

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH – COURT NO. 2

Customs Appeal No. 76943 of 2017

(Arising out of Order-in-Original No. KOL/CUS/COMMISSIONER OF CUSTOMS/AIR PORT&ACC/17/2017 dated 12.09.2017 passed by the Principal Commissioner of Customs (Airport & Air Cargo Complex), Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. Atherton Engineering Co. (Pvt.) Limited : **Appellant**
21, Rajendra Nath Mukherjee Road,
Kolkata – 700 001

VERSUS

Commissioner of Customs : **Respondent**
(Airport & Air Cargo Complex),
O/o. The Principal Commissioner of Customs
(Airport & Air Cargo Complex),
Custom House, 15/1, Strand Road,
Kolkata – 700 001

AND

Customs Appeal No. 77008 of 2017

(Arising out of Order-in-Original No. KOL/CUS/COMMISSIONER OF CUSTOMS/AIR PORT&ACC/17/2017 dated 12.09.2017 passed by the Principal Commissioner of Customs (Airport & Air Cargo Complex), Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Vickram Jaitha, Ex-Director, : **Appellant**
M/s. Atherton Engineering Co. (Pvt.) Limited
20, Ballygunge Circular Road,
Kolkata – 700 019

VERSUS

Commissioner of Customs : **Respondent**
(Airport & Air Cargo Complex),
O/o. The Principal Commissioner of Customs
(Airport & Air Cargo Complex),
Custom House, 15/1, Strand Road,
Kolkata – 700 001

APPEARANCE:

Shri Arnab Chakraborty, Advocate
Smt. Shreya Mundhra, Advocate
Assisted by Shri Chiranjit Pal, Advocate
for the Appellant(s)

Shri Faiz Ahmed, Authorized Representative
for the Respondent

CORAM:

HON’BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)
HON’BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOS. 76161-76162 / 2024

DATE OF HEARING: 15.05.2024

DATE OF DECISION: 26.06.2024

ORDER: [PER SHRI R. MURALIDHAR]

The present appeals are on an issue which has a chequered history.

2. A Show Cause Notice dated 23.01.2002 was issued for the subject imported goods viz. “Artemia Cysts (Brine Shrimp Eggs)”, when they were imported during April, 1999. In respect of similar goods, proceedings were initiated against the present appellants by the Mumbai Customs in August 1998 for the imports carried out from Mumbai Port. After about two years, proceedings were also initiated against the present appellants by the Calcutta Customs. The chronological events pertaining to the present case are as per the following table: -

Date	Particulars
August 1998	Customs Authorities in Mumbai initiated proceedings against the Company for changing the classification from CTH 2309.90 to Heading 0511.
18.02.1999	Order passed by the Commissioner (Appeals), Mumbai accepting the Company’s submissions and holding that the said goods are correctly classifiable under CTH 2309.90.
09.04.1999	Bill of Entry no. 756 filed for import of such goods in Kolkata port.
13.04.1999	Provisional assessment of the goods imported at Kolkata port opted for as department insisted on classification under the Heading 0511.

22.04.1999 and 24.04.1999	Show Cause Notice was issued demanding duty on the goods relating to past imports made at Kolkata port.
10.01.2001	Order passed by CEGAT, Mumbai allowing appeal filed by the Department and holding that the imported goods were classifiable under CTH 0511.
15.03.2001 and 22.03.2001	The Company voluntarily paid the duty under protest to the departmental authorities.
29.01.2002	Letter issued by the Department requesting for voluntary payment of the duties in respect of certain Bills of Entry filed at Kolkata port. It was also stated that this was a case of error of classification and that the Company had fully cooperated with the department and supplied the requisite details and voluntarily paid disputed duties even prior to finalization of the provisional assessments.
04.04.2002	The Appeal filed by the Company before the Hon'ble Supreme Court against the Order passed by CESTAT, Mumbai was dismissed and it was held that the goods were classifiable under CTH 0511 and not CTH 2309.90.
06.11.2002	An Order-in-Original No. KOL/CUS/AIRPORT/ADMN./04/09 dated 06.11.2002 was issued <i>inter-alia</i> confirming the duty demand against the Company and imposing a penalty of Rs. 5,00,000/- on the Appellant under Section 112(a) of the Customs Act, 1962.
02.03.2006	CESTAT, Kolkata in its Final Order no. A-294-296 held that Artemia Cysts were classifiable under CTH 05.11. However, as regards imposition of penalty on the Appellant, it was held that: "15. In this case, during the relevant period of imports, the appellants declared the said goods under Chapter Heading No. 2309.90, based on an order of the Commissioner (Appeals) in their own case and in respect of the very same 'said goods, imported at Mumbai. The order of the Commissioner (Appeals) in the appellants case at that time was based on the fact that other importers were also classifying the said products under Chapter Heading No. 23.09. As such, armed with the order of Commissioner

	<i>(Appeal) in their favour, the appellant's classification of the said products under Chapter Heading No. 23.09 cannot be faulted with, as an act done, with mala fide intention to evade duty. To my mind, anyone would have done the same way. This act of classifying the said products under Chapter Heading 23.09 by the appellants is reflective of their bona fide impressions and cannot by any stretch of imagination, would attract penal provisions of Sections 112(a) and 114A of the Customs Act, 1962. Under the circumstances it cannot be held that there was mis-declaration of the said products on importation on the part of the appellants warranting imposition of penalties on them.</i> <i>16. Hon'ble Tribunal in the case of Nishiland Park Ltd. v. Commr. of Customs as reported at 2002 (142) E.L.T. 174 (Tri. - Mumbai) had an occasion to decide on the imposition of penalty on an identical issue. The Hon'ble Tribunal held that :</i> <i>• "Redemption fine & Penalty-Customs-Appellants under bona fide belief that goods classifiable under Heading No. 95.08 of Customs Tariff Act, 1975, previous import by another importer having been classified them under R.F. Reduced penalties imposed on appellants set aside"</i> <i>17. It can be seen that the Tribunal in that case set aside the penalties imposed based on the classification of other importers . In the case before me appellants are on a stronger footing in as much that the classification of the 'said products' was under Chapter Heading No. 23.09 was held in their own case during the relevant period.</i> <i>18. In light of above discussions , I am of the view that the imposition of the penalty on the appellants under Section 114A of the Customs Act, 1962 and the personal penalties imposed under Section 112(a) of the Customs Act , 1962 is unwarranted and are liable to be set aside."</i>
10.03.2010	The Hon'ble High Court at Calcutta vide its Order in W.P. No. 748 of 2006 filed by the Company remanded the matter back for re-

	hearing by conducting the factual enquiry as to whether the imported goods contained an embryo or a living organism.
13.04.2017	The Hon'ble High Court at Calcutta vide its Order in W.P. No. 203 of 2017 filed by the Company directed to proceed with the remand directions provided vide its earlier Order of 2010.
12.09.2017	In the <i>De novo</i> proceedings, the Respondent confirmed a penalty of Rs. 3,00,000/- under Section 112(a) of the Customs Act, 1962 on the following grounds The Appellant had full knowledge that the goods imported are not prawn feed. Further. the Appellant had deliberately mis-declared the description and classification of the imported goods. - For such act of omission and commission the Appellant has rendered goods liable for confiscation. Accordingly, penalty is imposable.

