CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 86112 of 2022

(Arising out of Order-in-Original CAO No. CC-PVNSB/19/2021-22/Adj.(I) ACC dated 31.01.2022 passed by Commissioner of Customs (Import), Air Cargo Complex (ACC), Sahar, Andheri (East), Mumbai.)

Zydus Healthcare Limited **.....Appellants**
Zydus Corporate Park
Scheme No.63, Survey No.536,
Khoraj, Gandhi Nagar
Near Vaishnodevi Circle
Ahmedabad – 382 481.

VERSUS

Commissioner of Customs (Import), ACC **.....Respondent**
Air Cargo Complex, Sahar, Andheri (East)
Mumbai–400 099.

Appearance:

Shri T. Vishwanathan, along with Shri Akhilesh Kangasia, Advocates for the Appellants
Shri Manoj Kumar, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87462/2023

Date of Hearing: 09.05.2023
Date of Decision: 09.05.2023

PER : M.M. PARTHIBAN

This appeal has been filed by M/s Zydus Healthcare Limited (herein after, referred to as 'the appellants'), assailing Order-in-Original CAO CC-PVNSB/19/2021-22/Adj.(I) ACC dated 31.01.2022 (herein after, referred to as 'the impugned order') passed by the learned Commissioner of Customs (Import), Air Cargo Complex (ACC), Sahar, Andheri (East), Mumbai.

2. Briefly stated, the facts of the case are that the appellants herein is a manufacturer of Active Pharmaceutical Ingredients (API) formulations and marketing of drugs used for treating various ailments. During such manufacturing process, the appellants had imported '*Probio-Tech AB-Blend-*

35' i.e., Probiotics which is used for manufacture of 'Providac' capsule. For manufacturing the said drug, the appellants have obtained the requisite license under Drugs and Cosmetics Rules, 1945 from the State Government of Sikkim. The imported probiotics are in the nature of cultures of micro-organisms which are manufactured by the supplier abroad and are supplied to the appellants in bulk form accompanied with the certificate of conformity for use in human being. The imported probiotics contain active ingredients namely Lactobacillus acidophilus LA-5 and Bifidobacterium-BB 12. On the above basis, the appellants had classified in the imported probiotics under Customs Tariff Item (CTI) 3002 9030 of the First schedule to the Customs Tariff Act, 1975 attracting import duty of 14.712% (BCD10% + CVD 0% + Secondary Education cess 1% + Higher Education cess 2% + Special Additional Duty of Customs-SAD 4%) and discharged applicable customs duties by availing certain duty exemptions under various notifications, in 41 Bills of Entry (B/Es) filed during the disputed period covering the aforesaid imports. The Special Intelligence & Investigation Branch (SIIB) of the Department had received an information that the appellants have misclassified the imported products in order to evade payment of higher customs duty. Accordingly, the Department conducted investigation disputing the classification of the imported probiotics and on completion of such investigation had proposed show cause proceedings for re-classifying the imported goods under 2106 9099 attracting import duty of 53.543% (BCD30% + CVD 12.5% + Secondary Education cess 1% + Higher Education cess 2% + SAD 4%) as these are finished products that possesses the characteristics of food ingredient/ final food preparation and demanding differential import duty under Section 28 (4) of the Customs Act, 1962 and for imposition of penalties. On adjudication of the case, the learned Commissioner of Customs (Import), ACC, Sahar had confirmed the adjudged demands has proposed in the SCN dated 31.03.2021 and imposed penalties under section 114 A ibid. Being aggrieved with the impugned order dated 31.01.2022, the appellants have filed this appeal before the Tribunal.

