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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75468 of 2024

(Arising out of Order-in-Original No. KOL/CUS/COMMISSIONER/PORT/ADJN/14/2023 dated 18.12.2023 passed by the Commissioner of Customs (Port), Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. Aquapharm Chemical Limited **: Appellant**
(Formerly 'M/s. Aquapharm Chemicals Private Limited')
9th and 10th Floor, Amar Synergy,
12B, Sadhu Vaswani Road, Pune – 411 001

VERSUS

Commissioner of Customs (Port) **: Respondent**
Custom House, 15/1, Strand Road,
Kolkata – 700 001

APPEARANCE:

Shri Arvind Baheti, Chartered Accountant, for the Appellant

Shri Faiz Ahmed, Authorized Representative, for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76879 / 2025

DATE OF HEARING: 30.06.2025

DATE OF DECISION: 10.07.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the OrderinOriginalNo.KOL/CUS/COMMISSIONER/PORT/ADJN/14/2023 dated 18.12.2023 passed by the Ld. Commissioner of Customs (Port), Custom House, 15/1, Strand Road, Kolkata – 700 001 wherein the total import duty amounting to Rs.29,62,19,807/- [Rs.3,54,01,196/- under Section 28 of the Customs Act, 1962 + Rs.26,08,18,611 under Section 28AAA of the Customs Act, 1962], along with interest, has been

confirmed, besides imposition of penalties of Rs.3,54,01,196/- under Section 114A of the Act towards the goods imported, Rs. 50,00,000/- under Section 114AA of the Act and Rs.10,00,00,000/- under Section 114AB of the said Act towards the export leg. A fine of Rs.5,00,00,000/- in lieu of confiscation of the imported goods was also imposed under Section 125 of the Act, by the ld. adjudicating authority in the above order.

2. M/s. Aquapharm Chemical Limited (hereinafter referred to as the "appellant") is an Export Oriented Unit (EOU) engaged inter alia in manufacture of water treatment chemicals at their manufacturing facility located at Pune, Maharashtra. The appellant manufactures and sells a wide variety of 'Organophosphorus Compounds' (Acids and Salts) under the brand name 'Aquacid'. The appellant has been classifying the said goods under Tariff Heading "Other organo-inorganic compounds – Other" under Tariff item No. 29310090 (residuary) prior to 01.01.2012 and under Tariff Item No. 29319090 post 01.01.2012 for their domestic sale as well as exports since 2006.

3. The appellant had been receiving export incentives in the form of a Focus Market Scheme (FMS) on the export of the said products to notified markets during 2012 to 2014. The FMS was substituted by Merchandise Exports from India Scheme (MEIS) vide Public Notice No. 2 dated 01.04.2015 from the office of the DGFT. The appellant's claim for MEIS at the rate of 2% on the FOB value of the said export goods was also allowed by the licensing authority being covered under Sl. No. 1101 of Appendix 3B to the said Public Notice up to

March 2017 and thereafter, in terms of Sl. No. 1480 of Public Notice No. 61 dated 07.03.2017. Customs Tariff Heading 2931 was restructured vide Finance Act, 2016 w.e.f. 01.01.2017, whereby nine tariff items 2931 3100 to 2931 3900 were introduced under a new sub-heading titled '*Other Organo-phosphorus derivatives'* after Tariff item 2931 2000. Despite the said amendment, the appellant continued to classify the said products under same heading under the bona fide belief that the products concerned are 'compounds' and not 'derivatives'. No objection was raised by the department regarding the classification of the goods adopted by the appellant.

4. Pursuant to an investigation initiated by the DRI, Cochin Zonal Unit, a Show Cause Notice dated 02.11.2022 was, inter alia, served upon the appellant wherein the benefit of import duty exemption claimed by the appellant against 233 MEIS licenses was proposed to be denied on the ground that the appellant had misclassified its products exported under the brand name "Aquacid" during the period from 01.01.2017 to 30.09.2021.

5. It has been alleged that the appellant has mis-classified the goods under Tariff Item No. 29319090 and the Revenue was of the view that the said goods were more appropriately classifiable under the residuary Tariff Item 29313900 appearing in sub-heading "Other Organo-phosphorus derivatives". Consequently, the Notice proposed recovery of import duties of Rs. 26.08 crores under Section 28AAA and Rs. 3.54 crores under the proviso to Section 28, along with interest and penalties thereon.

6. The above Show Cause Notice was adjudicated vide the impugned order dated 18.12.2023 wherein the demands of duty, penalty and redemption fine (as indicated at paragraph 1 of this Order) have been confirmed against the appellant herein.

6.1. Aggrieved by the confirmation of the demands of duty, interest, penalties and redemption fine, the appellant has filed this appeal.

7. The submissions made by the Ld. Counsel appearing on behalf of the appellant are summarized below.

7.1. It is the appellant's submission that the entire proceedings are vitiated by law, as Custom authorities do not have the jurisdiction to question/ adjudicate on the eligibility of MEIS and deny the benefit thereunder until such licenses have been cancelled by DGFT:

(i) At the outset, the Appellant submits that Merchandise Exports from India Scheme (MEIS) is an export incentive scheme introduced by Ministry of Commerce, regulated and administered by DGFT in terms of Chapter III of the Foreign Trade Policy 2015–20 ('FTP 2015-20'), whereby benefits in the form of duty credit scrips are granted to exporters upon export of notified products to notified markets. Para 2.57 of the FTP expressly stipulates that the decision of DGFT shall be final and binding on all matters related to interpretation of policy including classification of any item for export/import in ITC (HS). Further, as per Para 3.01(h) of the Handbook of Procedures 2015-20 (HBP), MEIS scrips shall be issued by the Regional Authority (RA) only after thorough scrutiny of the

electronic documents, and in case the RA has any suspicion about wrong classification/mis-declaration, it shall seek physical documents for further scrutiny before granting the MEIS scrips. Thus, the creation of rights under MEIS and entitlement of benefits thereto including the power to dispute the classification falls squarely within the exclusive domain of the DGFT.

(ii) The said benefit can only be curtailed by the DGFT through cancellation of the duty credit scrips as per the process prescribed under Section 9 of the FT(D&R) Act, 1992 and the rules framed thereunder, viz., Rule 10 of the FTDR Rules, 1993. Therefore, unless the DGFT has initiated and concluded such cancellation proceedings, the presumption is that the MEIS scrips remain valid and enforceable.

(iii) Further, reference is invited to *Circular No. 334/1/2012-TRU dated 01.06.2012*, which states that Customs authorities can initiate recovery proceedings under Section 28AAA only after DGFT initiates any action for cancellation of instrument, however, the matter shall be decided only after the instrument has been cancelled by DGFT. Relevant extracts of the said circular are set out hereinbelow:

> *"II.2 Recovery of duty in case of instrument issued under Foreign Trade (Development and Regulation) Act :*
> *Section 28AAA has been inserted in the Customs Act through Section 122 of the Finance Act, 2012 to provide for recovery of duties from the person to whom an instrument such as credit duty scrips was issued where such instrument was obtained be means of collusion or willful misstatement or suppression of facts. Since the provision now has the force of law, action for recovery*

> *of duty can be initiated under the said provision. Field formations are advised to issue demands as soon as DGFT/concerned regional Authority initiates action for cancellation of an instrument but the matter may be decided only after the instrument has been cancelled by DGFT."*

(iv) In the present case, a total of 233 MEIS licenses, involving duty credit of approximately Rs.29.62 crores, are under dispute. No proceedings for cancellation have been initiated by the DGFT in respect of any of these licenses, save and except 18 licenses involving duty credit of Rs. 81.21 lakhs and even these proceedings remain unadjudicated as on date, with the status of all such licenses continuing to reflect as "ACTIVE" on the DGFT portal. Furthermore, it is submitted that only 16 out of these 18 licenses, involving duty credit of Rs. 77.38 lakhs, pertain to the issue on hand.

