IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV

DATE OF HEARING : 10/01/2018.
DATE OF DECISION: 10/01/2018.

Customs Appeal No. 53498 of 2014

[Arising out of the Order-in-Appeal No. CC (A)/CUS/ICD/73/2014 dated 17/02/2014 passed by The Commissioner of Customs (Appeals), New Custom House, New Delhi.]

CC, New Delhi (ICD, TKD) Appellant

Versus

M/s Daxen Agritech (India) Pvt. Ltd. Respondent

Appearance

Shri R.K. Majhi, Authorized Representative (DR) – for the Appellant.

Shri B.B. Sharma, Advocate – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 50102/2018 Dated : 10/01/2018

Per. B. Ravichandran :-

The Revenue is in appeal against order dated 09/04/2014 of Commissioner (Appeals), New Custom House, New Delhi. The dispute in the present case is regarding correct classification of bulk Reishi Gano Powder, bulk Ganocelium Powder imported by the respondent. The claim of the respondent is to classify the product as Ayurvedic Proprietary Medicine under heading

30039011 claiming the benefit of Notification 53/2011 (Sl. No. 363). The Revenue did not agree with the same and intended to classify the product as food supplement under CTH 21069099. The Original Authority held against the respondent. On appeal, by the impugned order, the Commissioner (Appeals) held that the classification will be as claimed by the respondent under Heading 30039011. Aggrieved by this, the Revenue is in appeal.

2. The learned AR elaborating the grounds of appeal submitted that the very same products now in dispute were examined for classification by the Tribunal, Chennai in the case of **DXN Manufacturing (India) Pvt. Ltd.** The Tribunal held that the product should be classified as miscellaneous food supplement under heading 2108 of the Central Excise Tariff, as it was existing during the relevant time. The assessee took the matter to the Hon'ble Supreme Court. The Apex court vide order dated 07/08/2015 in CA No. 1215 of 2006 directed the Tribunal to examine the matter afresh. A direction was given for fresh examination after considering all the evidences that are to be submitted by the assessee. Thereafter, the Tribunal again decided the matter issuing a final order No. 42811-42821 of 2017 dated 08/11/2017. All the evidences and submissions made by both the sides have been examined in detail and it was concluded that the products, which are identical to the one now in dispute in Delhi, were to be classifiable under CETH 2108.99. This is a miscellaneous heading under edible preparation, not elsewhere specified or included. The learned AR drew our attention to

specific finding and the ratio adopted by the Tribunal in the said order with reference to identical product of Ganoderma, Reishi Gano, Ganocelium. He further submitted that the Tribunal followed the principles laid down by the Hon'ble Apex Court dealing with dispute of classification between competing entries of either Ayurvedic Proprietary Medicine or food supplement. A detailed examination as made by the Tribunal, Chennai is squarely applicable to the present dispute. He further submitted that the recognition of the respondent/assessee for the product now in question by the Ayush Authorities and Drugs and Cosmetics Authorities by itself will not be the guiding principle by classifying under Custom Tariff. He submitted that the classification under Custom Tariff should be guided by the statutory entries and the explanatory notes including HSN notes. The parameters as laid down in other legal authority can be persuasive value only.

3. The learned Counsel appearing for the respondent strongly contested the appeal by the Revenue. He submitted that though the products examined by the Tribunal, Chennai are identical to the one now under dispute, certain crucial supporting evidence have not been submitted/examined before arriving at the said decision. He strongly pleaded that they have the evidences to make the distinction from the findings recorded by the Tribunal, Chennai on the similar product. It is his submission that the product under import are recognised by the State Authorities/ Ayush Authorities and were duly licenced for manufacture and

distribution. Further the ingredients of the product under import were indicated in the authoritative text/granth as explained by the Drug Authorities. Further he relied on the HSN Note 16 which he submitted has not been fully reproduced by the Tribunal in Chennai. In other words, it is the submission of the learned Counsel for the respondent that in para 13.2 of the order of the Chennai Tribunal, the full HSN note has not been reproduced. It is submitted that the crucial aspect is that "similar preparations, however, intended for prevention or treatment of diseases or ailments are excluded (Heading 30.30 or 30.04)". He submits the products under import are for prevention of identified disease and are accordingly labelled. These products are in the market as Ayurvedic medicaments and as such the impugned order is correct in classification as Ayurvedic Medicaments. He also submitted that case laws relied upon by the Tribunal, Chennai did not fully support the case of the Revenue. In fact, the principle that the product as identified in the market should form basis for classification is not fully appreciated by the Revenue.

4. The learned Counsel further submitted that they have the product certified as drug after due clinical trial. The learned Counsel for the respondent pleaded that the ratio of the order of Chennai Tribunal should not be applied to them.

5. We have heard both the sides and perused the appeal record. The first point both the sides agree, the products under examination before us are the same as before the Tribunal, Chennai. As per direction of Hon'ble Apex Court such detailed

order has been issued on 08/11/2017. Now the only serious contention of the respondent is that the ratio of the decision by the Tribunal, Chennai will have no application to the present case. Towards this end, the learned Counsel for the respondent submitted various points narrated above. We have carefully considered the appeal records as well as the decision of the Tribunal in **DXN Manufacturing (India) Pvt. Ltd.** (supra). The relevant portions of the order of the Tribunal is reproduced below for better appreciation :-

> "9.4 Accordingly, on the lines directed by Hon'ble Apex Court, we intend to analyze issues relating to these appeals. The main thrust of the appellant's contention is that the product Reishi Gano (referred to as RG) and Ganocelium (referred to as GL) are Ayurvedic Medicaments as accepted by Drug Controller and that they satisfy the twin tests laid down in the decision of Richardson Hindustan Ltd. Vs CCE Hyderabad - 1988 (35) ELT 424 (Tribunal) (maintained by Hon''ble Supreme Court in 1989 (42) ELT A100 (SC), namely, (1) product should be known as medicament in the common parlance (2) ingredients should be mentioned in Ayurvedic text books. Various documents have been submitted by appellant to justify their stand that the impugned goods are classifiable as Ayurvedic medicaments and Ayurvedic text books mention mushrooms in generic category of Bhuchatra. According to appellants, these documents would establish that the products are Ayurvedic medicaments which merit classification under Chapter 3003.39.
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> 10. The twin test laid down by the Hon'ble Apex Court in the Richardson Hindustan case judgment cited by the Ld.

Advocate for the appellant has indeed laid down the following tests to justify classification as product under Ayurvedic Medicament under Chapter Heading 3003 :

(i) that the product should be known as medicament in the common parlance and,

(ii) the ingredients should be mentioned in Ayurvedic text books.

We therefore intend to subject the impugned products to these two tests. Whether the product is known as APM, a medicament or for that matter, in any common parlance.

11.1 Though strong arguments and reliance on above discussed documents are advanced by the Learned Counsel to contend that the products are Ayurvedic Proprietary Medicines, on perusal of the label of the product we cannot find anything suggesting so. Bottles of the products GL were placed before us by Ld. Sr. Advocate. For ready reference, a scanned copy of the bottle label is reproduced below:

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The label indicates the product to be an Ayurvedic Proprietary Medicine. It is shown that each capsule contains Chatrakh and Shiitake. The dosage is mentioned as one capsule three times daily. The label however does not indicate that it would cure any particular disease. The label also does not indicate that the capsule is to be taken for any particular symptom. Label on a product is the basis which has to satisfy the first test of common parlance, since, it is the label which conveys to the customer the disease that can be cured using the medicament. Merely by

mentioning it as APM or by stating that the product contains some quantities of Chatrakh & Shiitake the appellant cannot contend that it is a medicament. The only inference that can be drawn from the indications in the label is that the product is only meant for general well being. As stated earlier, it is also a fact that the products were originally sold as food supplements. Though the Learned Sr. Counsel Sh. Lakshmi Kumaran took assistance of various literature, reports of clinical studies and other documents, which we have analyzed herein above, to canvass the argument that these products cure many an ailment and has therapeutic properties, however on the labels there is nothing to indicate that they cure any specific disease. Even the pamphlets accompanying the product does not claim to cure any disease, but in fact suggests that prevention is better than cure. The Learned Sr.Counsel has laid much thrust on the factum that dosage is indicated, and therefore the product would have therapeutic value. Nonetheless what are the diseases the products intend to cure by taking such measured doses, is not conveyed through the label or the pamphlet to satisfy the common parlance test. What is important is how the consumer looks at the product, and what is his perception in respect of the product.

11.2 The goods which were imported earlier from Malaysia were marketed as "food supplements". In fact, from the record it emerges that they were then called as "The Miraculous King of Herbs".

11.3 While marketing the said products, appellant had issued a advisory "What all DXN distributors should know", which made the following caution :

"Do not make any claims. Herbal food supplements are strictly classified as foods and regulated as such. Extra care must be done to avoid making specific claim about

what the products can do to the body. Any food may be categorized as a drug, if it is claimed that the product is for treatment, cure prevention and mitigation of a disease. The important word is disease. When a product is offered as a specific treatment for a disease, it becomes a drug.... It is very important to bear in mind that you are recommending a food supplement and that you do not intend to be misconstrued as a recommending a drug."

From the investigations conducted with distributors and stockists, it is seen that a number of stockists / distributors from whom statements were taken categorically stated that the RG and GL are not used to prevent any specific diseases but are only used to improve general health; that the company had informed them to promote the product as food supplement only; that these capsules basically are used as food supplement and are non-prescription drugs; that RG and GL capsules which had come as food supplement till December 2001, had started to market as APMs only from 2002; that however there is no change in composition or quality of RG and GL.