3. The issue to be resolved in the present case is as to which of the CTH classifications is to be applied. The appellant had classified the imported goods under Customs Tariff Heading 2309.90 being "*Preparations of a Kind Used in Animal Feeding*" - "*Other*" while the Department took the view that the imported goods were appropriately classifiable under Customs Tariff Heading 0511.99 pertaining to "*Animal Products Not Elsewhere Specified or Included; Dead Animals of Chapter 1 or 3, Unfit for Human Consumption*" - "*Other*".

4. A Show Cause Notice was issued on 23.01.2002 wherein, after due process, the Department stuck to its classification under CTH 0511.99 and confirmed the demand. Being aggrieved, the appellant filed their appeal before the Tribunal.

4.1. After hearing the issue, there arose a difference of opinion between the Members of the Bench at CESTAT, Kolkata. The Ld. Member (Technical) held the view that the classification adopted by the Revenue under CTH 0511.99 was correct, duty was required to be confirmed against the appellants and penalties were to be reduced. On the other hand, the Ld. Member (Judicial), though in agreement on the issue of classification falling under CTH 0511.99, was of the view that the matter was required to be remanded to the Commissioner so as to consider the applicability of exemption Notification applicable to products falling under Chapter 5 of the Customs Tariff Act. The difference of opinion was resolved by the Ld. Third Member, after which, vide Final Order Nos. A/691-693/KOL/2005 dated 22.09.2005 [2006 (197) *E.L.T.* 428 (*Tri. – Kolkata*)], the demand of duty came to be confirmed and penalty reduced to Rs.25,00,000/- against the appellant-company; the penalty on the other two appellants therein, namely, Shri Vickram Jaitha and Shri R.V. Jaitha was reduced to Rs.2,00,000/- (Rupees Two Lakhs) each.

4.2. Being aggrieved, the appellants moved the Hon'ble Calcutta High Court by way of Writ Petition No. 2013 of 2005. The Hon'ble Calcutta High Court vide Order dated 12.12.2005 set aside the above Order of the Tribunal dated 22.09.2005 and remanded the matter back to the Tribunal.

5. The appellant was always contending that the imported goods viz. Artemia Cyst (Brine Shrimp Eggs), would fall under Chapter Heading 2309.90 of the Customs Tariff Act whereas the Department held the view that they should fall under Chapter Heading 0511.99

5.1. Before the Tribunal, the Ld. Advocate appearing for the appellants had submitted that:

"...the imposition of the penalty is the only question which has been referred back by the Hon'ble High Court and he concedes, he does not have a case on merits. He also concedes the fact that the benefit of Notification No. 163/94 is not available to them in this case. He submits that it is a well settled law that the imposition of penalty in this kind of cases is not required."

(Ref. paragraph 6 of Final Order Nos. A/294-296/KOL/2006 dated 02.03.2006)

(Emphasis supplied)

5.2. The Ld. Third Member of the Tribunal, re-hearing the appeal which was taken up as per the directions of the Hon'ble High Court, after going through the above submissions, made the following observations: -

"8. Considered the submissions made by both sides and perused records. I find that the imports of "Artemia Cyst (Prime Shrinks Eggs) hereinafter referred as the "said goods" made by the appellants was during the period October, 1998 to February, 2001 and filed Bill of Entries classifying the same under Heading No. 2309.90, while the department wanted to classify the same under Chapter Heading No. 0511.99. The appellants justification for filing the Bill of Entries under Chapter Heading No. 2309.90 was based on the fact, that, in their own case the Commissioner (Appeals), Mumbai had held the classification under Chapter Heading No. 2309.90. The order of the Commissioner (Appeals)

was taken up by the Department to CESTAT. The Tribunal vide its order No. 128/2001-WRB/C-II, dated-10-1-01 reported at [2001 \(129\) E.L.T. 502 \(Tri.-Bombay\)](#) decided that the classification of the 'said products' merits classification under Chapter Heading No. 0511.99. An appeal against the said order by the appellant to Hon'ble Supreme Court was dismissed.

9. The appellant's dispute on the classification of the said products is now settled i.e. the said goods merits classification under Chapter Heading No. 0511.99. The Id. Member (J) in her separate order sought to remand the matter to the adjudicating authority to consider whether the appellant's 'said products' were eligible for exemption under Notification No. 163/94, dated 2-9-94 and reconsider the imposition of penalties on appellants.

10. I find that the Notification No. 163/94-Customs, dated 2-9-94 was rescinded/superseded vide Notification No. 47/96-Cus., dated 23rd July, 1996. The period of dispute in this case is from October 1998 to February, 2001. Since the exemption Notification No. 163/94-Cus., dated 2-9-94, was not available to the appellants, to my mind remanding the matter back to the adjudicating authority for deciding availability of exemption under Notification 163/94 would serve no purpose. Since it is not clear from the records of the case whether the rescinding/superseding Notification No. 47/96-Cus., dated 23rd July, 1996 was placed before Hon'ble Member (J) or not, to my mind had the said rescinding/ superseding notification been produced before the Hon'ble Member (J), she would have come to a different conclusion.

11. In view of the above discussions, I am of the view that as the question of classification of the 'said

products' has been settled against appellants and the benefit of Notification No. 163/94-Cus., dated 2-9-94 is not available to the appellants, the matter does not require any fresh consideration by the adjudicating authority.

12. So far as the penalty is concerned, the Hon'ble High Court had directed the third member to decide the issue relating to the reduced penalties. I now take up the issue of the imposition of the penalty. The Hon'ble High Court while disposing writ petition No. 2013/2005 directed the Tribunal as follows :

- "In the aforesaid circumstances, the said learned Third Member is directed to decide the aforesaid point relating to the reduced penalties at an early date but positively within a period of four weeks from the date of communication of this order after giving reasonable opportunities of hearing to the petitioner herein".

13. It can be safely conceived that Hon'ble High Court directed the Tribunal third member to decide the issue relating to reduced penalties which is to decide whether penalty as imposed by Member (T) is correct or Non-imposition of penalty by Hon'ble Member (J) is correct.

