

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86262 OF 2020

[Arising out of Order-in-Original No: CC-VA/22/2020-21 Adjudication (I) ACC dated 4th November 2020 passed by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai.]

Centaur Pharmaceuticals Pvt Ltd

Plot No. 4, Rajeev Gandhi Info Tech, Biotech Park
Phase – II, Hinjewadi, Chinchwadgaon, Pune - 411033

... Appellant

versus

Commissioner of Customs (Import)

Air Cargo Complex, Sahar, Andheri (E)
Mumbai - 400099

...Respondent

APPEARANCE:

Shri T Viswnathan, Advocate for the appellant

Shri Sydney D'Silva, Additional 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 / 85871 /2023

DATE OF HEARING: 01/11/2022

DATE OF DECISION: 28/04/2023

PER: C J MATHEW

Aggrieved by order¹ of Commissioner of Customs (Import), Air

¹ [order [order-in-original no. CC-VA/22/2020-21 Adj (I) ACC dated 14th November 2020]

Cargo Complex (ACC), Sahar, Mumbai fastening duty liability of ₹ 1,55,37,543 under section 28 of Customs Act, 1962, along with applicable interest under section 28AA of Customs Act, 1962, and penalty of ₹ 10,00,000 on them under section 112 of Customs Act, 1962, M/s Centaur Pharmaceuticals Pvt Ltd is in appeal disputing the classification adopted by customs authorities. The appellant, a manufacturer as well as contract research/clinical research specialist, also imports pharmaceutical and wellness products for marketing, distribution and sales in the country; they had, since June 2008, been importing 'Renadyl' from M/s Kibow Biotech Inc., USA under a license for packing, marketing and sale of the product in India. The said product is claimed to improve quality of life by decreasing creatine and blood urea nitrogen levels in patients suffering from chronic kidney disease.

2. The dispute is about import of 'Renadyl bulk probiotic dietary supplement capsules', valued at ₹ 2,39,99,912, between 22nd June 2018 and 28th November 2019 against 7 nos. bills of entry claiming conformity with description corresponding to tariff item 3002 9030 of the First Schedule to Customs Tariff Act, 1975 and consequent eligibility for rate of 'basic customs duty (BCD)' in notification no. 50/2017-Cus dated 30th June 2017 (at serial no. 218) and for 'integrated goods and services tax (IGST)' in notification no. 01/2017 dated 28th June 2017 (at serial no. 61)

respectively. Customs authorities, being of the opinion that the impugned goods were, owing to specified exclusions in notes to chapter 30 of the First Schedule to Customs Tariff Act, 1975, more appropriately akin to the description corresponding to tariff item 2106 9099 of First Schedule to Customs Tariff Act, 1975, issued consultative letter dated 7th February 2020 and the response thereof, dated 18th February 2020 and 15th June 2020, not being considered sufficiently satisfactory, coupled with absence at the hearing scheduled, in accordance with Pre-notice Consultation Regulation, 2018, for 19th June 2020, prompted issue of show cause notice dated 25th June 2020.

3. Before proceeding to examine the findings in the impugned order, it would be appropriate to take note of the rival descriptions within which the impugned goods were sought to be classified. The appellant appropriated coverage as ‘pharmaceutical products’ of chapter 30 of First Schedule to Customs Tariff Act, 1975 and, more particularly, within

‘cultures of micro-organisms (excluding yeast)’

corresponding to tariff item 3002 90 30 within the residuary

‘Other:’

corresponding to sub-heading 3002 90 comprising also ‘human blood’, ‘animal blood prepared for therapeutic, prophylactic or

diagnostic uses’, ‘toxins’ and the inevitable ‘others’ with it under

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

corresponding to heading 3002 within which were also enumerated ‘antisera, other blood fractions and immunological products, whether or not modified obtained by biotechnological processes:’, ‘vaccines for human medicine:’ and ‘vaccines for veterinary medicine’ as other sub-headings therein. *Per contra*, the adjudicating authority preferred coverage of ‘miscellaneous edible preparations’ of chapter 21 of First Schedule to Customs Tariff Act, 1975 and, more particularly, the residual