(v) Further, the Appellant submits that the Hon'ble High Courts and Tribunals have time and again held that Customs Department has no jurisdiction to unilaterally invalidate or disregard the MEIS scrips or recover benefits availed thereunder until and unless the DGFT has lawfully cancelled the underlying authorisation. Hence, the Appellant submits that the entire proceedings are vitiated by law and liable to be set aside in as much as the MEIS scrips availed by the Appellant have not yet been cancelled and continue to remain valid as on date. Reference in this regard is invited by the appellant to the following judgements:

- *M/s Colour CottexPvt. Ltd. vs. Commr. of Cus. (Export) ICD [2025 (6) TMI 368 - CESTAT NEW DELHI]*
- *Designco, M/s Amit Exports vs. UOI & Ors. [2024 (11) TMI 1150 - Delhi HC]*
- *Bharat Rasayan Ltd. vs. Commissioner of Customs, Nhava Sheva-II [(2025) 29 Centax 1 (Tri.-Bom)] [Affirmed by SC in (2025) 29 Centax 2 (S.C.)]*
- *Jeena & Company vs. Union of India [(2024) 15 Centax 55 (Mad.)].*

7.2. The appellant has also taken the ground that the products exported are Organophosphorus Compounds and not Organophosphorus Derivatives, which stands substantiated/corroborated by multiple uncontroverted expert opinions, consistent classification history as Organophosphorus compounds both under Customs and Central Excise since 2006 and acknowledgement in the Show Cause Notice:

(i) The appellant submits that the goods exported by the Appellant are 'Organophosphorus Compounds' being in nature of acid or salts and not 'Organophosphorus derivatives' as alleged by the Department. In this regard, the Appellant states that compound is a substance in which atoms of more than one element are chemically bonded, and Organophosphorus compound is one such compound which contain one or more phosphorus carbon (P-C) bond. Whereas, a derivative is a compound that is derived/synthesized from an identical compound/parent compound by a chemical reaction with the replacement of one atom or

group of atoms. In view of the aforesaid distinction, it is evident that compounds and derivatives are not same and that derivatives are derived from compounds.

(ii) The appellant submits that the impugned notice itself at various places, viz. para 3, 7 and 11 acknowledges the fact that the products concerned are nothing but 'Organophosphorus Compound'. Further, the Appellant has also obtained and furnished multiple expert opinions/certificates from various eminent scientists and professors affiliated to accredited National Institutions certifying/confirming the following:

a. Products concerned are Organophosphorus compounds and not Organophosphorus derivatives because the molecules of two hydroxyl groups in these are intact and have not been 'derivatized' by a chemical synthesis process.

b. Products concerned and exported by Appellant are not similar to the products which has been set out in Customs Tariff as Organophosphorus derivative.

c. Chemical structure of the products are not akin to those of Organophosphorus derivatives.

However, the Ld. Adjudicating Authority has without controverting the said opinions/certificates with any other technical report, proceeded to hold that the products exported as Organophosphorus derivatives.

(iii) The appellant submits that the Revenue authorities, not being qualified scientific experts, lack the technical competence to opine on the nature of the subject products, which are of complex chemical composition. It is a settled principle in law that the opinion/certificate of an expert is binding upon the Revenue and the same cannot be brushed aside, particularly when the authorities are not expert themselves and there is no evidence/material available to the contrary. Reference in this regard is placed by the appellant on the following judgements:

i. Monopoly Innovations vs. Union of India [2022 (58) GSTL 9 (Bom. HC)]

ii. Inter Continental (India) vs. Union of India [2003 (154) E.L.T. 37 (Guj.) – Para 19] [Affirmed in 2008 (226) E.L.T. 16 (S.C.)]

iii. Commissioner of Customs, Ludhiana vs. Longowala Yarns Ltd. [2019 (370) E.L.T. 1436 (Tri. – Chan.)]

(iv) Furthermore, the Appellant submits that it is a settled law that the onus to prove classification of the products under a particular Tariff heading is on the Department. In the present case, the ld. adjudicating authority has not put forth any iota of evidence to dispute the classification adopted by the appellant. Notably, the CRCL report dated 08.04.2021 which formed the very basis for disputing classification in the Impugned Notice has also not been relied upon by the Ld. Adjudicating Authority during adjudication, as the said report is inconclusive and does not address the core question that whether the products concerned are derivatives

or not. Thus, the Ld. adjudicating authority has failed to discharge the burden of proof in support of classification under Tariff Item 2931 3900. Reliance in this regard is placed on the following judgements:

i. *Hindustan Ferodo vs. CCE [1997 (89) ELT 16 (SC)]*
ii. *HPL Chemicals vs. Commissioner of C.Ex. Chandigarh [2006 (197) ELT 324 (SC)]*
iii. *M.P. Dyechem Industries vs. CCE [2002 (139) ELT 656 (Tri.) – Para 4] [Affirmed by SC in 2009 (238) ELT A24 (SC)]*

(v) Moreover, it is submitted that same classification was even adopted by the Customs authorities for assessing the shipping bills during the physical control regime. The Appellant has consistently and historically since 2006 adopted the same classification for clearance of the said products under Customs and Central Excise. It is pertinent to note that no dispute regarding classification of the said goods has ever been raised by either the Excise or GST authorities. This long-standing and consistent acceptance further substantiates the fact that products in question are organophosphorus compounds and not derivatives, and merit classification under Tariff 2931 9090.

(vi) In light of the submissions made hereinabove, the impugned Order is ex-facie bad in law, without any merit, and hence deserves to be set aside.

7.3. It has been contended by the appellant that no collusion, suppression or wilful mis-statement of facts can be attributed on the part of the appellant so as to warrant invocation of extended period under Section 28(4) or 28AAA and consequently, imposition of penalties under Section 114A, 114AA and 114AB are also illegal and unjustified:

(i) The ld. adjudicating authority has alleged that the appellant has wilfully suppressed material facts from Department in as much as it did not correctly describe and disclose in their shipping bills that the products exported are organo-phosphonates. In this regard, it is submitted that the appellant has all along since 2006 provided complete and accurate description of the products including their precise chemical name and the fact that these were acids/salts, in the shipping bills as well as the export invoices. It is further submitted that the term *'phosphonate'* is a broad chemical category encompassing a wide range of compounds and, by itself, would not be conclusive of the precise nature of the product, whereas, the Appellant has in a rightful manner specifically described the products in accordance with their actual chemical composition and nomenclature. Moreover, *'phosphonate'* was covered by specific Tariff items during the period 01.10.2008 to 01.01.2012, still the classification at eight-digit level under residuary of the products exported by the Appellant was accepted by the Custom authorities. Hence, the Ld. Adjudicating Authority has grossly erred in

observing that the goods were not properly described and disclosed by the Appellant.

(ii) It is further submitted that the Appellant has been consistently using the same description in the shipping bills and invoice for exporting the said products both prior to amendment and post-amendment, and even under the physical control regime since 2006 and therefore the Department was well aware of the classification adopted by the Appellant. Further, the same classification and product details were duly disclosed in ER-2 returns for domestic clearance of the said goods which have not been objected to. In the given circumstances, no suppression and wilful mis-statement can be alleged on the Appellant so as to invoke extended period of limitation and demand duty under Section 28 along with penalty under Section 114A as the facts of the case and the classification followed by the Appellant was well within the knowledge of the Department since 2006.

(iii) Furthermore, the Appellant submits that complete and accurate details of the exported products were duly disclosed in the application filed seeking MEIS scrips. The Appellants being an EOU, the application for MEIS scrips has passed through double muster, and the MEIS scrips were granted to Appellant only after having been scrutinised by the Development Commissioner as well as the DGFT authorities. Additionally, as per Para 3.01(h) of the Handbook of Procedures 2015-20 (HBP), MEIS scrips shall be issued by the Regional Authority (RA) only after thorough scrutiny of the electronic documents, and in case the RA has

any suspicion about wrong classification/mis-declaration, it shall seek physical documents for further scrutiny before granting the MEIS scrips. Moreover, the scrips are not only subject to scrutiny prior to their issuance but also after their issuance. Reference in this regard is invited to Para 3.19 of the FTP which provides for a Risk Management System whereby the RA may conduct a risk assessment and call for documents in order to conduct a further examination of the scrips already issued. In view of the above, demand under Section 28AAA and consequent imposition of penalties under Section 114AA and 114AB of the said Act does not hold any legs to stand and is liable to be set aside in as much as no wilful mis-statement/mis-declaration or suppression can be attributed on the part of the appellant. In this regard, the appellant relies on the following decision: -

i. Commissioner, Customs (Preventive) -Jaipur vs. M/s Pelican Quartz Stone and M/s Pelican Quartz Stone Versus Commissioner, Customs (Preventive) – Jaipur [2025 (5) TMI 2017 - CESTAT NEW DELHI]

