

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

Customs Appeal No.40483 of2023

(Arising out of Order in Original No. 101888/2023 dated 23.5.2023 passed by the Commissioner of Customs, Chennai II Commissionerate)

M/s. Ajinomoto India Pvt. Ltd.

Plot No. 14, One Hub Chennai
Panchanthiruthi Village, Manambathi Pot
Kancheepuram – 603 105.

Appellant

Vs.

Commissioner of Customs

Chennai II Commissionerate
Custom House
60, Rajaji Salai, Chennai – 600 001.

Respondent

APPEARANCE:

Shri R. Parthasarathy, Advocate for the Appellant
Shri M. Ambe, DC (AR) for the Respondent

CORAM

Hon'ble Shri S.S. Garg, Member (Judicial)

Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No.40364/2024

Date of Hearing : 24.01.2024

Date of Decision: 28.03.2024

Per M. Ajit Kumar,

This appeal filed by the appellant M/s. Ajinomoto India Pvt. Ltd. is against Order in Original No. 101888/2023 dated 23.5.2023 passed by the Commissioner of Customs, Chennai II Commissionerate. (impugned order)

2. The appellant regularly imports items for use in the food industry in their own brand name viz. AJI-NO-MOTO® and Ajitide I+G. They had vide Bill of Entry No. 7148378 dated 19.1.2022 imported Ajitide I+G (herein after referred to as Ajitide) and classified the same under CTH 3824 9900 as miscellaneous chemical products, with assessable

value declared as Rs.1,10,61,180/-, claiming basic customs duty exemption under Sl. No. 499(I) of Notification No. 46/2011 vide country of origin certificate issued under the ASEAN Free Trade Area Preferential Tariff Certificate of Origin. Officers of SIIB, examined the cargo pertaining to the above Bill of Entry under mahazar proceedings dated 1.2.2022. Samples were drawn from the consignment containing 20 Kg carton boxes packed with 'Ajitide'. The imported goods were felt to be used during food preparations in the food industry and it appeared that the same are rightly classifiable under CTH 2106 9060 as food flavouring material. Show Cause Notice dated 29.11.2022 was issued to the Appellant. The SCN proposed to demand differential duty, on imports covered by 68 bills of entry, from 1-12-2017 to 29-10-2022. After due process of law, the adjudicating authority reclassified the goods under CTH 2106 9060 and ordered for reassessment of the same denying the benefit of Notification No. 46/2011 dated 1.6.2011. Differential duty amount of Rs.40,83,51,948/- was confirmed along with interest and redemption fine imposed. An equal penalty was also imposed under sec. 114A of the Customs Act, 1962. Aggrieved, the appellant is before this Tribunal.

3. Department has not filed any cross-objection.

4 Shri R. Parthasarathy, learned counsel appeared for the appellant and Shri M. Ambe, learned AR appeared for the Revenue.

4.1 The learned counsel submitted that Ajitide (Disodium ribonucleotide) is a Chemical mixture of just two chemicals and is not a food preparation. It is purely a mixture of chemicals and is not meant for human consumption directly or after processing such as cooking, dissolving, or boiling in water without adding any other foodstuff and

hence cannot be classified under HSN 2106.9060. The SCN proposed to demand differential duty, on imports covered by 68 bills of entry, from 1-12-2017 to 29-10-2022, which shows that the classification was accepted by the Department over a long period of time and is now sought to be changed. The appellant had referred to **Indo Nissin Foods Ltd. Vs. Commissioner of Customs, Chennai**, the CESTAT vide [2001 [133] ELT 413], both for correct classification and also for not invoking the extended period. He prayed that the impugned order be set aside.

4.2 The learned AR stated that Ajitide is a flavoring material used during food preparation in the food industry. Flavoring material essentially refers to goods which provides a specific taste, or enhances the characteristics of the material like taste, fragrance etc. Further, it is providing Umami taste as admitted by the Appellant and they are used to enhance the flavor of food. The goods are hence rightly classifiable under the specific CTH 2106 9060. The appellant has deliberately suppressed the true characteristics of the product and simply used trade name "Ajitide" as its description and resorted to the wrong classification of the goods imported by them, in order to avail undue Notification benefit, hence invoking the larger period and penal action is justified. He prayed that the appeal may be rejected.

5 We have carefully gone through the appeal and have heard the rival parties. The main dispute between the parties relates to the classification of goods and stems from the fact whether the goods are 'flavour enhancers' falling under CTH 3824 9900 (miscellaneous chemical products) as favoured by the Appellant or under CTH 2106 9060 (food flavouring material) for being 'food additives' as contended

by Revenue. Eligibility to the benefit of exemption flows from the classification of the impugned goods.

Appellant's Averments

6.0 The following pleadings have been made by the Appellant:

(i) Ajitide (Disodium ribonucleotide) is a Chemical mixture of just two chemicals – Di Sodium 5' Inosinate and Di Sodium Guanylate. Both these are separately defined organic compounds.

(ii) They have been classifying the subject goods under TI 3824, as miscellaneous chemical products, at least since 2011 without being disputed by the customs department.

(iii) Ajitide by itself is not a food preparation. It is not meant for human consumption directly or after processing such as cooking, dissolving, or boiling in water without adding any other foodstuff.

(iv) No other food stuff is added to it nor does it have other substances with nutritive value added to it, Chapter Note 1 (b) clearly points out that Classification under 2106 is automatically ruled out.

(v) Chapter Note 1 (b) implies that the chemical mixture will fall under 3824.

(vi) Ajitide is a chemical which is recognized as a food additive by FSSAI and Codex Alimentarius.

(v) The Codex Alimentarius, uses the 'International Numbering System for Food Additives' (INS) for harmonised naming system for food additives as an alternative to the use of the specific name, which may be lengthy. Di sodium Inosinate (INS 631), Di sodium Guanylate (INS 627) & Disodium 5' Ribonucleotides (INS 635) have INS numbers allotted to them. Since INS numbers are allotted to them, the subject

goods with INS 635 is a food additive and not a food flavouring material. Food flavouring materials are not given INS numbers.

(vi) The appellant had referred to the case of **Indo Nissin Foods Ltd vs CC, Chennai**, the CESTAT vide 2001 [133] ELT 413, both for correct classification and also for not invoking the extended period.

Department's View:

6.1 The following points have been made by Revenue:

(i) Ajitide is an equal mixture of two chemically defined compounds i.e. Di sodium inosinate and Di sodium guanylate. Di sodium inosinate is a sodium salt of inosinic acid, and the same is used in food processing industry and is generally found in instant noodles, potato chips, and a variety of other snacks to provide umami taste. Di sodium guanylate is a sodium salt of the flavour enhancing nucleotide guanosine monophosphate (GMP). It is produced from dried seaweed and is often used in instant noodle, potato chips and other snacks, savory rice, current meat and packaged soup.

(ii) When Ajitide is added to food and taken in the mouth, the characteristic of Ajitide i.e. Umami flavour is perceived. It is a distinct taste and is sold in the market as a flavouring material. It is used in the food preparations to confer the Umami taste and also to enhance the flavour of food.

(iii) The impugned goods has nutritional value of its own and is used in the preparation of food stuff covered under section I to section IV of the Indian Customs Tariff. Hence as per Note 1(b) to Chapter 38 the said item is excluded from chapter 38 and is covered under Chapter 2106.

(iv) Flavoring material essentially refers to the 'goods' which provides a specific taste, or enhances the characteristics of the material like taste, fragrance etc. Further, as already discussed, as per the importers own technical details itself, it is providing Umami taste and enhance the flavor of food.

(iv) As per the **Britannica** flavouring, any of the liquid extracts, essences and flavours that are added to foods to enhance their taste and aroma. As per **Oxford learner's dictionary** flavoring is a substance added to food or drink to give it a particular taste. As per **Collins Dictionary** Flavorings are substances that are added to food or drink to give it a particular taste.

(v) The imported goods are known to the public as flavoring material. The same includes flavor enhancers as the "flavoring material" is a wider term. Thus, the term 'flavoring material' specified under CTI 2106 9060 includes material which provide characterized taste and the imported goods are essentially providing the same.

(vi) The FSSAI clarification submitted by the Importer was examined and it was found that though the letter states that the imported item is a flavor enhancer it is silent about the inherent characteristics of the goods.

7. We find that both the parties do not dispute that the classification of the impugned goods are to be done primarily as per their identity in common or commercial parlance. However as per Revenue the imported goods are known to the public as flavoring material whereas as per the Appellant they are known in the trade and are also marketed as flavor enhancers. So the basic question arises as to whether flavoring material and flavor enhancers are one and the same thing or

not. The learned Adjudicating Authority thinks so but the Appellant demurs. We would hence have to look into the distinction between food flavoring materials and flavour enhancers, if any.

7.1 One of the main purposes of eating is to enjoy the palatability of foods. We find that food flavoring materials and 'food enhancers' enhance the overall taste intensity and increase flavor characteristics of food. While they have not been defined in the Customs Tariff or the HSN, as per open sources, they have the following main characteristics;

I. Flavouring Materials:

- (i) Flavouring substances are products intended to impart or modify odour and/or taste in food. These substances add flavour to food or alter its existing flavour profile.
- (ii) A flavouring substance is a defined chemical compound with flavouring properties.
- (iii) A flavouring substance itself may be tasteless or odourless. Examples of flavouring materials include compounds that provide fruity, spicy, or savory notes to food.
- (iv) It is not intended to be consumed on its own.
- (v) A flavouring imparts odour and/or taste to food or modifies odour and/or taste of food.
- (iv) Flavouring materials directly contribute to taste and odour
- (v) They are food additives

II. Flavour Enhancers:

- (i) Flavour enhancers, also known as taste enhancers, do not inherently possess flavour and cannot impart flavour. Instead, they amplify or enhance the existing taste and/or odour of a foodstuff.

They also work by depressing undesirable flavours that already exist in foods thereby increasing a single flavour perception of the food being consumed.

(ii) These enhancers are often based on amino acids and nucleotides. They work by enhancing 'umami' (Umami translates to "pleasant savory taste" - derived from the Japanese for delightfulness) flavors.

(iii) It is a food additive.

(iii) Flavour enhancers enhance the taste that food already possesses in the following ways.

- to amplify the existing taste and/or odour of a foodstuff, and/or
- to increase the overall perception of all flavour characteristics, and/or
- to increase a single flavour perception so significantly that it is out of balance relative to the modification of the other flavour characteristics.

7.2 We hence find that both deal with the taste of food, odour etc. and how they can be changed / enhanced. Put simply 'flavouring materials' **impart** or **modify** odour and/or taste, while 'flavour enhancers' **enhance** the existing taste or **depress** certain undesirable taste/ flavour in food or odour's. A taste has a distinct set of taste bud receptors in the oral cavity. Umami, one of the five fundamental taste sensations, is also known to have its own specific receptor for its taste.

Umami is described in the Merriam-Webster dictionary as:

Umami: the taste sensation that is produced by several amino acids and nucleotides (such as glutamate and aspartate) and has a rich or meaty flavor characteristic of cheese, cooked meat, mushrooms, soy, and ripe tomatoes.

Umami is often described as a meaty flavor and is particularly strong in aged or fermented products, like cheese and wine.—Carla Ranicki

As per the discussions of the rival parties it is understood that glutamate, inosinate, and guanylate are umami-related substances. However, the precise role of these substances has not been well elucidated.

7.3 The question arises as to under which group does Ajitide falls. The impugned order has at para 33 referred to the technical literature provided by the importer, extract of which is reproduced here under:

"AJITIDE® I+G is a flavor enhancer composed by nucleoside inosinate and guanylate disodium, which confer Umami taste and enhance the flavor of food. In addition, it has strong synergy with AJI-NO-MOTO® and when used together, enhances Umami taste and flavor of the food.

AJITIDE® I+G is a product of easy application, as it is highly soluble in water, has low hygroscopicity, offers excellent stability at high temperatures and in the presence of light and is not perishable."

Benefits of AJITIDE I+G as per the technical literature:

- Confers the Umami taste and enhances the flavor.
- Acts synergistically with glutamates for enhanced flavor
- Promotes flavor improvement in a wide variety of foods
- Provides complexity, impact, long-lasting and harmonize the Savor.
- Potentiates the yield of aromas, making possible the cost reduction of the formulations.
- Enhances the effect of AJI-NO-MOTO® to make undesirable flavors be smoother, helping to reduce sodium

Usage recommendations

The dosage of AJITIDE® I+G varies according to the type of product and purpose desired in each application.

Must be used in conjunction with AJI-NO-MOTO® as it has low efficiency when used separately.

The impugned order hence concludes that Ajitide provides the perception of umami flavour of food and it also enhances the overall

flavour of food by acting synergistically with glutamates, while possessing nutritional value of its own. Hence Ajitide has two effects in foods: one is to induce or impart a unique taste called umami, which is one of the five basic tastes, and the other is to make food more palatable (i.e., flavor-enhancing or seasoning effects), which helps nutrition and is good for mental and physical health. Ajitide is hence not strictly a flavour enhancer, it also imparts the umami taste.

7.4 The Appellant has referred to the **Codex Alimentarius**, or "Food Code" which is a collection of standards, guidelines and codes of practice adopted by the Codex Alimentarius Commission, and is the central part of the Joint FAO/WHO Food Standards Programme. The Appellant has stated that according to the Codex, flavourings are products that are added to food to impart, modify, or enhance the flavour of food. It is the Appellants plea that Codex Alimentarius does not specifically deal with flavouring substances and they have not been assigned a "INS" code number, whereas Di sodium Inosinate (INS 631), Di sodium Guanylate (INS 627) & Disodium 5' Ribonucleotides (INS 635) have INS numbers allotted to them. Since INS numbers are allotted to them, the subject goods are food additives and not food flavouring material. They have also referred to the letter of FSSAI differentiating between enhancers and flavouring material by way of different product codes for registration. Hence CTH 2106 9060 which covers food flavouring material is to be ruled out.

7.5 We find that both food flavouring and food enhancers are within the pale of additives as seen from the definition of food additives given in Codex Alimentarius and FSSA reproduced below and since the

distinction of food additive being applicable equally, it will not take food enhancers beyond the pale of food flavouring material.

Codex Alimentarius Food Additives Definition

- Food additive means any substance not normally consumed as a food by itself and not normally used as a typical ingredient of the food, whether or not it has nutritive value, the intentional addition of which to food for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results, or may reasonably be expected to result, (directly or indirectly) in it or its by-products becoming a component of or otherwise affecting the characteristics of such foods. (**Codex Alimentarius Commission Procedural Manual, page 22, 21th Ed., 2013**) [emphasis added]

In India the **Food Safety and Standards Act, 2006** (FSSA) which is near identical states;

- (k) – “food additive” means any substance not normally consumed as a food by itself or used as a typical ingredient of the food, whether or not it has nutritive value, the intentional addition of which to food for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results, or may be reasonably expected to result (directly or indirectly), in it or its by-products becoming a component of or otherwise affecting the characteristics of such food but does not include – “contaminants” or substances added to food for maintaining or improving nutritional qualities; (emphasis added)

[**organoleptic** (adjective): acting on, or involving the use of, the sense organs.)

Both descriptions involve goods which may not have a taste /flavour of their own, are additives to food and are used for organoleptic purpose. The letter of FSSAI is not conclusive of the classification and brings out only an administrative arrangement for registration purpose. Flavour enhancers thus appear to be a species of flavouring material as stated in the impugned order. But more than their technical standards, what is of importance is how the goods are perceived by its users and in the common parlance.

8.0 Language is an imperfect vehicle of thought and the ability of the written language to precisely convey technical information and

description of products as done by mathematical symbols and formula, especially in the case of legal matters, enactment or notifications, may not at all times be achieved. As said "It is difficult to expect the Legislature carving out a classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned". The inability of words to achieve precision at times makes it necessary, as discussed above, to understand the legislative intent by the one principle which is fairly well settled by a catena of judgments by the Supreme Court, that words and expressions describing goods in a taxing statute should be construed in the sense in which they are understood in the trade, by the dealer and the consumer. The reason is that it is they who are concerned with it and it is the sense in which they understood it which constitutes the definitive index of the legislative intention. This perhaps reflects the Constitutional Court's thinking on the inability of the English language to convey complex technical information with a high degree of legal certitude in the classification of goods and services. The test commonly applied to such cases is: how is the product identified by the class or section of people dealing with or using the product?

8.1 It has been held in **M/s Indo International Industries v. Commissioner of Sales Tax, Uttar Pradesh**, [1981 (2) SCC 528], that "if any term or expression has been defined in the enactment then it must be understood in the sense in which it is defined but in the absence of any definition being given in the enactment the meaning of the term in common parlance or commercial parlance has to be adopted". In **Plasmac Machine Manufacturing Co. Pvt. Ltd. v.**

Collector of Central Excise, Bombay [1991 (51) E.L.T. 161 (SC) = 1991 Suppl (1) S.C.C. 57], it was held by the Apex Court :

“It is an accepted principle of classification that the goods should be classified according to their popular meaning or as they are understood in their commercial sense and not as per the scientific or technical meaning. Indo International Industries v. CST [1981 (2) SCC 528] and Dunlop India Ltd. v. Union of India [1976 (2) SCC 241] have settled this proposition. How is the product identified by the class or section of people dealing with or using the product is also a test when the statute itself does not contain any definition and commercial parlance would assume importance when the goods are marketable as was held in Atul Glass Industrial (Pvt.) Ltd. v. CCE [1986 (3) SCC 480] and Indian Aluminium Cables Ltd. v. Union of India [1985 (3) SCC 284]. In Asian Paints India Ltd. v. CCE [1988 (2) SCC 470] which was a case of emulsion paint, at para 8, it was said:

“It is well settled that the commercial meaning has to be given to the expressions in tariff items. Where definition of a word has not been given, it must be construed in its popular sense. Popular sense means that sense which people conversant with the subject matter with which the statute is dealing, would attribute to it.”

Again the Apex Court in **C.I.T. Andhra Pradesh v. M/s. Taj Mahal Hotel Secunderabad**, ([1972] 1 SCR 168) stated that in incorporating items in the statutes like Excise, Customs or Sales-tax whose primary object is to raise revenue and for which to classify diverse products, articles and substance resort should be had not to the scientific and technical meaning of substance but to their popular meaning viz., the meaning attached to these expressions by those dealing in them. This being so, we need not be further detained by a detailed study of the Codex Alimentarius, FSSA or foreign administration rulings in deciding the classification of the impugned goods.

9.0 The learned Adjudicating Authority has stated that the impugned good has nutritional value of its own, as was also mentioned on the label of the products and is used in the preparation of food stuff covered under section I to section IV of the Indian Customs Tariff.

Hence as per Note 1(b) to Chapter 38 the said item is excluded from chapter 38 and is covered under Chapter 2106. Note 1(b) of Chapter 38 of the Indian Customs Tariff reads as follows:-

“1. This Chapter does not cover:

(a) . .

(b) mixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs (generally, heading 2106)”

He then referred to the Supplementary note 1(5) of Chapter 21 of the Indian Customs Tariff which reads as follows:-

“1.(5). Heading 2106 (except tariff items 2106 90 20 and 2106 90 30), inter alia, **includes**:

(a)

(b) preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk or other liquids), for human consumption;

He also referred to the relevant Extract of the CTH 2106 from WCO HSN classification which is reproduced below:-

21.06	- Food preparations not elsewhere specified or included
2106.10	- Protein concentrates and textured protein substances
2106.90	- Other

Provided that they are not covered by any other heading of the nomenclature, **this heading covers:-**

(A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk etc.) for human consumption.

(B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts etc.) with foodstuffs (flour, sugar, milk powder etc.) **for incorporation in food preparations either as ingredients or to improve some of their characteristics** (appearance, keeping qualities etc.) (see the General Explanatory Note to Chapter 38). However, the heading does not cover enzymatic preparations containing foodstuffs (e.g. meat tenderisers consisting of a proteolytic enzyme with added dextrose or other foodstuffs). Such preparations fall in heading 35.07 provided that they are not covered by a more specific heading in the Nomenclature.

(emphasis added)

The Appellant on the other hand is of the view that the nutritive value on the labels of the impugned goods were mentioned only due to a statutory requirement and are not being mentioned now as the same is exempt by regulations. Hence they cannot be considered as edible preparations. Exclusion Note under Ch. 38 as per Note 1 (b) is not applicable as the General Notes to Global HSN clearly states that food additives are classifiable under Chapter 38 as below:

"The mere presence of "foodstuffs or other substances with nutritive value" in a mixture would not suffice to exclude the mixture from Chapter 38, by application of Note 1(b). Substances having a nutritive value that is merely subsidiary to their function as chemical products, e.g., as **food additives** or processing aids, are not regarded as "foodstuffs or substances with nutritive value" for the purpose of this Note. The mixtures which are excluded from Chapter 38 by virtue of Note 1(b) are those which are of a kind used in the preparation of human foodstuffs and which are valued for their nutritional qualities."
(emphasis added)

9.1 The words 'food', 'food additive' and 'primary food' are defined in Food Safety and Standards Act, 2006, but would not come to our help as it is a sound principle of construction not to interpret an expression used in one Act with reference to its use in another Act, since the meaning of words and expressions used in an Act must take their colour from the context in which they appear. In **Hari Khemu Gawali v. Deputy Commissioner of Police, Bombay and another** [AIR 1956 SC 559], a **Constitution Bench** of the Apex Court stated:

"It has been repeatedly said by this Court that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia."

'Preparation' and 'food preparation' have also not been defined. As per the Collins Dictionary 'preparation' means;

"Preparation is the process of getting something ready for use or for a particular purpose or making arrangements for something."

In common parlance 'food preparation' refers to the process of transforming edible ingredients into acceptable, delicious, and safe food. Chemical mixtures which are edible additives to food are understood in common parlance to be a part of food preparation. Since one of the main purposes of eating is to supply nutrients and calories to the body, the process is enhanced and made enjoyable by the palatability of food. This is achieved by various techniques, that help achieve particular food characteristics, such as a particular flavour, texture or appearance. 'Foodstuff' as per the **Merriam-Webster Dictionary** refers to 'a substance with food value. Specifically : the raw material of food before or after processing'. Ajitide is edible and is used in adding flavour to human foodstuff either directly or after processing for human consumption. It must be used in conjunction with AJI-NO-MOTO® as it has low efficiency when used separately. They increase the overall palatability and preferability by conferring umami taste and by enhancing the flavor of food. It does not lose its nutritive value just because the same is not being mentioned on the product label as the same is exempt by regulations. Flavourings are an essential component of foods, whether naturally present or added. The Appellant has referred to flavour enhancers as food additives. Food additives are generally known in the market to be stabilizers, emulsifiers, antioxidants, preservatives etc. however food flavouring material and food enhancers are not excluded.

10. Looking at the sum total of arguments it emerges that food enhancers are not far removed from food flavouring material. They

help in making food more palatable. Ajitide in facts has both characteristics. It possesses a flavour of its own and it also enhances taste. It is also known in the trade and among people who use it as food flavouring material. Hence the classification of the good under the Schedule to the Customs Tariff Act 1985, is more specific as a food flavouring material than as a miscellaneous chemical product. According the impugned goods are rightly classifiable under CTH 2106 9060.

11. The appellant has referred to certain case laws which are discussed below. It should however be understood that a decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. In the case of **Indo Nissin Foods Ltd** (supra), the item imported was flavour enhancers/ potentiators. The issue was whether the goods required a license to be cleared. The Appellant had in the Bill of Entry declared the item to be food additives and paid customs duty under Chapter 3823.00. Therefore, there was no challenge to the classification made in the Bill of Entry. Hence the matter is distinguished. In **M/S. Itspossible Marketing Ltd vs Cc, Chennai-II** [FINAL ORDER No. 43013/2017, dated: 27.11.2017] the goods imported were "Concentrated Mineral Drops", declared under Chapter 3004 5020 of Customs Tariff Act, 1975. The imported goods/products were saline solution having concentrated natural sea minerals from inland sea. The Department took the view that those products should be classified under CTH 2106 9099. The Tribunal held that the Department failed to prove by way of conclusive evidence as to why

the imported goods should not be classified under CTH 3004. The judgment had not given a positive finding on the classification of the imported goods and is hence distinguished. In **Banner Pharmacaps (I) Pvt. Ltd. vs Commissioner Of C. Ex.** [2005 (183) ELT 151 (TRI-BANG)] the Adjudicating Authority confirmed the classification of imported products as 'Dietary Food Supplements' under Chapter sub-heading 2108.99 of the CETA, 1985 as against the claim of the appellant for a classification under Chapter Heading 1503.00. The Tribunal held that mere encapsulating the vegetable oils into capsule form does not make it a different product. The issue involved is different and is hence distinguished. In **M/S. Symrise Private Ltd vs Commissioner Of Customs** the appellant had imported 'tomato dry flavour' under the cover of Bills-of-Entry by classifying the same under CTH **3302 1010**. The Department sought to classify the imported goods under Tariff Item 2106 9060. The Tribunal found that the imported good is of synthetic origin and consists of odoriferous substances, which is an industrial raw material for making food flavours and the same cannot be directly used in any food preparations for human consumption. The Tribunal held that Chapter Heading 3302 covers both natural and/or synthetic mixtures of odoriferous substances. In the present case we have seen that the goods fall under the category of the heading flavouring material which finds a specific mention in the Customs Tariff and does not relate to odiferous substance. The judgment is hence distinguished on facts. In **Commissioner of Customs Chennai II Vs Versus M/s. International Flavours and Fragrances India** [FINAL ORDER No. 40871 / 2023, dated 09.10.2023] the imports of various semi-finished

flavouring compound which were a mixture of synthetic aromatics and used in the manufacture of flavours and fragrances were classified by the importer under CTH 33021090. The Department finalised the classification of the imported goods under CTH 2106 9060. The Tribunal found that as per HSN Notes, CTH 2106 excludes preparations of a kind used for the manufacture of beverages, based on one or more odoriferous substances. Hence the facts are not similar and are distinguished. The Apex Court in **Bhavnagar University vs. Palitana Sugar Mills Pvt. Ltd** [2003(2) SCC 111], observed:

"It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision".

12. Sine the correct classification of the goods is under CTH 2106 9060 the goods are not eligible for exemption under Sl. No. 499(I) of Notification No. 46/2011 and the impugned order is upheld in this regard.

13. The other point for consideration is the invocation of the extended period and the imposition of penalty. It is seen that the impugned goods were imported by filing 68 bills of entry, from 1-12-2017 to 29-10-2022 by declaring them as 'Ajitide I+G'. It is the Revenues case that by making an incomplete declaration of the goods (suppression of facts) and mis-classifying them has lead to evasion of duty and hence the extended period of time as per section 28(4) of the Customs Act 1962 is rightly invokable and the goods are liable for confiscation under Section 111(m) & (o) *ibid* and the importer is also liable for a penalty.

13.1 In **Associated Cement Companies Ltd. Versus Commissioner Of Customs** [2001 (128) ELT 21 (S.C.)], the Apex Court observed;

"52. Though it was sought to be contended that Section 28 of the Customs Act is in pari materia with Section 11A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words "with intent to evade payment of duty" occurring in proviso to Section 11A of the Excise Act are missing in Section 28(1) of the Customs Act and the proviso in particular."

"with intent to evade payment of duty" hence is not an essential condition for evoking the extended time limit, if the statute so provides. However, 'suppression' means failure to disclose full, correct or complete information. The expression has been used in Section 28(4) and 114A of the Customs Act accompanied by strong words such as "collusion" and, "wilful mis-statement" therefore it has to be construed strictly. Although intent to evade payment of duty is not of consequence as per the section, it has to be shown that there has been a positive, conscious, and deliberate action and not a mere omission on the part of the Appellant. The discussions at para 57 of the impugned order are too cryptic and do not address these concerns so as to sustain a penalty of Rs 40,83,51,948/-.

13.2 The Hon'ble Supreme Court in **Northern Plastic Ltd. v. Collector of Customs & Central Excise** [1998 (101) E.L.T. 549 (S.C.)] has held that merely claiming the benefit of exemption or a particular classification under the bill of entry does not amount to mis-declaration or suppression of facts. Something more is required. Although the judgment was pronounced before the 'Self-Assessment' system has been introduced in respect of Customs clearance of imported goods under Section 17 of Customs Act, 1962, with effect from 8-4-2011, we find that earlier consignments bearing the same description, same classification were cleared by the department, vide 68 Bills of Entry, from 1-12-2017 to 29-10-2022. In the circumstances

it cannot prima facie be said that there was an intention on the part of the appellant to mis-declare the goods. Nor has Revenue brought in some additional facts to prove its case of 'suppression'. The goods are basically a mixture of chemicals used in the food industry and an arguable case has been made out by the Appellant, which is not a mere excuse to escape payment of duty. Hence the demand will only survive for the normal period and no penalty or fine is imposable. Further, even otherwise, no redemption fine can be imposed when goods have been cleared by Customs in the normal course. The Hon'ble Supreme Court in **Asstt. Collector v. Bussa Overseas and Properties Pvt. Ltd.** [2004 (163) E.L.T. A160 (S.C.)], dismissed the SLP against the judgment and order dated 04/08/1992 of the Bombay High Court in **Bussa Overseas and Properties Pvt. Ltd. v. C.L. Mahar, Asstt. Collector** [2004 (163) E.L.T. 304 (Bom.)] The High Court had held that once the imported goods are cleared for home consumption they cease to be 'imported goods' as defined in Section 2 of the Customs Act, 1962 and are consequently not liable to confiscation.

14. It is seen that interest is necessarily linked to the duty payable, such liability arises automatically by operation of law. As per the Hon'ble Supreme Court's judgment in **Commissioner of Central Excise, Pune Vs M/s SKF India** [2009-TIOL-82-SC-CX] interest is leviable on delayed or deferred payment of duty for whatever reasons.

15. Having regards to the discussions, the impugned order is upheld including the denial of the claim for exemption from duty but with the modification that the demand is limited to the normal period along with applicable interest. The fine and penalty imposed are set aside. The

appellant is eligible for consequential relief if any as per law. The appeal is disposed off accordingly.

(Pronounced in open court on 28.3.2024)

(M. AJIT KUMAR)
Member (Technical)

(S.S. GARG)
Member (Judicial)

Rex