IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL SOUTH ZONAL BENCH, CHENNAI

Appeal No.C/264/2009

(Arising out of Order-in-Original No. 631/2009 dated 12.05.2009 passed by the Commissioner of Customs, Chennai)

M/s. K-Link Healthcare (India) Pvt. Ltd. : Appellant

Vs.

Commissioner of Customs (AIR), Chennai : Respondent

Appeal Nos.C/270 – 274/2009 & C/CO/ 83- 84/2009

(Arising out of Order-in-Original No. 631/2009 dated 12.05.2009 passed by the Commissioner of Customs, Chennai)

Commissioner of Customs (AIR), Chennai : Appellant

Vs.

1. M/s. K-Link Healthcare (India) Pvt. Ltd
2. Shri Payyakkal Devadas, Director
3. M/s.Thirumalai & Company
4. M/s.Sri Valli Shipping & Transport
5. M/s.KMK Shipping and Clearing Pvt. Ltd. : Respondent

Appearance

Ms. J. Ragini, Advocate,
for the Assessee

Shri B. Balamurugan, AC (AR)
for the Revenue

Customs, Excise & Service Tax Appellate Tribunal

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Date of Hearing: **12.09.2017**
Date of Pronouncement: 13.09.2017

FINAL ORDER No. 42074-42079 /2017

Per: B. Ravichandran

All six appeals are against the common impugned order dated 12.05.2009 of the Commissioner of Customs, Airport, Air Cargo Complex, Chennai.

2. Appeal No. C/264/2009 is filed by the assessee-importer M/s. K-Link Healthcare (India) Pvt. Limited. The other five appeals are by the Revenue. The appellant-assessee regularly imported products from Malaysia which were subjected to assessment for Customs duty. Based on certain information that the appellant-assessee had mis-classified these products in order to evade payment of additional duty of customs, the officers conducted certain verification and thereafter proceedings were initiated by issue of SCN dated 23.05.2007. Classification of 15 products imported by the appellant-assessee and consequent valuation was the subject matter of dispute. The case was adjudicated by the

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original authority who held that the classifications declared by the appellant-assessee at the time of import of these goods were not correct. He examined each one of the imported items and concluded on their classification. These imports were covered by 33 Bills of Entry. The assessment in respect of 30 Bills of Entry were provisional due to pendency of final valuation with Special Valuation Branch. Three Bills of Entry were assessed finally as same could not be linked to SVB during the material time.

3. The original authority in the impugned order examined each one of the imported items and held on their classification and also valuation to be followed. The appellant-assessee accepted the findings in respect of six items and paid the differential duty. Regarding the remaining nine items, the appellant-assessee contested the findings of the original authority and preferred this appeal.

4. The original authority dropped the demand for differential duty in respect of the goods covered by three Bills of Entry the assessment for which were not provisional, holding that such demand was hit by limitation. Consequently, he dropped penal proceedings against the main appellant-assessee and other individuals/CHA against whom proposal for penalty was made in the SCN. Aggrieved by this, Revenue preferred these five appeals.

5. We heard the Ld. Counsel for the appellant-assessee. She submitted written note and also explained the dispute on classification in respect of nine products. We have also heard the

Ld. AR. He submitted that the products now under consideration can never be considered for classification under Chapter 30 which is for pharmaceutical products. The product literature and the package contain clear details about the nature and use of these products. These are never intended to be medicaments to diagnose, treat, cure or prevent any disease. The original authority has examined the product literature in detail and there is nothing in the present appeal to bring out different facts missed by the original authority. He supported the findings of the original authority on classification of the impugned goods.

6. On the appeals by the Revenue, he submitted that the appellant-assessee deliberately mis-classified the products though same party filed Bill of Entry with a different classification in Air cargo Complex. As such, the Ld. AR submitted that the original authority should have included the three Bills of Entry which were finally assessed, based on wrong information claimed by the appellant-assessee. The differential duty should have been decided for these three Bills of Entry also. Consequently, confiscation and penalties also should have been ordered by the original authority.

