IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NOS: C/907 & 976/2009

[Arising out of Order-in-Original No: 106/2009-CC (I) JNCH dated 22nd May 2009 of Commissioner of Customs (Import), Nhava Sheva.]

APPEAL NO: C/907/2009

Neulife Nutrition Systems …***Appellant***

versus

Commissioner of Central Excise
Pune – II ***…Respondent***

APPEAL NO: C/976/2009

Commissioner of Central Excise
Pune – II …***Appellant***

versus

Neulife Nutrition Systems ***…Respondent***

Appearance:

Shri JC Patel, Advocate for assessee

Ms P Vinitha Sekhar, Joint Commissioner (AR) for Revenue

CORAM:

Hon'ble Justice Dr. Satish Chandra, President
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 15/12/2017
Date of decision: 27/02/2018

ORDER NO: ____________________________

<u>Per: C J Mathew</u>

Both Revenue and M/s Neulife Nutrition Systems are aggrieved by order-in-original no 106/2009-CC (I) JNCH dated 22nd May 2009 of Commissioner of Customs (Import), Nhava Sheva and are in appeal. The adjudication pertains to import of goods by M/s Neulife Nutrition Systems in which some of the declared classification was sought to be altered and the value declared as 'retail selling price' for levy of additional duty of customs of those that were, admittedly, to be so valued, as well as those in which the classification was sought to be changed, are disputed.

2. Importer-appellant had filed the bill of entry no. 703275/08.02.08 for clearance of goods under heading no. 2106, 0404, 3502, 3501, 3504, 2922 and 2925 of the First Schedule to the Customs Tariff Act, 1975. Of these, only thirteen items were classified under heading no. 2106, which was liable to additional duty of customs on 'retail selling price', while the rest having been classified under other headings were to be assessed on the transaction value. The case against the importer is that the entire consignment was classifiable under heading no. 2106 with consequence of computation of additional duties of customs on 'retail selling price'. In addition,

the previous consignments entered against bills of entry no. 923890/25.09.07, 951273/15.10.07, 985046/12.11.07, 994773/19.11.07 and 654262/03.01.08 were also alleged to have been similarly misclassified leading to escapement of the additional duty as prescribed by law. The impugned order dropped the proposal to re-classify the goods declared to be 'whey' under heading no. 0404. Revenue is aggrieved by this.

3. The adjudicating authority, while reclassifying the other imports as proposed in the show cause notice, directed, in addition, the re-determination of 'retail selling price' of the items in the bills of entry as proposed in the notice for recovery of differential duty to the extent of ₹55,96,627 under section 28 of Customs Act, 1962 along with interest thereon under section 28AA of Customs Act, 1962. Furthermore, the goods so misdeclared, though not available, were held to be liable under section 111(m) of Customs Act, 1962 for confiscation, for which fine of ₹28,00,000 in *lieu* was ordered and the importer imposed with penalty of ₹10,00,000 under section 112 of Customs Act, 1962. M/s Neulife Nutrition Systems is in dispute over the revising of the 'retail selling price' and, hence, their appeal.

4. We have heard both sides at considerable length and we find that the issues in dispute can be disposed off by a common order and on the basis of precedent and law. There is, therefore, no requirement

to delve into the many submissions made by Learned Counsel and by Learned Authorized Representative.

5. We take up the issue of classification of the ‘flavors of whey protein concentrate’, ‘casein’ and ‘glutamine powder’ and ‘creatine’ that Revenue desire to bring under heading no. 21061010 and 21069099. As pointed out by Learned Counsel, the Tribunal, in *Amrit Foods v. Commissioner of Central Excise, Meerut-I [2006 (202) ELT 545 (Tri-Del)]*, has elaborated upon the scope of additions to ‘milk products’ thus

> *‘11. We have considered the arguments of both the sides. We find that the dispute of classification of milk shake mix (MSM) and soft serve mix (SSM) has to be decided on the basis of Chapter Note 4 of Chapter 4. According to Chapter Note 4 of Chapter 4, the product consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter or flavoured or containing added fruit or cocoa includes fats and oil derived from milk. The case of the appellant is that the product manufactured by them contains only natural milk constituents except stabilizers added by them within prescribed quantity as permitted under the Prevention of Food Adulteration Rules in accordance with HSN Explanatory Notes to Chapter 4. It is stated by them that for the product to be classified under sub-heading 1901.19, HSN Explanatory Notes had given examples on page 147 of Harmonized Commodity Description and Coding System Second Edition Volume 1 Section III “Food preparations of goods of headings 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a*

totally defatted basis, not elsewhere specified or included. The preparation of this heading may be distinguished from the products of Headings 04.01 to 04.04 in that they contain, in addition to natural milk constituents other ingredients not permitted in the products of those earlier headings. These products will go to the sub-heading 1901.19 only if it contains in addition to natural milk constituents other ingredients which are not the products of Chapter 4. In the present case except the stabilizers which are added in the milk is sugar which is stabilizing agent and dextrose which is also sugar. There are only addition of stabilizers. The dispute of the department is that stabilizers are emulsifiers and these are changing the characteristics of the products and its body and texture and gives smoothness to the products. This finding of the Commissioner is based on reply to question No. 9 of the statement dated 26-7-2000 of Shri Mr. P. Sree Sree. The Revenue has strongly relied upon this statement in support of their contention. In addition to that, the Revenue has argued that ageing process is also being done which is for packed ice cream mix. We find that the appellants claim is that the stabilizers are added for keeping the products stabilize during its storage and transport and its shelf life. The product stabilizers are emulsifier and maintains consistency of the products. They are not adding additional quality to the products. We find that this is squarely decided in case of Nestle India Limited v. CCE, New Delhi (supra) by this Tribunal. In the said decision, it is made clear that the milk product will go to the Heading 19.01 only if it contains other ingredients not permitted by Heading 04.01 to 04.04. We find that in the present case no other ingredients except permissible stabilizers have been added. Addition of stabilizers is essential to maintain the consistency and shelf life of the products. HSN Explanatory Note also qualifies the addition of stabilizers without changing its classification from

> *Chapter 4 to 19. The ratio of the decisions relied upon by the Revenue has no relevance to the present dispute. We, therefore, classify the products SSM and MSM under sub-heading 0404.90 of the Central Excise Tariff. The other two products i.e. coffee creamer and cream packed are also classified under sub-heading 0404.904. There is no reason given in the impugned order for classifying the product under Chapter 19. This is not disputed by the Revenue. We, therefore, set aside the order of the Commissioner and classify the products under sub-heading 0404.90.'*

6. The description for 'whey' in heading no. 0404 is no different and the principles governing the classification of 'milk products' with addition can be no different when flavorings and sweetenings have been added to 'whey'; the attempt to shift the classification to that of edible preparations does not find merit. The adjudicating authority cannot be faulted for dropping the proceedings on that count.

7. The impugned order has accepted the proposal in the show cause notice to discard the declared 'retail selling price' and re-determine these on the basis of certain documents purported to refer to the price at which goods of the importer-appellant were distributed and some statements. The provisions of section 14 of Customs Act, 1962 and the rules for valuation, notified from time to time, always did envisage the application of only one assessable value for levy of basic duties of customs and additional duties of customs if levied *ad velorem*. Following the alteration of the law for collection of duties of

central excise to subject specified goods to levy on ‘retail selling price’, a parallel provision for levy of additional duties was inserted in Customs Tariff Act, 1975. Notwithstanding this insertion, the machinery provision for ascertainment of transaction value, and its substitute values, did not expand beyond the scope of value as described in section 14 of Customs Act, 1962. Accordingly, the mechanics of ascertainment of assessable value under section 14 of Customs Act, 1962 may not be extended to confer authority for, or to provide the means to, re-determine the ‘retail selling price’ referred to in Customs Tariff Act, 1975. It would appear that the legislature did not intend interference with the ‘retail selling price’ except where the price at the retailer end varied with the declaration made for assessment, the enforcement thereto, empowered by Central Excise Act, 1944. The Customs Act, 1962 does not provide the wherewithal to do so.

8. We also take note of the contention of Learned Counsel that the ‘retail selling price’ declared the time of import was the intended price for sale to customers and that any revision thereafter would necessarily require the affixing of fresh labels which would amount to manufacture and the, therefore, subject to duties of central excise as leviable under Central Excise Act, 1944 with its own machinery provisions for the recovery of any duty that would arise in consequence.

9. On these two grounds, the re-determination of value for assessment of additional duties of customs by the adjudicating authority fails to find the backing of law.

10. Accordingly, we find that the appeal of Revenue must be dismissed and that of the importer-appellant be allowed.

(Pronounced in the Open Court on 27/02/2018)

(C J Mathew)
Member (Technical)

(Justice Dr. Satish Chandra)
President

**/as*