‘other’

corresponding to tariff item 2106 90 99 within the residual that, along with ‘diabetic foods’ and ‘sterilised or pasteurised millstone’, made up for

‘Other:’

among ‘custard powder’, ‘churna for pan’, ‘food flavouring material’, ‘compound preparations for making non-alcoholic beverages’, ‘sugar-syrups etc.’, ‘betel nut product known as “supari”’, ‘pan masala’ and ‘soft drink concentrates:’ enumerated together under

‘Other:’

corresponding to sub-heading 2106 90 within, and along with ‘protein concentrates and textured protein substances’,

‘Food preparations not elsewhere specified or included’

corresponding to heading 2106. Thus, the dispute is about the imported goods being ‘food preparation’ or being ‘cultures of micro-organisms (other than yeast)’ with the latter, though, corresponding to a tariff item, nonetheless, is also specified in the heading among other pharmaceutical products.

4. This elaborate layout is intended to afford a perspective of the architecture of the tariff that should not have been susceptible to such dispute and, therefore, appears to have been actuated by the allure of effective rate of ‘basic customs duty (BCD)’ at 5% intended, at serial no 218 in notification no. 50/2017-Cus dated 30th June 2017, for ‘*probiotics*’ corresponding to tariff item 3002 90 30 attended upon by ‘integrated goods and service tax (IGST)’ at 12% extended, *inter alia*, to goods conforming to the description corresponding to heading 3002, replicating the heading in First Schedule to Customs Tariff Act, 1975, at serial no 61 of Schedule II of the IGST Rates in notification no. 01/2017 (IT-R) dated 28th June 2017. The classification adopted in the order imposes ‘basic customs duty (BCD)’ at 50% with effect from 2nd February 2018 on ‘all goods’, except for specific compound

alcoholic preparations, corresponding to sub-heading 2106 90 of First Schedule to Customs Tariff Act, 1975 and ‘integrated goods and service tax (IGST)’ at 18% extended to, *inter alia*, goods conforming to the description corresponding to heading 2106, and identical to that *supra* in First Schedule to Customs Tariff Act, 1975 except for certain articles specified therein, at serial no 23 of Schedule III of the IGST Rates in notification no. 01/2017 (IT R) dated 28th June 2017.

5. In the impugned order, it was observed that the goods, in the form of capsules (253575 capsules per bulk packing), described in the website of the supplier with accompanying recitation of obligations devolving on them under the Dietary Supplement Health and Education Act of 1994 (DSHEA) and marked on the retail packing as ‘not for medicinal use’, are in conformity with ‘food supplement’, notwithstanding being encased in capsules that are ‘acid resistant’ merely for protection of the probiotics contained in it, to exclude from coverage as pharmaceutical products. The adjudicating authority was also influenced by

‘(a) foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters), other than nutritional preparations for intravenous administration (IV)’

in the exclusionary note 1 of chapter 30 of First Schedule to Customs Tariff Act, 1975 and by the *Explanatory Notes* of the Harmonized

System of Nomenclature (HSN) pertaining to the proposed heading 2106 of First Schedule Customs Tariff Act, 1975, comprising, besides residual food preparations, ‘protein concentrates and textured protein substances’ for inferring that products, barring those intended specifically for prevention or treatment of diseases and ailments, are not pharmaceutical products even if assisting in promotion and maintenance of general health or well-being. Furthermore, it was also noted that the labeling, in accordance with the Food Safety and Standards Authority of India (FSSAI) directive for enforcement of the statutory requirements in Food Safety and Standards Act, 2006, could not be ignored as also ‘over the counter’ sale without prescription, specifying dosage and period, from a medical practitioner that sets drugs and pharmaceutical products apart.