7. We have heard both sides and perused the appeal records.

8. The dispute is on classification of imported items based on the interpretation of facts regarding nature and usage of the products. We have extensively perused the product manual which elaborates the nature of some of the disputed items along with

their use etc. We have also perused the sample packages of the disputed items as submitted by the appellant-assessee during the course of hearing. There are nine products imported by the appellant-assessee, the classifications of which are now in dispute. The original authority classified these products either under Chapter 21 or under Chapter 33 depending upon the nature and usage of these products. Chapter 21 deals with miscellaneous edible preparations. Chapter 33 deals with essential oils and resinoids; perfumery, cosmetics or toilet preparations. The appellant-assessee claimed classification under Chapter 22, 29 and 30 of the tariff. These deal with beverages, spirits and vinegar (chapter 22), organic chemicals (chapter 29), pharmaceutical products (chapter 30). We considered the dispute in respect of each item for a finding.

8.1 ROOIBOS SOD Drink

The original authority examined the products catalogue and recorded as below:-

> "As per the product literature in the products Catalogue, Rooibos SOD Drink is a unique health benefit tea from South Africa, grown only in the magnificent unpolluted area in the Cedarberg region of the Cape of Good Hope. Rooibos SOD Drink is a caffeine free drink. It has a soothing effect on the central nervous system and is well accepted by people for natural health maintenance. It is rich in Iron, Potassium, Magnesium, Manganese, Copper, Calcium, Zinc, Fluoride and Flavonoid, very strong anti-free radical which slows down ageing and improves the

immune systems. Rooibos SOD Drink has 50 times more SOD, as well as other antioxidants that are not found in other drink making Rooibos SOD truly unique and far superior. Rooibos SOD Drink also supplements the daily amount of calcium and especially fluoride which is required for the development of strong teeth and bones. Rooibos SOD Drink is a truly unique beverage with a full range of health benefit. A refreshing drink for all occasions and can be enjoyed both hot and cold, whether it is the first thing in the morning, at normal drink time or as a relaxing drink just before bedtime. This functional health drink is suitable for all.

The Importer has submitted that as per the literature for this product this is a unique health drink and is made from the needle like leaves and twigs of a single plant known as 'Aspalathus Linearis' and there is no other addition; that it has been clarified in the literature itself that this drink is completely pure and natural as it contains no additives, preservatives and colorants; that point No. 14 in the Explanatory Notes of Chapter 21 states that this chapter includes "Products consisting of a mixture of plants or parts of plants (including seeds or fruits) of different species mixed with other substances such as one or more plant extracts, which are not consumed as such but which are of a kind used for making herbal infusions or herbal "teas", including products which are claimed to offer relief from ailments or contribute to general health and well-being" The Importer has contested that only products which consists of mixture of plants or parts of plants of different species or product consisting of plants or parts of single or of different species but mixed with other substances fall under Heading 2106 and therefore the classification suggested under 2106 by the department is inappropriate. The Importer has not given the correct classification for the above product and had failed to note that the Heading 2106 also includes 'products which are claimed to offer relief from ailments or contribute to general health and well-being'

The Importer had classified this product in the Heading 090200, 220290, 30049099, 22029090 and 21069099 in the Bills of Entry (mentioned in the Annexure-I & II). CTH0902 pertains to Tea, whether or not flavored. CTH/CETH 090200 does not cover "nutritional drinks made from herbal infusions or herbal teas including products which are claimed to offer relief from ailments or contribute to general health and well being". Therefore, Rooibos SOD Drink cannot be classified as 'Tea' under CTH/CETH090200. The other CTH/CETH preferred by the Importer is **2202,** which pertains to Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter of flavored, and other non-alcoholic beverages, not including fruit or vegetable juices of heading 20.09.CTH 2202 does not cover nutritional health drinks therefore classification under CTH.CETH 2202 is not correct. The Importer had also classified Rooibos SOD Drink in CTH 3004, which pertains to medicaments (excluding goods of heading 30.02, 30.05 or30.06) consisting of mixed or unmixed product for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms of packing for retail sale. At the bottom of the above product literature there is disclaimer

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which reads as: This product is not intended to diagnose, treat, cure or prevent any diseases. As discussed at the outset, this disclaimer means that the products is not a medicament and does not have any therapeutic value. As can be seen from the product literature, Rooibos SOD Drink is marketed only as a nutritional health drink and therefore it cannot be classified in CTH 3004. Rooibos SOD Drink is correctly classifiable under CTH 210690/ 21069099 and CETH 210899."

