

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Customs Appeal No. 85663 of 2019

(Arising out of Order-in-Original No. 93/2018-19/Commr./NS-I/JNCH dated 18.12.2018 passed by Commissioner of Customs (NS-I), JNCH, Nhava Sheva)

M/s. Pioma Chemicals

101-103, Shyam Kamal, 'D' Wing,
Agarwal Market, Vile Parle (W),
Mumbai 400 057.

Appellant

Vs.

Commr. of Customs, Nhava Sheva-I

Jawaharlal Nehru Custom House,
Nhava Sheva, Uran,
Dist. Raigad 400 707.

Respondent

Appearance:

Shri J.C. Patel, Advocate, for the Appellant

Shri Bhushan Kamble, Authorised Representative for the
Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/86786/2019**

Date of Hearing: 25.06.2019

Date of Decision: 10.10.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against the order in original No. 93/2018-19/Commr./NS-I/JNCH dated 18.12.2018 passed by Commissioner of Customs (NS-I), JNCH, Nhava Sheva. By the said order Commissioner has held as follows:

"13. Therefore, I order classification of the imported goods listed at paragraph 7 of the Show Cause notice under sub heading 15162091 of the customs tariff and order recovery of Rs 54,56,156/- under the provisions of sub-section (1) of Section 28 of the Customs Act, 1962.

The importer is also ordered to pay interest under the provisions of Section 28AA of the Act on the amount of duty short paid as determined above. For the reasons stated above, I do not order confiscation of the imported goods under Section 111(m) of the Act as proposed. I also do not impose any penalty on the importer under Section 112(a) of the Act."

2.1 Appellants had imported CAXESTER MCT 8040 (Medium Chain Triglyceride 60/40) and IMEX 3/9280 (Caprylic Capriate Triglyceride) by classifying the same under CTH 29159090 and availing the benefit of exemption under Notification No 12/2012-Cus at SI No 165.

2.2 These goods as per the revenue were correctly classifiable under heading No 15162091. After investigations a show cause notice dated 31.05.2018 was issued to the appellants asking them to show cause as to why;

- *The goods cleared vide past bills of entry as mentioned in para 7 should not be classified under CTH 15162091;*
- *Duty short paid amounting to Rs 54,56,158/- in respect of the past clearances of the subject goods (details as per para 7 of this notice), should not be demanded and recovered from him under the provisions of Section 28(1) of the Customs Act, 1962 and amount of Rs 53,38,914/- paid vide challan no HC-288 dated 23rd April 2018 should not be appropriated against the said duty demanded.*
- *Interest should not be charged and recovered from him under Section 28AA of the Customs Act, 1962, on the amount of duty so evaded by him.*
- *The goods valued at Rs 4,23,77,922/- should not be held liable to confiscation under Section 111(m) of the Customs Act, 1962.*
- *Penalty should not be imposed on M/s Pioma*

Chemicals under Section 112(a) of the Customs Act, 1962.

2.3 The show cause notice has been adjudicated by the Commissioner as per the impugned order referred in para 1, supra.

2.4 Aggrieved by the impugned order appellants have preferred this appeal.

3.1 We have heard Shri J C Patel, Advocate for the Appellant and Shri Bhushan Kamble, Assistant Commissioner, Authorized Representative for the Revenue.

3.2 Arguing for the appellant learned advocate submitted that-

- “Caprylic Capric Triglyceride” are an Ester formed by reaction of Caprylic Acid and Capric Acid with Glycerol and find use in Cosmetic preparations. Heading 291590 read with Note 5 of Chapter 29 specifically covers Caprylic Acid and its Ester.
- Heading 2915 covers Saturated Acrylic Monocarboxylic Acids. The Esters of these acids are also covered by heading no 2915 in view of Note 5(A) of Chapter 29. Further, the HSN Notes under Heading 2915 also clearly state that this heading covers saturated acyclic monocarboxylic acids and their anhydrides, halides, peroxides and peroxyacids esters and salts.
- Caprylic acid also known as Octanoic acid is specifically mentioned in the Customs Tariff Heading No 29159020. Capric Acid, also known as Decanoic Acid, which is represented by the Chemical formula $\text{CH}_3(\text{CH}_2)_8\text{COOH}$ is also a saturated, acyclic, monocarboxylic acid and would fall under Custom Tariff heading No 29159090.
- The imported goods viz “Caprylic Capric Triglyceride” are an Ester formed by reaction of Caprylic Acid of Heading 2915 and Capric Acid of Heading 2915 with

Glycerol of Heading 2905. Such Esters of heading 2915 also fall under Heading 2915 as per the HSN Notes.

- As per HSN notes under Caption (G), *"Classification of Esters, Salts, Co-ordination compounds and certain halides (1): Esters that Esters which are obtained by reaction of Acids of Chapter 29 with Glycerol of Chapter 29 are to be classified with the Acids of Chapter 29."*
- Since "Caprylic Capric Triglycerides" are an Ester formed by reaction of Caprylic Acid of Heading 2915 and Capric Acid of Heading 2915 with Glycerol of heading 2905, it will fall under Chapter 29 only.
- Even Chapter Note 1(c) to Chapter 15 excludes "fatty acids".
- It is settled principle as per the decision of Hon'ble Apex Court in case of Jocil Ltd [2011 (263) ELT 9 (SC)] and Board Circular No 574/11/2001-CX dated 22.02.2001 date specific tariff entry shall prevail over the general entry.
- Customs Tariff of Malaysia from where the goods have been imported specifically mentions Caprylic Capric Triglycerides under Tariff Heading 2915909000.
- Reliance placed by the Commissioner on the U S Customs, Kenya Customs rulings classifying the said goods under chapter 15, is totally misplaced. These ruling do not have any binding effect.
- The Commissioner had passed the order contrary to decisions of Apex Court in case of Garware Nylons Ltd {1996 (87) ELT 12 (SC)}, Nanya Imports & Exports Enterprises [2006 (197) ELT 154 (SC)] HPL Chemicals Ltd [2006 (197) ELT 324 (SC)].
- The Commissioner erred in proceeding on the basis that the process undertaken in the manufacture of

“Caprylic Capric Triglycerides” are quite akin to the processes described in HSN Notes in the context of heading 1516. He erred in not appreciating that once the goods are covered by Chapter 29 of Section VI and excluded from Chapter 15 by virtue of Note 1(c) of Chapter 15. Thus, merely on the basis of the alleged similarity of the process of manufacture of “Caprylic Capric Triglycerides” with the process of manufacture of goods of heading 1516.

3.3. Arguing for the revenue learned authorized representative for the revenue while reiterating the findings recorded in the impugned order, submitted that-

- The order of Commissioner holding the classification is after taking into account all the relevant factors.

4.1 We have considered the impugned order with the submissions made in Appeal and during the course of arguments.

4.2 The basic argument advanced by the appellants to dispute the classification made by the Commissioner vide the impugned order is that the goods in question are specifically covered by the entries in chapter 29 and have been excluded from Chapter 15 by virtue of Chapter No 1(c). On the other hand Commissioner have held the classification under Chapter 15, by recording the reasons as follows:

“8. I have gone through the case records and defence submissions. The dispute in this case revolves around classification of MTC. The process of manufacture, as per the show cause notice, and which is not disputed by the importer, involves separation of Caprylic and Capric acids from glycerol, mainly derived from coconut/palm kernel oil, which are then esterified(re-esterified) to add glycerol back to the fatty acids to synthesise MTC, and then refining it to achieve desired level of purity. The Importer has classified the MCT under subheading 29159090. The 6 digit entry 299090 is a residual entry which contains 4

entries, i.e. 29159010 for Acetyl Chloride, 29159020 for Octoic (caprylic) acid, 291509030 for Hexoic (Caproic) acid, and 29159090 is the last residual sub heading under heading 2915, which contains within its ambit saturated acyclic monocarboxylic acids, their anhydrides, halides, peroxides, and peroxy acids; as well as their halogenated, sulphonated, nitrated or nitrosated derivatives. The show cause notice, on the other hand, propose the subheading 15162091. The heading g1516 contains, within its ambit animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, interesterified, re-esterified or elaidinised, whether or not refined, but not further prepared. The 6 digit entry 151620 includes, within its ambit, vegetable fats and oil and their fractions. The commodities included under this entry, include cotton seed oil (edible grade/other), ground nut oil (edible grade/other), hydrogenated castor oil, opal wax (edible grade/other), and a residuary entry for edible grade (15162091), and one for other (12162299).