(iv) In any event, it is a settled law that classification is a legal interpretational issue which cannot be equated with that of mis-statement or mis-declaration. The Hon'ble Supreme Court has time and again held that mis-declaration of subject goods cannot be alleged against Appellant when the issue involved is purely of classification or claiming

benefit of exemption notification, even if the declared classification is found to be wrong or the exemption benefit claimed is found to be inadmissible. Reliance in this regard is placed on the following judgments:

i. *Lewek Altair Shipping Pvt. Ltd. vs. Commissioner of Cus., Vijayawada [2019 (366) E.L.T. 318 (Tri. - Hyd.)] [Affirmed by SC in 2019 (367) E.L.T. A328 (S.C.)]*
ii. *Northern Plastic Ltd. v. Commissioner [1998 (101) E.L.T. 549 (S.C.)]*
iii. *Densons Pultretanik vs. CCE [2003 (155) E.L.T. 211 (SC)]*

7.4. The appellant contended that the confiscation of unavailable imported goods and consequent imposition of redemption fine in lieu of such confiscation is not warranted, as there was no violation of Section 111(o) of the Customs Act, 1962:

(i) The appellant submits that once the goods are cleared for home consumption, they cease to be imported goods as defined under Section 2(25) of the said Act. In the instant case, goods are not available for confiscation because they have ceased to be imported goods and were not cleared under bond but finally assessed. Hence, the question of imposition of redemption fine does not arise when the goods itself are not liable for confiscation unless cleared under bond, which is not the case here. Reference in this regard is invited to the following judgements:

i. *Bussa Overseas & Properties vs. C.L. Mahar, Ass. Commissioner of Customs, Bombay [2004 (163) ELT 304 (Bom.)] [Maintained by Hon'ble Supreme Court in 2004 (163) ELT A160]*

ii. *Weston Components Ltd. vs. Commissioner of Customs, New Delhi [2000 (115) E.L.T. 278 (S.C.)]*

iii. *Commissioner of Customs (Import), Mumbai Versus Finesse Creation Inc. [2009 (248) E.L.T. 122 (Bom.)] [Maintained in 2010 (255) ELT A120 (S.C.)]*

(ii) Moreover, it is submitted that the decision of Hon'ble Madras High Court in the case of *Visteon Automotive Systems vs. CESTAT Chennai [2018 (9) GSTL (Mad.)]* relied upon by the ld. adjudicating authority is per incuriam and hence not applicable to the case. Thus, in view of the submissions made hereinabove, redemption fine of Rs.5,00,00,000/- in lieu of confiscation of goods under Section 111(o) cannot be imposed on the Appellant.

7.5. The appellant has further submitted that in any event, <u>the classification of the exported goods cannot be questioned by the Department at this stage in so far as the assessment of the underlying shipping bills with reference to which these licenses were issued have not been reassessed or appealed against and hence attained finality:</u>

(i) Without prejudice to the submissions made hereinabove, the Appellant submits that the underlying shipping bills with reference to which the MEIS licenses were granted to the Appellant

stood finally assessed in terms of Section 51 of the Customs Act, 1962 at the time of clearance of the export goods itself. If the Customs authorities intended to dispute the said assessments including the aspect of classification, the appropriate course would have been to either re-assess the Shipping Bills under Section 17(4) of the Customs Act or to prefer an appeal under Section 129D read with Section 128 of the said Act. The Department did not exercise either of these statutory remedies and allowed the assessments to attain finality. However, now at this stage, the Department has sought to circumvent the settled assessment by demanding duty under Section 28 of the said Act in respect of the goods imported by the Appellant by utilizing such MEIS scrips, the benefits of which have been lawfully accrued to the Appellant pursuant to exports under such assessed Shipping Bills. The Appellant submits that such an attempt is clearly impermissible in law and amounts to an indirect challenge to the finality of the original export assessments, which cannot be sustained in the eyes of law. Reliance in this regard is placed on the following judgements:

i. *Sanstar Bio Polymers Ltd and Sambhav Chowdhary Versus C.C. -Mundra [2022 (12) TMI 374 - CESTAT AHMEDABAD]*
ii. *Vittesse Export Import vs. Commissioner of Customs (EP), Mumbai [2008 (224) E.L.T. 241 (Tri. - Mumbai)]*
iii. *Designco, M/s Amit Exports vs. UOI & Ors (supra)*

7.6. In view of the above submissions, the appellant prayed for setting aside the demands of customs duties confirmed in the impugned order along with interest. They also prayed for setting aside the penalties imposed. The appellant also prayed for setting aside the order of confiscation and the imposition of redemption fine in lieu of such confiscation.

8. On the other hand, the Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

9. Heard both sides and perused the documents submitted before us.

10. We observe that the issue involved in the present appeal is with regard to the duty exemption claimed by the appellant against MEIS scrips. The impugned order seeks to recover Customs duty from the appellant under Sections 28 and 28AAA of the Customs Act, 1962, on the allegation that the appellant is not entitled to the benefit under the MEIS as they have obtained these scrips by mis-classifying the underlying export products under Tariff item No. 2931 9090 as against Tariff Item No. 2931 3900.

11. Hence, we observe that the first issue to be decided in the present appeal is whether the goods in question are appropriately classifiable under Tariff item No. 2931 9090, as claimed by the appellant, or under Tariff Item No. 2931 3900, as contended by the Revenue. For the sake of ready reference, the relevant Tariff Entries are extracted below: -

Tariff Item	**Description of goods**
2931	OTHER ORGANO-INORGANIC COMPOUNDS
293110	- Tetramethyl lead and tetraethyl lead:
29311010	--- Tetramethyl lead
29311020	--- Tetraethyl lead
29312000	- Tributyltin compounds
	- Other Organo-phosphorus derivatives
29313100	-- Dimethyl methyl phosphonate
29313200	-- Dimethyl propyl phosphonate
29313300	-- Diethyl ethyl phosphonate
29313400	-- Sodium 3-(trihydroxysilyl)propyl methyl phosphonate
29313500	-- 2,4,5-Tripropyl-1, 3, 5, 2, 4, 6 trioxatriphosphinane 2, 4, 6-trioxide
29313600	-- (5-ethyl-2-methyl-2-oxido-1, 3, 2-dioxaphosphinan-5-yl)methyl methylmethyl phosphonate.
29313700	-- Bis[(5-ethyl-2-methyl-2-oxido-1, 3, 2-dioxaphosphinan-5-yl)methyl] methyl phosphonate
29313800	--- Salt of methylphosphonic acid and (aminoiminomethyl)urea (1:1)
29313900	-- Other
293190	- Other:
29319010	--- Organo arsenic compounds
29319090	--- Other

11.1 We observe that the appellant has classified the said goods as "Other organo-inorganic compounds – Other" under Tariff item No. 29310090 (residuary) prior to 01.01.2012 and under Tariff Item No. 29319090 post 01.01.2012. We findthat the Appellant has been consistently using the same description in the shipping bills and invoice for exporting the said products both prior to amendment and post-amendment, and even under the physical control regime since 2006 and therefore the Department was

well aware of the classification adopted by the Appellant and no objections has been raised against the said classification adopted by the appellant.

11.2. We observe that the term *'phosphonate'* is a broad chemical category encompassing a wide range of compounds. The appellant has specifically described the products in accordance with their actual chemical composition and nomenclature. Moreover, *'phosphonate'* was covered by specific Tariff items during the period 01.10.2008 to 01.01.2012, still the classification at eight-digit level under residuary of the products exported by the Appellant was accepted by the Custom authorities. After 01.01.2012 also the classification of the goods under the CTH 29319090, adopted by the appellant was not disputed by the department. We also find that the underlying shipping bills with reference to which the MEIS licenses were granted to the Appellant stood finally assessed in terms of Section 51 of the Customs Act, 1962 at the time of clearance of the export goods itself. If the Customs authorities intended to dispute the said assessments including the aspect of classification, the appropriate course would have been to either re-assess the Shipping Bills under Section 17(4) of the Customs Act or to prefer an appeal under Section 129D read with Section 128 of the said Act. We find that the Department did not exercise either of these statutory remedies and allowed the assessments to attain finality. Thus, we observe that raising the issue of classification to deny the benefit of MEIS scrips availed by the appellant without challenging the finally assessed shipping bills, is legally not sustainable.