8.2 We have perused the sample of the product submitted by the appellant. In the package it is clearly mentioned that the product is a unique health benefit drink, "Herbal Drink". The appellant-assessee claimed classification under CTH 2202 9090 ie., waters including mineral water and aerated water containing added sugar or other sweetening matters or flavoured or other non-alcoholic beverages not including fruit or vegetable juices of heading 2009. We find the original authority classified the product under CTH 2106 90/2106 9090/2108 99. CH 2106 deals with food preparations not elsewhere specified or included. Below the main heading, the classification was made under last miscellaneous heading "other". We note that the said product is being marketed as an health drink and the classification ordered by the original authority is correct. In this connection reference can be made to HSN notes (14) and (16) explaining the scope of heading 2106. The said notes are as under:-

"14. Products consisting of a mixture of plants or parts of plants (including seeds or fruits) of different species or consisting of plants or parts of plants (including seeds or fruits) of a single or of different species mixed with other substances such as one or more plant extacts, which are not consumed as such, but which are of a kind used for making herbal infusions or herbal "teas", (e.g., those having laxative, purgative, diuretic or carminative properties), including products which are claimed to offer relief from ailments or contribute to general health and well- being.

The heading excludes products where an infusion constitutes a therapeutic or prophylactic dose of an active ingredient specific to a particular ailment (heading 30.03 or 30.04).

The heading also excludes such products classifiable in heading 08.13 or Chapter 9."

"16. Preparations, often referred to as food supplements, based on extracts from plants, fruit concentrates, honey, fructose, etc. and containing added vitamins and sometimes minute quantities of iron compounds. These preparations are often put up in packagings with indications that they maintain general health or well-being. Similar preparations, however intended for the prevention or treatment of diseases or ailments are exculuded **(heading 30.03 or 30.04)**

The heading further excludes:

Preparations made from fruit, nuts or other edible parts of plants of heading 20.08, provided that the essential character of the preparations is given by such fruit, nuts or other edible parts of plants (heading 20.08).

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Micro-organisms of heading 21.02 put up as food supplements for human consumption (heading 21.02)."

The above clarificatory notes when applied to products in dispute make is clear that these cannot be considered as pharmaceutical products under Chapter 30 as now claimed by appellants.

8.3 BAE/K-Liquid Chlorophyll:

The appellant claimed the classification under Chapter 29 as organic chemicals. The Revenue classified the same under 210690/2106 9090/2108 99. We have perused the product literature as well as the samples of the said product. It is very clear that the same is marketed as "Nutritional drink", "Botanical beverage", "Universe Induced Energy". It is apparent that the claim of he appellant-asssessee to classify the product as organic chemicals is not tenable even on a plain reading of the Chapter as well as the product literature. We note that the details of the product literature have been reproduced by the original authority and applying the Note (14) of the explanatory notes for CTH 2106, the original authority classified the product under 2106. The product cannot be considered as a organic chemical. Chapter 29 generally applies to chemically define organic compound with or without impurities. The present product, as explained above, cannot be called an organic chemicals.

8.4 UIE Power Liquid:

As per the product literature it is clear that the said item is a drink solution containing high level of oxygen intended to activate cells of body and increase the metabolic rate. A few drops of this liquid are mixed with food or drink to improve the taste and to improve the immunity system. The appellant-assessee is claiming classification under Chapter 22 as beverages. We find that the same cannot be considered as a beverage and cannot also be considered under Chapter 30 as pharmaceutical products as originally claimed by the appellant at the time of import. The essential character of this product is the health drink based on product details highlighted for marketing. Accordingly, we are in agreement with the original authority in classifying the product under Chapter 21.

8.5 RIDDANCE

The appellant claimed this product is a medicament for classification under Chapter 30. We have perused the product literature as well as the sample of the impugned goods. It is clear that the said product is marketed for use in all round detoxification. The indications shown in the package is for use for health and strengthening the body. The product is explained in the manual as a combined power and natural Chinese herbs to perform natural detoxification function. There is no therapeutic or prophylactic use for this product. It cannot be classified as medicament under Chapter 30. We are in agreement with the original authority that the correct classification should be under Chapter 21.

8.6 Warrior Performance:

The appellant-assessee claimed the classification as medicine under Chapter 30. No product literature was submitted. However, based on the details of ingredients as furnished by the appellant-assessee, it is apparent that it is a food supplement made from plant extracts, consumed for general health and well-being. As in the case of Rooibos it is also made from a single ingredient in the form of capsules. The said product comes with a disclaimer that this is not medicine and not intended to diagnose, treat, cure or prevent any disease. This is a plant extract consumed for general health and well-being. Clearly the said product cannot be called as a medicine meriting classification under Chapter 30. We are in agreement with the original authority for classification of this product under Chapter 21.

8.7. K- Link Puyikang/Puyikang Takara, BAE Power Oil/K-Energy Power Oil, kinotakara, and Power touch:

These products were sought to be classified under Chapter 30 as medicines by the appellant-assessee. The original authority had examined the product literature, the contents and the usage of the said products and concluded that these are to be correctly classified under Chapter 33 which covers essential oils and resinoides; perfumery, cosmetics or toilet preparations. We have perused the product literature and samples of the impugned goods. None of these products merit classification as medicines or medicaments. These are not having any therapeutic or prophylactic value. K-Link Puyikang/Puyikang Takara is basically for ladies hygiene. There is no curative or therapeutic value for these products. At the best, some of these products have effect of removing toxins, overall enhancing the well-being of the person consuming or using them. The appellant-assessee themselves clearly printed in the literature as well as on the product package that these are not drugs and not intended to diagnose, treat, cure or prevent any disease. The product as packed and marketed should be considered for classification. When the appellant-assessee themselves claimed that these are not for curing or treating any disease, the question of considering them as medicaments does not arise.

9. The Ld. Counsel for the appellant-assessee submitted that while deciding classification, the normal use for which the product is put to use by the customer should be considered. She referred to the decisions of the Hon'ble Supreme Court in the case of *CCE, Calcutta Vs. Sharma Chemical Works* – 2003 (154) ELT 328 (S.C.) and *CCE Vs. Wockhardt Life Sciences Ltd.* – 2012 (277) ELT 299 (S.C.). We have perused these decisions. In Sharma Chemical Works the Hon'ble Supreme Court was examining a product whose ingredients are listed in Ayurvedic text books. Similarly, in Wockhardt Life Sciences Ltd., the product is listed in US Pharmacopoeia. One of the main ingredients is also listed in India Pharmacopoeia. In the present case, we are not dealing with any ingredients or products which are claimed to be in the Ayurvedic text or in recognized Pharmacopoeia. In fact, the Hon'ble Supreme Court examined the scope of Chapter 30 and the meaning of the

term "medicament". As noted earlier in this order and discussed elaborately in the impugned order, none of the products which are examined in the present dispute have any qualities which can be considered as curative in nature. Most of the products are aimed at enhanced well-being or hygiene and improved body conditions. These type of generic group items are rightly to be considered under Chapter 21 or 33 depending on the nature and usage.

10. On careful consideration of the submissions made by the appellant-assessee and the findings of the original authority, we note that there is no reason to interfere with the findings of the original authority. The appellant-assessee did not make any forceful submission based on contrary evidence to persuade us for variation of the impugned order.

11. The appeals by the Revenue are against the impugned order dropping the demand in respect of three Bills of Entry, on the ground of limitation. We note these Bills of Entry were finally assessed and a SCN was issued beyond the normal period. The original authority has examined this issue. He concluded that there is no evidence to support the claim of the Revenue that the appellant-assessee deliberately mis-declared the description of the imported goods in order to evade payment of duty. It was recorded that the product literature was made available to the department. The goods were also examined before assessment and permission granted after due assessment. We are in agreement that the original authority on the issue of limitation.

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The claim of the appellant –assessee for a particular classification by itself will not make the case for mis-declaration, when all the required details including the product literature and the imported product itself being available at the time of assessment. There can be no question of demand for extended period invoking fraudulent mis-statement etc. in such situation. There is no additional evidence unearthed which was not available at the time of assessment and clearance of goods. Accordingly, we find no merit in the appeals filed by the Revenue and the same are dismissed.

12. In view of the above discussions and analysis, the appeal filed by the appellant-assessee as well as all the Revenue's appeals are dismissed. COs filed by assessee in Revenue's appeals stand disposed.

(Order pronounced in the open court on 15.9.2017)

(B. RAVICHANDRAN) 15.9.17.
Member (Technical)

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

BB

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