CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 20876 of 2019

[Arising out of Order-in-Original No. COC-CUSTOMS-000-COM-09/2019-20 dated 23/07/2019 passed by Commissioner of CUSTOMS, COCHIN.]

M/s. Arbee Biomarine Extracts Pvt. Ltd.
IX-405 Karippadom PO
Thalayolaparambu
KOTTAYAM - 686605
KERALA

Appellant(s)

VERSUS

Commissioner of Customs
CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN - 682009
KERALA

Respondent(s)

Appearance:

Mr. Leejoy Mathew V, Advocate
3RD FLOOR, VALLAMATTOM ESTATE
RAVIPURAM M G ROAD NEAR COHIN SHIPYARD N
ERNAKULAM – 682 015.
KERALA

For the Appellant

Mr. P. Rama Holla, Superintendent (AR)

For the Respondent

Date of Hearing: 13/03/2020
Date of Decision: 03/06/2020

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20352 /2020

Per : P. ANJANI KUMAR

Brief facts of the case are that the appellants imported Squalene 80% under Advance Authorisation on 6-3-2018, with a pre-condition to

Export Squalene 99% within a period of 18 months. Appellants claim that Squalene is used for manufacturing medicines especially in cancer treatment as a supplementary drug for increasing the efficiency of the Chemotherapy drug and to reduce the side effects and toxicity of the Chemo drugs. On a reference made by Customs as to whether the goods fall under the Category of Fats & Oils, Central Institute of Fisheries Technology (CIFT), vide their Test Certificate dated 6/4/2018, opined that the Consignment has to be classified under HS code 15042090, as against declared classification of 29012990. The consignment was seized by Customs and original Show Cause Notice was issued and confirmed by the Commissioner vide OIO dated 24-7-2018, where in the impugned goods were confiscated for violation of conditions of Exim Policy. On an appeal preferred by the appellants, CESTAT, vide Final Order No.21933-21934/2018 dated 27/12/2018, remanded the issue back to the adjudicating authority for getting the goods retested at an institution having expertise in oceanography. However, on a similar order passed in respect of similarly placed importer i.e., M/s. Asha Biochem, department has filed a ROM in appeal No. C/21347/2018-DB. This Bench vide Final Order No.21933-21934/201 dated 27/12/2018 has accepted the ROM and modified the order to get the test undertaken at such institution that has expertise. As no institute was available for testing the goods, as per oceanographic parameters, the samples were again sent to CIFT who re-confirmed the test results indicated by them earlier. Customs Department in order to re-confirm the findings, of CIFT, sent the samples to Customs House Laboratory, an NABL accredited laboratory, who also confirmed the findings of the CIFT. Consequently, Commissioner passed the OIO 09/2019-20 dated 23/7/2019, in *de novo* confirming the classification of imported goods under CTH 1504 2090. Hence, this appeal No. 20876/2019.

2. Learned counsel for the appellants submits that Squalene is Hydro Carbon, an Organic Compound, containing carbon and Hydrogen only. The chemical definition is C301450 with CAS No. 111-02-04. It belongs to a class of Organic Compounds called acyclic unsaturated hydrocarbons as per Journal of Squalene. Classifying Goods under Chapter 29,14S Code 29012990, the following test needs to be satisfied

a. It has to be an Organic Compound
b. It must require a separate chemical definition whether or not containing impurities.
c. It has to be a Hydro Carbon
d. It has to be Acyclic
e. It has to be unsaturated

Being an Organic Compound, across the world, Squalene is traded under tariff HS code 29012990. He produced Exim data of Squalene and Tariff Classification by US national Commodity.

3. Learned counsel submits that HS code 15042090, deals with Fats and Oils (Journal on Fats & Oils) and their fractions, of fish other than liver oils. This HS code exclusively deals with crude Fats and Oils, which means the percentage of Fat, would be more than 90% and Oil must be in crude nature. On a perusal of HS code 2901 2990, it can be noticed that it deals with separate chemically defined acyclic hydrocarbon unsaturated. So to classify under HS Code 29012990 the Cargo needs to be a Hydro Carbon having high purity.

4. Learned counsel also submits that CESTAT vide order dated 24-7-2018**,** observed that the classification claimed by the Appellant is not contradicted so far and therefore the onus of disproving the same is on the Customs; Customs conceded that there is no dispute over the applicability of the claimed heading to the goods emerging for export; as per Advance authorization, the Appellant is required to Export is Squalene 99% and for the same Customs conceded that the required classification is 29012990; dominance of "Squalene" in the cargo imported is found beyond doubt; Department failed to prove conclusively the coverage under the heading they proposed; Since the Department failed to substantiate their claim, the heading/chapter proposed by the Importer /Appellant has to be allowed; Since the expiry date of the Cargo has not elapsed, the Department is allowed to have an analysis to find out whether the cargo is sourced from the marine origin; Appellant is at liberty to obtain a clarification from the licensing authorities of the eligibility to import Squalene oil even if of marine origin.

5. Learned counsel also submits that Customs issued a letter dated 15-3-2019 stating that they are unable to find any Institutions to do the required analysis. Container Freight Station (CFS) where the Customs detained the Cargo, vide letter dated 8-4-2019, reported that they were going to close down the unit and therefore the Appellant was directed to remove the Cargo without further delay. Customs notified the appellant on 28-5-2019 that they had conducted the analysis. In the said report, it is clearly indicated that the unsaponfiable matter in the impugned goods is 85.82**%;** Bureau of Indian Standards stipulates that for fish oil the Saponification value has to be in between 185-200 and the percentage of unsaponfiable matter percentage has to be 4%. From this, it is revealed that the Cargo is not Marine oil and it does not have the characteristics of the same.

6. Learned counsel also submits that the Appellant preferred Writ Petition No. 16986/2019 for compliance of Hon'ble Tribunal Order. Hon'ble High Court, vide interim order dated 15-7-2019, directed the Customs to pass an order within 3 days. Commissioner passed the impugned order on 23-7-2019. Commissioner passed the very same order which was already been interfered with by this Tribunal. High Court, vide order 1-8-2019, disposed of the Writ Petition, directing the DGFT to pass an order on the Application submitted by the Appellant and relegated the Appellant to approach this Tribunal challenging the Order of the Commissioner. DGFT passed an order on 5-9-2019, specifying that Squalene Oil derived from any source needs to be classified under HS Code 2901.

7. Learned counsel further submits that Chapter 15 deals with Animal or Vegetable Fats and Oils and their Cleavage Products. Squalene being a Hydro Carbon cannot be classified under the said chapter. The Cargo imported is 82% Squalene which means the predominant elements available are only carbon and Hydrogen; therefore it cannot be classified under the heads of Oils and fats. As per the present analysis, it is reconfirmed that the Cargo is not oil and the parameters do not match with the requirements of oil and are matching with that of Squalene only. It can also be revealed by Indian Standards for fish oil the percentage of unsaponfiable has to be only 4% whereas in the present analysis it can be noticed that the same is 85.82% which itself categorically confirmed that the same is not Oil. Learned counsel submits that in view of the above, the impugned order may be set aside.

8. Learned Authorised Representative, appearing for the revenue, reiterates the findings of OIO and submits that the Letter, from DGFT dated 5/9/2019, submitted by the appellants during hearing, was addressed to M/s Asha Biochem (not the appellant). DGFT clarification about the HS code of Squalene is not supported with any technical or legal grounds. Further, it contradicts appellant's claim that the imported item is not "oil", as the said letter itself mentions the item as "Squalene oil". The classification arrived by Customs department is based on the physical examination of the product at the time of import and subsequent test report issued by a Government approved accredit laboratory viz. CIFT (Central Institute of Fisheries Technology), Cochin.

9. Learned Authorised Representative submits that the importer has declared the goods as "**Acyclic Hydrocarbon Unsaturated Squalene 80%"** and classified the same under **CTH 2901 29 90** while filing import documents (under Advance Authorisation License); when the goods were examined by officers of Customs, in the presence of Customs brokers, it was observed that the content is light yellow liquid, of bad fishy smell packed in metal drums; samples were drawn from the consignment and sent to the CIFT (Central Institute of Fisheries Technology), Cochin, who vide Certificate dated 6/4/2018, stated that the oil received for inspection falls under the category of "Fats and Oil and their fractions, of fish or marine mammals, whether or not refined, but not chemically modified"**;** based on the said test report, the goods under import were held to be classifiable under CTH 1504 20 90**;** However, when the importer did not agree with the said test report, a reference was made again to CIFT, who vide letter dated 4/5/2018, clarified that the sample analysis was done using Perkin Elmer Gas chromatograph FID equipped with a column specific for the analysis of fatty acids and hydrocarbons present in oils.

10. Learned Authorised Representative submits that consequent to CESTAT, vide final Order, No.21933-21934/2018 dated 27/12/2018, directed for re-testing the item in an institution having expertise in oceanography; as no institute was available for testing the goods as per oceanographic parameters, the samples were sent again to CIFT, who confirmed the test results indicated by them earlier; the said report was reconfirmed by Customs laboratory; Consequently, the impugned order was passed classifying the of imported goods under CTH 1504 2090; Commissioner gave valid reasons for the same at Paras 25 and 26.

11. Learned Authorised Representative submits that in terms of ITC (HS), 2017 SCHEDULE 1 – Import Policy the goods falling under Exim Code (corresponding to CTH) 1504 20 90 are categorised under "prohibited" goods for import. Notes to ITC (HS), 2017 Schedule -1, Import policy, in respect of Chapter 29 (Organic chemicals), at para 2 (a) specify that the *Chapter does not cover Goods of heading 1504 or crude glycerol of heading 1520;* Therefore, under Heading 29, there is a specific exclusion of goods covered under heading 1504; hence it appears that the appellant's attempt to classify the goods of heading 1504 under chapter 29 is just to avoid the prohibition clause specified in the import policy. As per Para 4.18 of Foreign Trade Policy 2015-20, no export or import of an item shall be allowed under Advance Authorisation / DFIA if the item is prohibited for exports or imports respectively. DGFT, vide Policy Circular No. 22 (RE-2008)/2004-2009 dated 18th July'2008, clarified to the effect that the ITC HS code indicated in DGFT license or any correspondence is always subject to the outcome of the examination of cargo/shipping documents by the proper officers of Customs department. Hence, Customs department is the final authority to decide on the classification of imported goods.

12. Learned Authorised Representative submits that since the CIFT and Customs Laboratory, which are an accredited lab recognised by

Government, confirmed the reports, the report will have to form the basis for determination of classification of imported goods as held in

(i) CCE vs. BHEL reported vide 2018(10) GSTL 3 (SC)

(ii) SKOL Breweries Ltd vs. CCE, Mumbai-II: 2017 (7) GSTL 102 (Tri-Mumbai).

13. Heard both sides and perused the records of the case. The dispute that requires to be resolved in the instant case is the classification of squalene imported by the appellants whether under CTSH 15042090 (as claimed by the Department) or CTSH 29012990 (as claimed by the appellants). A look at the competing headings would throw some light on the issue. Chapter 15 of the Customs Tariff deals with animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes. Heading 150420 is as follows:

1504	**FATS AND OILS AND THEIR FRACTIONS, OF FIST OR MARINE MAMMALS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED**
1504 10	- Fish liver oils and their fractions
1504 10 10	--- Cod liver oil --- Other
1504 10 91	---- Squid liver oil
1504 10 99	---- Other
1504 20	-Fats and oils and their fractions of fish, other than liver oils
1504 20 10	--- Fish body oil
1504 20 20	--- Fish lipid oil
1504 20 30	--- Sperm oil
1504 20 90	--- Other
1504 30 00	-Fats and oils and their fractions, of marine mammals

As per ITC (HS), 2017 SCHEDULE 1 – IMPORT POLICY the goods falling under Exim Code (corresponding to CTH) 1504 20 90 are categorised under "prohibited" goods for import.

13.1. Chapter 29 of Customs Tariff covers organic chemicals; Note 1 (a) to the Chapter envisages that except where the context otherwise requires, the headings of this chapter applies only to (a) separate chemically refined organic compounds, whether or not containing impurities. Heading 2901 covers goods as follows:

	I.-HYDROCARBONS AND THEIR HALOGENATED, SULPHONATED, NITRATED OR NITROSATED DERIVATIVES
2901	**ACYCLIC HYDROCARBONS**
2901 10 00	-saturated -Unsaturated
2901 21 00	--Ethylene
2901 22 00	--Propene (propylene)
2901 23 00	--Butene (butylene) and isomers thereof
2901 24 00	--Buta-1,3-diene and isoprene
2901 29	--Other
2901 29 10	---Acetylene, whether or not in dissolved condition
2901 29 20	---Heptene (Heptylene)
2901 29 90	---Other

As per Chapter Note 2 (a) goods of heading 1504 or crude glycerol of heading 1520 is not covered in this chapter. Ongoing through the relevant Notes under Chapter 29, it appears that Chapter covers organic chemicals. The appellants claimed classification under 29012990 as applicable to acyclic hydrocarbons.

14. Regarding the claim of the appellants that CESTAT vide Orders cited above has observed as follows:

> *"8. It cannot but be noticed that the classification claimed by the appellants under the heading of 'unsaturated acyclic hydrocarbon other than ethylene, propylene, butylene, butadiene, acetylene or heptene', is of too broad a spectrum to gain approval without reference to the General Interpretative Rules. It appears to have stemmed from the chapter title, molecular composition and the*

principle of dominating constituent. It is clear from rule 1 of General Interpretative Rules, which discards titles as irrelevant to classification that every organic chemical need not necessarily find placement in the said chapter unless in conformity with the appropriate heading and sub-heading. As the specific descriptions within the heading 'acyclic hydrocarbon', admittedly, do not find direct fitment for the imported goods, the dominance principle is resorted to by Learned Counsel for appellants. The dominance principle in rule of General Interpretative Rules applies appropriately to classification of mixtures and, in the light of assertion of Learned Counsel that the content, other than 'squalene', in the imported goods are impurities, the claim for application thereof is self-defeating. Even if the claim of the composition is to be considered on its own, the scheme of the First Schedule will have to be examined.

9. Other than with reference to specified headings or descriptions in note 1(e), which need not necessarily be chemically defined, and goods specifically excluded, the headings in chapter 29 of First Schedule to Customs Tariff Act, 1975 are intended for 'separately defined organic compounds', whether or not containing impurities. Correspondingly, there are contra exclusions of 'separately defined organic compounds' in other chapters implying that conflict of choice between a specific heading in another chapter and in this chapter, the goods are, inevitably, to be classified in chapter 29. On the other hand, notes in chapter 15 of First Schedule to Customs Tariff Act, 1975, which Revenue considers to be more apt, is devoid of such a restrictive condition. Hence, a conflict between a specific heading in chapter 15 and chapter 29 would be resolved by classifying under the more specific heading of the two. Therein lies the dilemma for the claim of the appellant for coverage is under a residual entry that is handicapped thus"

15. Going by the above order of CESTAT, the conflict between a specific heading in Chapter 15 and Chapter 29 would be resolved by classifying the same under more specific heading of the two. We find that Learned AR for the Revenue contends that in view of the specific exclusion of goods under heading 1504, the goods cannot be classified under Chapter 29. To arrive at a proper classification of the goods, one needs to consider the characteristics of the product; technical literature available with the product and the test reports.

15.1 Learned Commissioner has observed in his OIO that the Product Data Sheet available in the Importer's website i.e. arbeefishoil.com shows that the importers were pioneer in the business of fish oil; squalene is one of their products and that the source of squalene was deep sea Shark liver oil. The chemical reports issued by CIFT and Customs Laboratory indicated the impugned product to be of marine origin. It is also confirmed by CIFT that the sample analysis was done using Perkin Elmer Gas Chromatograph FID equipped with a column specific for the analysis of fatty acids and hydrocarbons in oils. Therefore, it was confirmed that the sample was of marine origin and rich in Squalene. We find that whereas heading 1504 covers fats and oils of fish or marine mammals 2901 covers acyclic hydrocarbons. We find that 2901 refers to saturated and unsaturated acyclic hydrocarbons like ethylene, propene, butene, acetylene, heptane etc. which are organic compounds. Going by the literature available and the chemical reports, the impugned products is of marine origin and therefore can appropriately be classified under 1504 rather than 2901.

15.2 The appellants have taken a plea that their product contains unsaponifiable matter in the range of 85% and therefore, it cannot be classified under 1504 as oil. The Learned Adjudicating Authority observed that the dispute is about the classification and origin of goods that are imported and not export goods. CIFT reported that the impugned goods fish oil rich in Squalene and therefore, goods cannot be considered as Squalene. We find that there is no reference to the percentage of unsaponifiable matter with respect to the classification under heading 1504. Even going by the principles of *'ejusdem generis' or 'Noscitur a sociis'*, the impugned goods being of animal origin are rightly classifiable under Chapter 1504.

16. It has been also pointed out that the classification of the goods should not be based on the test reports. Though, we accept this in principle, we find that the test reports give a fair idea of the nature and characteristics of the product. In the instant case, CIFT and Customs Laboratories have reported that the impugned product is fish oil. Therefore, we find that it cannot be classified under Chapter 2901 as saturated or unsaturated acyclic hydrocarbons along with ethylene, propene, butene, acetylene, heptene etc. It is of a great common sense that any organic matter would contain hydrocarbons and for that very reason, it cannot be classified under the heading applicable to hydrocarbons. If such an approach is taken entire Customs Tariff as far as it deals with living beings, goods or plant or animal origin would become redundant. Moreover, there is no reason as to why a report given by a professional institute such as CIFT and accredited laboratory such as Customs Laboratory. We find that the learned Adjudicating Authority has relied upon the case of SKOL Breweries Ltd. 2017 (7) GSTL 102 (Tri. Mum) wherein it was held that expert opinion of independent body regarding the nature of the goods cannot be ignored. Therefore, we find that the report given by CIFT and Customs Laboratory cannot be ignored. The importers, on the other hand, did not produce any test report in their favour.

17. The importers argued that DGFT vide Letter dated 05.09.2019 addressed to M/s. Asha Biochem have clarified that the matter has been examined and it is informed that Squalene oil derived from any origin falls under HS Code 2901. The Learned Authorized Representative argues that DGFT vide Policy Circular No. 22(RE-2008)/2004-2009 dated 18th July 2008 clarified that during examination of cargo/shipping documents, Customs can determine the correct ITC (HS) code number of the items of the import and allow clearance of assessment or ask the importer to get the ITS (HS) code number corrected from the concerned regional authority of DGFT. We find that classification of imported goods is the prerogative of the assessing officer or say Customs who are duty-bound to arrive at the correct classification of the goods depending on the Customs Tariff Act and the HSN. The same has been held in ***Pheonix International Ltd. vs. CC, Nhava Sheva: 1999 (114) ELT 500 (Tribunal)***. Tribunal observed that

"In the matters of classification, it should not be doubted that the last word is with the Customs. This preposition is well set out in the Delhi High Court judgment in the case of Export Apparels Products Ltd. vs. UOI: 1997 (91) ELT 307." We find that in the case of ***Exports Apparel Group Ltd. vs. UOI: 1997 (91) ELT 307 (Del.)***, the Tribunal held that "*After examining all these provisions, we are of the view that the stand taken by the repondents is correct. It is for the Customs Authorities to examine if the goods had been imported in terms of the licence, and what duty of Customs, if any, is leviable thereon. If aggrieved, the petitioner has remedy under the Act by way of appeal. In this view of the matter also, we do not wish to go into the merit of the controversy as any observation made by us may prejudice the case of either of the parties. We will, therefore, dismiss the petition."* In view of the above, we find that the clarification issued by DGFT is of no consequence. Moreover, in the present issue, the clarification is not even issued in the case of the appellants.

18. We also find that the appellants have taken the plea that they have been importing the impugned products over the years and the classification of the same was being accepted by the Customs authorities. We find that there is no *estoppel* in revenue matters and Customs are not bound by any contradiction taken in the past owing to different set of circumstances and facts of the case. More so, as observed by this Tribunal in the order referred to above, it behooves the administration of India, as a responsible constituent of the polity of nations comprising of responsible humanity, not to be a willing accessory in the reprehensible slaughter of endangered species. In the context of this prohibition, the geographical origin, or the ultimate destination, of the goods is not relevant; irrespective of the source and consumption, the taint of inhumanity, and so promulgated by law, should not be allowed stain the public record of the country. Neither can the precedence of the past justify the continuance of a statutorily criminalized deed. We find, however, that based on the submissions of established practice penalty cannot be imposed just because Customs authorities have taken steps to correct the classification. During the course of arguments, learned counsel for the appellants, have requested that in case it is held that the goods are not permissible to be imported, the same may be allowed to be re-exported. We find that such a request needs to be made before the proper authority who will take a decision in accordance with law and facts of the case.

19. In view of the above, the appeal is allowed to the extent of setting aside the penalty. The impugned order is upheld in all other respects.

(Order was pronounced in Open Court on **03/06/2020**.)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

RV