14. If the arguments of the learned Departmental Representative are to be taken to logical conclusion, then it would amount that the Hon'ble High Court's direction is only to decide only imposition of reduced penalty has to be dealt by me. To my mind, this would be a wrong interpretation as the Hon'ble High Court while directing to decide point of reduced penalty, meant that I should come to a opinion whether the order of Learned Member (J) is correct on the point of penalty or Learned Member (T)'s

order is correct. In this case the penalty is imposed on the appellants is under Section 114A of the Customs Act, 1962 and under Section 112(a) of the Customs Act, 1962 on other two appellants. The provisions of the Section 114A and 112(a) of Customs Act 1962 are as follows :

- Section 114A. "Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be , as determined under sub-section (2) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined"

Provided....

Provided...

Provided....

Provided...

Provided...

- Section 112(a) : "who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such and act."

It is undisputed that the penalty can be imposed under the above sections if the conditions as enumerated are satisfied for imposition of the penalty.

15. *In this case, during the relevant period of imports, the appellants declared the said goods under Chapter Heading No. 2309.90, based on an order of the Commissioner (Appeals) in their own case and in respect of the very same 'said goods, imported at Mumbai. The order of the Commissioner (Appeals) in the appellants case at that time was based on the fact that other importers were also classifying the said products under Chapter Heading No. 23.09. As such, armed with the order of Commissioner (Appeal) in their favour, the appellant's classification of the said products under Chapter Heading No. 23.09 cannot be faulted with, as an act done, with mala fide intention to evade duty. To my mind, anyone would have done the same way. This act of classifying the said products under Chapter Heading 23.09 by the appellants is reflective of their bona fide impressions and cannot by any stretch of imagination, would attract penal provisions of Sections 112(a) and 114A of the Customs Act, 1962. Under the circumstances it cannot be held that there was mis-declaration of the said products on importation on the part of the appellants warranting imposition of penalties on them.*

.

.

.

18. *In light of above discussions , I am of the view that the imposition of the penalty on the appellants under Section 114A of the Customs Act, 1962 and the personal penalties imposed under Section 112(a) of the Customs Act , 1962 is unwarranted and are liable to be set aside."*

(Emphasis supplied)

5.3. As per the decision of the Third Member, a Final Order was passed by the Division Bench of the Tribunal. [2007 (208) E.L.T. 464 (Tri. – Kol.)]

5.4. Being agitated by this Final Order dated 02.03.2006, which was passed by a majority of 2:1, the appellants filed a Writ Petition No. 748 of 2006 before the Hon'ble Calcutta High Court. The Hon'ble High Court, in their discussions and reasonings in the Order dated 10.03.2010, has observed as under: -

"7. The goods are classified according to their description, in the schedules appended to the said Act. This classification is made because according to the Act different kinds of goods are exigible to different rates of duty. A particular use of the goods may also be suggested in the classification so as to determine the rate of duty charged. Any person who makes an estimation of duty chargeable has to first classify the goods properly. If a particular use of a product is indicated whether that use can be had of that particular imported product has also to be seen. Essentially, classification of goods reflects the policy of the legislature as to the amount of duty to be charged for particular goods. In interpreting this classification one should not take a very pedantic or bureaucratic approach. Sometimes the description of the goods mentioned in the tariff schedule is plain and simple. If the ordinary meaning of the words of description is taken, the description covers certain goods only. No second interpretation is required if particular goods fulfill or do not fulfill that particular description. But sometimes the description of the goods is such that the purpose of the legislature has to be ascertained. As in the case of statutory interpretation if a plain and ordinary meaning of the words provides complete meaning of a statute or a part of it recourse need not be taken to other aids.

Similarly in the case of classification of goods if the plain and simple meaning of the words can classify the goods the goods have to be classified accordingly. But sometimes the classification of the goods permits an investigation into the purpose of the legislature in fixing a duty for particular goods as well the purpose for which the goods are used. In this particular case we are concerned with the interpretation of the words 'prawn feed.' What is to be considered here is the use of the product. One has to see whether it can be used as such product. I do not think it really matters if a product undergoes some change after importation till the time it is actually used provided it remains the same product and it is used for the purpose specified in the classification. For example, if mangoes were classified as a product, I think if raw mangoes were imported and subsequently by some process there was a change in the condition, i.e. ripeness the product would still be classified as mango. This is because the essential nature and character of the product remains the same. In this case it is essential to determine whether the nature and character of the product remains the same.

8. Here, the contention of the writ petitioner is that these imported cysts contained little organisms or embryos which later became larva that prawns feed on. From this cystic stage this little organism is nurtured and incubated till it grows and attains proper form and shape to be fed to prawns. Therefore, according to them the nature and character of this product is not changed by nurturing or incubation. The product remains the same.

9. The imported product was desired to be classified by the importer under the heading 2309 which includes products used as animal feed. According to them prawn feed fitted the description.

According to the customs this products was classifiable under the heading 0511.99 which refers to other products in the category of non edible animal products.

10. The tribunal has passed this decision, based on the decision, with regard to importation of Brine Shrimp eggs of the Mumbai Bench of the same tribunal in Commissioner of Cus (P.) Mumbai. v. Atherton Engg. Pvt. Ltd. reported in [2001 \(129\) E.L.T. 502](#). The tribunal has drawn further support from the order of the Supreme Court dated 4-4-2002 dismissing the civil appeal against the order of Mumbai Bench to the tribunal. The order of the Supreme Court as reproduced by the tribunal reads :

"We have heard the learned counsel for the appellant. We find no merit in the appeal. The civil appeal is dismissed with costs."

11. It should be remembered that the above decision of the Supreme Court is the final decision on the particular consignment in issue between the parties involved in that litigation. I do not read that Supreme Court decision as an authority for the proposition that any product imported and declared as Brine Shrimp eggs would necessarily have to be classified in the 'other category' under the heading 0511 for reasons given by me below.

12. It is the categorical case of the writ petitioner that these goods which were imported by them were fertilised eggs. They contained embryos or little organisms enclosed within the cysts, which upon incubation in controlled temperature and hydration would become larvae which could be used as prawn feed, it is submitted.

13. *If there is an embryo within the egg, then there is a living organism within it. Upon such incubation the living organism merely grows, it does not change its nature and character. If there is no embryo within the eggs then there is no living organism and these eggs cannot be used as prawn feed.*

I am of the opinion that if an embryo is within an egg and it is subsequently incubated in controlled temperature and under hydration, the larvae which are subsequently born do not assume the character of any different product but remain in nature and characteristics the same product or organism which is within the egg. Therefore, if the eggs did contain an embryo they could be classified as feeding materials for prawns and ought to have been so classified. These embryos may not be proper prawn feed at the time of importation but could become so, after incubation. Refusing to classify the product as prawn feed on this basis is not reasonable. In deducing the above principle I have taken a lot of guidance from the case of Commissioner of Income-tax. v. Venkateswara Hatcheries (P.) Ltd. reported in (1999) 237 ITR 174 (S.C.) (supra).

