IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi – 110 066.

PRINCIPAL BENCH – COURT NO. II

Excise Appeal No. 51976 of 2018-DB

(Arising out of Order-in-Original No. 10-11/COMR./DDN/2018 dated 28.2.2018 passed by Commissioner, Central Goods & Service Tax, Dehradun)

M/s Shreya Life Sciences (P) Ltd. — Appellant
Plot No. 13, 14 and 15,
Raipur P.O. Bhagwanpur,
Roorkee, Uttrakhand

Versus

Commissioner, Central Goods & Service Tax, Customs & Central Excise, Dehradun — Respondent
E-Block, Nehru Colony, Haridwar Road,
Dehradun, Uttrakhand

<u>Appearance :</u>

Shri Santosh Khandelwal, Advocate - for the appellant

Shri S.K. Bansal, DR - for the respondent

CORAM: Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Bijay Kumar, Member (Technical)

Final Order No. 50595/2019

Date of Hearing: 12/12/2018
Date of Decision: 30/04/2019

Per Bijay Kumar :

The present appeal is filed against the order-in-original dated 28.2.2018 passed by the Commissioner.

2. The brief facts of the case are that the appellant is registered with the Central Excise department and are engaged in the manufacture of pharmaceutical products and Nutritional Supplement/proprietary food under the brand name 'Beneficiale

Liquid' and 'DSN Capsule'. The appellant is clearing their final product at nil rate of duty by availing the benefit of exemption under Notification No. 49/2003-CE dated 10.6.2003, which exempted the clearance of goods from the notified area in the state of Uttarakhand.

3. Acting on the intelligence gathered and developed by officers of DGCEI, Dehradun, regarding that the appellant was not paying the Central Excise duty by claiming and availing the exemption under Notification No. 49/2003, by mis-classifying their product under Excise Tariff Sub-Heading (CETH) under 3003 & 2106 inasmuch as the said product is in the nature of Nutritional Supplement/proprietary food and which appeared to be properly classifiable under 2106; which is not specified in exemption Notification No. 49/2003. After the investigation, the Show Cause Notice was issued to the appellant and the case was adjudicated upon confirming the demand including imposition of equal penalty and interest under the provisions of Section 11A(4) of Central Excise Act, 1944 (hereinafter referred to as Excise Act), interest under Section 11AA. The penalty was also demanded under Section 11AC read with Rule 25 of Central Excise Rules 2002. The Show Cause Notice culminated into the impugned order, by which entire demand, including interest was confirmed along with imposition of penalty. Being aggrieved, the appellant filed this appeal before us.

4. Learned Advocate on behalf of the appellant submits that the products manufactured by them are rightly classifiable under

Chapter Heading 3004 and 2106 of Central Excise Act, 1985 which is reproduced as under :

Tariff Irem	Description of goods	Unit	Rate of duty
(1)	**(2)**	**(3)**	**(4)**
3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale		
2106	Food preparation not elsewhere specified or included.		

It is submitted that for the classification of goods the therapeutic and prophylactic values are to be ascertained which is required in the treatment of diseases. The reliance is also placed on the decision of Hon'ble Supreme Court in the case of **Commissioner of Central Excise Vs. Wockhardt Life Sciences Ltd. –** 2012 (277) ELT 299 (SC) and **Commissioner of Central Excise, Mumbai-IV Vs. Ciens Laboratories, Mumbai** - 2013 (295) ELT 3 (SC). These judgement indicated that a product which has curative properties are considered to be of prophylactic values. It is further submitted that the products are being prescribed for the treatment of ailments by the doctors, which for the treatment immune system, loss of memory and malfunction of organs. These products contained vitamins, minerals and amino acids. It is also submitted that these products are considered as medicine in the medical profession and hence as per common parlance test should applied and be classified in the Chapter Heading 3004/2106 of Central Excise Tariff. Reliance was placed on the Apex Court's decision in the case of **G.S. Auto International Ltd. Vs. Collector of Central Excise, Chandigarh –** 2003 (152) ELT 3 (SC) and **Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner of Central Excise, Nagpur** - 2006 (196) ELT 3 (SC) to that effect.

4.1 It is also submitted that the various decisions which was submitted before the learned adjudicating authority had not been dealt with which is as under :

Sr. No.	Finding of Commissioner	Relevant para no. of impugned OIO	Submission of Appellant
1.	Relied on the case of DR. REDDY's LABORATOREIS LIMITED Verses STATE OF KERALA ST. Rev. No. 59 of 2006 as HC has observed that dietary supplement is generally for goods health	Para 6.7	There is no discussion on determination of classification based on common parlance test. The appellant has not submitted the prescription of the doctor, invoices of chemist and doctors write up to substantiate that in common parlance the product is considered as medicine.
2.	Relied on the case of DABUR INDIA LTD. Versus COMMISSIONER OF CENTRAL EXCISE, JAIPUR – 2005 (183) ELT 432 (Tri.-Del.) as Tribunal has observed that products are not medicine as package carried phrase "not for medical use".	Para 6.8	The Tribunal had in addition to this observation, have examined in detail the report of CRCL and authoritative books on Ayurveda to arrive that conclusion that the products in dispute are not medicine. The Commissioner has ignored these observations of Tribunal and relied only a part observation. Further, there is no such remark on the package of the appellant.
3.	Relied on the chapter note to chapter 30 which states that chapter 30 does not apply to food preparation containing only nutritional substances.	Para 6.10 & 6.11	Appellant has already substantiated in para 1 and 4 that products in dispute have prophylactic value. They are not only nutritional supplements.
4.	Stated that due to following packing the product is	Para 6.12 and 6.13	(a)Not-mention of warning message is

	nutritional supplement: (a)No warning or precautions message. (b)Stated as Nutritional Supplement. (c)No mention that the product can be used for prevention or treatment of any disease.		not determinative for classification of the products. Most of over the counter drugs do not have any such warning on packaging. (b)The mention of nutritional supplement is marketing practice followed by the appellant. The marketing and advertisement of product is not criteria for classification. (c)The product is used during recovery stage of any treatment. In addition to this, none of the medicine package contains the usage of medicine to prevent from being sold without prescriptions by chemists. The detailed legal submission has been made on para 5 below.
5.	Product is nutritional supplement as appellant have been manufactured it under FSSAI license	Para 6.12 and 6.16	License is not relevant to determine the classification. Kindly refer to para 7 for submission on this finding.
6.	Relied on the test report of CRCL	Para 6.15	The Chief Examiner has not stated the basis on which he has observed in report that products are not medicaments. Hence, such report is opinion and cannot be relied upon. Kindly refer para 6 for submission on this finding.

4.2 It is also submitted that the ingredients that is contained in the product is incorporated in Indian Pharmacopoeia and therefore, the same is required treated as medicine, on account of their prophylactic character. These products cannot be considered as food supplement only on the sole ground of not having precautionary warning on the packaging or is being sold across in the counter. It is submitted that these criteria are not decisive but only indicative of the nature of the product. Learned Advocate also placed reliance on the decision of Hon'ble Apex Court in the case of **Commissioner of Central Excise, New Delhi Vs. Connaught Plaza Restaurant (P) Ltd.** – 2012 (286) ELT 321 (SC), wherein it is held that the manner in which a product is marketed by the manufacturer does not necessarily play a decisive role in affecting the commercial understating of such product.

4.3 It was also submitted the report of CRCL is not complete when it indicated that: *"It is a preparation composed vitamins and minerals needed by the body to remain healthy. It is other than medicament."*

4.4 Further, it is also submitted that the classification adopted by the Department of Food Safety, Hardwar cannot be the ground for classifying the goods as nutritional supplements in absence registration under the Drug Controlling and Licensing Authority. It is submitted that the manufacture of product under Drug License is not a pre-requisite for classification of product under Chapter 30. Reliance was placed in the Hon'ble Tribunal in the case of **B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara -** 1994 (69) ELT 798 (Tribuna), had held that goods are manufactured under Drug License is not relevant to the classification of product as medicament. In view of above, he submits that the impugned order is not sustainable and liable to be set aside on this ground.

5. Learned Authorised Representative, on behalf of the Revenue, supports the impugned order on the ground mentioned therein. It is also submitted the sample was drawn and sent for test to CRCL who in its report has categorically stated that the product is other than medicament. The Revenue, therefore, concluded that the goods are classifiable under heading 2106, which is not included in Notification No. 49/2003. Therefore, the appellant is not entitled for this benefit of the notification No. 49/2003.

6. We have heard the parties and perused the case record. The issue is to be decided in this appeal is regarding classification of the product namely DSN and beneficial as to whether under Chapter 3004 and 2106. The department has drawn the sample and sent for the test to the CRCL, which is authorised Government body, for test of the product, in question. It has been opined by the CRCL as under :

> "Test Memo No. 02/2016
>
> Report:-
>
> On opening the sample packet two samples were found. Out of these are sample is packed in glass bottle kept inside paper cartoon (unit packing) described as "beneficial R Liquid" and registered here as CL-159 (DGCEI)/15.09.16 and second sample is packed in caps kept inside blister strip packing (2 Nos.) bearing described as "DSN capsules" & register here CL-160 (DGCEI)/15.09.16.
>
> 1. CL-159(DGCEI)/15.09.16 [Described as Beneficial Liquid]
>   The sample is in the form of light yellow colour liquid packed in a Unit packing (glass bottle). It answers positive test for Vitamin A, Vitamin B1, Vitamin B2, Vitamin B6, Vitamin B12 folic acid, zinc and manganese. It is preparation composed vitamins and minerals needed by the body to remain healthy. It is other than medicament.
>
> 2. CL-160 (DGCEI)/15.09.16 [Described as DSN capsules]
>   The sample in the form of light yellow colour powder filled in capsules kept in blister strip packing it answers for Vitamin B1, Vitamin B2, Vitamin B6, Vitamin B12, Vitamin C, Zinc and Folic acid. It is a preparation composed vitamins and minerals

> needed by the body to remain healthy. It is other than medicament.
> Sealed remnant sample returned".

This report has not been contested by the appellant as per record. The appellant has relied upon the various decisions with the chemical criteria is not applicable for the classification of product as drug or nutritional supplement. The appellant has given various prescription by the medical practitioner to prove that these products are being used for the treatment of malnutrition for various ailment. The appellant submits that these products need to be classified under Chapter 3004 of the Customs Tariff Act. We find that in this case the appellant have not contested the report by the CRCL. There is a system of retest in the CRCL on being aggrieved by the test report which has not been followed by the appellant. On other hand, the appellant argues that the test report is not conclusive criteria for classification of the goods under the Central Excise Tariff heading. This appears to be not correct proposition. Moreover, the appellant themselves has applied for Drug Licence and which was granted to them on 4.12.2007 to manufacture these products. However, this grant of drug licence is for the subsequent period and hence not having any bearings on the current proceedings. As the test report has not been contested by the appellant, we find no fault with the impugned order by the learned adjudicating authority. Accordingly, we upheld the same and reject the appeal filed by the appellant.

(Pronounced in open Court on 30.04.2019)

(Bijay Kumar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)