11.3. Regarding the merit of the classification of the impugned goods under the CTH 2931 9090 as claimed by the Appellant, we find that the appellant has exported the goods under the CTH description "Other organo-inorganic compounds – Other". In support of this classification, the appellant has furnished many opinions from the Experts in the field. One of the Expert's Opinion obtained by the Appellant was from the Indian Institute of Science, Education and Research (IISER), Pune wherein it has been categorically opined that the goods manufactured by the appellant are not derivatives of organo-phosphorus derivatives but merely "organo-phosphorus compounds". For the sake of ready reference, the relevant portion of the above Expert's Opinion is reproduced below: -

ANNEXURE-16

IISER PUNE

INDIAN INSTITUTE OF SCIENCE EDUCATION AND RESEARCH
(IISER), PUNE
(An Autonomous Institution, Ministry of Human Resource Development, Govt. of India)
Dr Homi Bhabha Road Pune 411008

Dr. S. Sivaram, FNA
Honorary Professor Emeritus and INSA Honorary Scientist
March 3, 2023

To whomsoever it may concern

Dear Sir/ Madam

I am issuing this technical letter of clarification in response to a request received from M/s Aquaphram Chemicals Pvt Ltd., Pune

I am a practicing scientist with specialization in chemical and polymer science with over fifty years of working experience in research and development in industry, a national laboratory and academic institutions, all in the public sectors. I held the position of Director, CSIR-National Chemical Laboratory, Pune from 2002 to 2010. Based on my knowledge of chemistry, I am competent to address the question posed to me by M/s Aquapharm Chemicals Pvt. Ltd. (ACPL)

The point in question is whether the organo-phosphorus products manufactured by ACPL can be called as organo-phosphorous derivatives or not.

According to accepted definitions of nomenclature in chemistry, a "derivative" is a compound which can be derived formally or synthesized from a parent compound. Organo-phosphorus compounds are compounds which contain one or more P-C bonds. Therefore, esters of organo-phosphoric acid are called derivatives. There are many derivatives of organo- phosphoric acids, for example, their corresponding esters, halides, amides, thio analogs etc.

The following products (1-8), mentioned in HS Code 2931.31.00 to 2931.38.00 are called derivatives of organo-phosphorous acids because one or both the hydroxyl groups have been chemically "derivatized" using other organic functional groups:

S. Sivaram

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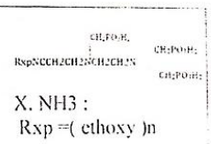
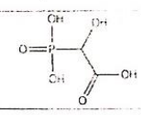
IISER PUNE

INDIAN INSTITUTE OF SCIENCE EDUCATION AND RESEARCH
(IISER), PUNE
(An Autonomous Institution, Ministry of Human Resource Development, Govt. of India)
Dr Homi Bhabha Road Pune 411008

22	Aquacid-130 EX Ethoxylated amino phosphonate ammonium salt	Polyethylene amine poly ethoxylated, phosphonomethylated	68966-36-9	 X. NH3 : Rxp =(ethoxy)n
23	Aquaci-118 EX-HPAA	Hydroxy-phosphono acetic acid	23783-26-8	

The reasons above referred products manufactured by APCL are not "derivatives" of organo-phosphorous acids is because in these molecules the two hydroxyl groups are intact and have not been "derivatized"by a chemical synthesis process.

Therefore, in my considered opinion based on my knowledge of chemistry, products of Aquapharm are not organo-phosphorus derivatives but merely organo-phosphorous compounds. They are distinctly different from the type of products called organo-phosphorous derivatives in terms of both chemical structure and properties.

Sincerely

S. Sivaram

S. Sivaram

Dr S. Sivaram
s.sivaram@iiserpune.ac.in
www.swaminathansivaram.in

11.4. From the relevant extracts of the Expert's Opinion reproduced above, it is seen that the Honorary Professor Emeritus and INSA Honorary Scientist, Dr. S. Sivaram, FNA has examined the product manufactured by the appellant and clarified that in the molecules of the said product, the two hydroxyl groups are intact and have not been derivatized by a chemical synthesis process. Accordingly, he has opined that the goods are not organo-phosphorus derivatives.

11.5. However, from the impugned order, it is observed that the ld. adjudicating authority has disregarded the said Expert's Opinion, at paragraph 33 of the impugned order. For better appreciation of the facts, the reasons given by the Ld. adjudicating authority to reject the Expert opinions furnidhed by the appellant as mentioned in the impugned order is extracted below: -

> *"33. After going through the above reports, I find following short-comings in them insofar as they fall short of deciding the question of correct classification of the impugned items -*
>
> *33.1 Firstly, experts have reasoned in the reports that the concerned products cannot be termed as 'organophosphorous derivatives' as the two Hydroxyl groups (-OH) attached with Phosphorous are intact and are not replaced/derivatized in these products. But I find that their interpretation is one-sided. As per the accepted definition of nomenclature in Chemistry, a 'derivative' is a compound which can be derived formally or synthesized from a parent compound. This same definition has been quoted by the experts in their reports cited by M/s Aquapharm. It is nowhere mentioned in the quoted definition that the process of synthesis or derivatization entails replacement of only the Hydroxyl groups in a parent compound; hence, just because the two Hydroxyl groups are intact in the molecular structure of the concerned chemicals, it does not imply that they cannot be termed as 'derivatives'.*
>
> *33.2 Secondly, experts have stated in their reports that exported products are either acids or salts and are not similar to the products which have been set out in the Customs Tariff as Organophosphorous Derivatives. But I find that their statement regarding acids and salts being different from 'derivatives' does not hold up when scrutinised in light of the Customs Tariff as a simple perusal of the relevant portion of the Customs Tariff post the changes effected vide Finance Act 2016 reveals that the product mentioned under Tariff Item 29313800-Salt of methylphosphonic acid and (aminoiminomethyl)urea(1:1) is an organo-*

phosphorous salt and it is categorised under the sub-Heading 'Other Organo-phosphorous derivatives' in the Customs Tariff. This clearly proves that, for classification purpose, salts can also be categorized under 'organo-phosphorous derivatives.'

33.3 Thirdly, it has been opined by the experts in their reports that the chemical structure of the aforementioned products of M/s Aquapharm is different from the type of products mentioned under HS code 29313100 to 29313800. Here I find that the experts, though may be masters in their own field, have failed to grasp the nuances of classification aspects as per Customs Tariff. If the molecular structure of a chemical is not matching with that of chemicals listed in Tariff Items 29313100 to 29313800, it does not mean that they are not fit for classification under the sub-Heading of 'Other Organo-phosphorous derivatives'. There is a residual Tariff Item (2931 3900) present under this sub-Heading which signifies that those organo-phosphorous derivatives which are not similar to the eight specific ones listed under Tariff Items 29313100 to 29313800 are to be classified under the residual Tariff Item 29313900."

11.6. From the above, we find that the ld. adjudicating authority has identified certain shortcomings in the said Expert's Opinion and rejected the same. In this regard, we do not agree with the reasons given by the Ld. adjudicating authority to reject the Expert Opinions. We agree with the submission made by the appellant that the Revenue authorities are not qualified scientific experts who have technical competence to comment on the opinion given by a qualified expert in the field. In support of this view, we rely on the decision of the Hon'ble Bombay High Court in the case of *Monopoly Innovations Pvt. Ltd. v. Union of India [2022 (58) G.S.T.L. 9 (Bom.)],* wherein the following observation has been made by the Hon'ble High Court on the issue

of acceptance of Expert Opinions by Revenue authorities: -

> *"20. At paragraph 7(vii) of the impugned order, the Commissioner upon consideration of the opinion of the Institute of Chemical Technology, Mumbai (hereafter "the Institute", for short), rejected the same by observing that he did not "find the report to be proper". The comments made for rejecting the report would tend to suggest that the Commissioner has good deal of knowledge in the subject of chemical science. However, we do not claim to be experts in the said subject and, therefore, it is beyond our competence to say which of the two versions (that of the Institute and the Commissioner) is correct. At the same time, we are also not aware of the educational qualifications of the Commissioner or his expertise in chemical science. In any event, how far the report of the Institute was worth consideration should have been examined by the Commissioner by obtaining a counter expert opinion and based thereon he could have proceeded to reject the Institute's report instead of discrediting the same. The observations made by the Commissioner are not structured on any referable scientific basis and, therefore, it is all the more necessary that the prayer of the petitioner for lifting of the orders of provisional attachment deserves de novo consideration."*