14. *Therefore, in the circumstances there has to be a factual enquiry which has not been done.*

15. *I do not agree with the submissions of Mr. R.K. Chowdhury that the order of the Commissioner could not have been passed without assessment. In my opinion, such an order is in the nature of an assessment. But nevertheless, such order has been passed without making available the test report of the provisional assessment to the writ petitioner or by considering any material, whether from the seller's invoice or other materials available from the seller or elsewhere, regarding the exact nature of the goods. The pointed fact of enquiry should have*

been whether the imported goods contained an embryo or a live organism. This factual enquiry ought to have been made upon notice to the writ petitioner and after giving them an opportunity to counter the evidence of the revenue and to produce his own evidence in support of his contention."

(Emphasis supplied)

5.4.1. After this, the Hon'ble High Court set aside the Tribunal's Order dated 02.03.2006 as well as the order passed by the Commissioner dated 06.11.2002, with a direction to the adjudicating authority to re-hear and re-decide the matter in accordance with the observations made by the Hon'ble High Court.

6. Accordingly, the adjudicating authority took up the hearing on 04.08.2017 and passed the impugned Order-in-Original No. KOL/CUS/COMMISSIONER OF CUSTOMS/AIR PORT&ACC/17/2017 dated 12.09.2017. In this order, he has classified the goods under CTH 0511 and has held that the present appellant is liable to pay differential duty of Rs.98,86,532/-. He appropriated the deposited amount of Rs.77,70,931/-. He also ordered for confiscation of the impugned goods giving an option to redeem the same on payment of redemption fine of Rs.75,00,000/-. He imposed a penalty of Rs.98,86,532/- on the appellant-company and a penalty of Rs.3,00,000/- each on the other two directors.

7. Being aggrieved, the present appeal has been filed by the appellant-company and one of its directors viz. Shri Vickram Jaitha (presently, ex-Director).

8. The Ld. Counsel appearing on behalf of the appellant submits that the Hon'ble Calcutta High Court had given a specific direction to the adjudicating authority to take up the case on *de novo* basis and follow the directions given therein while deciding the issue, but the adjudicating authority has not followed the directions given therein and has mechanically issued the impugned order, more or less relying upon the earlier decision of the Mumbai Bench of the CESTAT in the case of the same appellant [*ref. 2001 (129) E.L.T. 502 (Tri. – Mum.)*], which was upheld by the Hon'ble Supreme Court [*ref. 2002 (144) E.L.T. A204 (S.C.)*]. He submits that the Hon'ble High Court had observed that if there is an embryo within the egg(s), then it would mean that there is a living organism within it; if there is no embryo within the eggs, then there is no living organism and these eggs cannot be used as prawn feed. It is submitted that the Hon'ble High Court had taken the view that:

"...if the eggs did contain an embryo, they could be classified as feeding materials for prawn and ought to have been so classified. These embryos may not be proper prawn feed at the time of importation but could become so, after incubation. Refusing to classify the product as prawn feed on this basis is not reasonable..."

8.1. He submits that the Hon'ble High Court had further pointed out that the enquiry should have been made whether the imported goods contained an embryo or a living organism and that this factual enquiry ought to have been made upon notice to the Writ Petitioner (the present appellant) and after giving them an opportunity to counter the evidence of the

Revenue and to produce his own evidence in support of his contention.

8.2. It is also submitted that the Department has not supplied the test report nor disclosed any document alleging that the eggs had no embryo or living organism.

8.3. The Ld. Counsel for the appellants submits that against these specific directions, the adjudicating authority has not given any finding in the impugned order as to how the observations of the Hon'ble High Court are not applicable, while coming to a conclusion about the product falling under the classification of CTH 0511.99.

9. The Ld. Authorized Representative appearing on behalf of the Revenue reiterated the findings in the impugned order.

10. Heard both sides and perused the documents placed on record.

11. In the reply to the Show Cause Notice which was issued on 23.01.2002, among other submissions, the following submissions made by the appellant are required to be taken into consideration: -

"With reference to Paragraphs 8 to 16 of the show cause notice we reiterate the statements made in paragraphs 3 to 11 above and deny all allegations contrary thereto and/or inconsistent. We deny and dispute that in the facts and circumstances of the instant case there can be any scope whatsoever to allege that there was any mis-declaration on our part, willful or other wise or that we ever had any, malafide intention of misleading the assessing authorities so as to achieve any wrong classification

or that we suppressed any facts or violated any of the provisions of law as alleged or at all. The assessing authorities themselves have all along taken the view that we always acted bonafide by disclosing all relevant facts, documents and records to the Department and always fully cooperated with the Department in every respect. In fact, even the disputed duties were paid by us voluntarily and without any order against us simply because the Hon'ble CEGAT was pleased to decide the case relating to our imports at Mumbai against us and the matter is pending before the Hon'ble Supreme Court. All these facts have been specifically confirmed by the Deputy Commissioner in a series of letters including the last letter dated 29.1.2002 as mentioned above. We deny and dispute that on the basis of the statement of Sri Vickram Jaitha it can be alleged in any manner that the goods were not Prawn Feed. In the said statement of Sri Jaitha, it was clearly stated that the goods are Prawn Feed and nothing else and that these are internationally accepted and dealt with as Prawn Feed. In the said statement, details of various evidence in this regard were also mentioned. During the said statement, a question was put to Sri Jaitha as to what happens to the unhatched cysts to which he replied that these are destroyed and thrown away. We submit that absolutely nothing turns on the said part of the statement and it does not in any way show as if the goods imported by us were not Prawn Feed or as if the goods imported by us were converted in India into any new or different product as has been sought to be erroneously and incorrectly alleged in the show cause notice.”

(Emphasis supplied)

11.1. The adjudicating authority, in his findings, has held as under: -

"The consignment intercepted by DRI was allowed provisional-release at the request of the importer, securing the differential duty by Bank Guarantee. The importer, during the course of investigation, submitted several documents in support of their claim that the goods imported are correctly classifiable under heading 2309.90 and no misdeclaration was resorted to by them. From the literature of the overseas supplier, it appears that the Cysts are transported in a dry inactivated state to the user where they are hydrated, hatched and, thereafter, fed to the Prawns. It was mentioned in the literature that the Brine Shrimp Eggs should be hydrated, disinfected and then placed in filtered sea water, nerated near a strong or intense light source for 24 hours. The unhatched Cyst floats on top while the hatched Cysts sinks to the bottom of the Container which can be collected by siphoning.

