

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT No. I

Excise Appeal Nos. 42530 & 42531 of 2016

(Arising out of Order-in-Original No. 42&43/2016-Commr. dated 29.09.2016 passed by Commissioner of Central Excise, Customs & Service Tax, No. 6/7, ATD Street, Race Course Road, Coimbatore - 641 018)

Mr. M.K. Ashok Kumar

...Appellant

AGM-Operations,
M/s. Arjuna Natural Extracts,
No. 15/4B, Sirambarayampalayam Road,
Sennappachetty Pudur Road, Karumathapatti (via),
Coimbatore – 641 657.

Versus

Commissioner of GST and Central Excise

...Respondent

Coimbatore Commissionerate,
No. 6/7, ATD Street, Race Course Road,
Coimbatore – 641 018.

And

Excise Appeal Nos. 42532 & 42533 of 2016

(Arising out of Order-in-Original No. 42&43/2016-Commr. dated 29.09.2016 passed by Commissioner of Central Excise, Customs & Service Tax, No. 6/7, ATD Street, Race Course Road, Coimbatore - 641 018)

Excise Appeal No. 40329 of 2020

(Arising out of Order-in-Appeal No. CMB-CEX-000-APP-10/2020 dated 23.03.2020 passed by Commissioner of GST & Central Excise (Appeals), No. 6/7, ATD Street, Race Course Road, Coimbatore - 641 018)

M/s. Arjuna Natural Extracts

...Appellant

No. 15/4B, Sirambarayampalayam Road,
Sennappachetty Pudur Road, Karumathapatti (via),
Coimbatore – 641 657.

Versus

Commissioner of GST and Central Excise

...Respondent

Coimbatore Commissionerate,
No. 6/7, ATD Street, Race Course Road,
Coimbatore – 641 018.

APPEARANCE:

For the Appellants : Shri S. Jaikumar, Advocate
Shri M. Karthikeyan, Advocate
For the Respondent : Shri Anoop Singh, Authorised Representative

CORAM:**HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)****HON'BLE MR. AJAYAN T.V., MEMBER (JUDICIAL)****FINAL ORDER Nos. 40313-40317 / 2025**

DATE OF HEARING : 02.12.2024

DATE OF DECISION : 11.03.2025

Per Mr. VASA SESHAGIRI RAO

Excise Appeal Nos. E/42530 & 42531/2016 have been filed by Mr. M.K. Ashok Kumar, AGM-Operations, M/s. Arjuna Natural Extracts, Coimbatore and Nos. E/42532 & 42533/2016 have been filed by M/s. Arjuna Natural Extracts, Coimbatore (hereinafter Mr. M.K. Ashok Kumar and M/s. Arjuna Natural Extracts referred to as 'Appellants') assailing the Order-in-Original Nos. 42&43/2016-Commr. dated 29.09.2016 passed by the Commissioner of Central Excise, Customs & Service Tax, Coimbatore.

1.2 Excise Appeal No. E/40329/2020 has been filed by the Appellants which is directed against the Order-in-Appeal No. CMB-CEX-000-APP-10/2020 dated 23.03.2020 passed by the Commissioner of GST & Central Excise (Appeals), Coimbatore.

1.3 All the above appeals are being taken up together for disposal by a common order as the issues involved in all these Appeals are identical and connected.

2. Brief facts of these appeals are stated below:-

2.1 The Appellants are receiving purified fish oil from M/s. Arbee Biomarine Extracts Pvt. Ltd. and are engaged in further purifying and concentrating the Omega 3 content and supplying the same as Fish Oil - Ethyl Ester (EE for short) with variable Omega-3 content, classifying their final products under Heading 1504 of the Central Excise Tariff Act, 1985 (CETA). Though the Appellants have been registered with the Central Excise Department since 2006 for their other final products, they started paying Central Excise duty of 1% or 2% as per Notification No. 1/2011-CE dated 01.03.2011 and Notification No. 16/2012-CE dated 17.03.2012, for the impugned goods from 2011 till June 2017, till the introduction of GST.

2.2 The Deputy Commissioner of Central Excise, Coimbatore IV Division had called for details related to manufacture of fish oil manufactured by the Appellants and

the same was submitted on 08.10.2014 explaining the process carried out by them.

2.3 Subsequently, the field officers visited the factory premises and samples of raw material were drawn and sent to Chemical Examiner, Chennai for testing. From the test report dated 15.12.2014, it is seen that the sample drawn is in the form of pale-yellow liquid with characteristic of odour and the presence of fish oil has been established. However, in the said report it was also stated that the laboratory was not equipped to determine whether the sample was natural or chemically modified.

2.4 Further, the Department also drew samples *vide* test memo dated 22.05.2015 and sent the same to CFTRI, Mysore and obtained a report.

2.5 Subsequently, a Show Cause Notice dated 05.08.2015 was issued, proposing, re-classification of EE under CETH 3824 90 90 as against CETH 1504 20 20 / 1504 20 90, recovery of Excise duty along with interest and penalty and personal penalty on Mr. M. K. Ashok Kumar,

AGM of M/s. Arjuna. The same was followed with two Statements of Demand dated 26.04.2016 and 17.01.2018.

2.6 The Appellant contested the allegations *vide* their replies dated 02.11.2015, 25.05.2016 and 16.02.2018. The above notices culminated into the impugned Orders-in-Original Nos. 42 & 43/2016-Commr. dated 29.09.2016 confirming the entire demand along with appropriate interest and imposing equal penalty. The SOD dated 17.01.2018 was adjudicated by the Joint Commissioner *vide* Order-in-Original No. 18/2018-C.Ex.(JC) dated 13.11.2018. Aggrieved by the Order-in-Original dated 13.11.2018, the Appellant had preferred an appeal before the Commissioner (Appeals), where the entire demand, interest and penalty were held against them in toto, *vide* Order-in-Appeal No.CMB-CEX-000-APP-010/2020 dated 23.03.2020. Aggrieved by the above, the Appellants have filed the above captioned appeals before this Tribunal.

3.1 The Learned Counsels Shri S. Jaikumar and Shri M. Karthikeyan representing the Appellants have explained the process undertaken by them as under: -

- i. Crude Fish Oil (CFO), which is the by-product obtained during the manufacture of fish meal is the basic raw material are primarily sourced from the shores of Kochi, Mangalore, etc. This CFO are primarily Triglycerides (TG) which are bonded with glycerols and with a meagre amount of Free Fatty Acids (FFA). The CFO is the basic raw material for their suppliers, who process CFO to produce Purified Fish Oil (PFO) at their factory.
- ii. At the hands of their supplier, the CFO would be initially filtered with activated carbon to remove certain impurities and odour and charged inside the process tanks. In the process tanks the CFO which are long carbon chained TG, which are bonded with are treated with a mix of ethanol and potassium hydroxide (KOH). In this process, the KOH, which is a catalyst, helps the glycerol to get de-bonded from the long carbon chained TG and the ethyl molecule gets bonded in place of glycerol, thus forming Ethyl Esters. Free Fatty Acids (FFA) would then get converted into Ethyl Esters by subsequently charging with a stronger catalyst, viz, Sulphuric Acid (H_2SO_4), thus resulting in PFO. The de-bonded glycerol as well as catalytic elements viz, Potassium(K) & Sulphur(S) would

thereafter be separated as effluents and the resultant PFO would be supplied to them in tankers.

- iii. Upon receipt of the above mentioned PFO from the supplier, the same are pumped to the raw material storage tanks at their factory.
- iv. Subsequently, PFO is pumped from the above storage tanks in pipelines to Falling Film Evaporators (FFE), where the process of further purification and collection of fractions of Eicosapentaenoic Acid (EPA) and Docosahexaenoic Acid (DHA) of differential concentrations takes place.
- v. These oil fractions with differential concentration are thereafter charged into the main mixing vessel, in desired proportions, along with very small portions (less than 0.1%) of anti-oxidants like Mixed Tocopherol, Vitapherole, Tertiary butylhydroquinone (TBHQ) which are intended to protect the final products, viz, EE from possible oxidation and resultant discoloration, when agitation happens resulting in finished product of desired concentration of EPA/DHA. This final product would be once again tested at their in-house laboratory for both concentration percentage of EPA/DHA as well as other standards of FSSAL. Thereafter, the final product, EE is collected in containers of various sizes (190/25/10 kgs), labelled

and dispatched to the end customers along with the above certificates.

3.2 The Ld. Advocates have assailed the various allegations raised in the Show Cause Notice which have been confirmed in the impugned order on the following grounds.

3.3.1 With respect to the allegation that EE is a synthetic version of chemically modified fish oil, the counsels would submit that, the process undertaken by them is a simple fractional distillation using heat and vacuum. Further, the main processing of the CFO to PFO is taking place at the hands of their supplier. Assuming without admitting that, if at all there is any chemical modification, the same could have happened only at the hands of their supplier, where the CFO is converted into PFO. It was also impressed that, the classification of the PFO under CETH 1504 20 20 of CETA, at the hands of their supplier remains undisputed till date. That being so, without proposing any change of classification of the PFO, on the contrary, accepting the classification of PFO under CETH 1504 20 20 at the supplier's end, proposing any change in classification at the hands of the Appellants would be

nothing but an inherent contradiction and render the allegation *void ab initio*, for want of logic, reasoning and legality.

3.3.2 Reliance was placed on the decision of the Supreme Court in the case of *Delhi Cloth & General Mills Co. Ltd. [1962 (10) TMI SC]*, wherein, the Hon'ble Apex Court has laid down the ratio with respect to the essential ingredients to constitute a manufacture and consequential change in tariff classification, the three cardinal tests to constitute a manufacture are, change in name, use and character. In the instant case, the process undertaken by them is only further purification and concentration of EPA/DHA, which would not answer the above tests as laid down by the Supreme Court to constitute a "manufacture", at the first place.

3.4.1 With respect to the allegation that the "FFA" are excluded by Chapter Note 1(e) of Chapter 15 of CETA, the Ld. Advocates would submit that, what has been excluded *vide* the said Chapter Note 1(e) are Fatty Acids falling under Section VI of CETA but the product in question are not "Fatty Acids" *per se*, but a Fish Oil (EE) containing Fatty

Acids. It is further submitted that as per Chapter Note 1(a) of Chapter 29, only "separate chemically defined organic compounds, whether or not containing impurities" are classified under Chapter 29 of CETA, whereas the products in question, mainly EE are not separate chemically defined compounds, a fact duly taken cognizance of in the impugned Order-in-Original itself (Para 30.5 of the OIO No. 42 & 43/2016-Commr. dated 29.09.2016), and hence the exclusion of "Fatty Acids" under Chapter Note 1(e) of Chapter 15 has no application, whatsoever, to the goods in hand.

3.4.2 Reference is also drawn to the Explanatory Notes of the HSN with respect to Heading 1504 and 1516, wherein, inter-esterified/trans-esterified fats and oils are squarely covered under Chapter 15. Thus, it was urged that the allegation in the SCN as well as the confirmation in the impugned Orders, that Fatty Oils are excluded from Chapter 15 is incorrect which has comfortably ignored the vital fact that the impugned EE is a Trans - Esterified Fish Oil, which duly finds its place in Chapter 15 itself.

3.4.3 Further, it was also submitted that the observation of the Ld. Adjudicating Authority that EE are not technically Oil, based on Bailey's Industrial Oil and Fat Products (6th Ed.) (Para 29.5 of the Order-in-Original No. 42 & 43/2016-Commr. dated 29.09.2016) needs to be brushed aside, because of the very fact that the CFTRI test report relied by the Department itself conclusively holds that EE are "oil in nature".