11.7. A similar view has been expressed by the Hon'ble Gujarat High Cour in the case of *Inter Continental (India) v. Union of India [2003 (154) E.L.T. 37 (Guj.)],* which has been affirmed by the Hon'ble Apex Court as reported in *2008 (226) E.L.T. 16 (S.C.)].* The relevant paragraph of the decision of the Hon'ble Gujarat High Court in the above case reads as follows: -

> *"19. Mr. Patel during the course of discussion referred to the provisions of Prevention of Food Adulteration Act, 1954 as well as Rules thereunder with special reference to Sec. 6 of the said Act and Rule 5 which defines standards of quality on various*

articles as specified in Appendix "B" to the Rules. Our attention was invited to various standards set out in Appendix "B" to urge that only slight difference was there between the different kinds of oils for the purpose of ascertaining whether oil was of edible grade or not. It is not necessary for our purpose to deal with the various technical aspects laid down in Appendix "B" for the simple reason that it is an admitted position between the parties that when the imported goods entered territorial waters of India, the Boarding Officer had drawn samples of the product for test in the presence of the representative of the Master of Vessel, the Shipping Agent and representative of the Importer; and such samples had been sent for testing to the Chemical Examiner, Customs House, Kandla, who has opined that the same does not conform specification for crude palm oil (edible grade) as per IS-8323-E-1977. It appears that the said sample was also forwarded through the Referal Hospital and Community Health Centre, Mundra-Kutch, to the Public Analyst, Food and Drug Laboratory, Vadodara for opinion. He has opined to the effect that the sample conforms to the standards and provisions laid down under the Prevention of Food Adulteration Rules, 1955, for palm oil and cannot be used as such for human consumption. Therefore, once the competent authority who is technically qualified to tender opinion in relation to the technical standards prescribed under the provisions of Food Adulteration Act and Rules thereunder has tendered his opinion it would not be open to any one to take a contrary stand, unless and until such technical opinion is displaced by specific and cogent evidence in the form of another technical opinion. Merely by approaching the matter by stating that the goods could be converted into palm oil of edible grade by carrying out certain processes, the respondent No. 3 who is an officer of the department cannot displace the report of technical expert, nor can he insist that inspite of such report the importer must establish that end-use of the product shall not be other than one as regards entry in which the goods admittedly fall at the time of import."

11.8. In this regard, we also refer to the decision rendered by the Tribunal at Chandigarh in the case of *Commissioner of Customs, Ludhiana v. Longowalia Yarns Ltd. [2019 (370) E.L.T. 1436 (Tri. – Chan.)]* wherein the Tribunal held that in the absence of a contrary report being produced by the Revenue, the test report given by the expert (i.e., CIPET, in the said case) has to be considered as a conclusive report.

12. We observe that the onus to prove the classification of a particular product lies on the Department. In the present case, it is a fact on record that the Department had drawn samples and sent the same to CRCL, for testing and analysis. CRCL, vide their Reported dated 08.04.2021, has submitted their views. However, we find that the said report has not been relied upon in this proceedings. In this regard, the appellant submitted that the ld. adjudicating authority has not relied upon the CRCL report since the said report is inconclusive and does not address the core question as to the products in question being derivatives or not. For the sake of ready reference, the said CRCL Report dated 08.04.2021 is extracted below: -

245

भारतसरकार
वित्तमन्त्रालय, राजस्वविभाग
केन्द्रीयअप्रत्यक्ष कर एवंसीमाशुल्कबोर्ड
केन्द्रीयराजस्वनियन्त्रणप्रयोगशाला
हिलसाइडरोड, पूसा, नईदिल्ली- 110012

Government of India
Ministry of Finance, Department of Revenue
Central Board of Indirect Taxes & Customs
Central Revenues Control Laboratory
Hillside Road, Pusa, New Delhi - 110012
Tel.:011-21520123/25843494 Fax: 011-25843495
Email: dir.crcl-cbec@nic.inWebsite:http://crcl.gov.in

TEST REPORT

Date: 08.04.2021

Lab No. CRCL/29/438 to 442 (DRI) **Date: 11.03.2021**

Test memo no: F.No. DRI/CoZU/CHN/Enq-08/2020/310 **Date: 17.02.2021**

Sample Received from: DIRECTORATE OF REVENUE INTELLIGENCE COCHIN ZONAL UNIT

Description of the sample: 1. A 108 EX
2. A 105 EX
3. A 1067 EX
4. A 1054 PG
5. A 1022 EX

Date of Receipt: 11.03.2021

Sample Plan: Sample not Drawn by this laboratory

REPORT:

CL.NO.	FORM	NVR	ASH at550°C	REPORT
438 DRI	Transparent liquid	53%	Nil	The sample u/r is an aqueous preparation of organic compound containing phosphorous atom linked to carbon atom.
439 DRI	Transparent liquid	66.2%	Nil	The sample u/r is an aqueous preparation of organic compound containing phosphorous atom linked to carbon atom.
440 DRI	Pale yellow coloured liquid	45.6%	10.2%	The sample u/r is an aqueous preparation of organic compound containing phosphorous atom linked to carbon atom.
441 DRI	White coarse powder	–	48.3%	The sample u/r is organic compound containing phosphorous atom linked to carbon atom.
442 DRI	Transparent liquid	51.4%	11.72%	The sample u/r is an aqueous is preparation of organic compound containing phosphorous atom linked to carbon atom.

Sealed remnant returned herewith.

Chemical Examiner II

डॉ. सन्तु दास / Dr. SANTU DAS
रसायन परिक्षक ग्रेड-II / Chemical Examiner Gr.-II
भारत सरकार / Government of India
वित्त मंत्रालय / Ministry of Finance
राजस्व विभाग / Deptt. of Revenue
केन्द्रीय राजस्व नियन्त्रण प्रयोगशाला
Central Revenue Control Laboratory
नई दिल्ली / New Delhi-110012

Note 1: The results relate only to the items tested.
Note 2: Sample not Drawn by this laboratory.
Note3: The report shall not be reproduced except in full without approval of this laboratory.

copy to DGFT & Appraising group

12.1. We take note of the fact that CRCL is a department approved lab and the report furnished by them are normally relied upon in the departmental proceedings. We observed that no valid reason has been given by the ld. adjudicating authority for non-consideration of the CRCL Report. In this regard, we agree with the submission of the appellant that CRCL is a Departmental laboratory and the report submitted by them cannot be ignored or disregarded without any valid reason. Thus, we agree with the submission of the appellant that the department has not discharged the onus cast upon them to prove the classification advocated by them with evidence.

12.2. This view has been held in the case of *Hindustan Ferodo Ltd. v. Collector of C.Ex., Bombay [1997 (89) E.L.T. 16 (S.C.)],* wherein the Hon'ble Apex Court has held that:

> *"3. It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed."*

12.3. The above view has also been taken in the judgement rendered in the case of *H.P.L. Chemicals Ltd. v. Commissioner of C.Ex., Chandigarh [2006 (197) E.L.T. 324 (S.C.)]* wherein it has been ruled that the burden of proof lies squarely upon to Revenue if it intends to classify the goods under a particular heading or sub-heading different from that claimed by an assessee. The relevant part of the said judgement reads as follows: -

> *"29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue. On the one hand, from the trade and market enquiries made by the Department, from the report of the Chemical Examiner, CRCL and from HSN, it is' quite clear that the goods are classifiable as "Denatured Salt" falling under Chapter Heading No. 25.01. The Department has not shown that the subject product is not bought or sold or is not known or is dealt with in the market as Denatured Salt. Department's own Chemical Examiner after examining the chemical composition has not said that it is not denatured salt. On the other hand, after examining the chemical composition has opined that the subject matter is to be treated as Sodium Chloride."*

13. We find that the ld. adjudicating authority has reclassified the impugned goods under the Tariff Entry No. 29313900. The said observations of the ld. adjudicating authority in the impugned order, for reclassifying the goods are reproduced hereunder: -

> *"31.2 Now that it is decided that the impugned products of M/s Aquapharm are organo-phosphorous derivatives, I refer to the sub-Heading Note-1 in Chapter-29 of the Customs Tariff which states - "within any one Heading of this Chapter, derivatives of a chemical compound are to be classified in the same sub-heading as that compound provided that they are not more specially covered by any other sub-heading...". As organo-phosphorous derivatives are specifically covered by a sub-Heading inserted in the Heading 2931 vide Finance Act 2016, such derivatives should be placed along one of the nine Tariff Items under the said*

sub-Heading. Out of these nine Tariff Items, eight specific organo-phosphonates are placed under Tariff Items 2931 3100 to 2931 3800 and all other organo-phosphorus derivatives would fall under the residual Tariff Item 2931 3900. As the organo-phosphonates of M/s Aquapharm are different from the eight specific organo-phosphonates placed along the Tariff Items 2931 3100 to 2931 3800, I find that the Organo-phosphonates manufactured and exported by M/s Aquapharm under the brand name of 'Aquacid' are most appropriately classifiable under CTI 2931 3900 as per Rule 3(a) of the General Rules of Interpretation read with sub-Heading Note-1 of Chapter 29 of the Customs Tariff."