3.1. Learned Advocate for the appellants contends that the appellants having considered that the import product is probiotics and since these are cultures of micro-organism had correctly classified the same under CTI 3002 9030; the appellants have obtained requisite Registration Certificate No. BD-551 dated 14.07.2017 in respect of the supplier M/s Chr. Hansen Avedoere having factory at Denmark for import of probiotics/drugs and for manufacture of medicines for human use, by using such imported probiotics/ drugs from the Central Drugs Standard Control Organisation (CDSCO), Ministry of Health and Family Welfare, New Delhi; the imported goods have been subjected to customs approved laboratory tests and the test reports dated 16.08.2018 confirm that the said imported goods are Probiotic and contains alive micro-organisms. It is also pleaded by the Learned Advocate that the appellants have been importing the same goods, which are freeze–tride cultures of bacterial strain probiotic properties, since 2015 by declaring the same classification and availing the benefit of said notifications and the imported goods are further processed by manufacturers of probiotic products. As the Customs Tariff Heading (CTH) 30.02 specifically cover impugned products i.e., cultures of microorganisms, the appellants have classified the product accordingly and not under CTH 21.06, which is a residual entry for preparations not elsewhere specified or included. Accordingly, they claimed that classification is a matter of bonafide belief and does not amount mis-declaration, thereby extended period of limitation is not applicable in their case.

3.2. In support of their stand, the learned Advocate had relied upon the following decisions of the Tribunal and the judgement of the Hon'ble Supreme Court, in the respective cases mentioned below:

(i) *Danisco (India) Pvt. Ltd. Vs. Commissioner of Customs (Import), Mumbai* – Final Order No. A/85408-85409/2023 dated 14.03.2023 in Customs Appeal No. 85379 and 85380 of 2022 (Tri.-Mumbai)

(ii) *T. Stanes & Co.* Vs. *Commissioner of Central Excise, Coimbatore* - 2009 (235) E.L.T. 183 (Tri.-Chennai)

(iii) *Midas Fertchem Impex Pvt. Ltd.* Vs. *Principal Commissioner of Customs, Air Cargo Complex (Import), New Delhi* - 2023 (1) TMI 998 New Delhi

(iv) *Food Safety & Standards Authority of India Vs. Danisco (India) Pvt. Ltd. & Anr.* – 2015 SCC Online Del 8899

4. Learned Authorised Representative (AR) reiterated the findings made by the Commissioner of Customs (Import) in the impugned order and submitted that issue of classification of impugned goods, has been examined in detail by the learned Commissioner of Customs. Thus, learned AR justified the action of Commissioner of Customs (Import) in demand of differential duty, confiscation of the goods, and imposition of penalty in the impugned order and stated that the same is sustainable in law.

5. We have heard both sides and perused the case records.

6.1 The issue involved herein is to decide the classification of imported goods by the appellants as to whether, the same merits classification under Customs Tariff Item 3002 9030 as claimed by the appellants; or, is it classifiable under Customs Tariff Item 2106 9099 as contended by the Department, for deciding on the appropriate levy of customs duty, in respect of various Bills of Entries filed during the disputed period.

6.2 In order to address the above issue of classification of imported goods, we would like to refer the relevant legal provisions contained in Section 12 of the Customs Act, 1962; the Customs Tariff Act, 1975 and rules framed thereunder for consideration of proper and appropriate classification of the subject goods under dispute.

"***Section 12. Dutiable goods.*** -

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government."

"***Section 1. Short title, extent and commencement.*** -

(1) This Act may be called the Customs Tariff Act, 1975.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Section 2. Duties specified in the Schedules to be levied. -

The rates at which duties of customs shall be levied under the Customs Act, 1962 (52 of 1962), are specified in the First and Second Schedules.

xxx xxx xxx xxx

THE FIRST SCHEDULE – IMPORT TARIFF
(Refer Section 2)

THE GENERAL RULES FOR THE INTERPRETATION OF IMPORT TARIFF
Classification of goods in this Schedule shall be governed by the following principles:

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 the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially

shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provisions does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub headings and any related sub headings Notes and, mutatis mutandis, to the above rules, on the understanding that only sub headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

THE GENERAL EXPLANATORY NOTES TO IMPORT TARIFF

1. Where in column (2) of this Schedule, the description of an article or group of articles under a heading is preceded by "-", the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading. Where, however, the description of an article or group of articles is preceded by "- -", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-". where the description of an article or group of articles is preceded by "---" or "----", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-" or "--".

2. The abbreviation "%" in any column of this Schedule in relation to the rate of duty indicates that duty on the goods to which the entry relates shall be charged on the basis of the value of the goods as defined in section 14 of the Customs Act, 1962 (52 of 1962), the duty being equal to such percentage of the value as is indicated in that column.