Copy of the Certificate of Registration issued to the overseas supplier by Utah, Department of Agriculture, was also submitted which shows that Brine Shrimp Eggs and various Shrimp/Prawn Feed or Larvae Feed are different items. The importer also submitted a copy of letter from Marine Product Export Development Authority (Ministry of Commerce, Government of India) dated 30-10-95 which implicated that Brine Shrimp Eggs/Artemia Cysts are used as Prawn Feed in Prawn Hatchery and is not fit for human consumption. During the course of investigation, a clarification was sought from M.P.E.D.A. regarding what exactly are fed to the Prawn, to which, it was reported that Artemia Cysts (Brine Shrimp Eggs) are hatched first and then the hatched Napulii are fed to the Prawn.

.
.
.

The importer in their reply in the Show Cause Notice insisted that the Brine Shrimp Eggs are preparations of a kind used in animal feeding which are Prawn Feeds and used as such. In support of this contention they mainly relied on the documents which has been discussed in the preceding paragraphs, In addition, they also relied on a Test Report of Chemical Examiner, Mumbai, which simply indicates that descriptions on the container and literature shows the material imported are comprised of Artemia Cysts which are used as Prawn Feeds. However, the importer had not dealt with the clarification of MPEDA dated 09-01-2002 which states that Artemia Cyst are hatched first and thereafter the hatched Napulii are fed to the Prawn in Prawn Hatchery.

From what has been discussed thereinbefore it is evident that Artemin Cysts are necessarily to be hatched first and only hatched Artemia Napulil are fed to Prawn Larvae. The Brine Shrimp Eggs are collected in Cyst form Salinas world-wide, processed and packed for easy transportation. After harvesting, these undergo a lot of process which inactivate their development and only in controlled laboratory condition, the seeds will hatch into live feed for Prawn. These are complete food for Prawn and sufficient in Fatty Acid, Protein, etc. These have got no other use in India except in Hatcheries.

It is, therefore, clear that the goods as imported need a lot of careful processing before these are fed to Prawn. Artemia Cysts are, in fact, inactivated eggs imported in dehydrated and dormant condition in sealed can and what are fed to Prawn are active Napulii produced after careful processing of the seeds. From the statement referred to in earlier paragraph it is also clear that

the entire quantity Imported will not hatch into Larvae and unhatched portion is destroyed.

Coming to the question of classification, Chapter-5 of the Customs Tariff Act does not cover edible product (other than Guts, Bladder and Stomach of Animals, whole and pieces thereof and animal blood, liquid or dried). Admittedly, the goods as imported, are not edible and, therefore, these are not excluded from Chapter 5. It is, thus, undisputed that the goods as imported are correctly classifiable under Heading 0511.99. This finding is further reinforced from ITCC (HS) Classification of Import Item which includes Artemia under Sub-Heading 05119901.10. By Artemia, it means Artemia Cysts which is apparent from the attached condition "subject to the condition that Artemia Cysts are imported only in dry and inactivated state in air-tight Tin and Polythene vacuum pack". In Explanatory note to Chapter 5 it has been clarified that Chapter 5 covers the variety of materials of animal origin unworked or having undergone a simple process of preparation which are not normally used as foods. I am, therefore, convinced that Artemia Cysts are appropriately classifiable under Heading 0511.99. It is not the case that Larvae have been Imported and, therefore, question of classification under Chapter 23 of unprocessed animal material i.e., eggs in this case does not arise (the import item is Brine Shrimp Eggs).

*.
.
.*

The importers in their reply to the Show Cause Notice contended that a similar dispute was also raised by the Customs authorities in connection with import of identical goods made at Mumbai. A Show Cause Notice was issued by the concerned

Assistant Commissioner proposing classification of the said goods under Tariff Heading 05.11 on August 18, 1998. An order was passed in that Show Cause Notice on October 06, 1998 rejecting their submissions and confirming classification under Tariff Heading 05.11. An appeal was filed against the said order of Assistant Commissioner and Commissioner (Appeals) vide order dated February 18, 1999 accepted their submissions and held that the goods were correctly classifiable under heading 2309.90. The authorities at Mumbai filed as appeal against the order of Commissioner (Appeals) and Tribunal vide order dated January 10, 2001 allowed the appeal filed by the Department. Thereafter, an appeal was filed by the importer in the Hon'ble Supreme Court against the order of Tribunal which was admitted by the Hon'ble Apex Court.

The Hon'ble Supreme Court Bench comprising of the Hon'ble Mr. Chief Justice S.C. Bharucha, Hon'ble Mr. Justice M. Santosh Hegde and Hon'ble Mr. Justice D.M. Dharmadhikari on April 04, 2002 dismissed the Civil Appeal No. 2889 of 2001 filed by the present importer against the CEGAT Order dated January 10, 2001. While dismissing the appeal the Hon'ble Supreme Court held "We have heard Learned Counsel for the appellant. We find no merit in the appeal. The Civil Appeal is dismissed with cost".

In view of dismissal of the appeal by the Hon'ble Apex Court, the issue of classification of the subject goods under CTH 05.11 has attained finality. On the question of levability of SAD, the importer explained that the goods were imported for the purpose of sale and these were actually sold from Calcutta where Sales Tax is chargeable on sale or purchase of goods.

However, as discussed in the preceding paragraph, the imported items need to undergo a hatching process after importation resulting into a different item which is then fed to the prawn. The item imported is not a prawn feed itself but merely a raw material in preparation of a different item i.e., used as prawn feed. What are being sold by the importer are prawn feed which is clearly different from Artemia Cysts-Brine Shrimp Eggs imported in this case."

[ref. Order-in-Original dated
06.11.2002/25.11.2002 passed by the
Commissioner of Customs, Custom House,
Calcutta]

(Emphasis supplied)

11.2. From the above arguments adduced by the appellants before the adjudicating authority, it is clear that they have been maintaining that the goods which were imported were prawn feed classifiable under CTH 2309.90. Nowhere in their reply or submissions had they taken a stand that the issue has to be decided by taking up the imported goods for testing towards the existence of larvae inside the eggs and accordingly to classify the eggs with larvae under one heading and eggs without larvae under a different heading.

12. It is also observed that the appellant have relied upon the case proceedings in their own case at Mumbai when the same was in their favour till the Commissioner (Appeals) level. At that point of time, the adjudicating authority had held that the products will be classifiable under CTH 0511.99. When an appeal was filed by the appellant, the Ld. Commissioner (Appeals) had held that the product would be classifiable under CTH 2309.90. Being aggrieved, the Revenue filed an appeal before the Tribunal, Mumbai.

12.1. On going through the Final Order No. 128/2001-WZB/C-II dated 10.01.2001 passed by the Tribunal, Mumbai, it is seen that even here, the appellants have not taken any specific stand that the eggs containing larvae should be classified under one heading and the eggs without larvae should be classified under another heading. The Tribunal has gone into the specifics of Customs Tariff Headings 2309 and 0511 along with the Chapter Notes thereto and has come to a very clear conclusion that the goods in question will fall under 0511.99.