6. According to Learned Counsel for the appellant, the impugned goods are intended for oral ingestion by patients suffering from kidney ailments and the capsule, made of hypromellose gellam gum acid, and containing streptococcus thermophilus, lactobacillus and acidophilusbifidobacterium longum (all being probiotic), is also filled with prebiotic viz., inulin and xylo-oligosaccharides with magnesium stearate as emulsifier rendering it to be, essentially, a mixture of probiotics. He contended that the evidence offered by them, in the form of certification by nephrologists, of clinical studies and of test reports from patients using the product, make it abundantly clear that

these are not food supplements.

7. He emphasized further that the overwhelming presence of probiotics indicates conformity with the description corresponding to the tariff item sought by them and objected to the finding in the impugned order on the ground that a residual heading of broad description would not meet the test entailed by the decision of the Hon'ble Supreme Court in *HPL Chemicals Ltd v. Commissioner of Central Excise, Chandigarh* [2006 (197) ELT 324 (SC)] and in *Hindustan Ferodo Ltd v. Collector of Central Excise* [1997 (89) ELT 16 (SC)]. He also argued that content of any advertising or publicity material or coverage under Indian and foreign statutes, intended for other regulatory objectives, are no guide to classification of imported articles. Pointing out that the consuming public does not consider it to be dietary or food supplement, approval of the claimed classification was urged by him.

8. Reliance was placed by him on the decision of the Tribunal in *T Stanes & Co v. Commissioner of Central Excise, Coimbatore* [2009 (235) ELT 183 (Tri-Chennai)] in support of his contention that therapeutic use suffices for inclusion in the heading sought for by them. This, in our view, does not come to the assistance of the appellant in the light of decisions of the Hon'ble Supreme Court *supra*, setting out the fundamental principle of onus on the tax

authority to propose an alternative classification without reference to the one sought by assessee and for resort to rule 3 of General Rules for the Interpretation of this Schedule in Customs Tariff Act, 1975 only thereafter, requiring each such exercise by customs authorities to undergo the test of conformity. Learned Counsel further cited the authority of the decision of the Tribunal in *Softesule Ltd v. Commissioner of Central Excise, Mumbai-II* [2002 (146) ELT 418 (Tri-Mumbai)] for substantial weightage to be accorded to common parlance understanding of ‘food supplement’ in the absence of any definition in the statute. It was also contended that the decision of the Tribunal, in *Commissioner of Central Excise, Chennai-IV v. Tanmed Pharmaceuticals Ltd* [2018 (1) TMI 1123-CESTAT Chennai], elaborating upon the *genre* of enumerations as determinant of classification therein, is applicable to them. According to him, the decision of the Hon’ble High Court of Bombay in *Blue Star Ltd v. Union of India and anr* [1980 (6) ELT 280 (Bom)], and several others, support the various contentions recorded *supra*. We do not consider these to be of relevance in the light of the core of the dispute that is before us, *viz.*, the coverage of the impugned goods within the description corresponding to the heading fastened on the appellant by the adjudicating authority. By default, non-adherence to the General Rules for the Interpretation of the Schedule in Customs Tariff Act,

1975 and failing, thereby, to discharge the onus devolving on the proper officer of customs to propose a heading that bears close affinity to corresponding description, renders the classification sought by the assessee to be final. It is only in the event of ambiguity in the descriptions sought by either side that other peripheral tests of determination, including 'common parlance', are resorted to.

9. Likewise, the reiteration of the adjunct evidence, relied upon in the impugned order, by Learned Authorized Representative serve only to divert attention from the essence of classification laid out in, and universally accepted as, the General Rules for the Interpretation of the Schedule in Customs Tariff Act, 1975. Nor are we concerned with the use to which the product is put, or intended by, its consumers. It is contended by him that from 'probiotics' as well as tariff item 3002 90 30 of First Schedule to Customs Tariff Act, 1975 in the notification, there can be no doubt that 'probiotics' would not be classifiable as 'other edible food preparations' but the claim of appellant would have some traction if that was the description in the impugned bills of entry; he postulated that, in the event of resort to rule 3 of General Rules for the Interpretation of this Schedule in Customs Tariff Act, 1975, the adjudicated classification would prevail. He drew attention to *Explanatory Notes* for chapter 21 which not only enumerates certain descriptions

for inclusion but is also amenable to a generalization of the intended coverage that extends to the impugned goods. He placed reliance on the decision of the Appellate Authority for Advance Ruling under GST, West Bengal in *Re: Eskag Pharma Pvt Ltd [2019 (27) GSTL 749 (App.A.A.R.-GST)]*; that, however, is not binding on us. According to him, the impugned goods are not ‘probiotics’ intended for use by the pharmaceutical industry which the claimed classification covers but finished product containing ‘probiotics’ among other ingredients.

10. In our view, his reliance on the decision of the Tribunal in *Shreya Life Sciences (P) Ltd v. Commissioner of CGST, Customs & Central Excise, Dehradun [2019 (369) ELT 1043 (Tri-Del)]*, though relating to classification dispute over the same two chapters of First Schedule to Customs Tariff Act, 1975, was substantively influenced by test reports which is absent in the proceedings thus far. He has also drawn attention to the decision of the Hon’ble Supreme Court in *Commissioner of Central Excise, Delhi-III v. Uni Products India Ltd [2020 (372) ELT 465 (SC)]* which held that

‘23. “The common parlance test”, “marketability test”, “popular meaning test” are all tools for interpretation to arrive at a decision on proper classification of a tariff entry. These tests, however, would be required to be applied if a particular tariff entry is capable of being classified in more than one heads.....

24. The Tribunal found that though in common parlance products involved may not be considered as carpets, in view of the wordings of the chapter, section notes, chapter notes and explanatory notes, the goods were classifiable under chapter Heading f5703.90.90.

25. We do not find any error in such reasoning..... Thus, we see no reason as to why we should make a departure from the general trend of taking assistance of these Explanatory Notes to resolve entry related dispute....’

11. According to Learned Authorised Representative, rulings of the competent authority in the United States Customs have persuasive value in the absence of settled law, applicable on all fours, to the dispute now before the Tribunal. Reliance has been placed by him on ‘classification of probiotic powders’ in ruling no. HQ H253254 of August 2015 of Branch Chief, Tariff Classification and Marking Branch and ruling no. HQ W968085 dated 30th January 2007 on classification of ‘encapsulated bacteria cultures’ by Director, Commercial and Trade Facilitation Division.

12. We find that the task before us is straightforward. The concessional rate of duties of customs, extended by notification no. 50/2017-Cus dated 30th June 2017, is available to imported ‘probiotics’ corresponding to tariff item specified therein; ‘probiotics’ that are ‘cultures of micro-organisms (excluding yeast)’, corresponding to heading 3002 of First Schedule to Customs Tariff Act, 1975, are, doubtlessly, eligible to the benefit thereof which, being the default

classification and as set out by the Hon'ble Supreme Court in *re Hindustan Ferodo Ltd* and in *re HPL Chemicals Limited*, may be controverted only by proposing alternative classification established as adhering to the General Rules for Interpretation of Schedule in Customs Tariff Act, 1975. Of itself, mere enumeration in the exemption notification does not render all 'probiotics', or compounds containing probiotics, to be classifiable within heading 3002 of First Schedule to Customs Tariff Act, 1975; that is abundantly clear from the decision of the Hon'ble Supreme Court in *Eskayef Limited v. Collector of Central Excise* [1990 SCC (4) 680].