13.1. From the above findings, we observe that the Ld. adjudicating authority has considered the goods exported by the appellant as 'organo-phosphorus derivatives', which are classifiable under Tariff Entry No. 29313900. However, the evidence available on record and the Expert opinion submitted by the appellant categorically indicates that the goods manufactured by the appellant are not "organo-phosphorus derivatives", but "organo-phosphorus compounds". Thus, we hold that the reasons given by the ld. adjudicating authority in the impugned order for reclassifying the goods under Tariff Entry No. 29313900 are legally not sustainable. Accordingly, we hold that the impugned goods are appropriately classifiable under Tariff Entry No. 29319090, as claimed by the appellant and reject the reclassification of the goods under the CTH 29313900, in the impugned order.

14. Therefore, in view of the above discussion and by relying upon the decisions cited supra, we find that the Expert's Opinion submitted by the appellant cannot be brushed aside and consequently hold that the goods in question are "organo-phosphorus compounds" and not "organo-phosphorus derivatives". Accordingly, we hold that the impugned goods are appropriately classifiable under Tariff Entry No. 29319090, as claimed by the appellant and reject the reclassification of the goods under the CTH 29313900, in the impugned order.

15. The next issue that is required to be decided is as to the eligibility of the appellant to the benefit under the MEIS.

15.1. In the instant case, the Show Cause Notice has been issued to recover the duty exemption claimed by the appellant against MEIS scrips. In this regard, the appellant has contended that the Customs authorities do not have the jurisdiction to question the eligibility under the MEIS and such benefits can only be denied if the licences are cancelled by the DGFT. In support of this view, the appellant relied on the Circular No.334/1/2012-TRU dated 01.06.2012.

15.2.We have perused the Circular No.334/1/2012-TRU dated 01.06.2012 referred to by the appellant. For ready reference, the relevant portion of the said Circular is reproduced below: -

> ***"II.2 Recovery of duty in case of instrument issued under Foreign Trade (Development and Regulation) Act :***
>
> *Section 28AAA has been inserted in the Customs Act through Section 122 of the Finance Act, 2012 to provide for recovery of duties from the person to whom an instrument such as credit duty scrips was issued where such instrument was obtained be means of collusion or willful misstatement or suppression of facts. Since the provision now has the force of law, action for recovery of duty can be initiated under the said provision.* ***Field formations are advised to issue demands as soon as DGFT/concerned regional Authority initiates action for cancellation of an instrument but the matter may be decided only after the instrument has been cancelled by DGFT."***
>
> (Emphasis supplied)

15.3. From the above clarification, we observe that the demand, if any, pertaining to the availment of benefit in respect of MEIS scrips, could be initiated by the Customs authorities only after cancellation of the instrument by the DGFT.

15.4. It is pertinent to note that in the present case, no proceedings for cancellation of the MEIS Scrips have been initiated by the DGFT except in respect of 18 licences.The appellant has produced a copy of the letter issued by the DGFT authorities for recovery proceedings in respect of the said 18 licences. But, we find that as on date, the action proposed by DGFT in respect of those 18 licenses are also remain unadjudicated, as evident from the status of all such licences continuing to reflect as "ACTIVE" on the DGFT portal. Thus, we observe that in respect of those 18 shipping bills also, no final action has been initiated by the DGFT for cancellation of the MEIS scrips issued.

Accordingly, we find merit in the submission of the appellant that it cannot be construed that cancellation proceedings have been initiated against these 18 licences. Thus, we agree with the submission of the appellant that no action has been initiated by DGFT for cancellation of the licenses till date. Accordingly, we hold that the demand confirmed in the impugned order before initiation of any action by DGFT authorities is legally not sustainable and hence we hold that he demand of customs duty confirmed in the impugned order is legally not sustainable.

15.5. As the MEIS scrips issued by the DGFT in this case are still active and have not been cancelled, we hold that the recovery proceedings initiated by the Customs authorities on the ground that the said MEIS scrips were obtained by wrongly mis-classifying the goods under Tariff Entry No. 2931 9090 are not sustainable.

15.6. We find that this view is supported by the decision of this Tribunal in the case of *Colour CottexPvt. Ltd. v. Commissioner of Customs (Export), ICD, Tughlakabad [2025 (6) TMI 368 – CESTAT, New Delhi].* The relevant portion of the said decision is reproduced below: -

> *"13. The first issue that arises for consideration is whether jurisdiction under section 28AAA of the Customs Act could have been invoked without the DGFT having initiated process for cancellation of the license and whether adjudication could be done as the DGFT did not cancel the instrument.*
>
> *14. This issue was examined by the Delhi High Court in M/s Amit Exports. The Delhi High Court held that it was not possible to recognize a right that may be to said to inhere in the customs authority to doubt the issuance of the instrument. After referring to the FTP 2015-20, the Delhi High Court held that it*

provides in paragraph 2.57 that it would be the decision of the DGFT on all matters pertaining to interpretation of policy, provisions in the handbook of procedures and so it would be impermissible for the customs authority to deprive a holder of the instrument the benefits that can be claimed, absent any adjudication of declaration of invalidity by the DGFT. The relevant portion of the judgment of the Delhi High Court is reproduced below:

> *"104. As we read the various provisions enshrined in the FTDR Act alongside the FTP as well as the FTDR Rules, we find ourselves unable to recognize a right that may be said to inhere in the customs authorities to doubt the issuance of an instrument. We, in the preceding parts of this decision, had an occasion to notice the relevant provisions contained in the FTDR Act and which anoint the DGFT as the central authority for the purposes of administering the provisions of that statute and regulating the subject of import and exports. The FTP 2015-20 in unequivocal terms provides in para 2.57 that it would be the decision of the DGFT on all matters pertaining to Interpretation of policy, provisions in the Handbook of Procedures, Appendices, and more Importantly, classification of any item for import/export in the ITC (HS) which would be final and binding. The FTP undoubtedly stands imbued with statutory authority by virtue of Section 5 of the FTDR Act.*
>
> *105. Of equal importance are the FTDR Rules and which too incorporate provisions conferring an authority on the Director General or the licensing authority to suspend or cancel a license. certificate, scrip or any instrument bestowing financial or fiscal benefits. Once it is held that the MEIS would clearly qualify as an instrument bestowing financial or fiscal benefits, the power to cancel or suspend would be liable to be recognized as being exercisable by the Director Genera the licensing authority alone. It would thus be wholly impermissible for the customs authorities weither ignore the MEIS certificate or deprive a holder thereof of benefits that could be claimed under that scheme absent*

any adjudication or declaration of invalidity being rendered by the AGET in exercise of powers conferred by either Rules 8. 9 or 10 of the FTDR Rules. The customs authorities cannot be recognised to have the power or the authority to either question or go behind an instrument issued under the FTDR in law.

106. Taking any other view would result in us recognizing a parallel or a contemporaneous power inhering in two separate sets of authorities with respect to the same subject. That clearly is not the position which emerges from a reading of Section 28AAA. Quite apart from the deleterious effect which may ensue if such a position were countenanced, in our considered opinion, if the validity of an instrument issued under the FTDR Act were to be doubted on the basis of it having been obtained by collusion, wilful misstatement or concealment of facts, any action under Section 28AAA would have to be preceded by the competent authority under the FTDR Act having come to the conclusion that the instrument had come to be incorrectly issued or illegally obtained. The procedure for recovery of duties and interest would have to be preceded by the competent authority under the FTDR Act having so found and the power to recover duty being liable to be exercised only thereafter.