3. In any entry, if no rate of duty is shown in column (5), the rate shown under column (4) shall be applicable.

ADDITIONAL NOTES

In this Schedule,—

(1)(a) "heading", in respect of goods, means a description in list of tariff provisions accompanied by a four-digit number and includes all sub-headings of tariff items the first four-digits of which correspond to that number;

(b) "sub-heading", in respect of goods, means a description in the list of tariff provisions accompanied by a six-digit number and includes all tariff items the first six-digits of which correspond to that number;

(c) "tariff item" means a description of goods in the list of tariff provisions accompanying eight digit number and the rate of customs duty;

(2) the list of tariff provisions is divided into Sections, Chapters and Sub-Chapters;

(3) in column (3), the standard unit of quantity is specified for each tariff item to facilitate the collection, comparison and analysis of trade statistics."

6.3 From the plain reading of the above legal provisions, it transpires that in order to determine the appropriate duties of customs payable on any imported goods, one has to make an assessment of the imported goods for its correct classification under the First Schedule to Customs Tariff Act, 1975 in accordance with the provisions of the Customs Tariff Act by duly following the General Rules for Interpretation (GIR) and the General Explanatory notes (GEN) contained therein. The First Schedule to the Customs Tariff Act, 1975 specifies the various categories of imported goods in a systematic and well-considered manner, in accordance with an international scheme of classification of internationally traded goods, i.e., 'Harmonized Commodity Description and Coding System' (HS). Accordingly, goods are to be classified taking into consideration the scope of headings / sub-headings, related Section Notes, Chapter Notes and the General Rules for the Interpretation (GIR) of the First Schedule to the Customs Tariff Act, 1975. Rule 1 of the GIR provides that the classification of goods shall be determined according to the terms of the headings of the tariff and any relative Section notes or Chapter notes and thus, gives precedence to this while classifying a product. Rules 2 to 6 provide the general guidelines for classification of goods under the appropriate sub-heading. In the event of the goods cannot be classified solely on the basis of GIR 1, and if the headings and legal notes do not otherwise require, the remaining Rules 2 to 6 may then be applied in sequential order. Further, while classifying goods, the foremost consideration is the 'statutory definition', if any, provided in the Customs Tariff Act. In the absence of any statutory definition, or any guideline provided by HS explanatory notes, the trade parlance theory is to be adopted for ascertaining as to how the goods are known in the common trade parlance for the purpose of dealing between the parties.

7. In the case before us, the contending classification of imported goods discussed in the impugned order are either under customs tariff item 2106

9099 or customs tariff item 3002 9030 of the First Schedule to the Customs Tariff Act. Thus, it is clear that at the Chapter and Heading level, there is difference of views among the department and the appellants. The dispute in classification lies in the narrow compass of analysis of the appropriate Headings and corresponding Sub-headings, Tariff Items under which the impugned goods are covered as per the Customs Tariff. Now, we may closely examine the scope of the contending classification for determining correct classification of the imported goods. The tariff entries in the First Schedule to the Customs Tariff Act relevant to the present dispute are extracted as below:

Tariff Item	**Description of goods**	**Unit**	**Rate of Duty**	
			Standard	Preferential Areas
(1)	(2)	(3)	(4)	(5)
2106	**Food preparations not elsewhere specified or included**			
2106 10 00	- Protein concentrates and textured protein	Kg.	30%	-
2106 90	- *Other:*			
	---*Soft drink concentrates*			
2106 90 11	----Sharbat	Kg.	150%	-
2106 90 19	----Other	Kg.	150%	-
2106 90 20	--- Pan masala	Kg.	150%	-
2106 90 30	--- Betel nut product known as "Supari"	Kg.	150%	-
2106 90 40	---Sugar-syrups containing added flavouring colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup	Kg.	150%	-
2106 90 50	--- Compound preparations for making non-alcoholic beverages	Kg.	150%	-
2106 90 60	--- Food flavouring material	Kg.	150%	-
2106 90 70	--- Churna for pan	Kg.	150%	-
2106 90 80	--- Custard powder	Kg.	150%	-
	--- *Other*:			
2106 90 91	----Diabetic foods	Kg.	150%	-
2106 90 92	----Sterilized or pasteurized millstone	Kg.	150%	-
2106 90 99	**----Other**	Kg.	150%	-