9. According to the Explanatory Notes to the Harmonised Commodity Description and coding System, the heading 15.16 would cover, inter alia, re-esterified and fats and oils (also called esterified fats and oil) which are triglycerides obtained by direct synthesis from glycerol with mixtures of free fatty acids or acid oils from refined, even if they have a waxy character and even if they have been subsequently deodorized or subjected to similar refining processes, and whether or not they can be used directly as food. Exclusions to the heading 15.16 are described as hydrogenated etc fats and oils and their fractions which have undergone such further preparation for food purposes as texturation (Heading 15.17) as also hydrogenated interesterified or elaidinised fats or oils or their fraction, where modification involves more than one oil (heading 15.17 or 15.18). The heading g29.1, according to the explanatory notes, include saturated acyclic halogenated, Sulphonated, nitrated or nitrosated derivatives. This

heading includes *n*-Hexoic (Caproic) and 2-ethylbutyric acid and their salts and esters as well as *n*-Octoic (caproic) and 2-ethylhexoic acids as their salts and esters. The Explanatory Notes define ester of carboxylic as those obtained by replacement of the hydrogen atom of the carboxyl group (-COOH) by alkyl or aryl radical. Such ester are represented by the general formula $RC(O)OR_1$, in which, R and R_1 are alkyl or aryl radicals (methyl, ethyl, phenyl etc.). Salts of carboxylic group (-COOH) by an inorganic cation, like sodium, potassium, ammonium. They are represented by the general formula $RC(O)OM$, where R is an alkyl, aryl or alkaryl radical and M is a metallic or other inorganic cation.

10. The products which have been imported in this case are Caprylic Capriate Triglyceride or other medium Chain Triglycerides. The processes undertaken in the manufacture of these MTCs, discussed hereinbefore, is quite akin to the processes described in the Explanatory Notes in the context of heading 15.16. It is the contention of the importer that the Caprylic Capriate Triglyceride is an ester (corresponding to a salt in inorganic chemistry) having chemical formula $C_{21}H_{40}O_5$. This formula is at a variance with the general formula of the esters as described in the Explanatory Notes, in so far as the alkyl/aryl/alkaryl radical as well as the metallic or other inorganic cation are not reflected in the said formulas. Paragraph 4.1 of the show cause notice, which has not been challenged by importer in their defence submission, quotes from the Hawley's condensed chemical dictionary (15th Edition); Food, Fats, oils, 6th edition (The Institutes of Shortening and Edible oils Inc., Washington D.C. 1998), Ullman's Encyclopedia of Chemistry 3 (6th edition, 2003), the Kirk Othmer Encyclopedia of Chemical Technology to establish characteristics of oils, fats and triglycerides. These academic product characterizations, it is advanced, have formed the basis of a consistent stand over a fairly long period of time of the customs authorities of the United

states of America to hold that Caprylic/Capric Triglycerides (MCTs) are correctly classifiable under heading 15.16. The show cause notice also refers to a Kenya customs ruling vide which the product in question has been placed has been placed exclusively under heading 15.16. While cognizant of the importer's argument that the ruling s of US/Kenya customs have no legal force, the persuasive value of such independent rulings need no emphasis, in so far as they clarify the widely followed international practices. The importer has urged to apply the classification adopted by the Malaysian customs authorities, without providing any documentary evidence from Malaysian customs in their support.

11. Medium Chain Triglycerides, obtained by the direct synthesis of glycerol (from vegetable oil sources) or free fatty acids (from coconut or palm kernel oil) are triglycerides whose fatty acids have an aliphatic tail of 6-12 carbon atoms. The fatty acids found in MCTs are called medium chain fatty acids (MCFAs). Like all triglycerides, MCTs are composed of a glycerol backbone and three fatty acids. In the case of MCTs, 2 or 3 of the fatty acid chains attached to glycerol are of medium length. **Rich sources for commercial extraction of beneficial MCTs include palm kernel oil and coconut oil. Medium Chain Triglycerides are obtained by the hydrolysis of crushed palm/palm kernel oil, fractioning of fatty acids mixture, and re-esterification.** Through the process of hydrolysis or saponification the fatty acids and glycerine (Glycerol group) present in crushed palm oil/palm kernel oil are separated. The separated mixture of the fatty acids (C4 – C22) undergoes hydrogenation because unlike Caprylic(C8) and Capric(C10) acids, which are carboxylic, saturated, mono-acylic acids, other acids in the mixture of fatty acids are not saturated. Hydrogenation saturates the mixture of fatty acids which prevents it from turning rancid. The saturated fatty acid mixture is then fractioned

to derive various fatty acids including Caprylic acid ($C_8H_{16}O_2$) and Capric fatty acid ($C_{10}H_{20}O_2$) which are re-esterified with glycerine (Glycerol group) to get Caprylic/Capric Triglycerides which are medium chain triglycerides. As per HSN General Note to Chapter 15, the chapter covers animal or vegetable fats and oils, whether crude, purified or refined or treated in certain ways (e.g. boiled, sulphurised or hydrogenated). Further, the HSN Explanatory notes to sub-heading 15.16 reads as under:-

This heading covers animal or vegetable fats and oils, which have undergone a specific chemical transformation of a kind mentioned below, but have not been further prepared.

The heading also covers similarly treated fractions of animal or vegetable fats and oils.

(A) Hydrogenated fats and oils.

.....

(B) Inter-esterified, re-esterified or elaidinised fats and oils.

(2) Re-esterified fats and oils (also called esterified fats and oils) are triglycerides obtained by direct synthesis from glycerol with mixtures of free fatty acids or acid oils from refining. The arrangement of the fatty acid radicals in the triglycerides is different from that normally found in natural oils. Oils obtained from olives, containing re-esterified oils, fall in this heading."

4.3 As per published literature the product imported by the appellant Caprylic Capric Triglyceride is

- A mixed triester derived from coconut oil and glycerin. It comes in the form of an oily liquid, and is sometimes mistakenly referred to as fractionated coconut oil. (<https://www.truthinaging.com/ingredients/caprylic-capric-triglycerides>)
- Caprylic / capric triglyceride is an oily liquid made

from palm kernel or coconut oil. It is a mixed ester composed of caprylic and capric fatty acids attached to a glycerin backbone. Caprylic/capric triglycerides are sometimes erroneously referred to as fractionated coconut oil, which is similar in composition but typically refers to coconut oil that has had its longer chain triglycerides removed. Chemically speaking, fats and oils are made up mostly of triglycerides whose fatty acids are chains ranging from 6–12 carbon atoms, in this case the ester is comprised of capric (10 carbon atoms) and caprylic (8 carbon atoms). (<http://tomsofmaine.com/ours-promise/ingredients/capric-triglycerides>)

- **Description:** *Lipid (triester) composed of glycerin, caprylic & capric fatty acids. It is based on saturated even-numbered, unbranched natural fatty acids of vegetable origin. Please note that triglyceride is not the same as fractionated coconut oil. Triglyceride is a special esterification of coconut oil using caprylic and capric fatty acids, whereas fractionated coconut oil is made by distilling coconut oil. Clear oily liquid, no or faint odor. Insoluble in water, soluble in warm alcohols, miscible with fats & oils. Required HLB value is 11.0.*

Manufacture: *Coconut oil is first hydrolyzed to yield fatty acids and glycerol. The fatty acids undergo distillation to separate them into fractions of different chain lengths. The C8 caprylic acid and C10 capric acid fractions are then re-esterified with glycerol to form triglyceride.*

(http://www.makingcosmetics.com/Triglycerides_p_110.html)

- *Caprylic Capric Triglycerides (CCT) are mistakenly*

called Fractionated Coconut Oil. Caprylic Capric Triglycerides are a specialized esterification of Coconut Oil using just the Caprylic and Capric Fatty Acids, while Fractionated Coconut Oil is a, standard, distillation of Coconut Oil which results in a combination of all of the fatty acids, pulled through the distillation process. Fractionated Coconut Oil has the same feel, and performance, of traditional vegetable oils with a lighter feel and extended shelf life, than most common carrier oils. Caprylic Capric Triglycerides do not feel like a standard carrier oil, at all. Caprylic Capric Triglycerides are an ester and have a very light, silky oil, feel that is not at all greasy / oily feeling on the skin. There are many suppliers that haven't recognized the difference between these two products, which is unfortunate for the discriminate formulator because the two are not interchangeable. Just because they both come from coconut oil doesn't make them the same thing. If that rationale were accurate then they would have to say that Neroli, Petitgrain, and Bitter Orange are all the same thing because they all come from the same tree, or that Emulsifying Wax and CocoBetaine are the same thing because they come from the same Coconut. The difference between Caprylic Capric Triglycerides and Fractionated Coconut Oil are obvious in the chemistry, and to the touch. If a comparison is done, by applying the two to the skin, it is very clear that the Caprylic Capric Triglycerides offers a silky feel, a testament to the specialized esters, while the Fractionated Coconut Oil has the feel of a common carrier oil. Caprylic Capric Triglycerides have a dry, silky oil, feel that is almost powdery because it is still present on the skin but not oily. These are just the esthetic properties. When it comes down to chemical performance the Caprylic Capric Triglycerides are a suitable oil replacement,

when you need to use it with emulsifiers that are intolerant of carrier oils, where the Fractionated Coconut Oil is not. Ingredients To Die For offers Fractionated Coconut Oil as well, because it has value when you're looking for it's particular attributes as a vegetable oil, just not as a substitute for carrier oils, for oily skin, for sensitive skin, or oil free product claims and not as a substitute for Caprylic Capric Triglycerides.

Caprylic Capric Triglycerides are produced by the esterification of glycerol (plant sugars) with mixtures of caprylic (C:8) and capric (C:10) fatty acids from coconut or palm kernel oils. The special combination, and esterification, are responsible for the silky oil feel. This is a specialized process used to achieve the skin benefits of the specific fatty acid esters that also results in superior oxidative stability, low color, and odor, as it is then further refined to remove residual fatty acids resulting in a pure ester, with a silky oil feel, that is a great choice for sensitive skin and oil free applications. The unique metabolic, and functional properties, of Caprylic Capric Triglycerides, are a consequence of their chemical structure, and makes them a versatile ingredient in numerous Pharmaceutical and Cosmetic applications.

(http://www.ingredientstodiefor.com/item/Caprylic_Capric_Triglycerides/464#)

- Caprylic triglyceride is an ingredient used in soaps and cosmetics. It's usually made from combining coconut oil with glycerin. This ingredient is sometimes called capric triglyceride. It's also sometimes mistakenly called fractionated coconut oil.*

Caprylic triglyceride has been widely used for more

than 50 years. It helps smooth skin and works as an antioxidant. It also binds other ingredients together, and can work as a preservative of sorts to make the active ingredients in cosmetics last longer.

Caprylic triglyceride is valued as a more natural alternative to other synthetic chemicals found in topical skin products. Companies that claim that their products are “all natural” or “organic” often contain caprylic triglyceride.

While it’s technically made of natural components, the caprylic triglyceride used in products isn’t usually found in nature. A chemical process separates the oily liquid so that a “pure” version of it can be added to products.

(<http://www.healthline.com/health/caprylic-capric-triglycerides>)

Note- All the web-pages referred above were visited and assessed on 06.10.2019)

4.4 In our view the all the published literature support the findings recorded by the Commissioner in the impugned order to the effect that the goods imported are nothing but re-esterified fat/ oil. On going through the published literature referred above, and also the fact that as per the rulings relied from U S Customs and Kenya Customs we do not find any error in the classification of the goods determined under Chapter 15162091. It is true that the Rulings of the U S Customs and Kenya Customs may not be binding but definitely have great persuasive value as the Classification Code followed by all these Countries, are based on HSN Explanatory Notes at least upto the six digit level, with which the classification system adopted by Indian Customs is also aligned. It is only beyond six digit level that local jurisdictions have their own expansions.

4.5 The decisions relied upon by the appellants do not advance the case of the appellants as there is no dispute vis a vis the specific and general entries. Chapter 28 and 29 of the Customs Tariff refer to inorganic and organic chemicals. Every material in this universe will have chemical constituents - organic/ inorganic. Then can by referring to Chemical Structure, every product gets classified in these chapters. Such an argument is nothing but making the entire scheme of tariff redundant and hence the arguments advanced by the appellants need to be rejected on this ground itself.

5.1 In view of discussions as above, we dismiss the appeal.

(Order pronounced in the open court on 10.10.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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