13. The General Rules for Interpretation of Schedule in Customs Tariff Act, 1975 require that classification should proceed from the heading to the sub-heading and tariff item and that the description in the first of these is critical for proceeding to the next two levels, notwithstanding the conformity, even having all the appearances of being unquestionably so, of an impugned article with description corresponding to a tariff item. We also have no doubt that the description corresponding to heading 2106 of First Schedule to Customs Tariff Act, 1975 may not, by the handicap of being residuary, offer itself readily as a promising candidate for classification. Nonetheless, lack of disambiguation of 'food preparations' should not preclude, and, on the contrary, must induce, reference to the *Explanatory Notes* in the Harmonised System of Nomenclature (HSN) of the World Customs

Organisation. Indeed, the utility thereof that guided the decision in *re Uni Products India Ltd* must, of necessity, impose itself on us.

14. The structuring of the headings in chapter 21 of the First Schedule to Customs Tariff Act, 1975, notwithstanding the residuary positioning of the proposed heading, and the clustering of the articles in the later chapters of Section IV in the First Schedule to Customs Tariff Act, 1975 offers some understanding of the *genre* which is further reinforced by

‘Provided that they are cannot covered by any other heading of the Nomenclature, this heading covers :

(A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption....’

in *Explanatory Notes* to heading 21.06 in Harmonised System of Nomenclature (HSN); the primacy of this heading *vis-à-vis* any other, even if descriptions therein lack specificity, appears to us to be, unarguably, intended. It is not the contention of the appellant that the impugned goods can be sold only against a prescription; neither is it denied by them that the capsules are intended to directly ingested for promotion of general well-being and, even if it does aid in treatment of chronic disease in some particular organ, is not claim to be treatment for such ailment. A harmonious inference from all of these would, certainly, not exclude the impugned goods from coverage as ‘food supplement’ of one sort or the other. Inclusion within this heading is avoided only upon

specific enumeration elsewhere at the same level of comparison; we do not find any other heading in the First Schedule to Customs Tariff Act, 1975 that is specifically intended for 'probiotics' which the appellant claims the impugned goods to be. We are also constrained from depending upon entry in an exemption notification, such as notification no. 50/2017-Cus dated 30th June 2017, to decide upon acceptability of any tariff item in First Schedule to Customs Tariff Act, 1975 as a specific enumeration; in fact, having to resort to such premise manifests absence of specific description elsewhere affording primacy, thereby, to the proposed classification owing to the *Explanatory Notes supra*. In the circumstances, classification of the impugned goods within heading 2106 of First Schedule to Customs Tariff Act, 1975 would not be in breach of rule 1 of General Rules for the Interpretation of this Schedule in Customs Tariff Act, 1975.

15. In the absence of controverting of the *Explanatory Notes supra*, and donning the description thereof with mantle of correctness, the default approval of validity of classification claimed by the assessee ceases to operate. Furthermore, international practice, as evidenced by the rulings of two competent authorities of the United States Customs, is in accord with this finding of ours. In HQ H253254 dated 8th December 2015, it was held that

‘... In their condition as imported, the subject probiotic powders are finished products that possess the characteristics of a food

preparation. These products have been specially formulated and are intended for ingestion by humans. In this regard, HQ H966448, dated July 9, 2004 states the following:

“Food supplements, classified in heading 2106, HTSUS, encompass an expansive group of items. They simply must be prepared for human consumption. As such, these products are packaged for oral ingestion only as a capsule, tablet, powder or liquid. They are put up in packaging with indications that they maintain general health or wellbeing. See HQ 966527, dated October 21, 2003.

The subject products have been prepared for human consumption and are sold to consumers for such purpose. They readily fit into the heading for food preparations. They are intended for the consumer’s general health and well-being. By virtue of GRI 1, the subject products are properly classified in headings 1901 and 2106, HTSUS, as food preparations not elsewhere specified or included.

The probiotic powders at issue are not classified under heading 3002, HTSUS as “cultures of micro-organisms (excluding yeasts) and similar products” because Chapter Note 1(a) to Chapter 30, HTSUS, indicates that the chapter “does not cover... foods or beverages..., other than nutritional preparations for intravenous administration.” Although the probiotic powders of food preparations that contain cultures of micro-organisms, they are not designed for intravenous administration. Therefore, because the subject probiotic products are food preparations for oral ingestion, they are specifically excluded from classification by virtue of Note 1(a) to Chapter 30, HTSUS....’

16. Likewise in ruling HQ W968085 dated 30th January 2007, it was held that

‘after reviewing your arguments, we do not believe that the

language of your preferred heading, “cultures of microorganisms” describes your client’s products.... It is clear from the language of the relevant definition of “culture” and the exemplars in the EN, the cultures of microorganisms referred to in the tariff are cultures that serve as starting materials for the manufacture of finished products - not as the components of an already finished product. The products classified in the two New York rulings cited in support of your desired classification are distinguishable from your client’s product. The products classified in NY L86890 and NY D80280, in their condition as imported, consisted simply of pure, freeze-dried cultures of microorganisms diluted with cornstarch. The imported products were to undergo further processing (with the addition of inactive ingredients) before undergoing encapsulation as finished products to be marketed as dietary supplements. Your client’s products have already undergone that processing and are that final product....’

17. It is apparent that ‘probiotics’ may have been, as seen from the referred notification, legislatively intended to be counted as pharmaceutical product and, as ‘cultures of microorganisms’, would not be excluded. In the rulings of United States Customs, the significance of not being amenable to further manufacture has ruled the probiotic products impugned therein to certain inclusion as ‘food supplement’ of some sort. In the absence of any domestic decisions that are contrary, or distinguishable on the given set of facts, foreign rulings offer sufficient guide insofar as customs assessment, endeavouring for universal uniformity, is concerned. Our

interpretation of the *Explanatory Notes* in the Harmonised System of Nomenclature (HSN), relevant to the classification sought to be fastened by customs authorities on the impugned product, and demonstrated as concurring with international practice, is, thus, immune to the urgings of Learned Counsel for the appellant. Accordingly, we have no hesitation in holding that the classification adopted in the impugned order does not merit to be interfered with. Consequently, the appropriate rate, corresponding to the said description, in the notification for levy of 'integrated goods and services tax (IGST)' applies. The concessional rate of duty sought for by the appellant in the bills of entry cannot be extended to them.

18. All that remains for consideration at this stage is exclusion from recovery under section 28 of Customs Act, 1962 owing to bar on invoking the extended period. We find no evidence of misdeclaration or suppression in the bills of entry filed by the appellant. It is also abundantly clear from our exposition leading to the outcome of upholding the classification sought to be fastened by the customs authorities that this was not so evident as even to speculate, let alone conclude, that the ingredients essential to invoking the extended period of limitation did exist. The demand is, thus, restricted to the normal period of limitation intended by section 28 of Customs Act, 1962 which, with effect from 14th May 2016, is two years from the relevant date. The differential duty computed in the impugned order

lies entirely within normal period. Therefore, the computation thereof does not warrant to be interfered with.

19. Penalty has been imposed on the appellant under section 112 of Customs Act, 1962 and appears to have been a consequence of the finding that the goods are liable for confiscation under one or the other provision of section 111 of Customs Act, 1962. Of the several elements therein, the sole breach that needs to be considered for evaluation is section 111(m) of Customs Act, 1962. In the light of the findings *supra* on the complexity of the facts and circumstances leading to the invoking of section 28 of Customs Act, 1962, we are unable to hold that any material particular had been withheld in connection with clearance of the goods for home consumption. Hence, the goods are not liable for confiscation and, consequently, liability for penalty will not arise.

20. Therefore, we allow the appeal to the extent of setting aside the liability to confiscation and the penalty imposed. We uphold the recovery of differential duty. Appeal is, accordingly, disposed of.

(Order pronounced in the open court on 28/04/2023)

(S.K. MOHANTY)
Member (Judicial)

(C J MATHEW)
Member (Technical)