107. Section 28AAA would thus have to be interpreted as contemplating a prior determination on the issue of collusion, wilful misstatement or suppression of facts tainting an instrument issued under the FTDR Act before action relating to recovery of duty could be possibly initiated. A harmonious interpretation of the two statutes, namely, the Customs and the FTDR Acts leads us to the inescapable conclusion that the law neither envisages nor sanctions a duality of authority inhering in a separate set of officers and agents simultaneously evaluating and adjudging the validity of an instrument which owes its origin to the FTDR Act alone. It is these factors, as well as the role assigned to the DGFT which perhaps weighed upon courts to acknowledge its position of primacy when

it come to the interpretation of policy measures referable to the FTDR Act as well as issues of classification emanating therefrom.

108. This clearly flows from what our High Court held in Simplex Infrastructure when it approved the view expressed by the Gujarat High Court in Alstom India and which had held that export benefits claimed and enjoyed pursuant to approvals granted as per the provisions of the FTDR Act could not be reviewed or redetermined except in accordance with the procedure prescribed therein. A similar view came to be expressed by the Allahabad High Court in PTC Industries and where it was held that any doubt with respect to the description or classification of exported goods would have to be referred for the consideration of the DGFT. The Allahabad High Court had thus concurred with the view expressed by the Bombay High Court and which too had observed that benefits which could be claimed under a Duty Entitlement Pass Book license could not be denied by the customs authorities on the basis of their own perception on the subject of appropriate classification. The Bombay High Court had held that as long as the licensing authority had desisted from either reviewing the grant or cancelling the license, it would be wholly impermissible for the customs authorities to deprive the importer or the exporter of benefits. The view expressed by the Gujarat, Allahabad and the Bombay High Courts stands reiterated in the two subsequent decisions of Autolite and Jupiter Exports. The principles culled out in the aforenoted decisions are in line with what the Supreme Court had succinctly observed in Titan Medical Systems (P) Ltd. Vs. Collector of Customs. We are thus of the firm opinion that it would be impermissible for the customs authorities to either doubt the validity of an instrument issued under the FTDR Act or go behind benefits availed pursuant thereto absent any adjudication having been undertaken by the DGFT. An action for recovery of benefits claimed and availed would have to necessanly be preceded by the competent authority

> *under the FTDR Act having found that the certificate or scrip had been illegally obtained. We have already held that the reference to a proper officer in Section 28AAA is for the limited purpose of ensuring that a certificate wrongly obtained under the Customs Act could also be evaluated on parameters specified in that provision. However, the said stipulation cannot be construed as conferring authority on the proper officer to question the validity of a certificate or scrip referable to the FTDR Act."*
>
> *(emphasis supplied)*

15. In this connection, it may also be important to refer to the TRU letter dated 01.06.2012 highlighting the budget changes on the eve of the enactment of the Finance Act, 2012. The relevant portion of the leter is reproduced below:

> *"11.2 Recovery of duty in case of instrument issued under Foreign Trade (Development and Regulation) Act:*
>
> *Section 28AAA has been inserted in the Customs Act through Section 122 of the Finance Act, 2012 to provide for recovery of duties from the person to whom an instrument such as credit duty scrips was issued where such instrument of law, action for recovery of duty can be initiated under the said provision. Field formations are advised to issue demands as soon as DGFT/concerned regional Authority initiates action for cancellation of an instrument but the matter may be decided only after the instrument has been cancelled by DGFT."*
>
> *(emphasis supplied)*

16. The impugned order, therefore, is without jurisdiction as the DGFT has neither cancelled the instrument nor even initiated proceedings for cancellation of the instrument."

15.7. Further, we observe that a similar view has also been taken in the case of *Bharat Rasayan Ltd. v. Commissioner of Customs, Nhava Sheva-II [(2025) 29 Centax 1 (Tri. – Bom.)],* which has been affirmed by the Hon'ble Apex Court as reported in *(2025) 29 Centax 2 (S.C.).* The observations of the Tribunal in the said case are reproduced below: -

> *"6. The period involved herein is from 2016 to 2019. Merchandise Exports from India Scheme (hereinafter referred to as MEIS') was introduced in the Foreign Trade Policy 2015-2020 (FTP 2015-20) as an incentive scheme for the export of goods. Objective of the MEIS is to promote the manufacture and export of notified goods/products. Trade facilitation is a priority of the Government for cutting down the transaction cost and time, thereby rendering Indian exports more competitive. The rewards are given by way of duty credit scrips to the exporters. This scheme is notified by Director General of Foreign Trade (DGFT) and implemented by the Ministry of Commerce & Industry. The said scheme aims to offset associated costs or infrastructural inefficiencies involved in export of goods or products produced or manufactured in India. The incentives under the said schemes are given in percentage, anywhere ranging between 2% to 5% of the realized free-on-board (hereinafter referred to as "FOB") value of exports as per shipping bills. These scrips can be utilized to pay customs duties or anti-dumping duties or it can also be transferred to other persons. The entitlement to MEIS benefits is governed by the Chapter-III of the said Policy. In other words, the substantive rights and obligations are created by the MEIS Scheme under Chapter-III of the FTP According to Para 3.04 of the said Policy once the notified goods are exported to a notified market, the exporter becomes entitled to the MEIS benefits. Thus, entitlement, restriction thereof and conditions, if any, have to be looked into within Chapter-III of the FTP 2015-20. The exporter becomes entitled to the MEIS benefits once it exported the notified goods to the notified market and this benefit cannot be deprived except by cancellation of the said scrips by the DGFT itself after following due procedure. A detailed procedure*

for cancellation of the scrips has been set out under Section 9(4) of the Foreign Trade (Development & Regulation) Act, 1992 (in short "FIDR which is extracted as under:-

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.

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10. These proceedings have been initiated by the customs authorities u/s. 28(4) of Customs Act, 1962 for recovery of alleged fraudulently availed MEIS duty credits utilized by the appellant for the payment of customs duty at the time of import along with interest u/s. 28AA ibid. In these proceedings, initiated by the customs authorities, everything including confiscation of the goods is revolving around the re-classification of the exported goods by the customs.

11. It has also been noticed by us that the details of MEIS Scrips issued against aforesaid 54 shipping bills were sought by the customs department from DGFT, New Delhi vide letter dated 20.7.2021 followed by various reminders dated 31.8.2021, 14.10.2021 and 26.10.2021 respectively, but were not responded by DGFT. The MEIS scrips issued against the respective bills had already been utilized towards the payment of Customs duty levied on the goods imported by the appellant themselves. As per para/clause 3.19 of the Foreign Trade Policy 2015-20 over-claimed or illegally claimed MEIS benefits alongwith interest is recoverable by the Regional Authorities of DGFT, if the scrip is issued to the Exporter and the same is not utilized for the payment of customs duty. Therefore, in the first place only the DGFT is empowered to cancel or recover the MEIS scrips and that too only if it's not utilized for payment of customs duty. What the customs authorities are trying to recover from the appellant u/s. 28(4) ibid is MEIS benefits already availed by the appellant during the years 2016-2019 which certainly they Cannot do as under the said provision the customs department can recover only the 'duty' not levied or not paid or short levied or short paid or erroneously refunded or 'interest' not paid, part-paid or erroneously refunded by reason of

collusion or willful mis-statement or suppression of facts and not the MEIS benefits and, that, too only on the ground of ineligibility to ME15. The learned Counsel has also submitted that there is no customs duty liability on export of the impugned product even if the classification is changed and the issue is only about the availability of MEIS benefits to the appellant which we have already made clear.

12. Hon'ble Supreme Court in the matter of Titan Medical Systems (P) Ltd v. Collector of Customs, New Delhi; 2003(151) ELT. 254 (SC) has laid down that once an advance licence was issued and not questioned by the licensing authority, the customs Authorities cannot refuse exemption on an allegation that there was misrepresentation because if there was any misrepresentation, it was for the licensing authority to take steps in that behalf. The Hon'ble Supreme Court has held that if the licensing authority ie. DGFT has not questioned the veracity of the transactions undertaken under the license, the customs authorities cannot refuse exemption on an allegation that there was any misrepresentation. Likewise in the present situation the appropriate authority could only be the authority which issued the license i.e. DGFT and not the customs authorities. This Tribunal also in the matter of Axiom Cordages Ltd. v. CC, Nhava Sheva-II; (2023) 4 Centax 120 (Tri.-Bom) has held that the allegation with regard to MEIS benefits wrongly availed by the appellant does not have an independent nexus to the Customs Act, 1962 inasmuch as such scheme, designed for the Merchant Exporter, are dealt with under the Foreign Trade Policy (2015-20) and Foreign Trade (Development & Regulation) Act, 1992 and thus the administration of MEIS squarely falls within the jurisdiction of the office of the DGFT and not the customs authority. It further held that the division of exercise of authorities between the DGFT and customs authorities is well recognized judicially and should be respected to prevent abuse of due process of law.

13. We deem it proper to address a very pertinent issue which arises in situation we are dealing with and it is about the role of customs authorities. Merchandise Exports from India Scheme (MEIS) is intended to offer incentives to eligible exporters on the basis of their export performance in a given year. Thus, the actual exports, as evidenced in

shipping bills endorsed in accordance with Section 51 of Customs Act, 1962, are scrutinized by the licensing authority ie. DGFT and scrips issued thereon in accordance with eligibility for inputs as designed in the Standard Input Output Norms (SION), Customs authorities have no role in this process once the exports have been completed. It lies within the exclusive domain of the agency designated under Foreign Trade (Development & Regulation) Act, 1992 and no other. To invalidate exports, it is necessary for customs authorities to invoke section 113 of Customs Act, 1962 and Section 113(i) in particular. Under this provision, only goods entered for exportation can be subject to confiscation and, as per section 2(18) 'export' means 'taking out of India ton place outside India, implying that once goods have left India they cease to be under exportation. Such exports, under Section 51 of Customs Act, 1962, attain finality and can be reopened only if duty has not been collected or goods are found to be prohibited; there is no other empowerment for post-export confiscation. Eligibility for any benefit arising therefrom lies alone thin the exclusive domain of the agency designed under Foreign Trade (Development and Regulation) Act, 1992 as the oping bill cannot be nullified except in the said circumstances

14. The role of customs authorities, if at all, may commence only upon presentation of scrips for clearance of exported goods that too in accordance with Notification No. 24/2015-dt. 8.4.2015 issued u's. 25 of the Customs Act, 1962. Once the scrips are issued and are presented before customs authorities to be debited towards duty liability as assessed, the acceptance thereof is governed by the notification (supra) issued u/s, 25 ibid. This is segregation of jurisdiction, which is implicit in the confiscation applicable to utilization of scrips on imports of goods. There is, thus, no concurrent jurisdiction over the stages volved between export and import and each stage is governed to the limits of licensing and assessment jurisdiction by the respective statutes.

15. The functions of the licensing authorities and the customs authorities operate in different fields. The function of the licensing authorities is to consider whether any particular item should be allowed to be imported or exported due to various circumstances

such as the requirement of the item, the amount of foreign exchange involved, permissibility and the relevant factors. If satisfied about the feasibility and permissibility the licensing authority grants license and, at times, may impose such conditions as they find necessary. This granting of licence may be dependant upon a policy enunciated in advance by the Government or may even be made to depend on the individual judgment of the licensing authority. As against this, the function of customs authorities start only after the goods are imported and brought into the territorial water of the country. Customs authorities are concerned with the recovery of Customs duty and to check evasion of payment of duty and with the prevention of entry of goods which are prohibited goods as defined by the Customs Act. It is not for the customs authorities to interpret licensing policy or to enforce the same once a valid licence is produced or to dissect the license granted. This function is of the licensing authority. If this bifurcation of function is not adhered to, there is every likelihood of utter confusion. The licensing authority may interpret the policy one way and the customs authorities may take contrary view producing a conflict between the two authorities resulting in harassment to the Importer or exporter, as the case may be. It is therefore, that the function of the two authorities which operate in two different spheres must be kept within their proper ambit. If a licence is granted in respect of a particular item by the licensing authority, the customs authority will have no right or power to go beyond the licence and determine the classification or reclassifying the same. It is only the licensing authority who has to determine the said question at the time of granting licence.

16. Before parting with this matter, there is another aspect of the present proceedings that needs highlighting. The exercise of rejecting the entitlement to the scrip commenced with reclassification of the export goods, for assigning a different tariff item in Schedule to Customs Tariff Act, 1975. The classification of the goods is exclusive to Section 12 of Customs Act, 1962 and that too only for levy of duty. The classification declared by the exporter can be disturbed only by reference to the General Rules for Interpretation of the Export Tariff appended to Customs Tariff Act, 1975. Like

> *undertaking of reclassification for imported goods, it is necessary that the onus of identifying the correct classification as substitute for declared classification rests with the assessing officer/proper officer. Such reclassification is to be undertaken solely for the purpose of conformity with the General Rules for Interpretation and not for any other purpose. Reclassification for any other purpose has no place in adjudication.*
>
> *17. In view of the discussions made hereinabove, we are of the view that the customs authorities have overstepped its jurisdiction by resorting to re-classification of exported goods and cancelling the MEIS scrips. The same are hereby restored to the appellants. Accordingly the impugned order is set aside and the appeal filed by the Appellant is allowed with consequential relief, if any, in accordance with law."*

15.8. From the decisions cited above and by referring to the Circular cited supra, we hold that the recovery proceedings initiated by the Customs authorities are not sustainable, since the DGFT authorities have not cancelled the licenses in question.

16. In view of the above discussion, we hold that the demands of Custom duty of Rs.3,54,01,196/- confirmed under Section 28 of the Customs Act, 1962 and Rs.26,08,18,611/- confirmed under Section 28AAA of the Customs Act, 1962 are not sustainable and hence, the same are set aside.

17. As there was no mis declaration of the goods, we hold that the said goods exported are not liable for confiscation under Section 111(o) of the Customs Act, 1962. Accordingly, the redemption fine of Rs.5,00,00,000/- imposed in lieu of such confiscation is set aside.

18. The appellant has also contested the invocation of extended period of limitation as well as the imposition of penalties on them under Sections 114A, 114AA and 114AB of the Customs Act, 1962.

18.1. We find that the present dispute pertains to classification and thus it was the responsibility of the Department to arrive at the correct classification of the impugned products. In this regard, it is on record that the appellant have been classifying the said goods as "Other organo-inorganic compounds – Other" under Tariff item No. 29310090 (residuary) prior to 01.01.2012 and under Tariff Item No. 29319090 post 01.01.2012 for their domestic sale as well as exports since 2006. Thus, it is not a case where the appellant has modified the classification for the purpose of deriving any undue benefit. In case the Department had any doubt as regards classification, they should have raised objections earlier when the appellant had classified the said goods and exported the same under 29319090. Having not raised any objection at that time, it is not proper to allege suppression of facts on the appellant's part for invocation of the extended period of limitation to demand Customs duties. As there is no suppression of facts with the intent to evade duty established in this case against the appellant, we hold that the extended period of limitation is not invokable in this case.

18.2. For the same reasons recorded in paragraph 18.1 supra and considering the fact that the appellant has not violated any of the provisions contained in Sections 114A, 114AA and 114AB of the Customs Act, 1962, we hold that no penalty is imposable on the appellant under the said Sections and accordingly, the

penalties imposed on the appellant under the above said sections are set aside.

19. In the light of the above findings, we pass the following order: -

(1) The demands of Custom duty of Rs.3,54,01,196/- confirmed under Section 28 of the Customs Act, 1962 and Rs.26,08,18,611/- confirmed under Section 28AAA of the Customs Act, 1962 are set aside.

(2) The penalties imposed on the appellant under Sections 114A, 114AA and 114AB of the Act are set aside.

(3) We hold that the goods are not liable for confiscation under Section 111(o) of the Act. Accordingly, the redemption fine of Rs.5,00,00,000/- imposed in lieu of such confiscation is set aside.

20. In the result, we set aside the impugned order and allow the appeal filed by the appellant, with consequential relief, if any, as per law.

(Order pronounced in the open court on **10.07.2025**)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd