per the procedure laid down in the first schedule annexed to this Notification. For the reasons discussed above the benefit of Advance authorisation is to be denied only prospectively for the consignments where samples were drawn and thereafter. Accordingly, the demand is upheld for 6 bills of entry from Sl.no 43 to 48. The other 9 bills of entry which are provisionally assessed are to be reassessed by reclassifying the same under Chapter Heading 0511.

17. Since it is a classification issue and the question of benefit of the scheme is allowed for 42 consignments and the other 9 consignments are under provisional assessments, the question of redemption fine or penalty does not arise.

18. The Appeal is allowed partially on the above terms.

*(Order pronounced in open court on **12/03/2024.**)*

**(P. A. AUGUSTIAN)**  
**MEMBER (JUDICIAL)**

**(R. BHAGYA DEVI)**  
**MEMBER (TECHNICAL)**