11.4 Earlier, while marketing the said products, the accompanying pamphlets for both RG & GL highlighted a common tag line An ounce prevention is better than a pound of cure . In respect of RG, the claim was made that the commodity contains more than 200 active elements divided into three categories consisting 30% water soluble elements, 65% organic soluble elements and 5% volatile elements . The contents were indicated as Polysaccharides, Organic germanium, Adenosine, Triterpenoids, Ganoderic Essence, Protein, Fibre . Nowhere in these pamphlets was a claim made that they were ayurvedic medicines, or for that matter that they had any ayurvedic preparations. The pamphlets also do not make any claim that the items are Ayurvedic preparations.

On the other hand, it was only claimed that in respect of RG the contents were Ganoderma Lucidum harvested exactly the 100th day of growth and in case of GL that the product was Myceilum of Ganoderma Lucidum harvested after 21 days of growth . Scanned copies of these relevant pamphlets are reproduced below :

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12.1 No doubt, the appellants have claimed that the ingredients in respect of RG are Ganoderma (Chatrakh) and Shiitake (Bhuchatra) and in respect of GL also, ingredient Shiitake (Bhuchatra) has been shown and another ingredient Ganomycelium has also been indicated as Chatrakh . To counter this, Revenue have obtained a statement from Dr. D.Athisayaraj, Head of Section of Siddha/Auurveda, Aringnar Anna Hospital of Indian Medicine who has deposed that Bhuchatra does not mean Shiitake and he does not know botanical name for Ganoderma Lucidum and Ganoderma Mycelium. In cross examination, Dr. Athisayaraj stated he has read the original text of Ayurvedic medicine and the name of Chatrakh and Bhuchatra are available in olden times as well as modern times. Although the appellants have produced an articulation on the issue by Dr. K.S.Viswanatha Sharma as already found herein above, that write up do not categorically state that the impugned products are Ayurvedic medicines.

12.2 It is also not disputed that Dr. D. Athisaya Raj, Head of Siddha, Ayurvedic Department, Arignar Anna Hospitals of Indian Medicine who had earlier recommended classification of RG and GL capsules as ayurvedic proprietary medicines but later had admitted that his recommendation was

incorrect since it was based on bogus clinical reports. It further appears that Dr. D. Athisaya Raj was cross examined before the adjudicating authority, on which occasion also, he deposed that he did not consider 'Ganoderma' and 'Shiitake' as ayurvedic medicines. It also emerges that in response to a letter from the Director of Drugs Control, Tamil Nadu, the said HOD, Ayurveda had opined as under :

"These items (Chatraka & Buchatra) are basically food supplements may be used to give therapeutic value with some other drug to be given for identified diseases and that these items cannot be used independently to cure any disease"

12.10 The Drug Licence by itself cannot be the basis for classification. The classification for the purpose of collection of revenue is to be on the basis of Excise / Customs legislations. The primary object of Excise Act being to raise revenue, the classification of the product so as to determine the rate of duty has to be considered independent from the Drugs and Cosmetics Act, 1940 and like legislations. The Hon ble Apex Court in the case of Shree Baidyanath Ayurved Bhawan Ltd. (supra) opined in para 41 as under :

"41. True it is that Section 3(a) of the Drugs and Cosmetics Act, 1940 defines Ayurvedic, Sidha or Unani Drug but that definition is not necessary to be imported in New Tariff Act. The definition of one statute having different object, purpose and scheme cannot be applied mechanically to another statute. As stated above, the object of Excise Act is to raise revenue for which various products are differently classified in New Tariff Act."

Based on the discussions herein above, we are therefore of the considered opinion that the impugned goods in question

cannot be claimed to be Ayurvedic Proprietary Medicines for the purpose of classification in the Central Excise Tariff Act"

6. We have given close consideration to the submissions of the learned Counsel for the respondent for a distinction to be made from the ratio of the above decision of the Tribunal, Chennai. We note that the whole thrust is on the recognition of the product by the Drug Control Authorities. This aspect has been dealt with by the Tribunal, Chennai. It was categorically recorded that a drug licence by itself cannot be the basis for classification. The second important aspect emphasised by the learned Counsel for the respondent is that the product ingredient has been recognised and listed in the authoritative granth by Ayurvedic. This aspect also has been examined by the Tribunal, Chennai. We note that the product is based on specific species of mushroom. The text relied by the respondent is for mushroom in general. It is a common understanding that mention of mushroom in general will not make all of them as ayurvedic medicine. This aspect has also been considered by the Tribunal, Chennai in detail.

7. On careful consideration of the impugned order, we note that impugned order distinguished the decision of the Tribunal, Chennai passed in the first round of litigation. We note that based on the direction of the Apex Court, the Tribunal, Chennai went into the dispute in much more elaborate manner with all the evidences placed before them and we have no reason to differ from the ratio and finding arrived by the Tribunal, Chennai. Accordingly, following the same, we hold that the impugned order

has erred in classifying the product as Ayurvedic medicine and it should have been correctly classified as food supplement as pleaded by the Revenue. Accordingly, impugned order is set aside. Appeal by the Revenue is allowed.

(Order dictated and pronounced in the open court.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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