

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

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PRINCIPAL BENCH – COURT NO. 4

**Customs Appeal No. 50750 Of 2021**

[Arising out of Order-in-Original No. 79/2020-21/CH/Principal Commissioner dated 24.03.2021 passed by the Principal Commissioner of Customs, New Delhi]

**M/s Avitech Nutrition Private Limited : Appellant (s)**  
GP 37, Sector 18, Udyog Vihar, Gurgaon

Versus

**Principal Commissioner of Customs : Revenue (s)**  
ACC Import, New Customs House, Near  
IGI Airport, New Delhi

**APPEARANCE:**

Shri Satinder Kaur, Advocate for the Appellant  
Shri Rajesh Singh, Authorized Representative for the Department

**CORAM :**

**HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)**  
**HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**FINAL ORDER No. 58487/2024**

Date of Hearing:10.05.2024

Date of Decision:02.09.2024

**HEMAMBIKA R. PRIYA**

The present appeal has been filed by M/s Avitech Nutrition Private Limited (hereinafter referred to as 'Appellant') against the Order-in-Original No. 79/2020-21/CH/Principal Commissioner dated 24.03.2021 passed by the Principal Commissioner of Customs, New Delhi wherein the demand of Rs. 76,39,881/- along with interest was confirmed and penalty of Rs. 5,00,000/- has been imposed.

2. The brief facts of the case are that the appellant had imported "Vitamin AD3 (1000:200) IU/G (Feed grade/Feed additive)" under 17 Bills of Entry valued at Rs. 13,32,15,012/- The importer classified the

impugned goods under CTH 2309-90-90 as 'Preparations of a kind used in animal feed' and cleared them on payment of BCD 20% and Nil IGST under S.No. 102 of Notification No. 02/2017-Integrated Tax Rate. During audit of records, it was observed that the goods imported were intermixture of vitamin A and vitamin D3 and derivatives of Vitamin A, thus are classifiable under CTH 2932100 which attract BCD @ 7.5%, Social Welfare Surcharge (SWS) 10%, IGST 18% [S. No 40 of Schedule-III notification No. 01/2017-Integrated Tax (Rate) dated 28.06.2017. Consequently, it was alleged that mis- classification of the imported goods had resulted in short levy of duty amounting to Rs. 76,39,881/-. The said importer in pre-notice Consultation proceedings stated that "Vitamin AD3 having active ingredient of Vitamin-A(1 lakh IU/gm and Vitamin D3 2lakh IU/gm) with carrier of organic matrix, inorganic matrix, preservative and Antioxidant, is render them suitable for the purpose of animal feeding alone. However, the department formed an opinion that the impugned goods are appropriately classifiable under CTH 29362100. Accordingly, a SCN dated 30.09.2020 was issued to the appellant demanding differential duty of Rs. 76,39,881/ along with interest as applicable. Thereafter, the matter was adjudicated by the Principal Commissioner of Customs vide Order-in-Original dated 24.03.2021 holding the classification under CTH 29362100 and confirming the said differential duty under section 28(1) of the Customs Act, 1962 and Penalty of Rs. 5,00,000/- under section 112(a)(iii). Aggrieved by the said order, the appellant is before us.

3. Learned Counsel for the appellant submitted that the issue of the correct classification of Vitamin AD3 has been determined in the following cases:-

- (i) **Hima Dye Chem Corporation vs. Commissioner of Customs, Mumbai (2018 SCC Online CESTAT 4109);**
- (ii) **BV Bio Corp Pvt. Ltd. vs. Commissioner of Customs (Customs Appeal No. 85017 of 2018);**
- (iii) **Chokhani Pharma Vet vs. Commissioner of Customs, Mumbai (1999 SCC Online CEGAT 2522).**

In these cases, Vitamin AD3 was correctly classified under CTH 23.02. The above judgements were based on the principles elucidated in the case of **Tetragon Chemie (P) Limited vs. Collector of Customs & Excise & Ors [1999 (63) ECC 709]** and **Commissioner of Central Excise, Pune vs. Abhi Chemicals and Pharmaceuticals Private Limited [AIR 2005 SC 1345]** which fully cover the present case.