Tariff Item	**Description of goods**	**Unit**	**Rate of Duty**	
			Standard	Preferential Areas
(1)	(2)	(3)	(4)	(5)
3002	**Human blood; animal blood prepared for therapeutic, prophylactic or diagnostic uses; antisera, other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes; vaccines, toxins, cultures of micro-organisms (excluding yeasts) and similar products**			
	Antisera, other blood fractions and immunological products, whether or not modified or obtained by biotechnological processes:			
3002 11 00	-- Malaria diagnostic test kits	Kg.	10%	10%

Tariff Item	Description of goods	Unit	Rate of Duty	
			Standard	Preferential Areas
(1)	(2)	(3)	(4)	(5)
3002 12	-- *Antisera and other blood fractions:*			
3002 12 10	--- For diptheria	Kg.	10%	10%
xx	xx	xx	xx	xx
3002 13	--*Immunological products, unmixed, not put up in measured doses or in forms or packings for retail sale:*			
3002 13 10	--- Immunological products, unmixed, not put up in measured doses or in forms or packings for retail sale	Kg.	10%	10%
xx	xx	xx	xx	xx
3002 14	--*Immunological products, mixed, not put up in measured doses or in forms or packings for retail sale:*			
3002 14 10	--- Immunological products, mixed, not put up in measured doses or in forms or packings for retail sale	Kg.	10%	10%
xx	xx	xx	xx	xx
3002 15 00	--Immunological products, put up in measured doses or in forms or packings for retail sale	Kg.	10%	10%
3002 19 00	-- Other	Kg.	10%	10%
3002 20	-*Vaccines for human medicine:*			
	---*Single vaccines:*			
3002 20 11	---- For cholera and typhoid			
xx	xx	xx	xx	xx
3002 30 00	-Vaccines for veterinary medicine:	Kg.	10%	10%
3002 90	- *Other:*			
3002 90 10	--- Human blood	Kg.	10%	10%
3002 90 20	---Animal blood prepared for therapeutic, prophylactic or diagnostic uses	Kg.	10%	10%
3002 90 30	---**Cultures of micro-organisms (excluding yeast**)	Kg.	10%	10%
3002 90 40	--- Toxins	Kg.	10%	10%
3002 90 90	--- Other	Kg.	10%	10%

8. It could be seen that by applying the GIR 1, the position is made clear that Heading 2106 and the tariff entries therein covers within its scope and ambit, mainly of two broad categories of goods viz., (i) Other Food preparations for use, directly or after processing for human consumption and (ii) Other Food preparations consisting wholly or partly of foodstuffs, used in making of beverages or other foods preparations for human consumption. On the other hand, Heading 3002 and the tariff entries therein covers within its scope and ambit, three broad categories of goods viz., (i) Human blood (ii) Animal blood prepared for therapeutic, prophylactic or diagnostic use; and (iii) Antisera, other blood fractions and immunological products. For ascertaining proper classification, legal recourse is made to the terms of the headings. From the scope of the headings of CTH 2106 and CTH 3002, it is clear that both these headings cover entirely different set of goods. While the CTH 2106 covers other foods preparations which are not listed in any of

the former headings of Chapter 21, which itself cover miscellaneous food preparations; the CTH 3002 covers blood and blood fractions or fluid fractions separated from blood, immunological fractions which are specific products of human or animal blood. Thus, prima facie it appears that CTH 3002 is more appropriately provides possible coverage of the imported goods rather than the CTH 2106. Further, as per GIR 3(a) the heading which provides the most specific description shall be preferred to headings providing a more general description, and going by this rule too, it is prima facie appears that the CTH 3002 is the more appropriate classification for the imported goods in this case. However, in order to arrive at specific conclusion on the proper classification of the goods, further examination of the relative Section or Chapter notes would provide necessary guidance.

9. Moreover, in order to decide further among the contending classification, whether the imported goods fall under the first category as 'other food preparations' or under the second category 'blood or immunological fractions', one needs to look for the support of relative Section or Chapter notes. In this regard, we find that there is no specific Section Note or Chapter Note in relation to CTH 2106. However, Note 2 to Chapter 30 provide for explaining the scope of products covered under the expression "immunological products" under CTH 3002. The extract of the same is given as below:

> *"2. For the purposes of heading 3002, the expression "immunological products" applies to peptides and proteins (other than goods of heading 2937) which are directly involved in the regulation of immunological processes, such as monoclonal antibodies (MAB), antibody fragments, antibody conjugates and antibody fragment conjugates, interleukins, interferons (IFN), chemokines and certain tumor necrosis factors (TNF), growth factors (GF), hematopoietins and colony stimulating factors (CSF).;"*

Thus, we find that the imported goods being 'Probiotics', which are live microorganisms, could be covered under the scope of explanation given in Chapter Note 2 to Chapter 3002.

10. In order to further examine the classification in terms of HS explanatory notes of the WCO, which describe in detail the scope and coverage of the goods under the Customs classification, the extract of HS classification in respect of heading 2106 and 3002 are given below:

"Harmonized Commodity

Description and Coding System

Explanatory Notes

"2106 – Food preparations not elsewhere specified or included.

2106.10	*- Protein concentrates and textured protein substances*
2106.90	*- Other"*

Provided that they are not 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.

(B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. This heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.)…."

"3002 – Human blood; animal blood prepared for therapeutic, prophylactic or diagnostic uses; antisera, other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes; vaccines, toxins, cultures of micro-organisms (excluding yeasts) and similar products.

xx xx xx xx xx xx

This heading covers:

(A) Human blood (e.g., human blood in sealed ampoules).

(B) Animal blood prepared for therapeutic, prophylactic or diagnostic uses.

(C) Antisera, other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes.

These products include:

(1) Antisera and other blood fractions …..

(2) Toxins (poisons) ….

(3) Cultures of micro-organisms (excluding yeasts). These include ferments such as lactic ferments used in the preparation of milk derivatives (Kephir, yogurt, lactic acid) and acetic ferments for making vinegar; moulds for the manufacture of penicillin and other antibiotics and cultures of micro-organisms for technical purposes (e.g., for aiding plant growth).

(4) Viruses, human, animal and vegetable and anti-virus

(5) Bacteriophage…

(6) Diagnostic kits…

xx xx xx xx xx xx

(D) Diagnostic kits….

The products of this heading remain classified here whether or not in measured doses or put up for retail sale and whether in bulk or in small packings."

11. We have examined HSN explanatory notes to both the contending classification and the goods covered thereunder as shown above. The scope of coverage of goods under the heading 'cultures of micro-organisms' and

the result of the test reports in the present case, which is indicative of the probiotic as a medicine which is used for treatment of bacterial vaginosis, urinary tract infections, vaginal yeast infection, eczema, diarrhoea etc. containing live microorganisms, indicate that the imported probiotics '*Probio-Tech AB-Blend-35'* is more appropriately classifiable under CTI 3002 9030.

12. Further, in terms of GIR 3, in a situation where for any reason goods are, *prima facie*, classifiable under two or more headings, classification shall be preferred under the heading which provides the most specific description, instead of the heading providing a more general description. Inasmuch as the heading 3002 9030 covering "cultures of micro-organisms" is more specific than the contending heading 2106 9099 covering "other" of other food preparations not elsewhere specified or included. Hence, in our considered view, the appropriate classification of the imported goods would be under Customs Tariff Item 3002 90 30.

13. We also find that the Co-ordinate Bench of this Tribunal, in the case of *Danisco (India) Pvt. Ltd. Vs. Commissioner of Customs (Import), Mumbai* (supra) in Final Order No. A/85408-85409/2023 dated 14.03.2023 (in Customs Appeal No. 85379 and 85380 of 2022, have held that 'probiotics' is classifiable under chapter 30 only and not under chapter heading 2106.

> *"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 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 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.

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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.

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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 r les 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 subheading 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 reinvestigation 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."

14. In view of the foregoing discussions and analysis, we conclude that the product under consideration i.e., *'Probio-Tech AB-Blend-35'* is would appropriately be classifiable under CTI 3002 9030 and not under CTI 3002 90 30, as claimed by Revenue.

15. Therefore, we are of the considered view that the impugned order dated 31.12.2021 passed by the learned Commissioner of Customs (Imports), Air Cargo Complex, Sahar, Mumbai cannot be sustained on merits.

16. Therefore, by setting aside the impugned order, we allow the appeal in favour of the appellants.

(Operative portion of the order pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha