

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85379 OF 2022

[Arising out of Order-in-Original No. CC-PVNSB-17-2021-22-Adj.(I) ACC dated 28th December 2021 passed by Commissioner of Customs (Import) Air Cargo Complex, Mumbai]

Danisco (India) Pvt Ltd

81, 82, 83, 8th Floor, 2 North Avenue, Maker Maxity,
Bandra-Kurla Complex, Bandra (E), Mumbai – 400 051.

... Appellant

versus

Commissioner of Customs (Import)

Air Cargo Complex, Navpada, Sahar Village,
Andheri (E), Mumbai – 400 099.

...Respondent

WITH

CUSTOMS APPEAL NO: 85380 OF 2022

[Arising out of Order-in-Original CAO No. CC-PVNSB-18-2021-22-Adj.(I) ACC dated 29th December 2021 passed by Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Danisco (India) Pvt Ltd

81, 82, 83, 8th Floor, 2 North Avenue, Maker Maxity,
Bandra-Kurla Complex, Bandra (E), Mumbai – 400 051.

... Appellant

versus

Commissioner of Customs (Import)

Air Cargo Complex, Navpada, Sahar Village,
Andheri (E), Mumbai – 400 099.

...Respondent

APPEARANCE:

Shri T Viswanathan, Advocate and Ms Lakshmi Menon, Advocate for the appellant

Shri D S Maan, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR S K MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 85408-85409 /2023

DATE OF HEARING:	15/11/2022
DATE OF DECISION:	14/03/2023

PER: C J MATHEW

Two appeals of M/s Danisco India Pvt Ltd, impugning demands under section 28 of Customs Act, 1962, along with applicable interest under section 28AA of Customs Act, 1962, and penalties of like amount under section 114A of Customs Act, 1962 consequent upon re-assessment by substitution of classification, declared as tariff item 3002 9030 with tariff item 2106 9099 of First Schedule of Customs Tariff Act, 1975, and attendant denial of benefit of notification no. 12/2012-Cus dated 17th March 2012 (at serial no. 195) and notification no. 50/2017-Cus dated 30th June 2017 (at serial no. 218), are taken up for disposal in this common order. The first of the appeals lies against proceedings before Commissioner of Customs (Import), Air Cargo Complex (ACC), Chhatrapati Shivaji International Airport (CSIA), Mumbai culminating in order¹ for recovery of ₹ 5,07,06,602 as differential duty on import of 'probiotic culture' of three varieties against 73 nos. bills of entry filed between 18th July 2016 and 31st March 2021. The other appeal lies against

¹ [order-in-original no. CAO no. CC-PVNSB/17/2021-22/Adj(I) ACC dated 28th December 2021]

proceedings before Commissioner of Customs (Import), Air Cargo Complex (ACC), Chhatrapati Shivaji International Airport (CSIA), Mumbai culminating in order² for recovery of ₹ 90,89,022 as differential duty on import of 'Howaru probiotic culture' against bills of entry filed between 21st June 2016 and 26th October 2018.

2. The appellant claims that they had been importing the same goods, which are freeze-tried cultures of bacterial strain having probiotic properties, since 2015 by declaring the same classification and availing the benefit of the said notifications and that the imported goods are further processed by manufacturers of probiotic food products. In these appeals, it is their contention that the classification adopted by the adjudication authority is inappropriate as the impugned goods do not match the description corresponding to tariff item 2106 9099 of First Schedule to Customs Tariff Act, 1975. Though the proximate grievance of the appellant is the recovery of differential duty arising from denial of concessional rate extended by the notifications claimed by them, the manner in which the customs authorities have approached the dispute warrants narration of its contours before the rival submissions are taken up for evaluation.

3. The two notifications, issued under section 25 of Customs Act, 1962 for the period prior to 1st July 2017 and the period thereafter, enable clearance of 'probiotics' covered by tariff item 3002 9030 of

² [order-in-original no. CAO no. CC-PVNSB/18/2021-22/Adj(I) ACC dated 29th December 2021]

First Schedule to Customs Tariff Act, 1975 at concessional duty of 5% ad valorem; the description ‘cultures of micro-organisms (excluding yeast)’ corresponding to the said the tariff item in First Schedule to Customs Tariff Act, 1975, however, makes no mention of this specific article and neither does the description

‘Human blood; animal blood prepared for therapeutic, prophylactic or diagnostic uses; antisera, other blood fractions and immunological products, whether or not modified or attained by means of biotechnological processes; vaccines, toxins, cultures of micro-organisms (excluding yeasts) and similar products’

corresponding to heading 3002 in First Schedule to Customs Tariff Act, 1975. Nonetheless, for the purposes of extending benefit of the concessional rate, there can be no doubt that ‘probiotics’ falls, along with ‘human blood’, ‘animal blood prepared for therapeutic, prophylactic or diagnostic uses’ and ‘toxins’ with products similar to ‘vaccines, toxins, cultures of micro-organisms (excluding yeasts)’ falling under the residual ‘others’ corresponding to tariff item 3002 9090 of First Schedule to Customs Tariff Act, 1975 within description ‘other’ corresponding to sub- heading 3002 90 of First Scheduled to Customs Tariff Act, 1975 as ‘cultures of micro-organisms (excluding yeast)’ therein. We may also note that all of these are broadly classified as ‘pharmaceutical products’ in chapter 30 of First Schedule to Customs Tariff Act, 1975 and the notes to the chapter, as well as

sub- heading therein, are also of little relevance except to the extent that adjudicating authority as held that ‘foods or beverages, other than nutritional preparations for intravenous administration’ in note 1 (a) precludes inclusion of the imported goods therein owing to further utilisation for manufacture of downstream products instead of consumption at that stage. The substituting classification is emplaced in chapter 21 of First Schedule to Customs Tariff Act, 1975, intended for ‘miscellaneous edible preparations’, and it is clear from the several headings therein that the imported goods do not find fitment in any of the specific descriptions corresponding to five of the headings and customs authorities have found ‘food preparations not elsewhere specified or included’, corresponding to heading 2106 of First Schedule to Customs Tariff Act, 1975, to be the most appropriate classification. The adjudicating authority has concluded that the imported goods are ‘food preparations’ that are not ‘protein concentrates and textured protein substances’ but also not any of the goods specified within, including ‘diabetic foods’ and ‘sterilised or pasteurised millstone’ within the residual ‘others’ therein.

4. Considered in the factual matrix *supra*, the case of the customs authorities is that the imported goods are not ‘probiotics’ which would, doubtlessly, not be ‘edible preparations’ at all but ‘food preparation’ of some indeterminate composition. It is on this finding that the claim for benefit of the concessional rate of duty has been

denied.

5. Learned Counsel for the appellant has drawn attention to the decision of the Hon'ble Supreme Court in *HPL Chemicals Ltd v. Commissioner of Central Excise, Chandigarh* [2006 (197) ELT 324 (SC)] and to the General Rules for the Interpretation of this Schedule in Customs Tariff Act, 1975 to discredit the finding of the adjudicating authority. According to him, the decision *supra* of the Hon'ble Supreme Court which squarely places the onus thus

'30. *It has been held by this Court in number of judgments that burden of proof is on the Revenue in the matter of classification. In Union of India and Others v. Garware Nylons Limited and Others - 1996 (10) SCC 413, in Para 15 this Court held as under :-*

"15. In our view, the conclusion reached by the High Court is fully in accord with the decisions of this Court and the same is justified in law. The burden of proof is on the taxing authorities to show that the particular case or item lit question is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority. Especially in a case as this, where the claim of the assessee is borne out by the trade enquiries received by them and also the affidavits filed by persons dealing with the subject-matter, a heavy burden lay upon the Revenue to disprove the said materials by adducing proper evidence. Unfortunately, no such attempt was made. As stated, the evidence led in this case conclusively goes to show that Nylon Twine manufactured by the assessee has been treated as a kind of Nylon Yarn by the people conversant with the trade. It is commonly considered as Nylon Yarn. Hence, it is to be classified under Item 18 of the Act. The Revenue has failed to establish the contrary. We would do well to remember the guidelines laid down by this Court in Dunlop India Ltd. v. Union of India. AIR 1977 SC 597 at Page 607. In such a

situation, wherein it was stated (AIR P. 607 SCC P. 254, Para 35) :-

“When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause.”

31. Similarly, in *Hindustan Ferodo Limited v. Collector of Central Excise, Bombay*, 1997 (2) SCC 677, it is held in Para 4 as under :-

“It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22-F 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”.

has not been discharged. Furthermore, he contends that the reliance placed by the adjudicating authority on the descriptions of the two chapters in First Schedule to Customs Tariff Act, 1975 runs counter to the mandate in the General Rules for the Interpretation requiring the classification to be determined in terms of headings.

6. We are, thus, able to narrow down the scope of resolution of this dispute to the demonstrated appropriateness of describing the imported goods as ‘food preparation’ and the stage for comparison with the declared classification to determine more suited description of the two thereafter. Accordingly, we turn to the adjudication order for ascertainment for, while the eligibility for the concessional rate will be determined by conformity to being ‘probiotics’, such comparative evaluation which will be necessitated only upon only

upon determination, by default, of classification of the goods as declared by the appellant and subject to the adjudication order having delved into the nature of the imported goods. Having determined an alternative classification which does not permit contemplation of any concessional rate of duty, we may, here itself, conclude that the determination of conformity with the description in the said notifications does not fall within the scope of this appeal as the impugned orders have not forayed in that direction.

7. It is seen from the show cause notices that there is no allegation that the impugned goods are not 'probiotic cultures' as claimed in the bills of entry. Nor is there any technical ascertainment that could lend support to any suggestion that the goods are not in accordance with the declaration. The notices have alleged misdeclaration of the goods which, having been permitted clearance, without the intervention that places onus on customs authorities to alter the classification in accordance with section 17 of Customs Act, 1962, owing to special status assigned to the importer, should also be properly classified in the bill of entry to pass muster even if the particulars relating to the goods are not, of itself, misdeclared. The purport of the proceedings initiated by the two notices leading to the impugned orders are clear: re-determination of classification.

8. Though the adjudication orders appear to have suggested that

the imported goods are not the final product for human consumption and, yet, as intermediary for manufacture of food supplements to be treated as food preparations, there is no finding that the goods are not ‘probiotic cultures’ or that, being ‘cultures’ and not ‘probiotics’ *per se*, are disentitled to the benefit of concessional rate of duty sought in the bills of entry. The issue of whether the goods are ‘probiotics’ or not is, thus, not relevant to the proceedings. The wealth of material produced by both sides on the subject of ‘probiotics’ does not, therefore, assist in resolution of the dispute before us.

9. Learned Counsel has placed before us rulings of foreign customs administrations as has Learned Authorized Representative. We take notice that the impugned orders are about the nature of the impugned goods in the context of exclusions in chapter 30 of First Schedule to Customs Tariff Act, 1975 and inclusions in chapter 21 of First Schedule to Customs Tariff Act, 1975. The rulings relied upon by both sides had arisen from examination of the relevant product in the framework of the enumerations at the domestic level in the respective tariffs and that of the European Union (EU) pertains to application of non-tariff barriers imposed by a constituent State. At this stage, we may also take notice that, notwithstanding the several submissions of Learned Authorized Representative on the proper classification of ‘probiotics’ – whether as food supplement or ingredient for manufacture of food supplement, the intent of law

insofar as classification of 'probiotic' within heading 3002 of First Schedule to Customs Tariff Act, 1975 is beyond question as the notification cited by the appellant unambiguously deem it to be so. No amount of argument or depth of research can move 'probiotics' or, for that matter, 'cultures of micro-organisms (excluding yeast)' to chapter 21 as proposed by the show cause notices.

10. It, therefore, only remains to be seen if any finding of the adjudicating authority permits such re-classification within the restraining framework *supra* and in conformity with the rules of engagement for alteration of classification as decided by the Hon'ble Supreme Court in *re HPL Chemicals Ltd.* The impugned orders have held, and ignoring the lack of any allegation on the description of imported goods as detailed in the bills of entry, that the goods are ingredients intended for use in manufacture of food supplements and such goods find acceptability within chapter 30 only to the extent that these are intravenously administered. Indeed, on the admission on behalf of the appellant that the 'cultures' are to be processed further before use by consumers, intravenous administration is not a claim at all. The adjudicating authority, and Learned Authorized Representative, rely upon note 1(a) in chapter 30 of First Schedule to Customs Tariff Act, 1975 based upon a statement of a technically qualified representative of the importer before the investigators and, having excluded the 'food additive' thereby, proceeds to rely upon the

General Rules for the Interpretation of the Schedule in Customs Tariff Act, 1975 for fitment in the proposed classification.

11. All of this commences with the supposition that the impugned goods are ‘food preparations’ for which reliance has been placed on the elements elaborated in the description corresponding to sub-heading 3002 06 in Explanatory Notes to Harmonized System of Nomenclature (HSN) and the common ground of administration other than intravenously. Thereafter, conformity with that pertaining to heading 2106 in Explanatory Notes to Harmonized System of Nomenclature (HSN) was rendered. However, this approach may be validated only upon exclusion of the impugned goods from chapter 30 of First Schedule to Customs Tariff Act, 1975 and is tantamount to comparison of two rival headings for the more appropriate fitment which is permissible only after fulfilment of fitment of the description within the heading sought to be imposed by customs authorities, viz., heading 2106 of First Schedule to Customs Tariff Act, 1975 *sans* reference to notes in the chapter containing the declared classification. This is evident from

‘1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to terms of the headings and any relative Section or Chapter Notes....’

in the General Rules for the Interpretation of this schedule in Customs

Tariff Act, 1975 and absence thereof is insufficient discharge of obligation laid down in *re HPL Chemicals Ltd.*

12. In the normal course, such deficiency in adjudication proceedings would be remedied by remand for fresh determination. That, however, would be mere academic exercise, in circumstances of the claim that impugned goods are ‘probiotic cultures’, for not having been disputed in the show cause notices and the appropriate tariff item within which ‘probiotic’ falls having been established by the exemption notification issued under Customs Act, 1962. Though Learned Authorized Representative did try to fill the gaps by conjecturing upon the description in the invoice and by relying upon technical material to urge that the impugned goods do not conform to ‘probiotics’, acceptance of such argument would be tantamount to re-investigation and issue of fresh notice with new grounds, allegations and proposals which cannot be countenanced at the appellate stage.

13. Consequently, the impugned order is beyond remedy and must be set aside. Appeals are allowed.

(Order pronounced in the open court on 14/03/2023)

(S K MOHANTY)
Member (Judicial)

**/as*

(C J MATHEW)
Member (Technical)