3.1 The Ld. Counsel further submitted that the argument made by the revenue in that case was to distinguish *Tetragon Chemie* claiming that the product in the case of *Tetragon Chemie* consisted "of a mixture of vitamins, minerals and various other ingredients which was not similar to the product 'Recovit' as the same consists of only intermixtures of vitamins and, therefore, it is correctly classifiable under Chapter Sub-heading 2936.00 (emphasis added). However, the Supreme Court dismissed the appeal, and concluded that "products which have mixture of vitamins and minerals with addition of other ingredients and which are used for animal feed and are not fit for human consumption are to be classified as animal feed supplement under Chapter Sub-Heading 2302 and not under Chapter 29. The Learned Counsel further contended that it is evident that, for the classification of goods in the two competing entries, the relevant question is whether the goods are used for animal feeding or not. In arriving at this conclusion, the usage of the goods in trade needs to be

considered and, if there exists any ambiguity in the trade usage of the goods, only then the reference can be made to the technical literature of the goods. In the present case, a reference to trade usage and technical literature both unequivocally confirms that the impugned goods are used for animal feeding. In addition to the technical literature, the Id. Counsel also submitted that several documents had been placed before the Principal Commissioner to substantiate that the impugned goods are known as feed additives in common trade usage viz. Details of Imports of impugned goods into India, Purchase Orders placed in the Domestic Market and the documents issued by the Ministry of Fisheries, Animal Husbandry and Dairying, the Department of Animal Husbandry and Dairying under the aegis of the Ministry of Fisheries, Animal Husbandry, and Dairying. He contended that the Ministry issues consolidated lists, which included the impugned product Vitamin AD3 1000:200 for import as animal feed additives and supplements. Therefore, even governmental documents establish that the impugned goods are appropriate for use in animal feeding alone.

3.2 The Id. Counsel submitted that the Principal Commissioner considered the CBEC Circular No. 188/22/96-CX dated 26.03.1996, and had incorrectly interpreted that the circular applied only to animal feeds that contain vitamins in micro quantities. He submitted that the circular does not require that the vitamins should be present in micro-quantities only. The Learned Counsel further submitted that the Material Safety Data Sheets (MSDS) of its supplier Xiamen Kingdom way Vitamins Ltd clearly establishes that the impugned goods contain Vitamins to the tune of 53.2% and the remaining elements are various carriers, stabilizers, etc. The MSDS specifically notes that the impugned goods are suitable for animal feeding only and nowhere

does it state that the vitamins contained in the impugned goods retain their identity as independent chemicals. Therefore, the Ld. Counsel submitted that it is evident the impugned goods can only be used as feed additives and not as independent chemicals. Moreover, the Appellant also submitted the technical literature from other major manufacturers of Vitamin AD3. These also indicate the usage of these products as feed additives only. Ld. Counsel contended that the factual findings in the impugned order are mutually contradictory, contrary to the record, and therefore erroneous.

4. Learned Authorized Representative for the Revenue reiterated the findings in the impugned order and submitted as under:-

**Classification:** The goods in question, being an intermixture of Vitamins A and D3, is more precisely classifiable under CTH 29362100, which specifically covers provitamins and vitamins, natural or reproduced by synthesis, derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent. This specificity aligns with Rule 3(a) of the General Rules for the Interpretation of the First Schedule, which prioritizes the heading that provides the most specific description.

**Nature of the Product:** The impugned goods are primarily an intermixture of vitamins, intended for use as feed additives, not complete animal feed or fodder themselves. Chapter 23 covers products that have undergone processing to such an extent that they lose the essential characteristics of the original material, thereby becoming prepared animal fodder. However, the subject goods are not processed vegetable or animal material but are synthetic vitamins, thus aligning more closely with the descriptions in Chapter 29.

**Judicial Precedents and Legal Interpretation:** The reliance on the Tetragon Chemie case by the appellant does not directly apply due to the distinct nature of the products in each case. Tetragon Chemie dealt with premixes containing vitamins alongside a variety of other constituents already in the form of animal feed supplements. In contrast, the product in question is a specific intermixture of vitamins, without additional feed or mineral components, placing it squarely within the realm of Chapter 29 rather than Chapter 23. In support of his submission, learned AR relied upon the decision of **Hon'ble High Court of Allahabad in the case of Sonam International, reported at 2012 (275) E.E.T. 326 (All.)**.

**HSN Explanatory Notes and Chapter Notes Interpretation:** Ld. AR submitted that the HSN Explanatory Notes provide clarity on the exclusion of vitamins from Chapter 23, specifying that vitamins, whether or not chemically defined or intermixed, fall outside the scope of headings related to animal feed, especially when they do not alter the character of vitamins for general use. This distinction is crucial and supports the classification under Chapter 29, as the goods in question are vitamins with a specific use as feed additives, not general animal feed products.

4.2 Further, Id. AR submitted that the Chapter Heading 2309 is in the nature of a residuary heading as Chapter Note I to Chapter 23 says that the Heading 2309 includes products of a kind not elsewhere specified or included, whereas chapter sub-heading 2936 is a specific heading for vitamins and provitamins. As per the Rule 3(a) of General Interpretation Rules, the specific heading shall prevail over the general heading. In this regard, he relied upon the judgement of the **Hon'ble Supreme Court in the case of Dunlop India Ltd. & Madras**

**Rubber Factory Ltd. v. Union of India and Others reported in 2002-TIOL-647-SC-CUS-LB 1983 (13) E.L.T. 1566 (S.C.).** He further submitted that the appellant has placed reliance on the order of the Larger Bench of the Hon'ble Tribunal in the case of **Tetragon Chemie reported at 2001 (138) E.L.T. 414 (Tri. LB)** which was upheld by the Hon'ble Supreme Court as reported at **2001 (132) E.E.T. 525 (S.C.)**. However, the products in the present case (i.e. vitamins of high concentration which would be used in animal feed) is different from that of Tetragon Chemie (i.e. premixes of vitamins along with other constituents which was already in the final form of animal feed supplement). In view of above, the product do not contain mineral substance and only had intermixture of Vitamin A and D3 with certain solvent, stabilizer and antioxidant which is covered under Chapter note to heading 2936. In support of his submissions, Id. AR relied upon the following decisions:-

- **CCE, Calcutta v. Alnoori Tobacco Products reported at 2004-TIOL-85-SC-CX 2004 (170) E.L.T. 135 (S.C.).**
- **1983 (13) E.L.T. 1566 (S.C) DUNLOP INDIA LTD.**
- **MADRAS RUBBER FACTORY LTD. Versus UNION OF INDIA AND OTHERS**

4.3 In view of above submissions, Id. AR prayed that the appeal of the appellant may be dismissed and the impugned order may please be upheld.

5. We have heard the Ld. Counsel for the appellant and the Ld. AR for the department. The issue before us is whether the product Vitamin AD3 is liable to be classified under heading Customs Tariff Heading 2309 as claimed by the appellant or CTH 2936 as alleged by the department.

5.1 We note that the Ld Counsel has submitted that the said product is squarely covered by the Tribunal's decision in *Tetragon Chemie (P) Ltd & Ors vs CCE* [1993(63)ECC 709] which was upheld by the Hon'ble Supreme Court [2002 10 Supreme Court Cases 331]. It has been contended before us that the impugned order has attempted to distinguish *Tetragon Chemie* claiming that the product in the case of *Tetragon Chemie* consisted "of a mixture of vitamins, minerals and various other ingredients which was not similar to the product 'Recovit' as the same consists of only intermixtures of vitamins and, therefore, held it to be correctly classifiable under Chapter Sub-heading 2936.00.

5.2 In order to appreciate the submissions, we proceed to examine the goods imported by the appellant. We find that the appellant has imported goods, viz., 'Vitamin AD3'. We observe that as per the Material Safety Data Sheets (MSDS) of the supplier of the goods, M/s Xiamen Kingdom way Vitamins Ltd states that the impugned goods contain 53.2% Vitamins and the remaining elements are various carriers, stabilizers, etc. We proceed to examine the two competing headings, which is reproduced hereinafter:

**"2309 PREPARATIONS OF A KIND USED IN ANIMAL FEEDING:**

2309 10 00 - Dog or cat food, put up for retail sale

- 2309 90 - Other:

2309 90 10 í--- Compounded animal feed

2309 90 20 --- Concentrates for compound animal feed

--- Feeds for fish (prawn, etc.) :

2309 90 31 ---- Prawn and shrimps feed

2309 90 32 ---- Fish feed in powdered form

2309 90 39 ---- Other

2309 90 90 --- Other

**2936 XI. —PROVITAMINS, VITAMINS AND HORMONES**

**2936 PROVITAMINS AND VITAMINS, NATURAL OR REPRODUCED BY SYNTHESIS (INCLUDING NATURAL CONCENTRATES), DERIVATIVES THEREOF USED PRIMARILY AS VITAMINS, AND INTERMIXTURES OF THE FOREGOING, WHETHER OR NOT IN ANY SOLVENT -**

**Vitamins and their derivatives, unmixed:**

2936 21 00 -- Vitamin A and their derivatives”

5.3 In order to arrive at the correct classification of a product, it is imperative to also refer to the relevant Chapter notes and HSN Explanatory notes. It is seen that Chapter 23 of the Customs Tariff covers used and waste from the food industries; prepared animal fodder. The relevant Chapter note states that the heading 2309 includes **products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material, other than vegetable waste, vegetable residues and byproducts of such processing.** Therefore, in order to satisfy the requirements for classification under this chapter, it is imperative that product sought to be classified is obtained by processing of used/waste vegetable or animal material. We find that as per the Material Safety Data Sheets (MSDS) of the supplier of the goods, M/s Xiamen Kingdom way Vitamins Ltd states that the impugned goods contain 53.2% Vitamins and the remaining elements are various carriers, stabilizers, etc. There

is no mention of any used/waste vegetable or animal material. We also observe that the HSN explanatory notes to the heading 23.09 excludes vitamins, whether or not chemically defined or intermixed, whether or not in any solvent or stabilised by the addition of antioxidants, or anticaking agents, by adsorption on a substrate or by applying protective coating of, gelatin, faxes, facts, etc., provided that the quantity of such additives, substrate of coating does not exceed that required for preservation of transport and provided that such additives, substrates, or coating do not alter the character of the vitamins and not render them particularly suitable for specific use rather than for general use. The HSN explanatory notes for the heading 29.36 includes (a) intermixtures of vitamins, of pro-vitamins or of concentrates, such as, for instance natural concentrates of vitamin A and D in various proportions, to which an additional quantity of vitamin A or D has been added subsequently. With the above classification guidelines, we now consider the impugned goods. We once again note that as per the product data sheet reproduced in the impugned order, Vitamin AD3 is a product that contains Vitamin A and Vitamin D3, which are coated by gelatin, starch, and sugar and stabilised with an antioxidant. We note that the impugned goods are not obtained by processing vegetable or animal materials, for it to be classified in Chapter 23. Consequently, we opine that Chapter 29 specifically covers the impugned goods, as has been held in the impugned order.

5.4 The Ld Counsel has contended that the Supreme Court's decision upholding the Tribunal's decision in the case of Tetragon Chemie squarely covers their product. We note that in the judgment in the

case of Tetragon Chemie, the Tribunal held that pre-mixes including those containing mineral substances and vitamins or pro-vitamins are classifiable under CTH 23.09. In the instant case, we note that the product under question is not a pre-mix containing mineral substances/vitamins or pro vitamins, but is an admixture of Vitamin A & D3. We note that while Chapter 29 refers to separate chemically defined compounds, the Explanatory Notes to HSN includes pro-vitamins and vitamins which remain classified in chapter 29, even when they are not separate chemically defined compounds, whether or not in a solvent. We are of the opinion that even though vitamin products are intended to be used in animal feed preparations, they are not excluded from the ambit of Chapter 29 of Customs Tariff Act, 1975. Classification under specific entry under Chapter 29 is to be preferred over residuary classification under Chapter 23 in view of Rule 3A of General Interpretative Rules Accordingly, classification under Heading 2936 of Customs Tariff Act, 1975 is appropriate.

5.5 In the above context, we also note that Chapter heading 2309 is in the nature of a residuary heading as per chapter note 1 to Chapter 23. As per rule 3(a) of the General Interpretation Rules, specific heading shall prevail over the general heading. In this context we note that the Hon'ble Supreme Court in the case of Dunlop India Ltd and Madras Rubber Factory Ltd vs Union of India [2002 TIOL 647 SC] held as follows:

“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”.

5.5.1 We also note that the Hon’ble Supreme Court in the case of M/s Santosh Maize Industries Ltd [2023(385) ELT 814(SC)] in the context of Tamil Nadu VAT held that a specific entry will prevail over the general entry. This stand was reiterated by the Apex Court in the case of Videocon Industries as well [2023 (384) E.L.T. 628 (SC)]. Therefore, the Chapter heading 2936 being a specific heading will prevail over the residuary heading of Chapter 23.

5.6 Further, as per the Rule 1 of the General Rules of Interpretation, the classification of goods is to be determined according to the terms of the headings and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of Rule 1 and if the headings and legal notes do not otherwise require Rules 2 through 6 may be applied in order. HSN explanatory notes to Heading 2309 includes preparations for use in making the complete feeds or supplementary feeds. In the instant case, the Vitamin AD3 is to be mixed with an animal grade carrier, for it to be classifiable under Heading 2309. The HSN Explanatory notes to Chapter Heading 2936 also states that constituents of natural vitamins can be used in animal feed. In this context, we note that the Hon’ble Supreme Court in its judgment in the case of M/s Thermax Ltd Vs Commissioner of Central Excise, Pune [2022 (382) E.L.T. 442 (S.C.)] has highlighted the persuasive value of the HSN and held as follows:-

“6. The definition of a product given in the HSN should be given due weightage in the classification of a product for the purpose

of levying excise duty. This is because in the Statement of Objects and Reasons of the Bill leading to enactment of *Central Excise Tariff Act, 1985*, it was clearly stated that the pattern of tariff classification is broadly based on the system of classification derived from the *International Convention on the Harmonised Commodity Description and Coding System* (Harmonised System) with such contraction or modification thereto as are necessary, to fall within the scope of the levy of Central Excise duty. The tariff so suggested for the levy under the Indian Tariff Act is based on an internationally accepted nomenclature, in the formulation of which, all considerations, technical and legal, have been taken into account. This was done to reduce avoidable disputes on tariff classification. Besides, the tariff would be on the lines of the harmonized system. It was also borne in mind that the tariff on the lines of the harmonized system would bring about considerable alignment, between the Customs and Central Excise Tariffs, which in turn, would facilitate charging of additional customs duty on imports, equivalent of excise duty. It was therefore expressly stated in the Statement of Objects and Reasons that the Central Excise Tariff are based on the HSN and the internationally accepted nomenclature was as such taken into account, to reduce tariff classification disputes. **Thus, it was suggested that a safe guide for classification is the internationally accepted nomenclature emerging from the HSN and in case of doubt, the HSN should be chosen advisory for ascertaining the true meaning of any expression used in the Tariff Act.** In *Wood Craft* (supra), in the opinion written by Justice J.S. Verma, the following was pertinently opined in this context :

"12. ... .. Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN. This being the expressly acknowledged basis of the structure of Central Excise Tariff in the Act and the tariff classification made therein, in case of any doubt the HSN is a safe guide for ascertaining the true meaning of any expression used in the Act. The ISI Glossary of Terms has a different

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7. Commenting on the importance of taking guidance from HSN Classification and how a taxing statute should be construed in consonance with their commonly accepted meanings in the trade and popular sense, Justice Sanjiv Khanna in *D.L. Steels* (supra) also so correctly observed as follows :-

"9. The Harmonised System of Nomenclature, developed by the World Customs Organisation, has been adopted in India by way of the Customs Tariff Act, 1975, though there are certain entries in the Schedules to this Act which have not been assigned HSN

codes. The Harmonised System is governed by the *International Convention on Harmonised Commodity Description and Coding System*, which was adopted in 1983, and enforced in January, 1988. This multipurpose international product nomenclature harmonises description, classification, and coding of goods. While the primary objective of the HSN is to facilitate and aid trade, the Code is also extensively used by governments, international organisations, and the private sector for other diverse purposes like internal taxes, monitoring import tariffs, quota controls, rules of origin, transport statistics, freight tariffs, compilation of national accounts, and economic research and analysis. In the present times, given the widespread adoption of the Harmonised System by over 200 countries, it would be extremely difficult to deal with an international trade issue involving commodities, without adverting to the Harmonised System. The Code is the bedrock of custom controls and procedures. The HSN consists of over 5000 commodities groups, which are structured into 21 Sections and 97 Chapters, which are further divided into four and six digit sub-headings. Many custom administrations, like India, use an eight or more digit commodity coding system, with the first six digits being the HSN code.

10. Classification under the Harmonised System is done by placing the goods under the most apt and fitting sub-heading. This is done by choosing the appropriate Chapter, Heading, and sub-heading respectively. To facilitate interpretation and classification, each of the 97 Chapters in the HSN contain corresponding Chapter Notes, General Notes, and Explanatory Notes applicable to the Headings and sub-headings within that Chapter. In addition, there are six General Rules of Interpretation<sup>n</sup> applicable to the Harmonised System as a whole.

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12. We would, at this stage, take on record the well-settled principle that words in a taxing statute must be construed in consonance with their commonly accepted meaning in the trade and their popular meaning. When a word is not explicitly defined, or there is ambiguity as to its meaning, it must be

interpreted for the purpose of classification in the popular sense, which is the sense attributed to it by those people who are conversant with the subject matter that the statute is dealing with. This principle should commend to the authorities as it is a good fiscal policy not to put people in doubt or quandary about their tax liability. The common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law-maker. However, the above rule is subject to certain exceptions, for example, when there is an artificial definition or special meaning attached to the word in a statute, then the ordinary sense approach would not be applicable.”

5.6.1 It is important to note here that in the aforesaid judgment, the Supreme Court has reiterated the view that the HSN code is the bedrock of custom controls and procedures. It has also been held that as per the HSN, classification is done by placing the goods under the most apt and fitting sub-heading. Accordingly, in our view the impugned product is appropriately classifiable under CTH 2936.

5.7 We also take note of the fact that the chemical composition of the impugned goods is synthetic and the product is not derived out of processing of vegetable or animal material, in order to render its classification in Chapter 23. Further, it is seen that they serve a specific purpose as feed additives, which is also consistent with the goods described under CTH 29362100. Further, the presence of stabilizers, antioxidants, or solvents does not alter the vitamins' character but ensures their preservation and efficacy as feed additives, which is in line with the guidelines that additives should not exceed the quantity required for preservation or transport and should not alter the essential character of the vitamins.

5.8 It has also been submitted before us that in trade parlance and Industry, these items are regarded as animal feed. While trade parlance and market recognition as feed additives might suggest a classification under Chapter 23, however, the legal and technical criteria for classification direct the need for classification based on its chemical composition and the product's primary use. The role of the product as a vitamin intermixture for feed additive use, rather than as a direct feed ingredient, supports its classification under Chapter 29. In this context we note that the Hon'ble High Court of Allahabad in the case of Commissioner of Customs, CGO vs Sonam International [2012 (275) ELT 326 (All)] has held that vitamins of high concentration use for the manufacture of animal feed will be classifiable under CTH 29.36 only. The relevant paras of the judgment are reproduced hereinafter: -

**"126.** Emphasis has been given by the learned counsel for the respondent on the judgment of the Delhi Tribunal in the case of *Tetragon Chemie* (supra). In this case, the Tribunal considered the dispute with regard to animal feeding preparation consisting of one or more vitamins and nutrients mixed with diluent classified under Heading 2302 of CETA 1985. The Tribunal upheld the classification as animal feed supplement on the ground that Heading 2309 of HSN include sweetened forage and other preparation. Other preparations include preparations for supplementing farm-product feed and preparations for use in making the complete feeds. Vitamins or provitamins, amino acids, anti-biotics, coccidiostats, trace elements, emulsifiers, flavorings and appetizers are the ingredients of these preparations and since preparation are known in trade i.e., animal feeding they are known to the

users as preparation of a kind used for animal feeding and are so described.

**127.** Though the case of *Tetragon Chemie* (supra) does not seem to apply on the facts and circumstances of the present case, but it shall be appropriate to observe that presence of vitamin-E between 45-50% or 900.90 grams out of 100 grams, does not seem to cover by HSN Code 2309. More so when admittedly, the goods seized were *sent to industries in Maharashtra for manufacturing of animal feed supplement for animal feed*. In case goods imported itself were animal feed supplement as claimed, then there would have been no occasion to send the goods to utilise it for preparation of animal feed supplement. Virtually, the overwhelming presence of vitamin-E in the goods seized shows that deliberately, knowingly and intentionally, it was imported as vitamin-E and sent to various industries for *preparation of 'animal feed supplement' which has been virtually admitted by the witnesses*.

**128.** It has been admitted by the respondent's counsel that vitamin-E supplied by the respondent M/s. Sonam International, is used for making broiler premix, layer premix, SK bed, SK Mix, ABDK, etc. In case the goods in question for preparation would have been directly imported for use as animal feed supplement, then things would have been different and it could have been treated as HSN Code 2309. The Tribunal seems to be impressed by the word, "includes", under Chapter 23 of CETA. With regard to scope of heading 2302, by using the word, "includes", does not mean that language or words, used in heading 2936 may be given go-bye. Virtually by using the word, "includes", undoubtedly, the legislature provided in addition to preparation mentioned in heading 2302 products of a kind, used in animal feeding and processing may be included.

Inclusion does not mean that a product or goods because of overwhelming presence of an ingredients having independent existence, shall lose its identity. In the present case, though, vitamin-E may be used in preparation of animal feed supplement but because of such permissibility, the independent identity of vitamin-E shall not extinguish under the mask of animal feed supplement. In case, vitamin-E is not in proportionate to other ingredients necessary for the product of animal feed supplement, then in appropriate case even if some other materials are mixed, such goods may be categorised under heading 2936. The Tribunal seems to overlook this aspect of the matter.

**129.** We should not overlook the fact that the vitamin-E in animal feed supplement may be used in small quantity but its constituent should be in definite proportion to make it edible for cattle. Vitamin-E cannot be used upto 45-50% in the present case as animal feed supplement. Nothing has been brought on record by the respondent to establish that there are animal feed supplement containing vitamin-E to the extent of 45-50%. Rather from the evidence on record, it appears that the goods seized was sold to the industries in Maharashtra for preparation of animal feed supplement.

**130.** From the definition noted by the Tribunal in *Tetragon Chemie's* case (supra), under Customs Excise Tariff Act, 1985 or Rules framed thereunder, the animal feed supplement as defined under the Exemption Notification dated 15-2-1984, affirms this proposition. The definition as noted by the Tribunal, in *Tetragon Chemie's* case (supra), is reproduced as under :

“99. ...”animal feed supplement mean an ingredient or combination of ingredients added

to the basic feed mix or part thereof to fulfill the specific need usually used in micro-quantities and requiring careful handling and mixing” Further, “Animal feed Concentrates” means a feed intended to be diluted with other feed ingredients to produce a complete feed optimum nutrition balance.”

Thus, even if in view of the definition clause, the ingredients of animal feed supplement to the extent it relates to vitamins amino acids, antibiotics, coccidiostats, trace elements, emulsifiers, flavorings and appetizers etc., should be in minute quantity. This fact is evident from the evidence on record which shows that the goods seized by the appellant, were used in preparation of animal feed supplement in the industries (supra).

**131.** That is why, Chapter 23 under heading 2309 includes product of a kind used as animal feeding not elsewhere specified or included, obtained by processing vegetables or animal material to such extent that they have lost the essential characteristics of the original material, other than vegetable wastes, vegetables residues and by-product of such processing. Thus, note under Chapter 23 itself provides that the product under heading 2309 contains the preparation under heading 2309 which has lost their original identity or essential characteristics after mixed with other products while preparing animal feed supplement. The extent of 45-50% of vitamin speaks volume.

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133. The aforesaid proposition seems to be supported by Apex Court judgment relied upon by the respondent reported in 2001 (132) E.L.T. 525 (S.C.): Collector of Central Excise, Bangalore Vs. Tetragon Chemie P. Ltd. (supra), whereby, the Tribunal's

judgment was affirmed by Hon'ble Supreme Court. Their lordships while dismissing the appeal of Customs Department, affirming Tetragon Chemie's case (supra), observed that animal feed supplement were included in tariff item 2302 being preparation of a kind used in animal feeding including dogs and cats. Affirmation of judgment of Tetragon Chemie (supra by Hon'ble Supreme Court, is based on the fact that the issue before the Tribunal was with regard to assessment of 'animal feed supplement' under heading 2302. **In the present case, the product or goods seized were sent to Maharashtra in various industries including Baadar Schulz Laboratories as base material for preparation of animal feed supplement and admittedly, vitamin-E is used by the industries as base material along with other materials to prepare animal feed supplement.**

134. The case of Abhi Chemicals (supra), relied upon by the respondent's counsel, also relates to animal feed supplement where, Hon'ble Supreme Court held that vitamin mix with anti-oxidants, minerals, solvents, stabilizers, used as animal feed, is classifiable as animal feed supplement under heading 23.02 of Central Excise Tariff and not as inter-mixture of vitamins under sub-heading 2936.00. In the present case, the question with regard to inter-mixture of vitamin or of animal feed supplement but seizure of goods (vitamin-E) which is used as base material for preparation of animal feed supplement.

135. The case of Lalchand Bhimraj (supra), also relates to animal feed supplement where, final preparation was used as additives in animal feed. In the present case, the goods seized were sold to industries for manufacture of animal feed supplement as base material."

5.9 In the instant case, it is seen that as per the Material Safety Data Sheets (MSDS) of its supplier Xiamen Kingdom way Vitamins Ltd clearly establishes that the impugned goods contain Vitamins to the tune of 53.2% and the remaining elements are various carriers, stabilizers, etc. In view of the above factual position, we find no reason to differ from the impugned order with regard to the classification of Vitamin AD3 in Chapter 2936.

6. We also note that the decisions relied upon by the Id counsel have in turn relied on the judgment of the Supreme Court in the case of Tetragon Chemie, which has been distinguished in the impugned order, as well as by the aforesaid judgment of High Court of Allahabad.

7. We now address the submissions related to interest payment. We note that the adjudicating authority has confirmed the interest under Section 28AA of the Customs Act, 1962. We note that once the exigibility to tax is established, interest is payable, as per the statutory provision. We note that the Id counsel has submitted that interest is not liable to be paid as the duty was not liable to be paid. We do not agree with this contention. We note that in the case of Pratibha Processors v. Union of India 1996 (88) E.L.T. 12 (S.C.)- the Supreme Court held that "Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable'. Accordingly, we hold that as the differential duty demand is upheld, the demand of interest in the impugned order is correct.

8. We now address the issue relating to imposition of Rs 5,00,000/ as penalty. We hold that as there were several contrary decisions with regard to the classification of the said product Vitamin AD3 during the relevant time, there was confusion amongst the importers. Consequently, we hold that the imposition of penalty is not warranted in the instant case.

9. In view of the above discussions, we uphold the classification of Vitamin AD3 under CTH 2936 and uphold the demand along with interest confirmed in the impugned order. However, we set aside the penalty imposed on the appellant. Accordingly, we partially modify the impugned order to the extent indicated above, and the appeal is allowed partially to the extent indicated above.

*(Order pronounced in the open Court on 02.09.2024)*

**(DR. RACHNA GUPTA)**  
MEMBER (JUDICIAL)

**(HEMAMBIKA R. PRIYA)**  
MEMBER (TECHNICAL)

G.Y.