IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH - COURT NO. – III

Customs Appeal No. 119 of 2012
(Arising out of Order-in-Appeal C.Cus. No.261/2012 dt. 18.04.2012 passed by the Commissioner of Customs (Appeals), Chennai)

M/s.Zymonutrients Pvt. Ltd. **Appellant**
A-14, Industrial Estate, Hebbal
Mysore 570 016.

vs

Commissioner of Customs, **Respondent**
Custom House, 60, Rajaji Salai,
Chennai 600 001.

(i) Customs Appeal No. 120 of 2012 (ii) Customs Appeal No. 121 of 2012 (iii) Customs Appeal No. 122 of 2012 (iv) Customs Appeal No. 123 of 2012 (v) Customs Appeal No. 124 of 2012 (vi) Customs Appeal No. 125 of 2012 (Zeus Biotech Ltd.)

(Arising out of Order-in-Appeal No.239-244 dated 30.03.2012 passed by the Commissioner of Customs (Appeals), Chennai)

APPEARANCE:

Shri S. Loknath, Consultant For the Appellant
Ms. T. Usha Devi, DC (AR) for the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri P. Anjani Kumar, Member (Technical)

Final Order No. 41574-41580 / 2019

Date of Hearing: 18.11.2019
Date of Decision: 26.11.2019

Per P. Anjani Kumar

The appellants M/s.Zymonutrients Pvt.Ltd. and M/s Zeus Biotech Ltd. had imported "inactive dried yeast– animal feed supplement" and classified the same under CTH 23099020 claiming the same to be "preparations of a kind used in animal feeding". However, the department reclassified the same under CTH 21022000. The appellants have paid the duty under protest and cleared under test bond. Test report confirmed the goods are either not fit for human consumption or to be "inactive dried yeast". The department has subsequently finalized the Bills of Entry rejecting the classification claimed by the appellant. The appellants have appealed against this orders before the Ld. Commissioner (Appeals) contending that though provision assessment was made order under Section 17 (5) of Customs Act, 1962 was not issued and therefore all the appeal were filed in time. Commissioner (Appeals) has dismissed the appeal of the appellant on merits and though holding that it was mandatory for the department under Section 17 (5) of Customs Act, 1962 to issue its speaking order, rejecting some appeals, stating that they are time-barred being filed beyond the condonable period from the date of Bill of Entry. Hence, these appeals.

2. Learned Counsel for the appellants submits that the lower adjudicating authority has not applied his mind and arrived at an erroneous decision based on a circular issued by the Ministry of Finance which is not condonable under law; the material purchased and used by the appellants for poultry feed supplement; they have rightly classified under CTH 23, They relied upon the following cases:

(i) Sun Export Corporation Vs CC 1997 (93) ELT 641 (SC) wherein it was held that supplements of animal feeds which are generally added to the animal feed were also covered by the generic term 'animal feed'.

(ii) CCE Vs Surendra Cotton Oil Mills & Fert. Co. - 2001 (127) ELT 3 (SC) wherein it was held that animal feed includes animal supplements also.

(iii) Tetrogon Chemie (P) Ltd. Vs CCE - 2001 (138) ELT 414 (Tri.-LB) wherein it was held that vitamin sued for mixing in animal feed will be classified under chapter 23 of CET.

(iv) CC Vs Lal Chand Bhimraj 2007 (220) ELT 189 (Tri.-Chennai) wherein it was held that vitamins mixed with dilutants which are used as an additives to the main feed for livestock are to be considered under Chapter 23.

(v) CCE Vs 2002 (142) ELT 18 (SC) wherein it was held that HSN Explanatory Notes are not only persuasive but are entitled for greater consideration in the classification of the goods.

3. Appellants further contended that Ld. Commissioner (Appeals) though accepted that the issue of speaking order vide Section 17 (5) of the Customs Act, 1962 was mandatory, held some appeals to be barred by time. They relied upon the following cases :

(i) Woods struck Furniture Pvt. Ltd. Vs UOI - 2011 (269) ELT 327 (SC)

(ii) HMT Ltd Vs CC Chennai 2009 (239) ELT 239 (Kar.)

(iii) HDFC Bank Ltd. Vs UOI 2011 (271) ELT 175 (Kar.)

4.1 Learned AR, for the department, reiterates the issues considered while finalizing the provisional assessment and submits that as per general rules of interpretation, when the goods are prima facie classifiable under two or more headings, classification has to be done according to the heading which provides the most specific description than to headings providing a more general description. The case of *Tetrogon Chemie* (supra) does not refer to yeast and other cases referred by the appellants are not relevant to the present facts of the case. She relies upon the following cases to support that classification of the goods is correct under 2102000:

(i) Kastri Foods and Chemicals Vs CCE 1995 (77) ELT 584 (Tri.-Del.)

(ii) Kasturi Foods and Chemicals Vs CCE 1995 (80) ELT 169 (T)

(iii) Marco India Vs CC Maras 1994 (74) ELT 5 (SC)

4.2 Ld. A.R submits that as per the appellants, the goods cannot be consumed by human beings and merit classification under preparations of a kind used for animal feed and the appellant dependent on the letter issued dt.12.7.2011 by the Central Food Laboratory; the test reports received in the instant case, from CRCL, described the product to be inactive yeast; appellants cannot rely on rejection of sample by CFL stating that the same was not fit for human consumption. She further submits that as in the present case provisional assessment was in terms of Section 18 (1) (b) of Customs Act, 962 and thus, speaking order in terms of Section 17 (5) of Customs Act, 1962 is not required to be issued; further, in terms of Section 128 (1) of Customs Act, 1962 any decision or order passed by officers of Customs can be appealed before the Commissioner (Appeals).

5. Heard both sides and perused the records of the case.

6. The issues that require consideration in this case are

(i) Whether in the facts and circumstances of the case, the lower adjudicating authority was required to issue a speaking order in terms of Section 17 (5) of the Customs Act, 1962

(ii) in the absence of such speaking order what could be the relevant date for appeal in terms of Section 128 of Customs Act, 1962.

(iii) what is the correct classification of the impugned goods whether under Chapter 21 as contended by the department or under Chapter 23 as contended by the appellant.

7. Coming to the issue of speaking order under Section 17 (5) of the Customs Act, 1962, we find that initial classification claimed by the appellants was rejected by the department and the appellants have also protested the payment of duty. We find that in terms of Section 17 (5) *where any reassessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.*

8. On perusal of this provision, it is crystal clear that in cases where the reassessment is done contrary to the assessment done by the importer and where the assessee does not accept such reassessment in writing, the proper officer shall pass a speaking order under reassessment; in the instant case, the appellants have claimed classification under CTH 23099090 whereas the department has assessed under CTH 21022000; therefore, it is evident that the assessment has been done contrary to the claim of the appellant; the appellants have registered protest also; it is not the case of the department that the appellants have accepted the reassessment in writing; therefore, in terms of Section 17 (5) of Customs Act, 1962, the department was under obligation to issue a speaking order. To this extent, we find that the appellant's submissions are sustainable. We also find that Ld. Commissioner (Appeals) has also accepted in principle that the order under Section 17 (5) of the Customs Act, 1962 was mandatory. Therefore, we find that the Ld. Commissioner was not correct in rejecting some of the appeals on the basis of time bar. However, a question arises, under the circumstances, as to what should be the relevant date for the purpose of filing an appeal under Section 128 (1) of Customs Act, 1962, in cases bills of entry assessments have been finalized contrary to the claims of the appellant and without issue of a speaking order. It could not be the intention of the legislature that the aggrieved party wait indefinitely for such order to be issued before proceeding to appeal. In such cases, the provision of Section 128 (1) themselves take care and by virtue of the provisions, the mere finalization of a Bill of Entry itself becomes an order or communication of the order. Therefore, the appeals are required to be filed in such circumstances within a time period from the date of such reassessment / finalization.

9. Coming to the issue of classification of Enzymes imported by the appellant as to whether the same would be merited classification under heading 21 or under heading 23. We find that headings 2102 and 2309 read as follows:

Tariff Item	Description of goods	Unit	Rate of duty€#	
			Standard	*Preferential Areas*
(1)	(2)	(3)	(4)	(5)
2102	**Yeasts (active or inactive); other single cell micro-organisms, dead (but not including vaccines if heading 3002); prepared baking powders**			
2102 10	- *Active yeasts*:	kg.	30%	-
2102 10 10	--- Culture yeast	kg.	30%	-
2102 10 20	--- Baker's yeast	kg.	30%	-
2102 10 90	--- Other	kg.	30%	-
2102 20 00	--- Inactive yeasts, other single-cell micro-Organisms, dead	kg.	30%	-
2102 30 00	- Prepared baking powders			

Tariff Item	Description of goods	Unit	Rate of duty€#	
			Standard	*Preferential Areas*
(1)	(2)	(3)	(4)	(5)
2309	**Preparations of a kind used in animal feeding**			
2309 10 00	-Dog or cat food, put up for retail sale.	kg.	30%	-
2309 90	- *Other :*	kg.	30%	-
2309 90 10	---Compounded animal feed.	kg.	30%	-
2309 90 20	---Concentrates for compound animal feed.	kg.	30%	-
		kg.	30%	-
		kg.	30%	-
2309 90	---*Feeds for fish (prawn, etc.):*	kg.	30%	-

31	----Prawn and shrimps feed.			
2309 90 32	----Fish meal in powdered form.			
2309 90 39	----Other			
2309 90 90	----Other			

On going through the above classification, we find that CTH 2102 covers yeasts (active or inactive); other single cell micro organisms, dead (but not including vaccines of Heading 3002); prepared baking powders and under 8 digit heading 21022000 inactive yeasts, other single-cell micro-organisms dead.

10. Going by the test reports of CRCL, impugned goods are inactive yeast; in view of the explanatory notes to chapter 21 dried yeast is also known as inactive yeast and for that reason inactive yeast is to be considered as dried yeast. We find that appellants have tried to argue that the impugned goods are not fit for human consumption on the basis of CFTRI report and hence do not fall under 2102. However, we find that under chapter sub heading 2102, there is no condition stating that it should be fit for human consumption. Either under 2102 or 21022000, one single dash covers yeasts; other single micro-organisms, dead; prepared baking powders; inactive yeast, other single cell micro organisms, dead. We find that there is no exclusion for yeast which are declared not to fit for human consumption. On the contrary, we find that heading 23.09 has got only two single dashes. One single dash contains dog or cat food, put up for retail sale and the second single dash contains "others" and the various foods and concentrates for animals are listed subsequently. It is clear that the entire heading 2309 talks of preparations of a kind used in animal feeding. By no stretch of imagination the impugned products imported by the appellants are preparations of a kind animal feeding. At the best, they may be used for preparation of animal feeds that is to say that they are raw material used for preparation of animal feed. Therefore, they cannot be classified along with animal feed merely by virtue of the inclusive definition given in the explanatory notes for the heading 2309 CETA.

11. The appellants have greatly relied upon the decision of the Larger Bench in the case of *Tetrogone Chemie* (supra) wherein the vitamins used for mixing in the animal feed was held to be classified under chapter 23 of CETA. However, we find that this judgment is in respect of Central Excise Tariff Act, 1985; the issue before the Bench was the assessments of Vitamins manufactured by the manufacturers of Animal feed/ supplements; it was rendered in the context of Tariff existing at that time. The present case is about the imports which are to be classified under Customs Tariff Act. Therefore no inference can be drawn from the case cited above. Moreover, we find that note to chapter 23 specifically says that "heading 2309 includes products of a kind used in animal feed, not elsewhere specified or included, obtained by processing vegetable or animal materials to such extent that they have lost the essential characteristics of the original material, other than vegetable waste, vegetable residues and by-products of such processing". Therefore, it is clear that the chapter 23 shall include products of a kind used in animal feed. However, the emphasis that they are not elsewhere included. As submitted by the Ld. A.R and as held by the Commissioner (Appeals) heading 21022000 specifically mentions yeast active or inactive. Therefore, when yeast has a specific mention under heading 2102, that cannot be classified under any other heading under chapter 23 in view of the chapter note mentioned above. Therefore, we find that the classification arrived by the department and upheld by the Ld. Commissioner (Appeals) is consistent with the relevant chapter heading and notes and also general interpretative rules for classification wherein it is specified under rule 3 (a) of Interpretative Rules that the heading which provides most specific description shall be preferred to heading providing a more general description. We find that issue of import of Vitamin "E" 40% to 50% and claimed to be animal feed came before the Tribunal for discussion and that Tribunal in the case of CC Vs Sonam International - 2012 (275) ELT 326 (All.) has come to the conclusion that vitamins imported by the appellants therein are to be classified under 293600 and not under 2302 as 'animal feed supplement' as claimed by the appellants. We further find that in the above case of Sonam International Tribunal has discussed and distinguished the case of *Tetragon Chemie* (supra) and moreover, it is the later judgment on the issue and directly on the subject of import of similar items. In view of the above, we uphold the classification of impugned goods under CTH 21022000 as assessed by the department and as upheld by the Commissioner (Appeals).

12. In view of the above, we find that to extent of classification of the impugned goods is concerned; the order of the Ld. Commissioner (Appeals) does not require to be interfered with. In the result, we uphold the impugned order in so far as the classification of the impugned goods is concerned. We hold that classification of impugned goods i.e. yeast is correctly arrived by the Revenue under CTH 21022000. Under such circumstances, the appellant's submissions on the issue of time bar loose relevance in the instant case.

13. In the result the appeals are dismissed in terms of the above discussion.

(Order pronounced in open court on 26.11.2019)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**P. ANJANI KUMAR**)
Member (Technical)

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