3.4.4 With respect to the reliance placed on the 'nil' dated report of the CFTRI, the Ld. Counsels would submit that, at the outset, the integrity and authenticity of the CFTRI Report is itself in cloud, as the same has not been signed by any designated or approved authority of CFTRI. Further, a perusal of the said report would reveal that most of the values analysed and reported are totally irrelevant to determine the classification of the product in question. Further the report is also so bald without reference to any testing procedures adopted or to any scientific parameters. Notwithstanding its relevance, when the investigation has heavily relied on this report, to clarify and amplify, a cross examination was sought, which was denied without assigning any valid reason. Further it is submitted that even assuming without admitting, the said CFTRI Report does not

whisper or infer any finding, to classify the impugned goods under Chapter Heading 3824 or to take away the impugned products, *viz*, EE out of Chapter 15.

3.5 The Ld. Counsels would also assail the findings of the Ld. Adjudicating Authority placing reliance on Circular No. 81/2002 Cus. dated 03.12.2002 as completely erroneous and questioned the observation "The said Heading 3823 is now Chapter Heading 3824 of CETA, 1985."

3.6 The Ld. Counsels would also argue intensely against the invocation of larger period of limitation in the current proceedings. In this connection they would submit the following: -

- i. The Appellants have been manufacturing the impugned goods, *viz*, EE since 2003, a fact duly taken cognizance of, during the entire proceedings. It is also a fact on record that the Appellants have registered itself with the Department since 2006, for various other goods manufactured and cleared by them which are under the Central Excise umbrella. It is also a fact that the said goods, *viz*, EE has been

reported in all the statutory records and returns, which would demonstrate that there is no intention to evade any statutory levies, which would not render them liable for invocation for larger period and its consequential penalty.

- ii. Reference is drawn to Test Memo No. 01/2004-2005 dated 03.09.2004, whereby, way back in 2004, samples of the impugned goods were drawn by the Department and were sent for testing. When the above said fact was presented before the Adjudicating Authority, the same was dismissed by his casual finding that, *"However I find that they have not furnished copies of any of the documents in support of their claim. Further, the noticee has not stated the reasons for which samples were taken, the authorities to whom the samples were sent and the results of the testing."* (Para 31.2 of the Order-in-Original No. 42 & 43/2016-Commr. dated 29.09.2016). The above finding of the Ld. Adjudicating Authority is completely incorrect as the same was presented in their reply dated 02.11.2015.
- iii. Reliance is also placed on Notification No. 11 (RE-2013/2009-2014) dated 22.04.2013 issued by DGFT wherein it has been clearly mentioned that, fish oils having EPA/DHA content of more than 5% by weight

will merit classification under Chapter Heading 1504. It remains undisputed that all the goods cleared by Arjuna has EPA/DHA content is more than 5% by weight. When the Department governing the Imports and Exports themselves classify Fish Oil having EPA/DHA content more than 5% by weight under Chapter Heading 1504, it is a reasonable presumption that the Appellants cannot be attached with any motive or reason for classifying EE under CETH 1504.

- iv. Reliance is placed on the decision of the Supreme Court in *Nizam Sugar Factory [2006 (197) ELT 465 (SC)]* where the Court held that the allegation of suppression of facts against the Appellants cannot be sustained, when the first Show Cause Notice was issued all the relevant facts were in the knowledge of the Authorities.

4.1 The Ld. Authorised Representative Shri Anoop Singh argued for the Revenue and affirmed the findings in the impugned order. He has submitted that fish oil in raw form is of triglycerides which cannot be fractionated under FFE distillation. As the Appellants were not in a position of esterification facility in their premises and they receive raw material fish oil in ethyl ester form and the esterification

process is completed at the supplier's end. Further, he has stated that they receive raw material in the form of ethyl ester with low percentage of EPA and DHA and clear enriched fish oil ethyl ester which is nothing but mixture of fatty acids with refined EPA and DHA.

4.2 He has contended that Note 1(e) of Chapter excludes fatty acids or other goods covered under Section VI of the Central Excise Tariff Act and as the product been obtained after trans-esterification process, the product's classification under CETH 1504 is excluded and is more appropriately classifiable under CETH 3824. He has submitted that ethyl ester fish oil supplements with high concentration of EPA & DHA are different from triglycerides fish oil supplements / typical natural form with low concentration of EPA/DHA. The product is only fatty acid ethyl ester with higher concentration of EPA & DHA after undergoing the processes like esterification / trans-esterification / enrichment / distillation / blending / oxidation, etc. He has put forth that there is no merit in Appellants' argument that the Department has been accepting the classification for over eleven years and has now taken a somersault and that too without submission of legally valid reasons like Advance Ruling / Approved

Classification lists, etc. On the issue of cross examination of the Officials, the Ld. Authorised Representative has placed his reliance on *Malaram Bishnoi Vs. Commissioner of Customs, Chennai [2024 (11) TMI 1354-CESTAT Chennai]* in support of the stand taken by the Ld. Adjudicating Authority for denying the cross examination.

4.3 He also referred to the purchase order placed by one of their customers, M/s. Maneesh Pharmaceuticals Ltd., wherein it has been mentioned 12% against Excise duty and in spite of the same, the Appellants had paid only 2%, by misclassifying the goods under Heading 1504 instead of Heading 3824, thereby evading payment of duty with knowledge which warrants invocation of larger period. In their counter, the Ld. Counsels would submit that, if the above argument of the Department has to be considered, then the adoption of classification would be dependent on the purchase order placed by the customers and in the instant case, all their other customers have mentioned 2% Excise Duty only.

5. Heard both sides and considered the submissions and available evidence in records.

6. The product in question is an Esterified Fish Oil, processed by the Appellants to obtain Omega-3 concentrates, which are used / sold for human consumption as a food supplement after further preparation at their buyer's end. While the Appellants seek to classify their final product under CETH 1504 2020/1504 2090, the Department seeks to reclassify under CETH 3824 9090.

7. The foundation of the Appellants argument is that the process undertaken by them is a simple purification and fractionalization of the Purified Fish Oil (PFO) received by them from their suppliers and the process undertaken by them does not constitute "any manufacture". It is their case, when the classification of the PFO supplied by their suppliers is being accepted under Chapter Heading 1504, there is no reason for any change in classification at their end, primarily when there is no manufacturing activity at their end. In this context, they have taken us through the end-to-end process undertaken by them and have also

placed reliance on the judgement in the case of *Delhi Cloth & General Mills Co. Ltd. supra.*

8. It is the main contention of the Appellants that, when the classification of the raw material received from the supplier remains undisputed under CETH 1504 and when the process undertaken by them would not constitute any change in name, character or use, there cannot be any change in classification at their hands. We are not able to subscribe to this view for the reason that, once we have held that the goods are liable for excise duty at the hands of the Appellants, an independent assessment has to be done with respect to classification also at their end. Though, *prima facie*, the arguments of the Appellants may buy reason, a proper appreciation of the classification becomes pertinent.

9. Further, it is not in dispute that the raw materials received by the Appellants are already esterified at the supplier's end. On receipt of such esterified fish oil, the Appellants engage in a process which increases the concentration of Omega-3 content by vacuum distillation, to obtain the same esterified fish oil but with variable and

desired concentrations. Further the Appellants also add some anti-oxidants to avoid the product getting oxidised till its further consumption. Though the activity undertaken by the Appellants may not constitute a characteristic "manufacture", resulting in a new name, character and use as contemplated under the *Delhi Cloth & General Mills Co. Ltd. supra*, it appears that, under Chapter 15, any activity undertaken would constitute a deemed manufacture, thus making the impugned goods liable for excise duty on account of the process undertaken by them at their end. Hence, we are of the view that, the process undertaken by the Appellants would constitute a "manufacture" at the hands of the appellant. Now, the moot question is whether such deemed manufacture warrants any change in classification and if so, whether the same are liable to be classified either under CETH 1504 as contended by the appellant or CETH 3824 as contended by the Revenue.

10. For ease of reference, the following Headings of Central Excise Tariff and HSN are reproduced hereunder: -

Chapter Heading 1504

1504	FATS AND OILS AND THEIR FRACTIONS, OF FISH OR MARINE MAMMALS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED		
1504 10	-	<i>Fish liver oils and their fractions:</i>	
1504 10 10	---	Cod liver oil	kg. 6%
	---	<i>Other:</i>	
1504 10 91	----	Squid liver oil	kg. 6%
1504 10 99	----	Other	kg. 6%
1504 20	-	<i>Fats and oils and their fractions of fish, other than liver oils:</i>	
1504 20 10	---	Fish body oil	kg. 6%
1504 20 20	---	Fish lipid oil	kg. 6%
1504 20 30	---	Sperm oil	kg. 6%
1504 20 90	---	Other	kg. 6%
1504 30 00	-	Fats and oils and their fractions, of marine mammals	kg. 6%

Chapter Heading 1516

1516	ANIMAL OR VEGETABLE FATS AND OILS AND THEIR FRACTIONS, PARTLY OR WHOLLY HYDROGENATED, INTER-ESTERIFIED, RE-ESTERIFIED OR ELAIDINISED, WHETHER OR NOT REFINED, BUT NOT FURTHER PREPARED		
1516 10 00	-	Animal fats and oils and their fractions	kg. 6%
1516 20	-	<i>Vegetable fats and oils and their fractions:</i>	
	—	<i>Cotton Seed oil :</i>	
1516 20 11	—	Edible grade	kg. 6%
1516 20 19	—	Other	kg. 6%
	—	<i>Groundnut oil:</i>	
1516 20 21	---	Edible grade	kg. 6%
1516 20 29	---	Other	kg. 6%
	---	<i>Hydrogenated castor oil (opal-wax):</i>	
1516 20 31	---	Edible grade	kg. 6%
1516 20 39	---	Other	kg. 6%
	---	<i>Other:</i>	
1516 20 91	----	Edible grade	kg. 6%
1516 20 99	----	Other	kg. 6%

"

CHAPTER 15

**Animal or vegetable fats and oils and their cleavage
products; prepared edible fats; animal or vegetable
waxes**

NOTES:

1. *This Chapter does not cover:*

- (a) pig fat or poultry fat of heading 0209;*
- (b) cocoa butter, fat or oil (heading 1804);*
- (c) edible preparations containing by weight more than 15% of the products of heading 0405 (generally Chapter 21);*
- (d) greaves (heading 2301) or residues of headings 2304 to 2306;*
- (e) fatty acids, prepared waxes, medicaments, paints, varnishes, soap, perfumery, cosmetic or toilet preparations, sulphonated oils or other goods of Section VI; or*
- (f) factice derived from oils (heading 4002).*

1504 FATS AND OILS AND THEIR FRACTIONS, OF FISH OR MARINE MAMMALS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED

1516 ANIMAL OR VEGETABLE FATS AND OILS AND THEIR FRACTIONS, PARTLY OR WHOLLY HYDROGENATED, INTER-ESTERIFIED, RE-ESTERIFIED OR ELAIDINISED, WHETHER OR NOT REFINED, BUT NOT FURTHER PREPARED

15.04-Fats and oils and their fractions, of fish or marine mammals, whether or not refined, but not chemically modified.

1504 10 - *Fish-liver oils and their fractions*

1504.20 - *Fats and oils and their fractions, of fish other than liver oils*

1504.30 - Fats and oils and their fractions, of marine mammals

This heading covers fats and oils and their fractions derived from several varieties of fish (cod, halibut, menhaden, herring, sardines, anchovy, pilchard, etc.) or marine mammals (whales dolphins, seals, etc).

They are extracted from the body or liver of the fish or marine mammal or from waste thereof. They usually have a characteristic fishy smell and a disagreeable taste and vary in colour from yellow to reddish-brown. Cod liver and halibut liver and other fish liver yield oils with a high content of vitamins and other organic substances.

They are, therefore, chiefly used in medicine. These oils remain in this heading whether or not their vitamin content has been increased by irradiation or otherwise, but they fall in Chapter 30 when put up as medicaments, or emulsified or containing other substances added with a view to therapeutic use.

This heading also includes "fish stearin", a solid product obtained by pressing and decanting chilled fish oil. It is a yellowish or brown substance smelling of fish, and is used for the preparation of degreas, lubricants and low-grade soap. The fats and oils derived from fish or marine mammals remain in this heading when refined, but are excluded if partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised (heading 15.16)

15.16 Animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, inter-

esterified, re-esterified or elaidinised, whether or not refined, but not further prepared.

1516.10-Animal fats and oils and their fractions

1516.20-Vegetable fats and oils and their fractions

This heading covers animal or vegetable fats and oils, which have undergone a specific chemical transformation of a kind mentioned below, but have not been further prepared. The heading also covers similarly treated fractions of animal or vegetable fats and oils.

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(B) Inter-esterified, re-esterified or elaidinised fats and oils.

(1) Inter-esterified (or trans-esterified) fats and oils. *The consistency of an oil or fat can be increased by suitable rearrangement of the fatty acid radicals in the triglycerides contained in the product. The necessary interaction and rearrangements of the esters is stimulated by the use of catalysts."*

11. It is not in dispute that, the product in question is an Esterified Fish Oil / Ethyl Esters. As per the submissions of the appellants, esterification is a chemical modification by treating crude fish oil with Ethanol and Potassium Hydroxide resulting in esterified fish oil. So chemical modification takes place on account of esterification process. We note that such chemical

modification happens at the supplier's end, which is also an undisputed fact. Chapter heading 1504 classifies fish oils and their fractions **which are not chemically modified**. That be so, the esterified fish oil supplied by their suppliers to the Appellants cannot merit classification under CETH 1504, at the first place. Thus, the classification adopted by the Appellants for the impugned products under Chapter Heading 1504 is held to be incorrect.

12. However, we find that the Appellants have referred to alternate classification under CETH 1516 1000, which needs to be looked into. A perusal of the Explanatory Notes of the HSN to CETH 1516 *supra*, would reveal that trans-esterified fats and oils, where the consistency of such fatty oils has been increased by suitable rearrangement of the fatty acid radicals in the triglycerides are rightly classified under Chapter Heading CETH 1516. The above fits exactly to the product in question which is further fortified by the findings in the impugned order, taking cognizance of the above and that the impugned goods are resultant products of trans-esterification. (Ref: Para 30.2 of the impugned order).

13. Reference is also drawn to the Classification Rulings of the Harmonised System Committee 60th session-

held in October 2017, wherein the product in question has been considered for appropriate classification. After considering the classification with respect to their Harmonised System code numbers and also classification rationale, the Committee has held the following: -

Classification Rulings – HS Committee 60th Session

The following list contains the classification decisions (other than those subject to a reservation) taken by the Harmonized System Committee (60th Session – October 2017) on specific products, together with their related Harmonized System code numbers and, in certain cases, the classification rationale.

Advice
Parties seeking to import or export merchandise covered by a decision are advised to verify the implementation of the decision by the importing or exporting country, as the case may be.

No	Product description	Classification	HS codes considered	Classification rationale
1.	Blanched green shell mussels. The product is obtained by subjecting green shell mussels which have been partially shelled (half-shell) to a blanching/ thermal treatment process in order to open the shell . The partially shelled (half shell) is then frozen and packed. The retail package is labelled "Cook before consumption"	0307.32	03.07 and 16.04	GIRs 1 and 6.
2.	Quinoa, normally used for human consumption, which has undergone the removal of the saponin layer after harvest. The saponin layer is removed by washing, mechanical processing or by a combination of both. However, the shape of quinoa which has undergone washing or mechanical processing is not different from that of the original grain. Accordingly, the method used to remove the saponin layer is not discernible solely by the shape of the quinoa grain.	1008.50	10.08 and 11.04	GIRs 1 and 6
3.	Powder of konjac tuber consisting of 87.5 % by weight of glucomannan, 8.9 % by weight of moisture, and 1.6 % by weight of ash.	1212.99	12.12 and 13.02	GIRs 1 and 6
4.	The product is refined and modified fish oil from anchovies, with vitamin E (tocopherol) added as an antioxidant. The oil is highly concentrated omega-3 fatty acids EPA (eicosapentaenoic acid) and DHA (docosahexaenoic) bound in the form of triglycerides (400 mg/g of product and 300 mg/g of product, respectively). The triglycerides constitute 90 % of the product, and the remaining 10 % of the ingredients consists mainly of mono- and diglycerides. The product is exported in barrels and will be used in the manufacture of food supplements.	1516.10	15.04, 15.16 and 21.06	GIRs 1 and 6

14. A perusal of the above would reveal that the impugned goods are brought out in Sl.No. 4 of the above Opinion where the fish oils, refined/modified and added with anti-oxidants (9 tocopherol) with greater concentrations of Omega-3 fatty acids (EPA/DHA) and bound with TG with residual mono/di-glycerides are classified under Chapter Heading 151610.

15. Thus, we are of the considered opinion that impugned goods would merit classification under CETH 1516 1000, at the hands of the Appellants, (even at the hands of the supplier).

16. Having held the classification of the impugned goods under CETH 1516, we shall also examine the classification proposed by the Revenue under Chapter Heading 3824.

17. The main contention of the Revenue is that "Fatty acids" are excluded from the overview of Chapter 15 as per Chapter Note 1(e). As rightly contended by the Appellants, the exclusion of fatty acids as per Chapter Note 1(e) of Chapter 15 are only "Fatty acids" *per se* and also

falling under Chapter Heading Section VI, whereas the impugned products are not "fatty acids" simpliciter but fish oils containing fatty acids. Further the impugned goods are also not separate chemically defined compounds (Ref: Para 30.5 of the impugned order) as only the fatty acids of Section VI are excluded from Chapter 15, for which, the goods should be separate chemically defined compounds, which is not the case here.

18. Further, we also agree with the observation of the Ld. Adjudicating Authority that impugned goods are not technically Oil, based on Bailey's Industrial Oil and Fat Products (6th Ed.) but it is irrelevant and contradictory to the CFTRI test report relied by the Department in the proceedings. We are also not expressing any views on the CFTRI test report sought to be relied as the same has no relevance or impact and also that the same has not provided any support to the Revenue in terms of their proposed classification under Chapter 3824. It is not understood as to how CFTRI's test report has played any role or thrown any light in determining the classification of impugned goods.

19. With reference to the reliance placed on Circular No. 81/2002-Cus dated 03.12.2002, we find that the Circular is about a totally different product and reliance is also totally out of place and doesn't lend any support to the case of the Revenue as it pertained to classification of palm stearin which is specifically mentioned at CETH 382311. We find that the Ld. Adjudicating Authority relying on the Circular No. 81/2002-Customs dated 03.12.2002 has arrived at the conclusion that the impugned products *viz.*, Enriched Omega 3 Fatty Acid (Fish Oil - Ethyl Ester) and Enriched Omega 3 Fatty Acid-Powder (Fish Oil - Ethyl Ester-Powder) are more appropriately classifiable under heading 3823 adopting the similar logic for classification of Palm Stearin which is incorrect and illogical. Chapter Heading No. 3823 covers industrial monocarboxylic fatty acids; Acid oils from refining and Industrial monocarboxylic fatty acids. This heading also covers stearic acid and oleic acid. HSN Explanatory Notes explains that Heading 3823 includes commercial stearic acid. The Circular clearly distinguished as to which type of palm stearin was classifiable under CETH 1511 and which other type is classifiable under CETH 3823. Chapter Heading 1511 is basically triglycerides (Esters) of fatty acids and stearin was classifiable under 3823 which is basically a free fatty acid. The triglycerides of fatty acids (Esters) are two different organic compounds

and distinguished by determining the ester value. While triglycerides possess the ester values, free fatty acids do not possess the same. For ease of reference, Chapter Heading 3823 and 3824 are extracted below: -

Chapter Heading 3823

3823	INDUSTRIAL MONOCARBOXYLIC FATTY ACIDS; ACID OILS FROM REFINING; INDUSTRIAL FATTY ALCOHOLS		
	- <i>Industrial monocarboxylic fatty acids; acid oils from refining:</i>		
3823 11	-- Stearic acid:		
	--- Palm stearin:		
3823 11 11	---- Crude	kg.	16%
3823 11 12	---- RBD	kg.	16%
3823 11 19	---- Other	kg.	16%
3823 11 90	--- Other stearic acid or stearin	kg.	16%
3823 12 00	-- Oleic acid	kg.	16%
3823 13 00	-- Tall oil fatty acids	kg.	16%
3823 19 00	-- Other	kg.	16%
3823 70	- <i>Industrial fatty alcohols:</i>		
3823 70 10	--- Cetyl alcohol	kg.	16%
3823 70 20	--- Lauryl alcohol	kg.	16%
3823 70 30	--- Oleyl alcohol	kg.	16%
3823 70 40	--- Stearyl alcohol	kg.	16%
3823 70 90	--- Other	kg.	16%

Chapter Heading 3824

3824	PREPARED BINDERS FOR FOUNDRY MOULDS OR CORES; CHEMICAL PRODUCTS AND PREPARATIONS OF THE CHEMICAL OR ALLIED INDUSTRIES (INCLUDING THOSE CONSISTING OF MIXTURES OF NATURAL PRODUCTS), NOT ELSEWHERE SPECIFIED OR INCLUDED		
3824 10 00	- Prepared binders for foundry moulds or cores	kg.	12%
3824 30 00	- Non-agglomerated metal carbides mixed together or with metallic binders	kg.	12%
3824 40	- <i>Prepared additives for cements, mortars or concretes:</i>		
3824 40 10	--- Damp proof or water proof compounds	kg.	12%
3824 40 90	--- Other	kg.	12%
3824 50	- <i>Non-refractory mortars and concretes:</i>		
3824 50 10	--- Concretes ready to use known as "Ready-mix Concrete (RMC)"	kg.	6%
3824 50 90	--- Other	kg.	12%

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3824 79 00	-	Other	kg.	12%
	-	<i>Mixtures and preparations containing oxirane (ethylene oxide), polybrominated biphenyls (PBBs), polychlorinated biphenyls (PCBs), polychlorinated terphenyls (PCTs) or tris (2,3-dibromopropyl) phosphate :</i>		
.....				
3824 90	-	Other:		
	---	<i>Ammoniacal gas liquors and spent oxide produced in coal gas purification, case hardening compound, heat transfer salts; mixture of diphenyl and diphenyl oxide as heat transfer medium, mixed polyethylene glycols; salts for curing or salting, surface tension reducing agents;</i>		
3824 90	-	Other:		
	---	<i>Ammoniacal gas liquors and spent oxide produced in coal gas purification, case hardening compound, heat transfer salts; mixture of diphenyl and diphenyl oxide as heat transfer medium, mixed polyethylene glycols; salts for curing or salting, surface tension reducing agents;</i>		
....				
....				
3824 90 17	----	Surface tension reducing agents		
	---	<i>Electroplating salts; water treatment chemicals; ion exchanger; correcting fluid; precipitated silica and silica gel; oil well chemical:</i>		
3824 90 26	----	Oil well chemicals		
	---	<i>Mixture containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens other than chlorine and fluorine; ferrite powder; capacitor fluids – PCB type; dipping oil for treatment of grapes; Poly brominated biphenyls, poly chlorinated biphenyls, Poly</i>		
		<i>chlorinated terphenyls, crocidolite; goods of a kind known as "hazardous waste"; phosphogypsum :</i>		
3824 90 31	----	Mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens other than chlorine and fluorine	kg.	12%
3824 90 32	----	Ferrite powder	kg.	12%
3824 90 33	----	Capacitor fluids – PCB type	kg.	12%
3824 90 34	----	Dipping oil for treatment of grapes	kg.	12%
3824 90 35	----	Poly brominated biphenyls, poly chlorinated biphenyls, poly chlorinated terphenyls, crocidolite	kg.	12%
3824 90 36	----	Goods of a kind known as "hazardous waste"	kg.	12%
3824 90 37	----	Phosphogypsum	kg.	12%
3824 90 38	----	Phosphonic Acid, Methyl-compound with (aminoimino methyl) urea (1:1)	kg.	12%
3824 90 90	----	Other	kg.	12%

20. The Ld. Adjudicating Authority has observed as follows *vide* Para No. 30.06 of the Order-in-Original Nos. 42&43/2016-Commr. dated 29.09.2016 on the justification for classification of impugned products viz., enriched Omega 3 fatty acid (Fish oil-Ethyl Ester) under CETH 38249090 of Central Excise Tariff Act, 1985.

"30.6 In view of the above findings, it is proved that Fish oil Ethyl Ester is classifiable under 38249090 of the Central Excise Tariff as "chemical products and preparation of chemical or allied industries, not elsewhere specified or included". Further, by application of the General Rules of Interpretation of Central Excise Tariff, it is confirmed that the fish oil ethyl ester, is most appropriately classifiable under 382490 of the CE Tariff. It is also seen from para 4 of Board's Circular No. 81/2002-Cus. dated 03.12.2002 (which deals with the subject of classification of Palm Stearin) wherein it is clarified that, as regards the then heading 38.23 which covers industrial mono carboxylic fatty acids, the olein and stearin described thereunder are mixed fatty acids mainly palmitic, stearin, oleic acid etc., obtained by splitting of natural fats and oils by means of hydrolysis or saponification and then by crystallization and separation, are composed of mixtures of fatty acids are classifiable under heading 3823 of CETA 1985. The said heading 3823 is now Chap.3824 of CETA, 1985."

21. After examining the Tariff Entries, Section and Chapter Notes duly aided by HSN, Chapter 15 of the First Schedule of the Customs Tariff Act, 1975 deals with "Animal

or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes". The products derived from fats or oils and residues resulting from the treatment of fatty substance or of animal or vegetable waxes merits classification under Chapter 15. Further, it is also specifically mentioned in the notes to Heading 1504 that the fats and oils derived from fish or marine mammals remain in this heading when refined, but are excluded if partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised which come under CETH 1516. This clearly indicates that when the fats and oils derived from fish oil undergoes the process of esterification, it merits classification under Heading 1516.

22. Heading 1516 deals with "Animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised, whether or not refined, but not further prepared." The impugned products i.e., Enriched Omega 3 Fatty Acid (Fish Oil - Ethyl Ester) and Enriched Omega 3 Fatty Acid-Powder (Fish Oil - Ethyl Ester-Powder) are products of the process of refining of fish oil which has undergone processes of trans-esterification and distillation but not processed further. Therefore, these goods appear to merit

classification under Heading 1516 and specifically under sub-heading 1516 10 as provided in the notes to HSN.

23. Further, we are of the view that there is nothing in the relevant mandate of the said chapter or section notes of Chapter 15 entries to take it out of the purview of Chapter 15 and classify it under a miscellaneous entry. The impugned products are obtained in the process when refined fish oil undergo trans-esterification and distillation to derive the resultant product Omega 3 concentrate. The Department has proposed classification under Tariff Entry 3824 for this product.

24. We find that Stearic acid, palm stearin, oleic acid and industrial fatty alcohols are classified under CETH 3823 as these are mentioned therein specifically. Chapter 38 deals with "Miscellaneous chemicals products". The title itself denotes that it is a grouping of residuary headings for those goods which cannot be more appropriately classified elsewhere. Further, Heading 3823 deals with "Industrial monocarboxylic fatty acids; and oils from refining; industrial fatty alcohols". The Adjudicating Authority's observation that CETH 3823 is now Chapter Heading 3824 of CETA,

1985 is factually incorrect as both the Headings deal with distinct products. Further, his reliance on the Board's Circular No. 81/2002-Cus dated 03.12.2002 on classification of Palm Stearin for classification of the impugned products cannot be supported.

25. The proposed classification of Enriched Omega 3 Fatty Acid (Fish Oil - Ethyl Ester) and Enriched Omega 3 Fatty Acid-Powder (Fish Oil - Ethyl Ester-Powder) under Heading 3824 by the Department does not appear to be correct. As already stated, Chapter 38 deals with "Miscellaneous Chemical products". The residuary chapter is meant for those goods which cannot be classified elsewhere. Heading 3824 deals with "Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included. The Hon'ble Supreme Court in the case of *Mauri Yeast India Pvt. Ltd. Vs. State of U.P.* [2008 (225) ELT 321 (SC)] has held that in interpreting different entries, attempts shall be made to find out as to whether same answers the contents of the basic entry and only in the event it is not possible to do so, recourse to the residuary entry should be taken by way of last resort. We

are also of the view that there is considerable force in the argument of the Appellants that Chapter Heading 3824 is primarily intended for industrial applications, whereas the impugned goods are for human consumption. Even, in terms of Rule 3 of General Rules for the Interpretation of the Tariff, the Heading which provides the most specific description shall be preferred to headings providing a more general description. In case of mixtures, composite goods consisting of different materials or different components, the goods are to be classified as if they consisted of the material or component which gave them their essential characteristics. Applying this Rule 3, the impugned goods are more appropriately classifiable under CETH 1516 1000 of CETA, 1985.

26. At this point, we like to refer to the decision of the Hon'ble Supreme Court in the case of *M/s. H.P.L. Chemicals Ltd. Vs. Commissioner of Central Excise, Chandigarh [2006 (197) ELT 324 (SC)]* which has held as follows, and the ratio of which is squarely applicable to the facts of the case on the issue of classification: -

"29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is

squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue. On the one hand, from the trade and market enquiries made by the Department, from the report of the Chemical Examiner, CRCL and from HSN, it is' quite clear that the goods are classifiable as "Denatured Salt" falling under Chapter Heading No. 25.01. The Department has not shown that the subject product is not bought or sold or is not known or is dealt with in the market as Denatured Salt. Department's own Chemical Examiner after examining the chemical composition has not said that it is not denatured salt. On the other hand, after examining the chemical composition has opined that the subject matter is to be treated as Sodium Chloride.

30. It has been held by this Court in number of judgments that burden of proof is on the Revenue in the matter of classification. In Union of India and Others v. Garware Nylons Limited and Others - 1996 (10) SCC 413, in Para 15 this Court held as under :-

"15. In our view, the conclusion reached by the High Court is fully in accord with the decisions of this Court and the same is justified in law. The burden of proof is on the taxing authorities to show that the particular case or item lit question is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority. Especially in a case as this, where the claim of the assessee is borne out by the trade enquiries received by them and also the affidavits filed by

persons dealing with the subject-matter, a heavy burden lay upon the Revenue to disprove the said materials by adducing proper evidence. Unfortunately, no such attempt was made. As stated, the evidence led in this case conclusively goes to show that Nylon Twine manufactured by the assessee has been treated as a kind of Nylon Yarn by the people conversant with the trade. It is commonly considered as Nylon Yarn. Hence, it is to be classified under Item 18 of the Act. The Revenue has failed to establish the contrary. We would do well to remember the guidelines laid down by this Court in Dunlop India Ltd. v. Union of India. AIR 1977 SC 597 at Page 607. In such a situation, wherein it was stated (AIR P. 607 SCC P. 254, Para 35) :-

"When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause."

31. Similarly, in *Hindustan Ferodo Limited v. Collector of Central Excise, Bombay*, 1997 (2) SCC 677, it is held in Para 4 as under :-

"It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed".

32. It was submitted by the learned Senior Counsel appearing for the Revenue that the goods were classifiable under Heading No. 38.23 (now 38.24) as "residuary products of chemical or allied industries not elsewhere specified or included" which was the last item covered by Heading No. 38.23. The said Heading No. 38.23 is only a residuary heading covering residual

product of chemical or allied industries "not elsewhere specified or included". In the present case since the goods were covered by a specific heading, i.e., Heading No. 25.01, the same cannot be classified under the residuary heading at all. This position is clearly laid down in Rule 3(a) of the Interpretative Rules set out above. As per the said Interpretative Rule 3(a), the heading which provides the most specific description shall be preferred to the heading providing a more general description. This position is also well settled by a number of judgments of this Court. Reference may be made to M/s. Bharat Forge and Press Industries (P) Ltd. v. Collector of Central Excise, Baroda, Gujarat - 1990 (1) SCC 532. It was observed in Para 4 inter alia as under :-

"4. The question before us is whether the Department is right in claiming that the items in question are dutiable under tariff entry 68. This, as mentioned already, is the residuary entry and only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry. In other words, unless the department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary item."

33. Similarly, in Dunlop India Ltd. v. Union of India & Others - 1976 (2) SCC 241, this Court held :-

"When an article has, by all standards a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. The question of competition between two rival classifications will however, stand on a different footing."

34. Looking from any angle it cannot be held that the subject product would fall under the sub-heading 38.34 (now 38.24). It would fall under the specific Heading 25.01 as has been claimed by the assessee/appellant in the classification list filed by it.

35. For the reasons stated above, these appeals are accepted and the impugned orders are set aside with consequential effects. Parties will bear their own costs."

27. In view of the forgoing, we conclude that the goods in question, shall merit classification under CETH 1516 1000 and not under CETH 3824 9090 as contended by the Revenue.

28. As now, it is a settled law that, where the classification proposed by the Department cannot be sustained, then irrespective of the fact as to whether or not the classification of the Assessee is proper, the same would prevail as held by the Hon'ble Apex Court in *Warner Hindustan Ltd. Vs. CCE [1999 (113) ELT 24 (SC)]* which was followed by the Tribunal in *Pepsico Holdings Pvt. Ltd. Vs. CCE [2019 (25) GSTL 271 (Tri. Mum.)]* wherein the Tribunal held that the classification proposed in the Bill of Entry will prevail when classification of the Revenue is found to be inappropriate. Further, the Hon'ble Supreme Court in

CC Vs. Sunrise Traders [2022 (382) ELT 23 (SC)] affirmed the decision of the Tribunal in *M/s. Sunrise Traders & Ors. Vs. CC (2022 (381) ELT (Tri. Ahmd.))* that when the classification proposed by the Department fails, the only course of action would be to sustain the classification adopted by the Assessee and accordingly we hold the classification adopted by the Appellants.

29. The Appellants have also fiercely contended against the invocation of the larger period of the limitation against them in the impugned proceedings. We are in complete agreement with the Appellant's contentions that there has neither been any suppression of facts nor any wilful mis-statement warranting invocation of such larger period of limitations.

30. As rightly contended by the Appellants, way back in 2004 itself, samples of the impugned goods have been drawn by the Department and were sent for testing *vide* Test Memo No. 01/2004-2005 dated 03.09.2004, a copy of the same produced by the Appellants before the Adjudicating Authority *vide* their reply dated 02.11.2015.

31. More so, it has been time and again held by various courts including the Supreme Court that invocation of larger period is a draconian provision and has to be invoked with caution. This is a case of classification involving interpretation, where we find any suppression/misstatement wanting to invoke larger period. When the Appellants have duly discharged their responsibility expected out of them by clearing the goods under the cover of an invoice, it is for the Department to establish any suppression of material facts to invoke the larger period. In the instant case, we see no such proof/evidence brought out by the Revenue. On the other hand, by drawing samples way back in 2004, the Department have got entire knowledge about the products in question. Hence, we are of the view that there cannot be any ground for the Department to invoke larger period under proviso to Section 11A nor impose any penalty under Section 11AC of the Central Excise Act, 1944. We are also surprised to note that even in the subsequent periodical notices, equal penalty has been imposed on the Appellants and a disproportionate penalty has been imposed on an employee. When the order itself fails both on merits as well as on limitations, all the consequent penalties including the penalty imposed on the employee stands vacated.

32. In view of the forgoing discussions, the impugned Orders-in-Original No. 42&43/2016-Commr. dated 29.09.2016 passed by the Commissioner of Central Excise, Customs & Service Tax, Coimbatore and Order-in-Appeal No. CMB-CEX-000-APP-10/2020 dated 23.03.2020 passed by the Commissioner of GST & Central Excise (Appeals) are not sustainable and ordered to be set aside. Ordered accordingly.

33. Thus, the appeals are allowed with consequential relief, if any, as per law.

(Order pronounced in open court on 11.03.2025)

Sd/-
(AJAYAN T.V.)
MEMBER (JUDICIAL)

MK

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)