12.2. Being aggrieved, the appellant approached the Hon'ble Supreme Court, which vide Order dated 04.04.2002 dismissed their appeal with the following remark:

"We have heard learned Counsel for the appellant. We find no merit in the appeal. The civil appeal is dismissed with costs."

[Ref. 2002 (144) E.L.T. A293 (S.C)]

13. The decision of the Mumbai Tribunal and the upholding of the same by the Hon'ble Supreme Court was before the Kolkata Bench of the CESTAT, when the appeal against the Order-in-Original dated 06.11.2002/25.11.2002 was taken up for disposal on 22.09.2005.

13.1. From the submissions made by the appellants before the Kolkata Bench, again, it gets clarified that the appellants never took any stand that the eggs with larvae would be classifiable under a particular heading and that eggs without larvae would be classifiable

under a different heading. They were always disputing the classification under CTH 0511.99 as adopted by the Revenue, taking the stand that the same would fall under CTH 2309.90.

13.2. In the Final Order Nos. A/691-693/KOL/2005 dated 22.09.2005, the Kolkata Tribunal has gone through the statements recorded from the directors of the appellant-company and noted the following facts about the Artemia Cysts: -

"7. Artemia Cyst are necessarily to be hatched first and only hatched Artemia Nauplii are fed to Prawn Larvae. The Brine Shrimp Eggs are collected in Cyst form Salinas worldwide, processed and packed for easy transportation. After harvesting, these undergo a lot of process which inactivate their development and only in controlled laboratory condition, the seeds will hatch into live feed for Prawn. These are complete food for Prawn and sufficient in Fatty Acid, Protein etc. These have got no other use in India except in Hatcheries."

(Emphasis supplied)

13.3. After this, the Tribunal considered the identical litigation taken up at Mumbai in respect of the same appellant and has recorded as under: -

"11. Similar dispute relating to classification of the same item also existed in respect of the same importer in Mumbai. Mumbai Customs, however, assessed the item in question under CTH 05.11 against which the party went in appeal. The Commissioner (Appeals) decided in favour of the classification under Customs Tariff Heading No. 23.09, and allowed the appeal of the party with consequential relief to them. The Department went to the CESTAT against the Order of the

Commissioner (Appeals), Mumbai, and CESTAT, Mumbai in its Order No. 128/2001-WZB/C-II, dated 10-1-2001 reported in [2001 \(129\) E.L.T. 502](#) (Tri. - Bom.) in the case of Commissioner of Customs (P), Mumbai v. Artherton Engg. Pvt. Ltd., decided the classification under Customs Tariff Heading No. 05.11.

12. The appellant-company's appeal was decided by the Mumbai Tribunal as reported in [2001 \(129\) E.L.T. 502](#), wherein it was held that Brine Shrimp Eggs fall under Customs Tariff Heading No. 0511.99. The relevant extract of the above-referred judgment is reproduced below.

Chapter Note 1 to Chapter 5 of Customs Tariff reads as follows : -

"1. This Chapter does not cover :

(a) Edible products (other than guts, bladders and stomachs of animals, whole and pieces thereof, and animal blood, liquid or dried"

and the headings read as

"05.11 - Animal products not elsewhere specified or included: dead animals of Chapter 1 or 3, unfit for human consumption -

05.11.10 - Bovine Semen

- Others

0511.91 - Products of fish or crustaceans, molluscs or other aquatic

*invertebrates; dead animals of
Chapter 3.*

0511.99 - Other"

(c) From our findings herein above and the admitted position the goods under import are not edible, therefore they are not excluded from chapter 5 by note 1. Therefore the classification of goods as classified under heading 0511.99 would be the appropriate classification of the goods under import, in the condition in which they are imported. We are reinforced in this view of the classification of these goods, as the goods under import, are packed brine shrimp eggs supplied and would fall under heading 05.11 of the HSN and the Customs Tariff which is based on the HSN and not 'larvae' which are 'prawn feed'.

(d) We have examined the alternative classification under chapter 23 of the Customs Tariff note under Chapter 23 provides as under :

"Heading No. 23.09 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 by-products of such processing"

and the headings read as

"23.09 - Preparation of a kind used in animal feeding.

2309.10 Dog or cat goods, put up for retail sale

2309.90 Other"

-

A perusal of the Chapter above notes would indicate that if it is to be classified as a preparation of a kind used in animal feeding, in the present case, the larvae after processing are used as feed, therefore, the larvae as imported, would be classified under 2309. Since 'larvae' have not been imported and it is only that in egg form imports are effected the classification under 2309, of unprocessed animal materials i.e. eggs in this case, cannot be found by us to be correct, if we read the chapter notes.

(e) In view of our findings we do not consider the other submissions and the case law provided and relied upon by the respondent importers before us as we do not consider it necessary to deal with. The same as it is not for product under classification which is being arrived at based on the material supplied by the importers and the chapter notes. Therefore we find that classification of the present goods imported can be arrived at on a simple and plain reading of the chapter notes 2 to chapter 5 and chapter 25 and considering the classification of the goods in form in which

they have been admittedly to have been imported."

13. *Thereafter, an appeal was filed by the importer in the Hon'ble Supreme Court against the Order of the Tribunal, which was admitted by the Hon'ble Apex Court. The Hon'ble Supreme Court on 4-4-2002 [[2002 \(144\) E.L.T. A293](#) (S.C.)] dismissed the Civil Appeal filed by the appellants against the Mumbai CESTAT's Order. While dismissing the appeal, the Hon'ble Supreme Court held as under :*

-

"We have heard the learned Counsel for the appellant. We find no merit in the appeal. The Civil Appeal is dismissed with cost."

14. *After respectfully agreeing with the Mumbai Tribunal, we hold that the classification of Brine Shrimp Eggs imported by the appellants herein fall under Customs Tariff Heading No. 0511.99. As such, the demand of duty made by the Commissioner in his Adjudication Order referred to above, is confirmed. However, considering the facts of the case, we reduce the penalty to a sum of Rs. 25.00 lakh (Rupees twenty-five lakh) along with the applicable interest on the appellant-company. We also reduce the personal penalty of Rs. 5.00 lakh (Rupees five lakh) each on Shri Vickram Jaitha, Ex-Director of the appellant-company, and Shri R.B. Jaitha, Chairman and Director of the appellant-company, under Section 112(a) of the Customs Act, 1962, to a sum of Rs. 2.00 lakh (Rupees two lakh) each. But for the above modification, the appeals are otherwise rejected. Cross Objections filed by the Revenue also stand disposed of."*

(Emphasis supplied)

13.4. However, while this decision was taken by the Ld. Member (Technical), even as agreeing with the classification of Brine Shrimp Eggs under Chapter Heading 0511 as against Chapter Heading 2309 as claimed by the importer, the Ld. Member (Judicial) took note of the fact that the appellant had adduced an alternate plea that if the goods are classifiable under CTH 0511, then they would be entitled to exemption in terms of Notification No. 163/94-Cus. dated 02.09.1994. The Ld. Member (Judicial) noted that this Notification in question exempted animal embryos falling under the heading 0511 from the whole of the Customs duty. Since this matter was not argued before the adjudicating authority, she took the view that the matter ought to be remanded to the adjudicating authority to consider extending the benefit of exemption granted under Notification No. 163/94-Cus. dated 02.09.1994, even as she also took the view that the product in question would merit classification under CTH 0511.

13.5. After this, in view of the difference of opinion between the two Members, the matter was referred to a Third Member. During the hearing, it was brought to the notice of the Bench that Notification No. 163/94-Cus. dated 02.09.1994 had been rescinded / superseded vide Notification No. 47/96-Cus. dated 23.07.1996 and the period involved in the current litigation being from October 1998 to February 2001, Notification No. 163/94-Cus. has no application. Therefore, the Ld. Third Member held that there was no need for the matter to be remanded to the adjudicating authority.

14. The above detailed notings in the Final Order of this Bench on 22.09.2005 again show that no dispute

was raised by the appellant on the ground that if larvae would be found within the eggs (Artemia Cysts) then they would be classifiable under CTH 2309 or, even that if larvae were not in existence, then they would be classifiable under CTH 2309. The notings of the Ld. Member (Judicial), based on the submissions of the appellants, go on to clarify that the appellant in fact attempted to get the exemption under Notification No. 163/94-Cus. dated 02.09.1994 if the product was found to be classifiable under CTH 0511. In effect, this would tantamount to the party claiming that the eggs without embryo within them would fall under CTH 2309 and eggs with embryo would fall under CTH 0511. However, at no stage in the entire proceedings the appellants had sought for any test to be undertaken on the imported Artemia Cysts to check up about the existence of embryos inside and accordingly classify the goods under these two headings.

14.1 It could be observed from the notings of the Ld. Third Member in the as well as the arguments of the appellant before the Division Bench that the appellant has somehow tried to wriggle out of the situation by citing Notification No. 163/94-Cus. dated 02.09.1994 to get the benefit of exemption even if the product gets classified under CTH 0511, knowing fully well that this Notification was already rescinded, in July 1996. When the matter is being litigated by experts in Indirect Taxes, it is not conceivable that the supersession of this Notification was not known to them. As a matter of fact, it would mean that they have misled the Division Bench because of which the Ld. Member (Judicial) had taken the view to remand

the matter, which subsequently had to get resolved by a Third Member.

15. Being aggrieved by the majority decision, the appellant filed a Writ Petition before the Hon'ble Calcutta High Court. The Hon'ble High Court vide their Order dated 12.12.2005 in Writ Petition No. 2013 of 2005 noticed that the Ld. Third Member had not decided the issue relating to the reduced penalties and therefore, the earlier order to the extent that penalty provisions were not considered by the Ld. Third Member, was quashed.

16. After this, the matter was referred to a Third Member, who, after going through the case history and arguments put forth by both sides, passed the Final Order Nos. A/294-296/KOL/2006 dated 02.03.2006. The Ld. Third Member has considered the submissions from both the sides and noted that the appellant sought to classify the Artemia Cysts (Brine Shrimp Eggs) under CTH 2309.90 whereas the Department was of the view that the same would be classifiable under CTH 0511.99. The Ld. Third Member also took into consideration that an identical issue had come up before the Tribunal at Mumbai, which had held that the product in question would fall under CTH 0511.99. He also considered the alternate pleading of the exemption sought under Notification No. 163/94-Cus. dated 02.09.1994 and after noting that this Notification was rescinded vide Notification No.47/96-Cus. dated 23.07.1996, held that the benefit of the same is not applicable for the imports made during the period from October 1998 to February 2001. He has gone through the submissions from both sides on account of imposition of penalties and held that the penalty imposed on the appellants under Section 114A

and Section 112(a) of the Customs Act, 1962 were unwarranted and set aside the same.

16.1. Even from the above order of the Tribunal, it is seen that no pleading on account of actual testing of the eggs in question for coming to a conclusion about their correct classification was taken up by the appellant.

17. Being aggrieved by this Final Order dated 02.03.2006, the appellants have approached the Hon'ble High Court. The High Court vide Order dated 10.03.2010 has noted as under:

"8. Here, the contention of the writ petitioner is that these imported cysts contained little organisms or embryos which later became larva that prawns feed on. From this cystic stage this little organism is nurtured and incubated till it grows and attains proper form and shape to be fed to prawns. Therefore, according to them the nature and character of this product is not changed by nurturing or incubation. The product remains the same.

9. The imported product was desired to be classified by the importer under the heading 2309 which includes products used as animal feed. According to them prawn feed fitted the description. According to the customs this products was classifiable under the heading 0511.99 which refers to other products in the category of non edible animal products.

10. The tribunal has passed this decision, based on the decision, with regard to importation of Brine Shrimp eggs of the Mumbai Bench of the same tribunal in Commissioner of Cus (P.) Mumbai. v. Atherton Engg. Pvt. Ltd. reported in [2001 \(129\) E.L.T. 502](#). The tribunal has drawn further support

from the order of the Supreme Court dated 4-4-2002 dismissing the civil appeal against the order of Mumbai Bench to the tribunal. The order of the Supreme Court as reproduced by the tribunal reads:

"We have heard the learned counsel for the appellant. We find no merit in the appeal. The civil appeal is dismissed with costs."

11. It should be remembered that the above decision of the Supreme Court is the final decision on the particular consignment in issue between the parties involved in that litigation. I do not read that Supreme Court decision as an authority for the proposition that any product imported and declared as Brine Shrimp eggs would necessarily have to be classified in the 'other category' under the heading 0511 for reasons given by me below.

12. It is the categorical case of the writ petitioner that these goods which were imported by them were fertilised eggs. They contained embryos or little organisms enclosed within the cysts, which upon incubation in controlled temperature and hydration would become larvae which could be used as prawn feed, it is submitted.

13. If there is an embryo within the egg, then there is a living organism within it. Upon such incubation the living organism merely grows, it does not change its nature and character. If there is no embryo within the eggs then there is no living organism and these eggs cannot be used as prawn feed.

I am of the opinion that if an embryo is within an egg and it is subsequently incubated in controlled temperature and under hydration, the larvae which are subsequently born do not assume the character of any different product but remain in nature and characteristics the same product or organism which

is within the egg. Therefore, if the eggs did contain an embryo they could be classified as feeding materials for prawns and ought to have been so classified. These embryos may not be proper prawn feed at the time of importation but could become so, after incubation. Refusing to classify the product as prawn feed on this basis is not reasonable. In deducing the above principle I have taken a lot of guidance from the case of Commissioner of Income-tax. v. Venkateswara Hatcheries (P.) Ltd. reported in (1999) 237 ITR 174 (S.C.) (supra).

14. Therefore, in the circumstances there has to be a factual enquiry which has not been done.

15. I do not agree with the submissions of Mr. R.K. Chowdhury that the order of the Commissioner could not have been passed without assessment. In my opinion, such an order is in the nature of an assessment. But nevertheless, such order has been passed without making available the test report of the provisional assessment to the writ petitioner or by considering any material, whether from the seller's invoice or other materials available from the seller or elsewhere, regarding the exact nature of the goods. The pointed fact of enquiry should have been whether the imported goods contained an embryo or a live organism. This factual enquiry ought to have been made upon notice to the writ petitioner and after giving them an opportunity to counter the evidence of the revenue and to produce his own evidence in support of his contention."

[Ref. 2010 (256) E.L.T. 358 (Cal.)]

(Emphasis supplied)

18. Finally, the matter was remanded to the adjudicating authority to follow the directions of the Hon'ble High Court while passing the adjudication order. The adjudicating authority, after following the principles of natural justice, has passed the impugned order and being aggrieved, the appellants are before the Tribunal.

19. The main issue canvassed by the Ld. Counsel appearing on behalf of the appellants is that the observation of the Hon'ble High Court was that "the pointed fact of enquiry should have been whether the imported goods contained an embryo or a live organism. This factual enquiry ought to have been made upon notice to the writ petitioner and after giving them an opportunity to counter the evidence of the revenue and to produce his own evidence in support of his contention", which had not been followed by the adjudicating authority in the impugned order.

19.1. As observed above, the adjudicating authority had very limited scope to fulfil this condition. The imports pertained to the year 1998-2000 and, as has been highlighted above, the appellants never took the stand that the eggs in question were required to be tested in order to find out as to whether embryos / live organisms were in existence or not. Therefore, the Revenue has gone by the documentary evidence placed and the Chapter Notes and HSN details of Artemia Cysts and came to the conclusion that the product in question correctly falls under CTH 0511.

19.2. While several challenges have been made from time to time before the Hon'ble High Court and the

matter has also been re-visited by the Tribunal on several occasions, this point was never taken up nor argued at any material point of time.

19.3. In fact, from the Final Order dated 02.03.2006 passed by the Tribunal, it can be seen that the appellant has clearly stated that: -

"...the imposition of the penalty is the only question which has been referred back by the Hon'ble High Court and he concedes, he does not have a case on merits. He also concedes the fact that the benefit of Notification No. 163/94 is not available to them in this case. He submits that it is a well settled law that the imposition of penalty in this kind of cases is not required."

[Ref. paragraph 6 of Final Order Nos. A/294-296/KOL/2006 dtd. 02.03.2006 – CESTAT, Kolkata]

19.3.1. Thus, even as per the appellants, after the Order of the Hon'ble Calcutta High Court in Writ Petition No. 2013 of 2005 dated 12.12.2005, the appellants have accepted that they had no case on merits. This being so, it is not known as to how they have taken an absolutely new stand before the Hon'ble High Court in Writ Petition No. 748 of 2006 decided on 10.03.2010 about the existence or otherwise of larvae in the Artemia Cysts and tests not being conducted etc., when the same was never taken throughout the litigations as can be seen from the relevant paragraphs given above.

20. Another point to be noted is that on an identical issue, in respect of the same appellant, a decision was rendered by the Mumbai Tribunal holding that the product will fall under CTH 0511. This was challenged by the appellant before the Hon'ble Supreme Court, but the Hon'ble Supreme Court dismissed their appeal *[2002 (144) E.L.T. A293 (S.C)]*. Since the goods in question viz. "Artemia Cyst" was identical in respect of the same appellant, it can be safely concluded that the issue reached finality when the Appeal filed by the present appellant was dismissed by the Hon'ble Supreme Court. There is nothing to indicate that, factually, the present case is in any way different from their Mumbai case.

21. We have also perused the relevant Chapter Heading 0511 and find that when the Six Digits classification was modified to Eight Digits with effect from 20th January, 2003, "Artemia Cyst" was brought under 0511.99.11. This would again go on to show that prior to the onset of the eight-digit classification under CTH, under the earlier six digits, this product would fall under 0511.99, as has already been held in the earlier decision of the Tribunal as well as by the present adjudicating authority.

21.1. Further, we also note that presently, "Artemia Cysts" are specifically covered under 0511.91.40. It has been held in a catena of decisions that the specific entry is to be applied rather than the general entry.

The following decision is case in point:

▪ ***Commissioner of Customs, Chennai-II v. Shahnaz Commodities International Pvt. Ltd. [2023 (386) E.L.T. 214 (Mad.)]:***

"16. To sum up :

(a)

(b)

(c) HSN explanatory notes is normally a safe guide in determining classification under CTH. Roasted areca/betel nut having been mentioned in CTH 2008 19 20 under HSN, the impugned Ruling is in consonance with HSN classification.

(d) When there is a specific entry covering a product/commodity, the test of common parlance is irrelevant in determining classification."

(Emphasis supplied)

21.2. These Chapter Notes and descriptions of the goods would clarify that it is beyond doubt that the goods in question would fall under CTH 0511.99 during the period under dispute.

22. Therefore, we uphold the classification of the impugned goods under CTH 0511.99.

23. Insofar as the penalty of Rs.98,86,532/- imposed on the appellant-company under Section 114A of the Act and the penalty of Rs.3,00,000/- imposed on Shri Vickram Jaitha under Section 112(a) of the Act are concerned, we observe that vide the Final Order Nos. A/294-296/KOL/2006 dated 02.03.2006, the very specific issue of the penalties imposed under Section 114A on the company and the

personal penalty imposed under Section 112(a) against the directors was considered by the Third Member Reference Bench vide Final Order Nos. A/294-296/KOL/2006 dated 02.03.2006 and the same were held as not imposable.

23.1. We do not see any specific reason to differ from this decision of the Three Member Bench. Accordingly, we set aside the penalties imposed on the appellant-company in terms of Section 114A of the Customs Act, 1962 and on Shri Vickram Jaitha in terms of Section 112(a) of the Act.

24. Thus, the appeals stand allowed, partly in respect of the appellant-company viz. (M/s. Atherton Engineering Co. Pvt. Ltd.) and fully in respect of the director of the appellant-company (Shri Vickram Jaitha).

(Order pronounced in the open court on **26.06.2024**)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd