

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

COURT HALL - I

Customs Appeal No.41336 of 2013

(Arising out of Order in Original No. 20448/2013 dated 4.3.2013
passed by the Commissioner of Customs (Seaport - Import),
Chennai)

M/s. Wrigley India Pvt. Ltd.

Appellant

Dodabbapur Road
Rajankunta Post
A.V. Pura, Bangalore – 560 064.

Vs.

Commissioner of Customs

Respondent

Chennai Import Commissionerate
Custom House
No. 60, Rajaji Salai
Chennai – 600001.

And

Customs Appeal No.41400 of 2013

(Arising out of Order in Original No. 20448/2013 dated 4.3.2013
passed by the Commissioner of Customs (Seaport - Import),
Chennai)

Commissioner of Customs

Appellant

Chennai Import Commissionerate
Custom House
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Vs.

M/s. Wrigley India Pvt. Ltd.

Respondent

Dodabbapur Road
Rajankunta Post
A.V. Pura, Bangalore – 560 064.

APPEARANCE:

Shri Rohan Muralidharan, Advocate for the Appellant
Shri Rudra Pratap Singh, ADC (AR) for the Respondent

CORAM

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

Final Order Nos. 40382 & 40383/2024

Date of Hearing : 12.10.2023

Date of Decision: 04.04.2024

Per P. Dinesha,

This appeal is filed by the importer-appellant against the Order in Original No.20448/2013 dated 4.3.2013 dated passed by the Commissioner of Customs (Seaport – Import), Chennai.

2. Brief facts as could be gathered from the impugned order are that the appellant filed a Bill of Entry No. 743087 dated 8.1.2011 for clearance of 'Sweet Pearl P200', the country of origin was declared as France. The said goods were classified by the appellant under Tariff Item 29054900 claiming duty of 7.5% BCD + 10 CVD + 3% Educational Cess on CVD + 3% Education Cess on customs duty + 4% Special Additional Duty ad valorem.

3. Revenue appears to have not accepted the classification declared by the appellant based on an apparent input from intelligence, consequent to which, samples were drawn and forwarded to Expert Inspection Agency (EIA), Chennai for expert opinion. The said EIA vide its analysis report dated 22.3.2011 inter alia opined that the sample goods fall under proprietary item, is fit for use as food material. The Revenue still apprehending that the impugned goods were artificial sweetener and therefore a food flavouring material classifiable under Tariff Item 2106 9060, examined some of the employees of the appellant-company. Thereafter, samples were

again drawn and sent to Central Food Laboratory, Mysore to ascertain

- (i) whether the item is a sweet/gum and the like containing synthetic sweetening agent instead of sugar;
- (ii) whether it is an edible preparation containing different constituents in fixed proportion;
- (iii) If so what are the individual constituents and their percentage thereof and
- (iv) whether the goods require clearance under the Prevention of Food Adulteration Act, 1954 on the Food Safety and Standards Authority Act, 2006.

The said Central Food Laboratory vide its report dated 26.7.2011 sent its expert opinion stating that the subject goods comprised of 99% Maltitol as per NMR Spectroscopy Purity assigned by HNMR Spectroscopy.

4. Thereafter, a Show Cause Notice dated 7.7.2011 was issued inter alia proposing to reject the declared classification of the impugned goods under CTH 2905 4900 thereby reclassifying the same under CTH 21069060 and demanding differential duty demand on account of reclassification. It appears from the record that the appellant filed a detailed reply dated 5.3.2012 justifying its classification but, however, not satisfied with the explanation, the original authority / adjudicating authority vide the impugned Order in Original proceeded to reject the classification declared

by the appellant, reclassified the subject goods as proposed in the Show Cause Notice and also demanded the differential duty as proposed. It is against this order that the present appeal has been filed before this forum.

5. We have heard Shri Rohan Muralidharan, learned Advocate for the appellant and Shri Rudra Pratap Singh, learned Additional Commissioner for the Revenue, we have carefully perused the documents placed on record and also various decisions / orders relied upon during the course of arguments. The only issue that arises for our consideration is "whether the subject goods 'Sweet Pearl P200' is correctly classifiable under CTH 2905 4900?"

6. We find that it was Revenue which disputed the classification declared by the appellant and hence, the initial burden is on the Revenue to disprove the case of the appellant. The burden is also on the Revenue to justify the reclassification made under 21069060. From the impugned order, we find that the Revenue sought opinions of two experts i.e. EIA and Central Food Laboratory, Mysore but they appear to have been not considered. It is the further case of the appellant that it has been classifying Maltitol crystals / sweet pearl under the very same CTH 2905 4900 since 2004 and hence, as ruled by the Hon'ble Supreme Court in a catena of decisions including the following cases, when the

Revenue challenges the classification declared by the importer, the onus is always on the Revenue to establish that the item in question falls under the taxing category as claimed by them:-

- (a) HPL Chemicals Ltd. Vs. CCE, Chandigarh – (2006) 5 SCC 208
- (b) Parle Agro Pvt. Ltd. Vs. Commissioner of Commercial Taxes, Trivandrum – (2017) 7 SCC 540
- (c) Union of India & Ors. Vs. Garware Nylons Ltd. & Ors. – (1996) 10 SCC 413.

7. A perusal of the impugned order reveals that it is the case of the Revenue that the goods in question being artificial sweetener and a food ingredient used in the manufacture of chewing gum merits classification as a food flavouring material under CTH 2106. Sweet pearl is a flavour enhancer but the impugned order does not discuss the properties of a flavour enhancer and how the goods in question fit into the said description.

8. On the other hand, it is the case of the assessee that the subject goods are disaccharide alcohol produced from hydrogenation of maltose and is polyhydric alcohol/polyol. Maltitol is an organic compound used as a sugar substitute, the subject goods contain 99% Maltitol. This fact, according to the appellant, is supported by the report dated 26.7.2011 issued by CFL/CFTRI, Mysore. Chapter 29 specifically includes chemically defined organic compounds, whether or not

containing impurities. Further, the chemical structure is $C_{24}H_{44}O_{11}$, which is also the same for Maltitol syrup as well as the goods in question and hence, subject goods which are separately chemically defined compounds should be classified under chapter 29 alone.

9. Heading 2905 covers polyhydric alcohols. Even the HSN explanatory notes to Heading 2905 provides examples of other polyhydric alcohols, since similar goods are covered under this heading, the appellant chose to declare the imported goods under this heading only. It is also clear from general rules of interpretation to custom tariff that specific heading should be preferred over general heading, hence the product being polyol compound, which are specifically classable under heading to 2905, has a better claim to the classification more so, since the impugned order has failed in establishing its case.

10. We thus find that Revenue has not been able to establish its case. This being so we are in agreement with the decision of a Coordinate Bench in **Sun Rise Traders v. Commissioner of Customs, Mundra** [2022 (381) E.L.T. 393 (Tri. - Ahmd.)], wherein it was held as under;

2.5 Without prejudice to above findings, it is a settled legal position that if the goods are not classifiable under the chapter heading proposed by the revenue thereafter even the goods is classified under the chapter heading claimed by the assessee is correct

or not, the case of the department will fail. This gets support from the following judgments :

- *Pepsico Holdings Pvt. Ltd. - 2019 (25) G.S.T.L. 271* (Tri. - Mum.)

“8. In the light of the above, we cannot decide on a classification that has not been pleaded before us. Once the classification proposed by Revenue is found to be inappropriate, that claimed, while clearing the goods, will sustain even if it may appear to be inappropriate. We cannot also, in our appellate capacity, direct or accord the latitude for invoking Section 11A of Central Excise Act, 1944 by obliteration of the proceedings leading to the impugned order. The mandate of the law pertaining to recovery of duties not paid or short-paid will have to be followed to the letter.”

The above decision of the Tribunal is based on the view taken by the Hon'ble Supreme Court in the case of *Warner Hindustan Limited - (1999) 6 SCC 762 = 1999 (113) E.L.T. 24* (S.C.) wherein the Hon'ble Supreme Court has held as under :

“In our opinion, the Tribunal was quite wrong in these circumstances in allowing the appeal of the Excise Authorities and classifying the mint tablets as items of confectionary under Heading 17.04. The correct course for the Tribunal to have followed was to have dismissed the appeal of the Excise Authorities making it clear that it was open to the Excise Authorities to issue a fresh show cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionary. This would have given the appellant the opportunity to place on record such material as was available to it to establish the contrary. It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before authorities below.”

In view of the above settled law, irrespective whether the classification claimed by the appellant is correct or not since the classification proposed by the Revenue is absolutely incorrect, the entire case of the Revenue will not sustain.

3. Since the revenue has not been able to discharge their burden of proof. Hence the classification of goods declared by the appellants cannot be disturbed.”

11. In view of the above discussions, we are of the clear view that the classification declared by the appellant deserves to be upheld since Revenue has not justified reclassification of the impugned goods under CTH 2106 and therefore, we set aside the impugned order and allow the appeal with consequential benefits, if any, as per law.

12. Revenue has also preferred an appeal against the impugned order on the ground that the adjudicating authority has erred in not imposing equal penalty under sec. 114A of the Customs Act, 1962, since the adjudicating authority has confirmed the duty demand under sec. 28 of the Customs Act, 1962. However, as we have set aside the duty demand as confirmed by the original authority vide impugned order, we do not see any merit in the Revenue's appeal for imposing equal penalty in terms of sec. 114A. Therefore, the department's appeal is dismissed.

(Order pronounced in open court on 04.04.2024)

(M. AJIT KUMAR)
Member (Technical)

(P. DINESHA)
Member (Judicial)